



**Matindi v CS, National Treasury & Planning & 4 others (Constitutional Petition E280 of 2021) [2023] KEHC 1144 (KLR) (Constitutional and Human Rights) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1144 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E280 OF 2021  
DKN MAGARE, J  
FEBRUARY 17, 2023**

**BETWEEN**

**ELIUD KARANJA MATINDI ..... PETITIONER**

**AND**

**CS, NATIONAL TREASURY & PLANNING ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE NATIONAL ASSEMBLY REPUBLIC OF KENYA ..... 3<sup>RD</sup> RESPONDENT**

**THE SPEAKER NATIONAL ASSEMBLY OF KENYA ..... 4<sup>TH</sup> RESPONDENT**

**COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY .... 5<sup>TH</sup>  
RESPONDENT**

**Necessity of the tax waiver legislation based on country to country agreements to be compliant with the Constitution**

*The petitioner challenged the constitutionality of Legal Notice No 15 of 2021 and Legal Notice No 27 of 2021 on grounds that the legal notices exempted Japanese employees, consultants and companies involved in the projects financed by a loan by Japan to Kenya. The petitioner contended that the Legal Notices were discriminatory on grounds of nationality and race and were unconstitutional for not having been subjected to public participation. The petitioner also contended that section 13(2) of the Income Tax Act was unconstitutional to the extent that it authorized Income Tax waivers through a notice in the Kenya Gazette issued by the Cabinet Secretary for National Treasury and Planning against the dictates of article 210 of the Constitution that required all money bills to be passed by the National Assembly. The court held that the tax waiver legislation based on country by country agreements had to comply with the Constitution and must be on the basis of reciprocity, nondiscrimination, equality and tax neutrality. The court held that the legal notices were discriminatory and unconstitutional. Section 13(2) of the Income Tax Act was also declared to be unconstitutional for violating article 210 of the Constitution.*

Reported by John Ribia



**Tax Law** – tax waivers – waivers based on loan agreements issued by a foreign state to Kenya – where a loan agreement from a foreign state to Kenya specified that the nationals of the country that had financed the project in Kenya and that were working on the project were exempt from paying income tax - whether the income generated from companies, employees and consultants that were nationals of a country that had granted Kenya a loan and were working on the project funded by the loan qualified to be exempt from income tax - whether the income generated from companies, employees and consultants that were nationals of a country that had granted Kenya a grant and working on the project funded by the grant qualified to be exempt from income tax - , section 13(2), schedule 1, part 1, paragraph 21; section 5.

**Tax Law** – tax waivers – body with power to issue tax exemptions – elements – form and content - what elements should a tax waiver fulfil to be acceptable in law - whether the Cabinet Secretary for National Treasury and Planning had the power to grant tax waivers - whether tax waiver legislation based on country by country agreements had to comply with the and must be on the basis of reciprocity, nondiscrimination, equality and tax neutrality – Constitution of Kenya, 2010, article 210, article , section 13(2), schedule 1, part 1, paragraph 21.

**Constitutional Law** – arms of government – separation of powers - powers of the judiciary vis-à-vis the legislature – where an applicant sought for parliamentary reports to be invalidated due to the manner in which they were drafted - whether the doctrine of separation of powers estopped the High Court from invalidating a gazette notice on account of the gazette notice having errors that may confuse the reader - whether the judiciary had no powers to superintend on the legislature on how to draft their reports - whether the National Assembly abdicated its role by surrendering the powers to legislate on a money bill to the Cabinet Secretary for National Treasury and Planning – , articles 1, 3(1), 10, 24, 27, 35, 53, 54, 55, 56, 57, 73, 75, 94, 95, 97, 106, 114, 118, 120, 159, 201, 210, 260; schedule 5; paragraph 7(1).

**Constitutional Law** – public participation – public participation in relation to legislative instruments - whether Legal Notice No. 15 of 2021 was unconstitutional for want of public participation – , article 10 and 210

### **Brief facts**

The petitioner was aggrieved by the financing agreements between the Government of Kenya and Japan entered on various dates between August 16, 2010 and September 18, 2010 that exempted Japanese companies, Japanese consultants and Japanese employees involved in the projects under those financing agreements from the provisions of the . The exemptions in the financial agreements were brought to life in Legal Notice No 15 of 2021 and Legal Notice No 27 of 2021.

The petitioner contended that the Legal Notices were discriminatory on grounds of nationality and race and were unconstitutional for not having been subjected to public participation. The petitioner also contended that section 13(2) of the was unconstitutional to the extent that it authorized Income Tax waivers through a notice in the Kenya Gazette issued by the Cabinet Secretary for National Treasury and Planning against the dictates of article 210 of the that required all money bills to be passed by the National Assembly.

The arguments from the respondents were that that grants and loans were from foreign sources hence Kenya had to defer to the foreign authority.

### **Issues**

- i. Whether the doctrine of separation of powers estopped the High Court from invalidating a gazette notice on account of the gazette notice having errors.
- ii. Whether the judiciary had no powers to superintend on the legislature on how to draft their reports.
- iii. What elements should a tax waiver fulfil to be acceptable in law?
- iv. Whether tax waiver legislation that was based on agreements between two states that had the effect of indemnifying nationals from one country from paying taxes violated the principle of neutrality of tax and was discriminatory.
- v. Whether the income generated from companies, employees and consultants that were nationals of a country that had granted Kenya a loan, and that were working on the project funded by the loan, qualified to be exempt from income tax under paragraph 21 part 1 of the first schedule to the .



- vi. Whether the income generated from companies, employees and consultants that were nationals of a country that had granted Kenya a grant, and that were working on the project funded by the grant, qualified to be exempt from income tax under paragraph 21 part 1 of the first schedule to the .
- vii. Whether tax waiver legislation based on country by country agreements had to comply with the and must be on the basis of reciprocity, nondiscrimination, equality and tax neutrality.
- viii. Whether the Cabinet Secretary for National Treasury and Planning had the power to grant tax waivers.
- ix. Whether the National Assembly abdicated its role by surrendering the powers to legislate on a money bill to the Cabinet Secretary for National Treasury and Planning.
- x. Whether Legal Notice No. 15 of 2021 was unconstitutional for want of public participation.

**Held**

1. The errors related to the two gazette notices both named as 27/2021 could be classified *de minimis non curat lex* (law was not concerned with small things). They were small and inconsequential errors, for which the law provided no remedy. The regulations covered by the two notices were not impugned in terms of content or procedure. They had identifiers embedded within the notices, the legislative supplement number and the subject matter. One notice was in legislation supplement no 21 and another in no 13. They caused no confusion to a fairly average intelligent reader.
2. The reports of the National Assembly met minimum requirements of article 20 of the the which provided that official documents ought to be in English or Kiswahili. Whether the reports were confusing was not justiciable. Confusion was a subjective matter. The National Assembly regulated its own procedures. Reports needed to be intelligible to the immediate consumers of the business of Parliament.
3. If parliamentary reports were jumbled up, it was not the business of the court to intervene and as such the same was not justiciable. The reports may be consumed by members of the public, among other persons. However, that did not create a justiciable right as against parliament.
4. The doctrine of separation of powers required each of the three arms of government to stick to its lane. The court refrained from passing judgment on the quality and state of the reporting in Parliament.
5. Unless Parliament concealed or did not disclose some documents, there could be no justiciable cause over the contents and the intelligibility of a house report or the manner in which the house ran its affairs. That was not to say that they had a *carte blanche* to have unintelligible reports. It meant that question of accountability for those reports did not lie here.
6. The judiciary or the executive had no powers to superintend on the legislature on how to draft their reports. It was only the people who could recall their representatives for making such mistakes. People had 5 years cycle to improve the reports. If they could not do so, the court could not intervene.
7. The court would not engage in a debate on the competence of reports of the August house or such reports as may be having missing pages. Even if pages were missing, it was not the problem of the National Assembly but whoever brought the incomplete report. The court could not trace any report of the clerk of the National Assembly declining to supply a complete record to the petitioner.
8. Claims over the twin notices Nos 27 were dismissed. There was no correlation between the alleged errors related to Gazette Notice number 27 of 2021 and the content thereunder. The duty to number the Kenya Gazettes was not and could not be placed on the shoulder of the Cabinet Secretary. The issue of gazette notices with similar names should first be taken up with the Government Printer before being litigated upon.
9. Article 260 of the defined legislation as an Act of Parliament and laws made by county assemblies. Under section 9 of the , the regulatory impact assessment was not to be carried out except in very specific circumstances.
10. Section 13(1) of the was introduced by section 9 of Act No 8 of 1978 that stated that the income specified in party 1 of the First schedule, which accrued in or was derived from Kenya shall be exempt



