



**Okwama v Milestone Gaming Limited & 3 others; National Assembly (Interested Party)
(Constitutional Petition E016 of 2023) [2025] KEHC 11932 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E016 OF 2023**

S MBUNGI, J

JULY 31, 2025

**IN THE MATTER OF ARTICLES 1,2,3 (1),10,20,22,23,24,40,41(1)(2)(B) & 4(A),46(1)(C),
186,189,209,210,258 AND ARTICLE 259 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
ARTICLES 2(1), (2), (4),6(2),10,26,27,28,40,41(1), (2),(B)& 4A,43,46,
(1)(C),110,186,189,209,210 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE EXCISE DUTY ACT OF 2015

AND

IN THE MATTER OF THE BETTING AND LOTTERIES ACT (CAP131)

AND

IN THE MATTER OF THE INCOME TAX ACT

AND

**IN THE MATTER OF THE CONSTITUTIONALITY AND
LEGAL VALIDITY OF PARAGRAPH 4A OF PART 11 OF THE
FIRST SCHEDULE OF THE EXCISE DUTY ACT OF 2015**

BETWEEN

EDWARD OKWAMA PETITIONER

AND

MILESTONE GAMING LIMITED 1ST RESPONDENT

STANDARD GLOBAL EAST AFRICA LIMITED 2ND RESPONDENT

KENYA REVENUE AUTHORITY 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT



AND

THE NATIONAL ASSEMBLY INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner filed this constitutional petition dated 21st August 2023, challenging the constitutionality of Paragraph 4A of Part II of the First Schedule to the Excise Duty Act, 2015, as amended by the Finance Act, 2023 as in the impugned provision imposed a 12.5% excise duty on the amount wagered or staked by persons participating in betting activities.
2. The petitioner seeks the following orders: -
 - a. A Declaration that the imposition of 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 on amount wagered/played or staked on the Petitioner and the other players is in conflict with Section 5 and Section 9 of the Excise Duty Act and is therefore in contravention of Article 2(4) of the Constitution.
 - b. A Declaration that the imposition of 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 on amount wagered/played or staked on the Petitioner and the other players and an additional 20% Withholding Tax on Winnings amounts to double taxation and is therefore arbitrary and unconscionable, punitive, burdensome and contravenes the principles of public finance and taxation in particular, the Principle of fairness and equity on the sharing of the burden of taxation under Article 201 and also in violation of Article 210 of the Constitution on imposition of taxes, Article 20(4)(a) of the Constitution on equality and equity and Article 10 on National Values of Good Governance.
 - c. A Declaration that the imposition of 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 on amount wagered/played or staked on the Petitioner and the other players plus an additional 20% Withholding Tax on Winnings and not subjecting the same requirement to similarly situated persons in the country is discriminatory in nature and in contravention of Article 27 of the Constitution and is therefore null and void.
 - d. A Declaration that the imposition of 12.5% excise duty under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 on amount wagered/played or staked on the Petitioner and the other players plus an additional 20% Withholding Tax on Winnings and not subjecting the same requirement to similarly situated persons in the country is unconstitutional in so far as it does not provide the petitioners equal protection and benefit of the law in contravention of Article 27(1) of the Constitution and is therefore null and void.
 - e. A Declaration that the imposition of 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 on amount wagered/played or staked on the Petitioner and the other players plus and an additional 20% Withholding Tax on Winnings and not subjecting the same requirement to similarly situated persons in the country is in violation of Article 201 on equity, fairness and equality in taxation regimes and is therefore null and void.
 - f. A Declaration that paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 which imposes 12.5 % excise duty on amount wagered/played or staked on the Petitioner and the other players makes it impossible for the players staking on lower odds to win and instead,



drives the wager into losses, thereby arbitrarily taking away the players property in money in violation of their property rights under Article 40 of *the Constitution* and is therefore null and void.