- from tax so specified. Therefore, any instrument purporting to exercise powers made under another act was a statutory instrument
11. Section 13(2) of the provided on tax exemptions, article 210 of the provided that there could be no blanket exemption. The extent of waivers meant the amount waived. Every waiver must:
    1. be authorized by legislation.
    2. Each waiver must be reported to the Auditor General.
    3. Each waiver must be accompanied by a reason for such a waiver, and
    4. there should be a public record of the waiver and amount waived
  12. The required that each waiver be placed in a public record and for the same to be reported. No tax or licensing fees may be imposed, waived or varied except as provided by legislation. On the other hand section 13(2) of the required that waivers shall be exempt from tax to the extent specified in the notice.
  13. The supreme law of the land on waivers was enshrined in article 210 of the. The , was amended to accord to the new Constitutional dispensation vide section 7(1) of the Fifth Schedule to the Constitution which stated that all law in force immediately before the effective date continued in force and was to be construed with alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with the Constitution. *Ipsa facto*, the impugned notice fell far short of even the Act that it purported it relied on since the extent of waiver was not given.
  14. The waiver purported to be according to some financing agreements. The exemption was to be individualized and the amount waived must be specified and it had to identify who it applied to and the Auditor General ought to be informed about the waiver. Section 13(2) of the gave power to exempt income or a class of income. It did not give power to exempt people or a class of people. For taxation to be fair reasonable and proportionate, it had to have an element of neutrality and should be able to apply without discrimination unless it was for clearance of historical injustices and marginalization.
  15. The financing agreements were not part of the public records that covered the waiver. A person reading the Legal Notice was sent to look for the financing agreements to find the contents and terms of the waiver. However, the required that the extent be in the notice itself.
  16. The notice did not cover all workers involved in the projects financed by Japan, but Japanese companies, Japanese consultants and Japanese employees. There was no reason accompanying the same. There was no indication of the amount of tax waived as required under article 210 of the that the extent of waiver had to be specified.
  17. The criteria of race or ethnicity did not bring with it the sense of neutrality of tax. There should always be a way one could meet the criteria for waiver. A good example of compliance with the precepts in article 210 of the Constitution was the waiver under the the Persons with Disabilities Act in which there were qualifying persons and an objective criteria and not birth that was used to determine waiver provided under the relevant statute. Such expenditures were personalized and the amounts were known. The trouble with the contents of the impugned notice was that it was omnibus and covered all Japanese consultants, employees and companies involved in the specified projects. The extent of involvement was not set out and the upper and lower limits were also not provided and as a result the cost benefit analysis was not, and could not be done.
  18. Such blanket exemptions of nationals of one state, reeked of economic apartheid and were not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Kenyans were highly taxed, subjecting Kenyans working for those Japanese companies and projects to tax and having the Japanese workers from janitors to CEOs, walk home tax free defeated equal pay for equal work mantra.
  19. The nature of taxation was that it could cause economic disparities and as such it widened the economic gap. The blanket waiver especially on the loans which was a burden to the very tax payers for generations served no purpose. In order to quell embers of colonialism, where only Africans were



- paying certain taxes, it was important that the country consulted its people about whether they were willing to accept such transgressions.
20. Kenya's struggle against racism was enshrined in article 27 of the that provided that every person was equal before the law and had the right to equal protection and equal benefit of the law. Article 27 prohibited discrimination by the State based on race. Article 27(6) sought to realize the right to equality by undertaking the State to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Any measure under article 27(6) shall adequately provide for any benefits to be on the basis of genuine need. That was need for existence for the disclosure of the reason for waiver to ascertain genuine need.
  21. The effect of the waiver was economic apartheid, where, equal pay for equal work was thrashed. Japanese employees working in the same organization, ended up with all their money, while the local Kenyans and Kenyan residents in those organizations paid tax. Taxing only Kenyans and giving waivers to Japanese companies compromised the constitutional protection under article 27 of the . Even expatriates working for the same companies most of whom were non-resident but were not Japanese ended up paying more than their Japanese counterparts.
  22. The right to equal treatment could not be derogated from. If for any reason the state was interested in waivers, there should be legislation which legislation, which in itself did not discriminate. If the legislation was discriminatory, then there should be strict compliance with article 24 of the .
  23. A limitation was not valid unless the legislation specifically expressed the intention to limit that right or fundamental freedom, and the nature and extent of the limitation. The delated legislation on tax waivers in the impugned notice breached article 27 without expressly referring to it and justifying the same.
  24. Without reasons being given for the discriminatory blanket waiver, Legal Notice No 15 of 2021 dated 15/2/2021 was not justifiable in an open and democratic society. It was anathema to equality and financial prudence. The constitutional imperative was that all waivers must be by legislation. There was no legislation on the authority to issue a tax waiver for Japanese companies, Japanese consultants and Japanese employees in the specified agreements set out in the schedule.
  25. Practice from the 1960s was to have agreements singularly or specifically legislated upon. Under the , parliament always had a say on the type of interest and conditions for grant of loans. Full disclosure on conditions and amounts was paramount. Even in the which predated the, amounts were crucial and the minster was not authorized to waive tax.
  26. The existing first schedule to the named specifically the bodies to be exempted. However, to extend the same to certain office holders or nationals of certain states, in particular without reciprocity hence subjugating the to that of the Japanese empire. That was unconstitutional since it was only parliament that had the obligation and responsibility to impose tax, by extension un-impose by legislation
  27. The duty to impose tax, carried with it the duty, by legislation to un-impose tax. The National Assembly abdicated its role by surrendering the powers to legislate on a money bill to the Cabinet Secretary. He simply drew some gazette notice to be placed before an overwhelmed committee on delegated legislation, who despite not receiving satisfactory answers rubber stamped the Cabinet Secretary's request. That was contrary to article 210 of the.
  28. Although the definition legislation included county legislation, it was only the National Assembly that could originate a money bill. The Cabinet Secretary had no power in the to grant blanket tax waiver. That was in contravention of article 27 and 210 of the . The waiver had to follow the normal route on legislation. Waiving tax through delegated legislation did not meet the Constitutional imperative on money bills under article 114(3) of the. Article 114 sufficiently covered matters dealing with foreign loans and taxes or waivers incidental thereto as provided for under article 210 of the.



29. Public participation had foundational basis in article 10 and 256 of the. It was a tool the people reserved for themselves in light of history of Kenya. The importance of public participation could not be waived. Parliament waived the right to public participation in publishing the legal notices on grounds that the legal notices were not statutory instruments.
30. Public participation was not limited to statutory instruments. It was related to all legislation and even decisions on hiring of constitutional office holders. Parliament had no power to exclude public participation in legislation and other business. Parliament should be geared more towards public participation and not less of it. Legal Notice No 15 of 2021 was a statutory instrument and the law required it to go through public participation. The National Assembly breached the Constitution by failing to carry out public participation.
31. Parliament waived the need of public participation. They had power to determine the nature of public participation having regard to the nature of the issue. The more technical and wide the effects, the more the need to engage in public participation. The decision by parliament to waive public participation were made without requisite authority and was therefore null and void *ab initio*.
32. Loans were not equivalent to foreign sources. Whereas a grant was a foreign source, it was doubtful whether a loan, concessionary or otherwise qualified of a foreign source as the country was bound to repay the same from internal sources.
33. To the extent that a grant was not an entitlement, the court would not deal with it as it was subject to the wishes of the grantor. The petition did not show how grants were affected by the notices. That was because they were not loans covered under article 114 of the and were not a burden on the national debt and were not entitlements. Those were gratuitous payments or receipts which were governed by the donor's postulations. The same did not apply to loans which the country was bound re-pay.
34. An order compelling carrying out a duty had to be given only when the duty had been breached. It could not be given in anticipation. The court declined to compel the Kenya Revenue Authority to do its duty since there was no evidence that they had failed to carry out their duties. That was because, they were not under obligation to collect the income tax before a declaration was made.
35. Once the court re-ignited the duty today, it could not be placed on their shoulders at the pain of contempt when they had not declined to carry out their duty. The order was not ripe for determination. It could only be addressed once the same was ripe and justiciable.

*Petition partly allowed.*

### **Orders**

- i. *Declaration issued that the 1<sup>st</sup> respondent violated the by exempting Japanese companies, Japanese consultants and Japanese employees as set out in Legal Notice No. 15 of 2021 dated February 15, 2021 published on February 26, 2021 as issue No 17.*
- ii. *Declaration issued that Legal Notice No 15 of 2021 dated February 15, 2021 published on February 26, 2021 as issue No 17 was unconstitutional by itself and in its effect as it was contrary to articles 27 and 210 of the and had not been subjected to public participation. The said notice was quashed.*
- iii. *Declaration issued that section 13(2) of the was unconstitutional to the extent that it authorized Income Tax waivers through a notice in the Gazette and for specified persons without regard to the dictates of article 210 of the. To the extent of the inconsistency, in particular the use of the Kenya Gazette, instead of legislation, to effect tax waiver, was struck down.*
- iv. *Declaration issued that exemption or waiver of tax income could only be granted the National Assembly through national legislation after the same passed as a money bill as provided under article 114(3) of the; after public participation and in strict compliance with article 210 of the Constitution, which legislation would require that there be:*
  1. *A public record of each waiver and the reasons for the waiver.*
  2. *Each waiver, and the reason for it shall be reported to the Auditor General.*



3. *As per the dictate of article 27 of the, there could be no waiver based on national origin, race, colour, marital status, health status, ethnic society, religion, conscience, belief culture, dress, language or birth.*
- v. *Declaration issued that legislation on tax waiver involving country by country agreements must comply with the and must be on the basis of reciprocity, nondiscrimination, equality and tax neutrality.*
- vi. *Declaration issued that the National Assembly had no power to authorize waiver of tax other than through legislation contemplated and in strict compliance with article, 210 of the .*
- vii. *Grants were not affected by the instant decision as they were not a not loans covered under article 114 of the and were not a burden on the national debt and were not entitlements.*
- viii. *The claims regarding the mingling of reports by the National Assembly were not justiciable as parliament had a right to regulate its own procedure and on the basis of the doctrine of separation of power.*
- ix. *The named state officers were implementing the law before its unconstitutionality was pronounced and were acting in good faith.*
- x. *Income Tax covered under Legal Notice dated February 15, 2021 published on February 26, 2021 as issue No 17 was collectable with effect from the date of quashing of the impugned unconstitutional Legal Notice No 15 of 2021.*
- xi. *The court declined to compel the Kenya Revenue Authority to do its duty since there was no evidence that they had failed to carry out their duties.*
- xii. *Each party was to bear its own costs.*

## **Citations**

### **Cases**

1. Anarita Karimi Njeru v Republic (Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR)) — Mentioned
2. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR)) — Explained
3. Dida, Mohammed Abduba v Debate Media Limited & Media Council of Kenya (Civil Appeal 238 of 2017; [2018] KECA 642 (KLR)) — Explained
4. In the Matter of Kenya National Commission on Human Rights (Reference 1 of 2012; [2014] eKLR) — Explained
5. Kariuki, Kefa Nyaga v Office Commanding Station Kikuyu Police Station & 3 others; Welton Kibiwott Tubei (Interested Party) (Petition 16 of 2014; [2022] KEHC 2760 (KLR)) — Mentioned
6. Kenya Human Rights Commission v Attorney General & another (Constitutional Petition 87 of 2017; [2018] eKLR) — Mentioned
7. Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others (Civil Appeal 266 of 1996; [1997] KECA 58 (KLR)) — Explained
8. Matem, Mumo v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012; [2013] KECA 445 (KLR)) — Mentioned
9. Mugo & 14 others v Matiang'i & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Party) (Constitutional Petition 4 of 2019; [2022] KEHC 158 (KLR)) — Explained
10. Musyoka, Wilfred Manthi v Machakos County Assembly & 4 others (Constitutional Petition 7 of 2018; [2018] KEHC 5229 (KLR)) — Explained
11. Njoya, Timothy v Attorney General & Kenya Revenue Authority (Civil Appeal 112 of 2015; [2017] KECA 264 (KLR)) — Mentioned
12. Ol Pejeta Ranching Limited v David Wanjau Muhoro (Civil Appeal 42 of 2015; [2017] KECA 329 (KLR)) — Explained



13. *Ombati v Chief Justice & President of the Supreme Court & another; Kenya National Human Rights and Equality Commission & 2 others (Interested Party)* (Petition E242 of 2022; [2022] KEHC 11630 (KLR)) — Explained
14. *Owuor, Richard & 2 others (suing on behalf of Busia Sugarcane Importers Association) v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Cooperatives & 7 others* (Petition E263 of 2020; [2020] eKLR) — Explained
15. *Prabhulal G. Shah & S. Prambhulal Shah v Ramesh Meghji Shah* (Civil Appeal No 24 of 1985) — Explained
16. *Doctors for Life International v Speaker of the National Assembly and others* ((CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)) — Explained

#### Statutes

1. Constitution of Kenya, 2010 — Article 1, 3(1), 10, 24, 27, 35, 53, 54, 55, 56, 57, 73, 75, 94, 95, 97, 106, 114, 118, 120, 159, 201, 210, 260; Schedule 5; Paragraph 7(1) — Interpreted
2. Evidence Act (cap 80) — Section 60(1) (f) — Interpreted
3. External Loans and Credits Act (Repealed) (cap 22) — Section 5 — Interpreted
4. Government Proceedings Act (cap 40) — Section 3 (1), (2) — Interpreted
5. Income Tax Act (cap 470) — Section 13(2); Schedule 1; Part 1; Paragraph 21 — Interpreted
6. Kenya Revenue Authority Act, 1995 (Act No 2 of 1995) — Section 11 — Interpreted
7. Persons With Disabilities Act, 2003 (Act No 14 of 2003) — Section 42 — Interpreted
8. Revision of The Laws Act (cap 1) — In general — Cited
9. Statutory Instruments Act, 2013 (Act No 23 of 2013) — Section 2, 9 — Interpreted

#### Advocates

*Miss Kiramana* for 1st and 2nd Respondents

*Emacar holding brief for Awadh* for 3rd and 4th Respondents

*Miss Mwongera* for 5th Respondent.

## JUDGMENT

1. The petitioner, Eliud Karanja Matindi filed this petition supported by his affidavit dated 16/7/2021. The petition sought the following prayers: -

- a. The Cabinet Secretary for National Treasury and Planning or any other State or public officer who signed the Financing Agreements between the Government of Kenya and Japan, on various dates between 16/8/2010 and 18/9/2020, in the full knowledge that, notwithstanding the provisions of the *Constitution of Kenya, 2010*, including articles 10, 118, 201 and 210(1), the income which accrued in or was derived from Kenya by Japanese companies, Japanese Consultants and Japanese employees involved in the projects under those Financing Agreements would be have to be exempt from the provisions of the *Income Tax Act, 1975* [cap 470], violated the *Constitution of Kenya, 2010*, and other applicable laws;
- b. The National Assembly’s Committee on Delegated Legislation and, subsequently, the National Assembly itself, had no powers to declare that Legal Notice No 15 of 2021 was not a Legal Notice for the purposes of the requirements set out in the *Statutory Instrument Act, 2013*;





- c. The National Assembly's Committee on Delegated Legislation, by mingling and mingling the contents of three different reports, breached the provisions of the *Constitution of Kenya*, including those on good governance, integrity, transparency, accountability, openness and access to information;
  - d. The Cabinet Secretary for National Treasury and Planning breached the Constitutional provisions relating to access to information held by the state.
  - e. The Nation Assembly, by adopting its Committee on Delegated Legislation's mingled and mangled report on the Consideration of Legal Notice No 15 of 2021 on the Exemption from Income Tax for Japanese Companies, Japanese Consultants and Japanese Employees, dated May 2021, violated the provisions of the *Constitution of Kenya*, including those on good governance, integrity, transparency, accountability, openness and access to information;
  - f. Assigning the same serial number to two Legal Notices published in the same year yet dealing with two different matters, violated the constitutional national values and principles of governance, including the rule of law, good governance, integrity, transparency and accountability. The decision further breached the right to access to information, the *Revision of the Laws Act* [Cap 1] and the *Statutory Instruments Act, 2013*;
  - g. Legal Notice No 15 of 2021 is unconstitutional and, therefore, invalid, null, void and of no legal effect;
  - h. The two legal Notices No 27 of 2021 are unlawful and unconstitutional and, therefore, invalid, null and void;
  - i. The respondents, should, jointly and severally, pay the petitioner's costs for this suit.
- Upon the above declarations, an order:

- a. Quashing Legal Notice No 15 of 2021
- b. Quashing the two duplicate Legal Notice No 27 of 2021
- c. Of prohibition, permanently prohibiting any and all the respondents, their agents and any persons, howsoever acting, from given effect howsoever to the provisions of the impugned Legal Notice No 15 of 2021.
- d. Compelling the 5<sup>th</sup> respondent and any successors in the role or title, to immediately commence collecting all the income tax due from the income which accrued in or was derived from Kenya by Japanese consultants and Japanese employees involved in the projects specified in the impugned Legal Notice No 15 of 2021, in strict compliance with the provisions of the *Income Tax Act, 1975* [Cap 470].
- e. Compelling the 5<sup>th</sup> respondent, at least once every six months from the date of this court's judgement or such other period of time the court may deem appropriate, and, until they collect all the income tax due, to file at the honourable court's registry, publish in at least two newspapers with national circulation and through their websites and Social Media accounts (Twitter



©, youTube©, newsletters and any and all other accounts and means of publishing information to the public that they maintain and use), a notice information the people of Kenya of the progress made and their continued compliance with the court’s judgment, including amount of tax collected for the applicable reporting period, from whom the tax collected for the applicable reporting period, from whom the tax has been collected and the balance of due tax that still remains to be collected.