- g. A Declaration that paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 which imposes 12.5% excise duty on amount wagered/played or staked on the Petitioner and the other players makes it impossible for the players staking on lower odds to win and instead arbitrarily taking away the players economic and social rights in violation of their property rights under Article 43 of *the Constitution* and is therefore null and void.
- h. A Declaration that paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 which imposes 12.5 % excise duty on amount wagered/played or staked on the Petitioner and the other players makes it impossible for the players to make a living out of the lawful betting thereby threatening their livelihood in violation of their Right to Life under Article 26, and Right to Human Dignity under Article 28 of *the Constitution* and is therefore null and void.
- i. A Declaration that in the absence of any clear provision under the *Excise Duty Act* for levying of Excise Tax on bet or stake or on a non-supplier, importer or manufacturer of goods as provided for under the *Excise Duty Act*, paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 which levies 12.5% excise duty on wager/stake or a player or on placing of a bet/play is unconstitutional null and void.
- j. A Declaration that the imposition of Gross Gaming Revenue under Section 29A of the Betting Lotteries and Gaming Act (Cap 131) and the imposition Excise Duty of 12.5% under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on wager/stake or a player or on placing of a bet/play on a bet is double taxation in violations of Articles 201 and 209 of *the Constitution* and is therefore null and void.
- k. A Declaration that the Gross Gaming Revenue under Section 29A of the Betting Lotteries Act (Cap 131) is the excise duty contemplated under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on wager/stake or a player or on placing of a bet/play on a bet.
- l. A Declaration that Excise Tax is not applicable and cannot be imposed on a mere bet/play or on the amount wagered or staked in the absence of any winnings, income or profit thereof.
- m. A Declaration that paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 affects the functions of the County government under paragraph 4(a) of the Fourth Schedule to *the Constitution* and accordingly should have been subjected to input of both the National Assembly and the Senate as provided under Article 109 and no of *the Constitution* and passing thereof violates article 110(1)(c) as read with article 110(4) and (5) and is therefore null and void.

And Orders That:

- a. A permanent injunction stopping the 1st and 2nd Respondents from deducting 12.5 % excise duty tax from the Petitioner and other players/wagers as provided for under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015.
- b. An order prohibiting the 3rd Respondent from demanding from the 1st and 2nd Respondents or levying 12.5% excise duty against the 1st and 2nd Respondents as provided for under Paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015.



- c. An order prohibiting the 3rd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation of Paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 as against the 1st and 2nd Respondents.
 - d. The Respondents to bear the cost.
 - e. Any other orders and declarations the Court may deem fit and just in the circumstances.
3. The petition is supported by affidavit sworn on 21st August, 2023 by the petitioner and the annexures thereto.
4. The petition was opposed by the respondents by filing replying affidavits.
5. The 1st respondent's replying affidavit is dated 2nd March, 2025.
6. The 2nd respondent also filed a replying affidavit dated 8th April, 2025.
7. The 3rd respondent also filed a replying affidavit sworn by Josephine Mugure on 28th January 2025 and another one sworn by Samuel Njoroge dated 4th March 2025.
8. The 5th respondent also filed a replying affidavit sworn by the clerk of the National Assembly, Samuel Njoroge C.B.S dated 4th March 2025.
9. The interested party also filed a replying affidavit sworn by Jimal Ibrahim Hassan on 5th March 2025.

Description of the Parties.

10. The Petitioner is an adult male of sound mind, a Kenyan citizen, and an Advocate of the High Court of Kenya. He is also a sports enthusiast and an avid participant in betting activities, which serve as a form of entertainment and social engagement. He asserts that the petition is on his behalf and in the public interest, particularly on behalf of other betting participants who are similarly affected by the impugned tax measures.
11. The 1st and 2nd Respondents are limited liability companies duly incorporated in Kenya and licensed under the *Betting, Lotteries and Gaming Act* to offer betting and casino services under the "SportPesa" brand.
12. The 3rd Respondent is the Kenya Revenue Authority (KRA), a statutory body mandated to assess, collect, and account for taxes and revenues due to the Government of Kenya.
13. The 4th Respondent is the Attorney General of the Republic of Kenya and the principal legal adviser to the Government, whose mandate includes defending public interest and upholding *the Constitution* and the rule of law.
14. The 5th respondent is the National Assembly of Kenya, a body established under *the Constitution* of Kenya and vested with, amongst others, the responsibility of enacting laws for the Republic of Kenya.
15. The interested party is a limited liability companies duly incorporated in Kenya and licensed under the *Betting, Lotteries and Gaming Act* to offer betting and casino services, like the 1st and 2nd respondents.