- f. Compelling any and all State and public officers, (whether still in State and/or public office at the date of the judgment or not), who signed, on behalf of the Government of Kenya, the Financing Agreements between the Governments of Kenya and Japan with the full knowledge that these agreements unconstitutionally waived income tax due from the income which accrued in or was derived from Kenya by Japanese companies, Japanese consultants and Japanese employees, jointly and severally, to make up, from tier own personal and private resources, any shortfall in the income tax due and collected by the 5<sup>th</sup> Respondent in compliance with this court’s orders.
- g. Compelling the 1<sup>st</sup> respondent to publish all the information regarding all the Financing Agreement that are the subject of Legal Notice No 15 of 2021 including but not limited to:
  - a. Copies of each of the Financing Agreements specified in Legal Notice No 15 of 2021;
  - b. Confirmation of the amount of income tax that would have payable under the Income Tax, 1975[cap. 470] for each of the Financing Agreements, but for the exemptions;
  - c. The complete analysis carried out to reach to the conclusion that:

“the overall benefits to be derived from effective and efficient implementation of the (specified) projects out way (sic) the tax foregone. In addition, the income from the jobs created from the projects and income derived from expenditure on the said projects generates revenue that is far above the tax foregone as a result of the exemption.” [Extract taken from the National Assembly’s Committee on Delegated Legislation’s Report on the consideration of the Exemption from Income Tax for Japanese Companies, Japanese Consultants and Japanese Employees, May 2021.]
- h. Compelling the respondents, jointly and severally, to pay the petitioner’s costs for this suit.



- i. Any such other orders that this honourable court may deem just and fit to grant to meet the ends of justice and the requirements of the Constitution of Kenya, 2010.

To reinforce and affirm the 5<sup>th</sup> respondent's clarion call and exhortation to the people of Kenya, *Tuliye Ushuru Tujitegemeee!*

2. In a petition number petition is based on two sets of legal notices, that is, Legal Notice No 15 or 2021 and two notices with same number, that is, LN Nos 27 of 2021.
3. In the petition, the petitioner describes himself as a public spirited individual, a champion and defender of the Constitution of Kenya. By this, I understand him to mean that, he has taken up his duty as a citizen under article 3(1) which provides that, 'Every person has an obligation to respect, uphold and defend the Constitution.'
4. The foregoing solemn obligation is amplified in article 258(1) of the Constitution, which is to the effect that 'Every person has the right to institute proceedings claiming that this Constitution, has been contravened, or is threatened with contravention.'
5. The foregoing is augmented by article 258(c) where a person acting in Public interest is entitled to institute proceedings.
6. He pontificates on his desire that there be full and faithful implementation of the Constitution, in order to realize his and other Kenyan's essential human rights, equality, freedom, democracy, social justice and the Rule of Law.
7. The first respondent is the Cabinet Secretary for the time being responsible for matters finance and economic planning. He is sued for entering into contracts with the Government of the empire of Japan wherein Japanese employees, Japanese companies and Japanese consultants involved in specified Projects were unlawfully exempted from paying income tax that will otherwise have been due, under the Income Tax Act, cap 470.
8. The first respondent's decision was made through Legal Notice No 15/2021 dated 15/2/2021 published on 26 /2/2021 as issue No 17.
9. The second respondent is an office established under article 156 as is said as the chief government adviser to the National government. He is sued in his official capacity.
10. The 3<sup>rd</sup> and 4<sup>th</sup> respondents are the National Assembly duly constituted under article 93 of the Constitution and its speaker duly established under article 106 as of the Constitution. (I presume the petitioner meant article 106 (1)(a) as read with article 97(1)(d) of the Constitution).
11. The 5<sup>th</sup> respondent is a public officer appointed under section 11 of Kenya Revenue Authority Act. The petitioner avers that the 5<sup>th</sup> respondent is responsible for ensuring compliance with all laws set out in the 1<sup>st</sup> schedule of the Income Tax Act.
12. The first respondent is said to have instituted exemptions through bilateral agreements with Japan. He then purported to exercise authority under section 13(2) of the Income Tax Act to exempt Japanese Companies, Japanese consultants and Japanese employees in specified Projects from paying income Tax.



13. Section 13 of the *Income Tax Act* provides as doth: -

“13(1) Notwithstanding anything in Part II, the income specified in Part I of the First Schedule, which accrued in or was derived from Kenya shall be exempt from tax to the extent so specified.

(2) The Minister may, by notice in the Gazette, provide –

(a) that income or a class of income which accrued in or was derived from Kenya shall be exempt from tax to the extent specified in the notice;

(b) that an exemption under subsection (1) shall cease to have effect either generally or to the extent specified in the notice.

14. The petitioner then sets out a series of articles, which due to the economy of space, I will not regurgitate here. He argues that everyone is under duty to obey the *Constitution*, respect national values and act in the best interest of the people of Kenya; who shall be consulted through Public participation.

15. The petitioner points out that some of the power of this court and how it is expected to act under articles 165(3) d(iii) & (iv) and 159 of the *Constitution* and the manner in which this court is contemplated to act under articles 165(3) d(i) & (ii) and 159 of the *Constitution*.

16. He postulates that as a result of the respondents’ actions, the supremacy of the *Constitution* and that of the people as set out in articles 1, 2, 3, 10, among others has been or is threatened.

17. The petitioner filed a further affidavit dated November 12, 2021. He also filed submissions running up 79 pages. They reiterate the issues covered in the petition.

18. The petitioner, further sets forth powers of various respondents under the *Income Tax Act*, cap 470, Revision of Laws, *Kenya Revenue Authority Act*, *Statutory Instruments Act*, 2016 (sic) (presumably *Statutory Instruments Act* No 23 of 2013 and the standing order No 210 of the National Assembly of Kenya’s standing orders (5<sup>th</sup> edition).

19. The impugned Legal Notice No 15 of 2021 dated 15/2/2021 published on 26 /2/2021 as issue No 17 and the schedule accompanying the notice are set out in the petition. In order to fully appreciate the purpose, import and purport of the notice, I shall set it down verbatim.

“In exercise of the powers conferred by section 13 (2) of the *Income Tax Act*, the cabinet secretary for National Treasury and planning direct that the income which accrued in or was derived from Kenya by Japanese companies, Japanese consultants, and Japanese employees involved in the project under the financing agreement specified in the second column of the schedule that letter signed in the corresponding dated specified in the second column of the schedule shall be exempted from income tax to the extent specified in the Financing agreement.”(Emphasis added).

20. The schedule accompanying the Cabinet Secretary’s notice has 16 agreements dating from between December 20, 2007 to 18/9/2020. The matter was discussed in the Committee of Delegated Legislation of the National Assembly and adopted by the National Assembly on 19/5/2021.



21. The petitioner takes issue that the income tax waiver was contrary to article 210 of the Constitution as the same was without legislation.
22. The petitioner then challenges Legal Notice No 27 of 2021, which is allegedly duplicated and was over different issues. He blames the National Assembly for breach of articles 10(2) and 118(1) of the Constitution.
23. Legal Notice No 27 of 2021 of Gazette Supplement No 21, Legislative supplement No 13 of 5/3/2021 is on Public Finance Management (National Drought Emergency Fund) Regulation 2021 and another No 37(Legislative supplement of 17/3/2021 is exemption of specified airlines.
24. The main complainant against the National Assembly is that the committee on delegated legislation classified the Kenya Legal Notice No 15 of 2021 as not being a statutory instrument within the remaining of section 2 of the Statutory Instruments Act, No 23 of 2013 and as such not subject to public participation in the manner stipulated under sections 5 and 51 of the Statutory Instrument Act.
25. This is the gravamen of the petition to which I shall revert to later in this judgment. The petitioner then goes ahead and extrapolates on public participation and various minutes of the National Assembly and the Committee on Delegated Legislation of the National Assembly.
26. The petitioner is of the view that the action of giving exemption to the Japanese employees, Japanese companies and Japanese consultants violated the Constitution through elevating the Japanese claims, subordinating the Kenyan Constitution to the Japanese empire, failing to defend the Constitution, having opaque loan agreements, foregone income tax and failure to disclose the cost benefit analysis from waiver of income tax.
27. As a result, the petitioner states that articles 35, 53, 54, 55, 56, 57, 73, 75, 94, 95, 118 and 210 as breached the Constitution imperatives.

#### **The 1<sup>st</sup> Respondent's Replying Affidavit.**

28. The 1<sup>st</sup> respondent filed a replying affidavit through the Principal Secretary National Treasury, Dr Julius Monzi Muia sworn on 30/9/2021. He avers that the Cabinet Secretary has powers under section 13(2) of the Income Tax Act to issue the exemptions from income tax, or exempt income, which accrued in or was derived from Kenya to the extent specified, through a notice in the gazette.
29. According to him, the notice of the said exemption was laid in the National Assembly without undue delay. The National Assembly has power within 21 days to pass a resolution, or annul it pursuant to the Income Tax Act. He is of the view that the exemption was done within the law and as such there was no breach of the Constitution.
30. He posited that that the decision to exempt Japanese companies was within the law. He does not cover in his response, the decision to exempt Japanese workers and Japanese Consultants. He denied that the National Assembly was a rubber stamp as the decision was informed by negotiations and the agreements are preexisting in all Japanese Government financing.
31. He is thus of the view that legal Notice No 15 of 2021 dated 15/2/2021 and published on 26/2/2021 as issue No 17 is not a statutory instrument, but a Legal Notice published as per section 13 of the Income tax Act. He is stated that he has advised from Counsel that public participation was not necessary. He is states that sovereignty of the people is not threatened. He therefore prays that the petition be dismissed as the same is misconceived.



32. The 5<sup>th</sup> respondent filed a replying affidavit through Isaac Kwengu, who addresses himself as an officer attached to the policy and Tax Advisory Division of the 5<sup>th</sup> respondent. I do not remember the 5<sup>th</sup> respondent having divisions.

The 5<sup>th</sup> respondent, is sued as the chief executive officer of KRA.

33. Under section 3(2) of the [Kenya Revenue Authority Act](#), KRA is a body corporate. The section provides as doth: -

“The Authority shall be a body corporate with perpetual succession and a common seal and shall, subject to this Act, be capable in its corporate name of—

- (a) suing and being sued: Provided that any legal proceedings against the Authority arising from the performance of the functions or the exercise of any of the powers of the Authority under section 5 shall be deemed to be legal proceedings against the Government within the meaning of the [Government Proceedings Act](#) (cap 40); (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;
- (c) borrowing or lending money;
- (d) doing or performing all other things or acts for the furtherance of the provisions of this Act, which may be lawfully done or performed by a body corporate.”

34. The proper person to have divisions in that regard is the Kenya Revenue Authority. However, being a constitutional petitioner, there is a bit of latitude in order to obtain information from whoever claims to have the same. At least I take judicial notice under section 60(1)(f) of the [Evidence Act](#) that the deponent is not the Commissioner General.

35. He deposes that due process was followed. He stated that paragraph 21 part 1 of the first schedule to the [Income Tax Act](#) provide for exemption in respect of Income accrued in derived from of received in Kenya. The same reads: -

“I - Income accrued in, derived from or received in Kenya which is Exempt From Tax

- 1. So much of the income of a person as is expressly exempted from income tax by or under the provisions of any Act for the time being in force, to the extent provided by that Act.”

36. He is of the view that schedule 1 paragraph 27 exempts consultants. The section provides as follows: -

“27. The emoluments payable out of foreign sources in respect of duties performed in Kenya in connection with a technical assistance or other agreement for development services or purpose to which the Government is a party to a non-resident person or to a person who is resident solely for the purposes of performing those duties, in any case where the agreement provides for the exemption of those emoluments.”

37. He reiterates the authority of the Cabinet Secretary under section 13(2) a of the [Income Tax Act](#) cap 470. In paragraph 13-25 he pontificates on the need for the benefit of the good people of Kenya in total compliance with article 210 of the Constitution.



### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents.**

38. Michael Sialai filed an affidavit dated 30.9/2021. He is the clerk of the national assembly. He justified the proceedings before the National Assembly, either as a committee or the whole House.
39. He annexed a 68-page document marked as MS 1. He gives a chronology events surrounding LN No 15/2021. According to the Clerk of the National Assembly the notice was transmitted to Parliament and laid before the house under section 11 of the [Statutory Instruments Act](#).
40. There are no factual contestations with the petitioner except the effect of what was done. He confirms that public participation was not done as it was thought the matter involved an understanding between two governments therefore public participation was unnecessary.
41. I love his candour and innocent admission. I have been trying to look for the law, prohibiting public participation when it is two governments understand each other, but all in vain. He notes at paragraph 18 that the MPs also raised issue about the skewed nature of the agreement which lacked reciprocity. Nevertheless, Parliament found it unnecessary to carry out regulatory impact assessment.

### **The 5<sup>th</sup> Respondent's submissions.**

42. The 5<sup>th</sup> respondent filed a 37 paragraph response and an eleven page submissions, stating that the petition lack merits.
43. They regurgitate the contents of the replying affidavit in the submissions. They state that paragraph 27(1) of the first schedule to the [Income Tax Act](#) section 13(2) of the [Income Tax Act](#) and article 210 of the [Constitution](#) articles 94(1), 109 and 210(1) are their refuge.
44. They further rely on the presumption of constitutionality of statutes. They rely, *inter alia*, on the authorities of [Kenya National Human Rights Commission v Attorney General and another](#) [2018] eKLR, [Kefa Nyaga Kariuki v officer Commanding Station Kikuyu & 3 others; Welton Kibiwott Tubei \(Interested Party\)](#) [2022] eKLR [Anarita Karimi Njeru](#) [1979] eKLR. [Mumo Matemu v Trusted Society of Human Rights & 5 others](#) [2013] eKLR and [Rev DR Timothy Njoya v The Attorney General & another](#) [2017] eKLR.

### **Analysis**

45. The issues that have crystallized from the totality the affidavit evidence and submissions filed by all the parties, are as follows: -
  - a. Whether the 1<sup>st</sup> respondent had power and authority to issue the legal Notice No 15 of 2021.
  - b. Whether Legal Notice No 15 of 2021 is statutory instrument within the meaning of [Statutory Instruments Act](#).
  - c. Whether, Legal Notice No 15 of 2021 is legislation contemplated under article 210 of [the Constitution](#).
  - d. Whether: -
    - i) Public participation was necessary in respect of Legal Notice No 15/2021 and or
    - ii) Whether, public participation can be waived as done in this case.



iii) Whether Legal Notices no 27 of 2021 can be impeached.

46. There is a factual agreement to the effect that: -

- a. Legal Notice No 15 of 2021 was laid before the house.
- b. The committee on delegated legislation decided that Legal Notice No 15/2021 is not a statutory instrument hence public participation was not necessary.
- c. Section 13 of the *Income Tax Act* grants authority to exemption Income or a class of income.
- d. These is agreement on the content of the Gazette Notice.

47. However, there is a dispute whether the exemption should be : --

- a. To the extent specified in the Notice.
- b. To the extent specified
- c. To the extent specified in the agreements.

48. I am aware that Constitution should be interpreted in a holistic manner, within its context, and in its Spirit as per the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR, where at paragraph 137 they stated as doth: -

(137) 137] This, in our perception, is an interpretive conundrum, that is best resolved by the application of principle. This court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the *Constitution* should be interpreted in a holistic manner, within its context, and in its spirit. In the Matter of the Kenya National Human Rights Commission, Sup Ct Advisory Opinion Reference No 1 of 2012;[2014] eKLR, this court [paragraph 26] had thus remarked:

“...But what is meant by a holistic interpretation of the *Constitution*? It must mean interpreting the *Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result” [

49. The meaning of holistic interpretation of the *Constitution* was addressed by the Supreme Court *In the Matter of the Kenya National Human Rights Commission*, Reference No 1 of 2012; [2014] eKLR as doth: -

“26 ...But what is meant by a holistic interpretation of the *Constitution*? It must mean interpreting the *Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.





## Gazette Nos 27 of 2021

50. The issues taken on Gazette Notices Nos 27 of 2021 have not been clearly enunciated and should not engage the court any further. Whereas these errors are not and should not occur but they do happen. I will make no fodder out of it. The effect of those notices have not been challenged.
51. The errors related to the 2 Gazette Notices both named as 27/2021 can be classified de Minimis non curat Lex. These are small and inconsequential errors, for which the law provides no remedy. These regulations covered by the 2 notices are not impugned in terms of content or procedure.
52. In any case, they always have various identifiers embedded within the notices, in this case, the Legislative Supplement Number and the subject matter. It is noted that one notice is in legislation supplement No 21 and another in No 13. They cause no confusion to a fairly average intelligent reader.
53. The Petitioner also took issue with confusing reports of the National Assembly. His views were that the reports are in simple terms unintelligible. I have read the excerpts of the report of various committees of the August House and the National Assembly itself. I find that they meet minimum requirements of article 120 of the Constitution which provides that official documents ought to be in English or Kiswahili. The article provides as doth: -

### 120. Official languages of Parliament

- (1) The official languages of Parliament shall be Kiswahili, English and Kenyan Sign language, and the business of Parliament may be conducted in English, Kiswahili and Kenyan Sign language.
- (2) In case of a conflict between different language versions of an Act of Parliament, the version signed by the President shall prevail.
54. Whether the reports are confusing is not justiciable. This is because confusion is a subjective matter. Further, the National Assembly, regulates, its own procedures. Reports need to be intelligible to the immediate consumers of the business of the House, that is, the members of the August House.
55. If parliamentary reports are jumbled up, it is not the business of the court to intervene and as such the same is not justiciable. The reports may be consumed by members of the public, among others. However, that does not create a justiciable right as against parliament.
56. In *Ombati v Chief Justice & President of the Supreme Court & another; Kenya National Human Rights and Equality Commission & 2 others (interested party)* (Petition E242 of 2022) [2022] KEHC 11630 (KLR) (Constitutional and Human Rights) (17 August 2022) (Judgment) Neutral citation: [2022] KEHC 11630 (KLR), Hon Justice M Thande was of the considered view that: -

“the making of the impugned rules, offended the Constitution and the doctrine of separation of powers which requires each of the 3 arms of government to stick to its lane. In *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party)*;

With *Kenya Human Rights Commission & another (amicus curiae)*// (Petition 229 of 2012) [2012] KEHC 2480 (KLR) (Constitutional and Human Rights) (20 September 2012) (Judgment) a 3-judge bench of this court considered the



principle of separation of powers in relation to the judiciary and the legislature, observed as follows:

In answering these constitutional questions, it is imperative that we begin by re-stating that the doctrine of separation of powers is alive and well in Kenya. Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of the coordinate arms of government, the courts must defer to the decisions made by those other coordinate branches of government. Like many modern democratic constitutions, the new Kenyan Constitution consciously distributes power among the three coequal branches of government to ensure that power is not concentrated in a single branch. This design is fundamental to our system of government. It ensures that none of the three branches of government usurps the authority and functions of the others.”

57. This court, therefore refrains from passing judgment on the quality and state of the reporting in Parliament. It is my sincere hope that, the petitioner appreciates the spirit and the purport of separation of power.

58. On this I am guided by the persuasive South African case of *Doctors for Life International v Speaker of the National Assembly and others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) justice Ngcobo was of the view that: -

“The principle underlying the exclusive jurisdiction of this court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation...By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers.”

59. Unless Parliament conceals or does not disclose some documents, there can be no justiciable cause over the contents and the intelligibility of a house Report or the manner in which the house runs its affairs.



This is not to say that they have a carte blanche to have unintelligible reports. It means that question of accountability for those reports does not lie here.

60. Article 1(3) places the sovereign power in its rightful place, that it provides:
- (3) Sovereign power under the Constitution is delegated to the following state organs, which shall perform their functions. In accordance with the Constitution.
    - a. parliament and Legislative Assemblies in the County government.
    - b. The National Executive and the Government and
    - c. The Judiciary and Independent Tribunals.
61. Under article 1(1), of the Constitution, all sovereign power belongs to the people of Kenya; and shall be exercised only in accordance with the Constitution. Pursuant to article 1 of the Constitution the legislature is to exercise delegated power from the people. The legislative power can only be exercised by parliament or Legislative Assemblies in the Counties. The Judiciary or the executive have no powers to superintend on the legislature on how to draft their reports. It only the people who can recall their representatives for making such mistakes. People have 5 years cycle to improve the reports. If they cannot do so, this court cannot intervene.
62. Justice George V Odunga in Wilfred Mantchi Musyoka v Machakos County Assembly & 4 others [2018] eKLR, states as follows:-
- “84. The South African Constitutional Court in *Minister of Health and others v Treatment Action Campaign and others* [2002] 5 LRC 216, 248 at paragraph 99 underscored the court’s role to protect the integrity of the Constitution thus:

The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself.”
  85. I am duly guided and this court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and state organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this court.
  86. I must however caution that courts must exercise restraint where the legislative arm of the state is still undertaking its legislative mandate must not interfere,



save in exceptional circumstances, where the legislative process is still in motion.”

63. This court will not engage in a debate on the competence of reports of the August house or such reports as may be having missing pages. Even if pages are missing, it is not the problem of the National Assembly but whoever brought incomplete Report. I cannot trace any report that clerk of the National Assembly declining to supply a complete record to the Petitioner.
64. Hon Justice Odunga had earlier summarized the principles that guide separation of powers, in the case of *Wilfred Manthi Musyoka v Machakos County Assembly & 4 others* (*supra*) as doth: -
- “73. The broad principle of “separation of powers”, certainly, incorporates the scheme of “checks and balances”; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. This perception emerges from *Commission for the Implementation of the Constitution v National Assembly of Kenya, Senate & 2 others* [2013] eKLR where Njoki, SCJ opined that:
- “The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting ultra vires the *Constitution*. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, [their] limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided.”
74. The system of checks and balances serves the cause of accountability, and it is a two-way motion between different State organs, and among bodies which exercise public power. The commissions and independent offices restrain the arms of Government and other State organs, and vice versa. The spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers.”
65. Consequently, I dismiss all claims over the twin notices Nos 27. I do not find any correlation between the alleged errors related to Gazette Notice number 27 od 2021 the content. I shall therefore dismiss all the submissions on the twin Notices No 27/2021.
66. The duty to number the Kenya Gazettes is not and cannot be placed on the shoulder of the Cabinet Secretary. The issue of Gazette notices with similar names should first be taken up with the Government Printer before being litigated upon.



## Statutory Instruments

67. To start with, it is crucial that the nomenclature be settled upon to enable the proper understanding of the of the judgment. This will cover statutory instruments and legislation. These are imperative in unbundling the imbroglio that is this petition.
68. Article 260 of the [Constitution](#) define legislation to include –
- “legislation” includes.
- a. an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or
  - b. A law made by an assembly of a county government, or under authority conferred by such a law;
  - c. A law made by an assembly or a county government or under Authority conferred by such a law.
69. The statutory document is defined under the [Statutory Instruments Act](#), No 23 of 2013 as follows: -
- “means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.”
70. My reading of the [Statutory Instruments Act](#) is there should be Regulatory Impact Assessment except very few occasions. Therefore under section 9 of the [Statutory Instruments Act](#), the regulatory impact assessment is not to be carried out in very specific circumstances. The law provides as follows: -
- “A regulatory impact statement need not be prepared for a proposed statutory instrument if the proposed legislation only provides for, or to the extent it only provides for—
- (a) a matter that is not of a legislative character, including, for example, a matter of a machinery, administrative, drafting or formal nature;
  - (b) a matter that does not operate to the disadvantage of any person (other than a government entity) by—
    - (i) decreasing the person’s rights;
    - (ii) imposing liabilities on the person;
  - (c) an amendment of statutory instrument to take account of the prevailing Kenyan legislative drafting practice;
  - (d) the commencement of an Act or subordinate legislation or a provision of an Act or statutory instrument;
  - (e) an amendment of statutory instrument that does not fundamentally affect the legislation’s application or operation;
  - (f) a matter of a savings or transitional character;



- (g) a matter arising under legislation that is substantially uniform or complementary with legislation of the National Government or any County;
- (h) a matter advance notice of which would enable someone to gain unfair advantage;
- (i) an amendment of a fee, charge or tax consistent with announced government policy

**Income tax act**

71. Section 13(1) of the *Income Tax Act*, introduced by section 9 of Act No 8 of 1978 states as doth 13(1) Notwithstanding anything in part II, the income specified in party 1 of the First schedule, which accrues in or was derived from Kenya shall be exempt from tax so specified.

72. Therefore, any instrument purporting to exercise powers made under another act is a statutory instrument.

73. Further section 13(2) of the *Income Tax Act* provides, that (2) the minister may, by the Gazette, provide:

- a. That income or a class of income which accrued in or was derived from Kenya shall be exempt from tax to the extend specified in the notice.
- b. That an exemption under subsection (1) shall ceased to have expect letter generally or to be the expect specified in the notice.

74. Article 210 of the *Constitution* provides as follows: -

Article 210(1) No tax or license see may be imposed, waived or varied except as provided by legislation.

- 2. If legislation permits waiver the waiver of any tax or license fee:-
  - a. A public record of earlier waiver shall be maintained together with the reason for the waiver.
  - b. Each waiver, and the reason for it, shall be reported to the auditor General.
- 3. No law may exclude or authorize the exclusion of a state office and from payment of tax by reason of.
  - a. The office held by that state officer, or,
  - b. The nature of work of the state officer.

79. What I gather from article 210 of the *Constitution* is that there can be no blanket exemption. This means, that every waiver must: -

- a. Be authorized by legislation.
- b. Each waiver must be reported to the Auditor General.
- c. Each waiver must be accompanied by a reason for such a waiver, and



- d. There should be a public record of the waiver and amount waived.
79. In practical terms, the extent of waivers, means the amount waived. Before looking at the waiver in Legal Notice No 15 of 2021 dated 15/2/2021 and published on 26/2/2021 as issue No 17, it is crucial to note the differences between the Legal Notice No 15 of 2021, Constitution and the 1<sup>st</sup> respondent notice.
80. The *Constitution* requires that there shall be a public record of each waiver and the reason for the same and shall be reported. No tax or licensing fees may be imposed, waived or varied except as provided by Legislation. While on the other hand under 13(2) requires that shall be exempt from tax to the extent specified in the notice.
81. The Legal Notice No 15 of 2021 dated 15/2/2021 and published on 26/2/2021 as issue No 17, states “..... the extent specified in those financing agreements.
82. The question then is what is the law on waiver. The supreme law of the land on waivers is enshrined in article 210 of the *Constitution*. The *Income Tax Act*, is thus deemed amended to accord to the new constitutional dispensation *vide* schedule 5 section 7(1) which states as doth: -
- “All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with this Constitution.”
83. *Ipsa facto*, notice falls far short of even the Act that it purports it rely on since the extent of waiver is not given. The waiver purports to be according to some financing agreements. Exemption is individualized and the amount waived must be specified and to whom it applies and the Auditor General ought to be informed.
84. Section 13(2) of the *Income Tax Act*, gives power to exempt income or a class of income. It does not give power to exempt people or a class of people. For taxation to be fair reasonable and proportionate, it has to have an element of neutrality and should be able to apply without discrimination unless it is for clearance of historical injustices and marginalization.
85. The financing agreements are not part of the public records that cover the waiver. A person reading the Legal Notice is sent to look for the financing agreements to find the contents and terms of the waiver. However, the Constitution requires that extent be in the notice itself.
86. The notice does not cover all workers involved in the projects financed by Japan, but Japanese companies, Japanese consultants and Japanese employees.
- There is no reason accompanying the same. There is no indication of the amount of tax waived as required under article 210 of the *Constitution* that the extent of waiver to be specified.
87. To make matters more confused, the criteria of race or ethnicity does not bring with it the sense of neutrality of tax. There should always be a way one can or may meet criteria for waiver.
88. A good example of compliance with the precepts in article 210 of the Constitution, in spite of predating the *Constitution*, is the waiver under the the Persons with Disabilities Act No 14 of 2003. In that Act, there are qualifying persons and an objective criteria and not birth that is used to determine waiver provided under the relevant statute.
89. Under section 42 of the *Persons with Disabilities Act* No 14 of 2003, there are conditions and procedures that apply prior to grant of the said exemptions, that is: -



- (1) The following apply with respect to exemptions and deductions described in subsection (2)—
    - (a) no person is eligible for an exemption or deduction unless the exemption or deduction has been recommended by the Council and approved by the appropriate government authority;
    - (b) no person is eligible for an exemption or deduction unless any additional requirements or conditions prescribed in the regulations made by the Minister are satisfied;
    - (c) an exemption or deduction may be refused on the basis that it has not been provided for in the allocation of public resources.
  2. The exemptions and deductions referred to in subsection (1) are the exemptions and deductions under the following—
    - (a) section 12;
    - (b) section 16;
    - (c) section 35;
    - (d) section 36(1); and
    - (e) section 40.
90. Further such expenditures are personalized and even the amount are known. The trouble with the contents of the notice is that it is omnibus and covers all Japanese companies, employees and companies involved in the specified projects. The extent of involvement is not set out and the upper and lower limits are also not provided and as a result the cost benefit analysis was not and could not be done.
91. Such blanket exemptions of nationals of one state, reeks of economic apartheid and are not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. I arrive at that decision, after taking into account all relevant factors, especially in view of the fact Kenyans are highly taxed, subjecting Kenyans working for those Japanese companies and projects to tax and have the Japanese workers from janitors to CEOs, walk home tax free defeats equal pay for equal work mantra.
92. The nature of taxation is that it can cause economic disparities and as such it is to widens the economic gap. The blanket waiver especially on the Loans which is a burden to the very tax payers for generations serves no purpose. In order to quell embers of colonialism, where only Africans were paying certain taxes, it is important that the country consults its people whether they are willing to accept such transgressions.
93. Our nation’s struggle against racism is enshrined under article 27 of the [Constitution](#) as doth, which covers equality and freedom from discrimination, by providing that: -
1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
  2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
  3. ....
  4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.





5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
6. To give full effect to the realization of the rights guaranteed under this article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
7. Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
8. ....

94. Article 27 of the Constitution gives guidance that any measure under article 27(6) shall adequately provide for any benefits to be on the basis of genuine need.

This is essentially the *raison d'être* for the disclosure of the reason for waiver to ascertain genuine need.

95. What then is the effect of waiver given to only Japanese employees, companies as consultants. The effect of waiver gives to only Japanese Employees, Japanese companies and Japanese consultants. The effect is economic Apartheid, where, equal pay for equal work is thrashed. Japanese employees working in the same organization, end up with all their money, and which in cause of the local Kenyans and Kenyan resident and up paying.

96. In *Ol Pejeta Ranching Limited v David Wanjau Muboro* [2017] eKLR , the Court of Appeal found such unequal pay arising from race as discriminatory. The court was of the view that: -

Further, fairness requires that people doing similar work should receive equal pay. The principle has however extended to an analogous situation requiring that work of equal value should also receive equal pay as is claimed in the present appeal. The principle of equal pay for equal work, or work of equal value was succinctly explained in by the South African Labour Court in *Louw v Golden Arrow Bus Services (Pty) Ltd*[1999] ZALC 166 as follows;

Quote '.....it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds e.g. race or ethnic origin.'

97. Whereas this is not an employment matter, taxing only Kenyans and letting Japanese companies compromises the constitutional protection Under article 27 of the Constitution.

98. To make matters worse, even expatriates working for the same companies most of whom are nonresident but are not Japanese and up paying more than their Japanese contacts parts.

99. The right to equal treatment cannot be derogated from. If for any reason, the state is interested in waivers, there should be legislation which legislation, which in itself does not discriminates. If the legislation does discriminate, then there should be strict compliance with article 24 of the Constitution. Article 24 of the Constitution provides as follows: -

Article 24(1)

“A right or fundamental freedom in the bill of rights Shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account factors including.



- a. The importance of the purpose of limitation.
  - b. The nature and extent of limitation.
  - c. The need to ensure that enjoyment of rights and fundamental freedoms by and individual does not prejudice the rights and fundamental freedom of others, and
  - d. The relation between the limitation and the purpose and whether there are less restrictive means to achieve the purpose.
100. Article 24(2)(a) specifically states that a limitation is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation. The delated legislation on tax waivers in the impugned notice breaches article 27 without expressly referring to it and justifying the same.
101. In *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR
- “It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.”
102. Without reasons being given for the discriminatory blanket waiver, Legal Notice No 15 of 2021 dated 15/2/2021 and published on 26/2/2021 as issue No 17 is not justifiable in an open and democratic society. It is anathema to equality and financial prudence.
103. The constitutional imperative is that all waiver must be by legislation. I cannot find any legislation on the authority to issue waiver for Japanese companies, Japanese consultants and Japanese employees in the specified agreements set out in the schedule.
104. The practice I have seen from the 1960s is to have agreements singularly or specifically legislated upon.
105. I have perused the *External Loans and Credits Act*, cap 422 and note that parliament has always had a say on the type of interest and conditions for grant of loans. Full disclosure on conditions and amounts has been paramount. Section 5 of cap 422 provides as follows: -
- “as soon as practicable after a loan has been arranged or credit obtained under this Act, the minster shall lay before the national assembly a report on the tractions, specifying the parties, the circumstances giving rise to the transaction, amount or value of the transaction, the currency in which the amount or value is expressed, terms and conditions as to interest and repayment or payment and the aggregate o the capital sums borrowed and credit obtained under this act up to the date of the report and any other information which he considers appropriate.”
106. Even in that act which predates the *Constitution*, amounts are crucial and the minster is not authorized to waive tax.
107. The existing first schedule to the *Income Tax Act* namely specifically the bodies to be exempted. However, if the extend the same to certain office holders or nationals of certain states, in particular without reciprocity hence subjugating our Constitution to that of the Japanese Empire. This is unconstitutional since it is only parliament that has the obligation and responsibility to impose tax, by extension un-impose by legislation



108. The duty to impose tax, carries with it the duty, by legislation to un-impose tax. The national assembly abdicated its role by surrendering the powers to legislate on a money bill to the Cabinet Secretary. He simply drew some gazette notice to be placed before an overwhelmed committee on delegated legislation, who despite not receiving satisfactory answers rubber stamped the Cabinet Secretary's request. This is contrary to article 210 of the Constitution.
109. Although in the definition legislation includes County legislation, it is the national parliament that an originate a money bill.
110. Consequently, the Cabinet Secretary has no power in the new constitutional dispensation to grant blanket tax waiver. This is in contravention of article 27 and 210 of the Constitution. The waiver must follow the normal route on legislation. Waiving tax through delegated legislation does not meet the Constitutional imperative on money bills under article 114(3) of the Constitution. A money bill is defined under article 114(3) as doth: -
- “In this Constitution, "a money Bill" means a Bill, other than a Bill specified in article 218, that contains provisions dealing with
- a. taxes;
  - b. the imposition of charges on a public fund or the variation or repeal of any of those charges;
  - c. the appropriation, receipt, custody, investment or issue of public money;
  - d. the raising or guaranteeing of any loan or its repayment; or
  - e. matters incidental to any of those matters.
111. My understanding is that article 114 of the Constitution sufficiently covers matters dealing with foreign loans and taxes or waivers incidental thereto as provided for under article 210 of the Constitution.

### **Public Participation.**

112. The other attack on the Cabinet Secretary's Notice is that it was not subjected to public participation. Parliament, in their wisdom or otherwise stated that legal Notice No 15 of 2021 is not a statutory instrument within the meaning of section 2 of the Statutory Instruments Act. That may well be indeed so, but the reading of article 118 of the Constitution does not place the duty to engage in public participation in occasion of only statutory instruments.
113. Public participation has been litigated upon for years since 2010 till that path is now smooth and well-trodden. Article 73 identifies the authority on a state officer as a public trust that demonstrates respect of the people, promote public confidence and vests in the state officer the responsibility to serve the people rather than the power to rule over them.
114. The supreme court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (*supra*) at paragraph 381 had these words of wisdom to ooze: -

“(381) Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private “sweet heart” deals, secret contracting processes, skewed



sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted.”

115. Further, the importance of public participation cannot be gainsaid. It is a tool the people reserved for themselves in light of the history this country had. Justice A C Mrima in has this to state in Richard Owuor & 2 others (suing on behalf of Busia Sugarcane Importers Association) v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Cooperatives & 7 others [2021] eKLR, while dealing with an issue of public participation.

“ 127. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra) referred to Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR stated as follows: -

‘the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1<sup>st</sup> respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party’.....”

116. Article 10 of the Constitution places the duty and responsibility to apply National values on all person, whenever any of them: -

- a. Applies or interprets the Constitution.
- b. Enacts, applies or interprets the law.
- c. Makes or implement public policy decision.

117. This is enhanced by public participation, good governance, integrity, Transparency and accountability coupled with sustainable development.

118. The importance of public participation cannot be waived. Parliament waived the right to public participation in a very casual manner, that is, that the LN No 15 /2021 dated 15/2/2021 published on 26/2/2021 as issue No 17 is not a statutory instrument.

119. The foregoing cannot be correct since event the Cabinet secretary was trying to comply with the same Act. That notwithstanding, Public participation is not limited to statutory instruments. It is related to all legislation and even decisions on hiring of constitutional office holders.

120. Article 118 of the Constitution provides as doth:-

Public access and participation

- (1) Parliament shall—



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

121. In effect Parliament has no power to exclude public participation in legislation and other business. Parliament should thus be more geared towards public participation and not less of it.
122. For avoidance of doubt, Legal Notice No 15 of 2021 dated 15/2/2021 published on 26/2/2021 as issue No 17 was statutory instrument and required go through public participation. As such, the National Assembly breached that Constitution by failing to carry out public participation.
123. In *Mugo & 14 others v Matiang'i & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Party)* (Constitutional Petition 4 of 2019) [2022] KEHC 158 (KLR) (12 January 2022) (Judgment), hon Justice RK Limo held as doth at paragraph 64:-

“It is apparent, going by the above decision and other decisions cited by the parties in this matter and in particular the decision in *Khelef Khalifa & 2 others v Independent Electoral and Boundaries Commission & another* [2017] eKLR, that to attain the principle of public participation in a decision making process, the following parameters are required;

- a. There must be evidence of inclusivity that is to say that all stakeholders or those affected by an administrative policy, or law must be given an opportunity to express or ventilate their view well aware of what is at stake.
- b. The affected people must be given sufficient notice of the nature of the decision to be made and when the consultations will be held. The information must be disseminated through public barazas, churches, mosques, print and electronic media and other avenues to ensure that the information reaches the targeted audience.
- c. The government agency or a public officer in charge of the programme of public participation must of essence take into account the participation of the governed in quantitative as well as qualitative way. In other words, the engagement must be meaningful and done in good faith rather than a mere formality.
- d. Public participation calls for innovation and some level of malleability depending on the nature of subject matter for example culture, geographical issues, logistical constraints etc. The test to be applied is effectiveness and efficiency. The question to be asked is, is the mechanism effective in achieving sufficient public participation.
- e. Public participation does not mean that everyone must give their views on the issue at hand as to attain such a standard at times can be impractical.

124. These were the principles parliament was required to follow. Unfortunately, they waived the need of public participation. They have power to determine the nature of public participation having regard to the nature of the issue. The more technical and wide the effects, the more the need to engage in public participation.



125. Consequently, the decision by parliament to waive public participation were made without requisite authority, is thus null and void *ab initio*

### Grants

126. The arguments from the respondents were that that grants and loans are from foreign sources hence we have to defer to the foreign authority.

Respectively, I cannot agree that loans are equivalent to foreign sources.

127. Whereas I agree that a grant is a foreign source, it is doubtful whether a loan, concessionary or otherwise qualifies of a foreign source as the country is bound to repay the same from internal sources.

128. However, to the extent therefore that a grant is not an entitlement, I shall not deal with it in this judgment as it is subject to the wishes of the grantor. The petition did not show how grants are affected by the notices. This is because they are not a not loans covered under article 114 of the Constitution and are not a burden on the national debt and are not entitlements. These are gratuitous payments or receipts which are governed by the donor's postulations.

129. The same does not apply to loans which the country is bound re-pay.

### Orders Compelling KRA

130. An order compelling carrying out a duty must be given only when the duty has been breached. It cannot be given in anticipation.

131. The court declines to compel the Kenya Revenue Authority to do its duty since there is no evidence that they have failed to carry out their duties. This is because, they were not under obligation to collect the income tax before this declaration was made. Their duty starts today.

132. The Court of Appeal has an occasion to discuss an order of *mandamus* in the case of Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR where they stated as doth: -

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.”

133. This was enunciated also in the celebrated case of Prabhulal Gulabchand Shah v Attorney General & Erastus Gathoni Miano Civil Appeal No 24 of 1985 the Court of Appeal stated that:-

“The person seeking *mandamus* must show that there resides in him a legal right to performance of a legal duty by a party against whom the *mandamus* is sought or



alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature.”

134. Thus once the court re-ignites the duty today, it cannot be placed on their shoulders at the pain of contempt when they have not declined to carry out their duty. The order is thus not ripe as of today. It can only be addressed once the same is ripe and justiciable.
135. What then recommends itself in this state of affairs. The power of this court, under article 23 is to:
- a. Make a declaration of right.
  - b. An injunction
  - c. A conservatory order
  - d. A declaration of invalidity or any law that denies, violates, infringes or threatens a right or fundamental freedoms and is not justified under

Article 24:

- e. An order of compensation,
  - f. An order of Judicial review.
136. My understanding is that the remedies include “this means include, not limited to. The petitioner beseeched the court to make various orders. I can only make those orders the recommend themselves. The Petition is allowed to the extent below.

### **Disposition**

137. I allow the petition as follows: -
- a. It is hereby declared that the first respondent violated the Constitution by exempting Japanese companies, Japanese consultants and Japanese employees as set out in Legal Notice No 15 of 2021 dated 15/2/2021 published on 26/2/2021 as issue No 17.
  - b. It is hereby declared that Legal Notice No 15 of 2021 dated 15/2/2021 published on 26/2/2021 as issue No 17 is unconstitutional by itself and in its effect as it is contrary to articles 27 and 210 of the Constitution and had not been subjected to public participation. The said notice is hereby quashed.
  - c. It is hereby declared that section 13(2) of the Income Tax Act is unconstitutional to the extent that it authorizes Income Tax waivers through a notice in the Gazette and for specified persons without regard to the dictates of article 210 of the Constitution. To the extent of the inconsistency, in particular the use of the Kenya Gazette, instead of legislation, to effect tax waiver, is struck down.
  - d. It is hereby declared that Exemption or waiver of tax income can only be granted the National Assembly through National legislation after the same passes as a money bill as provided under article 114(3) of the Constitution; after public participation and in strict compliance with article 210 of the Constitution, which legislation will require that there be: -
    - a. A public record of each waiver and the reasons for the waiver.
    - b. Each waiver, and the reason for it shall be reported to the Auditor General.



- c. And, as per the dictate of article 27 of the Constitution, there can be no waiver based on national origin, race, colour, marital status, health status, Ethnic society, religion, conscience, belief culture, dress, language or birth.
- e. It is hereby declared that legislation on tax waiver involving country by country agreements must comply with the Constitution and must be on the basis of reciprocity, nondiscrimination, equality and tax neutrality.
- f. It is hereby declared that the National Assembly has no power to authorize waiver of tax other than through legislation contemplated and in strict compliance with article, 210 of the Constitution.
- g. The National Assembly breached the Constitution by waiving public participation.
- h. The prayers related to legal Notices No 27/2021 are not Justiciable and as such are dismissed *in limine*.
- i. Grants are not affected by this decision as they are not a not loans covered under article 114 of the Constitution and are not a burden on the national debt and are not entitlements.
- j. The claims regarding the mingling of reports by the National Assembly are not justiciable as parliament has a right to regulate its own procedure and on the basis of the doctrine of separation of power.
- k. Given that the named state officers, were acting in good faith, implementing the law before its unconstitutionality is pronounced.
- l. Income Tax covered under legal notice dated 15/2/2021 published on 26 /2/2021 as issue No 17 is collectable with effect from the date of quashing of the impugned unconstitutional Legal Notice No 15 of 2021.
- m. The court declines to compel the Kenya Revenue Authority to do its duty since there is no evidence that they have failed to carry out their duties.
- n. The remainder of the prayers are declined.
- o. Being a public interest Litigation, each Party to bear its own costs.

**DATED, ISSUED AND DELIVERED AT MOMBASA, VIRTUALLY THIS 17<sup>TH</sup> DAY OF FEBRUARY THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.**

**HON. MR. JUSTICE DENNIS KIZITO MAGARE**

**JUDGE OF THE HIGH COURT, MOMBASA**

**In the presence of:**

Eliud Matindi, the petitioner

Miss Kiramana for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Emacar holding brief for Awadh for 3<sup>rd</sup> and 4<sup>th</sup> Respondents Miss Mwongera for 5<sup>th</sup> Respondent.

Achieng & Abondo, Court Assistants