The History Of The Subject Matter

16. The National Assembly in the exercise of its constitutional powers under Article 95 of *the Constitution*, through Section 26(b) of the Finance Act, 2019, amended Part II of the First Schedule of the *Excise Duty Act*, by introducing paragraph 5 which provides for the payment of excise duty on betting at the rate of 20% of the amount wagered or staked. Subsequently, section 17(b) of the Finance Act, 2020, deleted paragraph 5 of Part II of the First Schedule of the *Excise Duty Act*, removing the imposition of the excise duty on betting.
17. Section 32 (c) of the Finance Act, 2021, inserted Paragraph 4A under Part II of the First Schedule of the *Excise Duty Act*. The amendment provided for excise duty on betting at the rate of 7.5% of the amount wagered or staked. Subsequently, the excise duty rate was raised from 7.5% to 12.5% through section 47 (b)(iv) of the Finance Act, 2023, which amended paragraph 4A of Part II in the First Schedule of the *Excise Duty Act*.
18. The rate of excise duty charged on the amount wagered or staked was further amended and increased from 12.5% to 15% through section 27 (b)(i) of the Tax Laws (Amendment) Act, 2024 which amended paragraph 4A of Part II of the First Schedule of the *Excise Duty Act*.
19. The National Assembly, in the exercise of its constitutional powers under Article 95 of *the Constitution*, amended the *Income Tax Act* to provide for withholding tax on winnings at the rate of 20% of the winnings paid out to punters from betting, lottery, gaming and gambling and other related transactions. Section 10(g) of the *Income Tax Act* provides that winnings are deemed as income accrued in Kenya.
20. Sections 35(1)(i) and 35(3)(h) provide that every person paying winnings to non-residents and residents deduct and remit the appropriate withholding tax.
21. Paragraphs 3(i) and 5(i) of the Third Schedule, Head B of the *Income Tax Act*, Cap 472 provide that the applicable withholding tax on winning is 20% for both residents and non-residents respectively.
22. The National Assembly, exercising the powers granted by Article 95 of *the Constitution*, passed Finance Act No. 15 of 2017. This Act amended the *Betting, Lotteries and Gaming Act* (the BLG Act) by introducing a new Section 29A. This section established a betting tax of 35% on gaming revenue. However, the betting tax in Section 29A of the BLG Act was later revised down to 15% through Section 53 of the Finance Bill, 2022.
23. In summary, the challenged taxes are:
 - i. Excise Duty charged on the amount wagered/staked by a punter at the point of placing a wager/bet at the rate of 15%;
 - ii. Withholding Tax charged at the rate of 20% on the winnings paid out to punters from betting, lottery, gaming and gambling and other related transactions; and
 - iii. Betting Tax charged at the rate of 15% of the gross revenue collected by bookmakers.

Mode Of Disposal

24. The parties agreed to rely on their respective affidavits filed in support and in opposition of the petition and annexures thereto, their filed written submissions and notes made by the court during the highlighting of submissions session and the authorities filed together with the submissions.



Submissions

25. I will note replicate the submissions wholly as they are filed for, they are voluminous but I will analyse them vis a vis issues for determination when making my determination on each particular issue. Largely, the submissions have highlighted the relevant law and case law the court should look at when making its determination and they also mirror the contents of the respective affidavits.

Issues For Determination

26. I will reproduce the issues for determination as set out by the parties first, then I will condense them into issues I think ought to be determined by this court.

Petitioner's Proposed issues for Determination:

27. The petitioner submitted the following issues for determination:
- i. Whether the imposition of 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 on amount wagered/played or staked on the Petitioner and the other players is in conflict with Section 5 of the Excise Duty Act and is therefore in contravention of Article 2(4) of the Constitution?
 - ii. Whether the imposition of 12.5 % excise duty on amount wagered/played or staked under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 on the Petitioner and the other players and an additional 20% Withholding Tax on Winnings amount to double taxation and is therefore arbitrary and unconscionable, punitive, burdensome and contravenes the principles of public finance and taxation in particular, the Principle of fairness and equity on the sharing of the burden of taxation under Article 201 and also in violation of Article 210 of the Constitution on imposition of taxes, Article 20(4)(a) of the Constitution on equality and equity and Article 10 on National Values of Good Governance?
 - iii. Whether the imposition of 12.5 % excise duty on amount wagered/played or staked under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 on the Petitioner and the other players plus an additional 20% Withholding Tax on Winnings and not subjecting the same requirement to similarly situated persons in the country is discriminatory in nature and in contravention of Article 27 of the Constitution?
 - iv. Whether the imposition of 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 on amount wagered/played or staked on the Petitioner and the other players plus and an additional 20% Withholding Tax on Winnings and not subjecting the same requirement to similarly situated persons in the country is in violation of Article 201 on equity, fairness and equality in taxation regimes?
 - v. Whether the imposition 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 on amount wagered/played or staked on the Petitioner and the other players it impossible for the players staking on lower odds to win and instead, drives the wager into losses, thereby arbitrarily taking away the players property in money in violation of their property rights under Article 40 of the Constitution?
 - vi. Whether paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 as Amended by Finance Act 2023 affects the functions of the County government under paragraph 4(a) of the Fourth Schedule to the Constitution and accordingly should have been subjected to input of both the National Assembly and the Senate as provided under Article



109 and Article 110 of *the Constitution* and passing thereof violates Article 110(1)(c) as read with article 110(4) and (5) of *the Constitution*?

- vii. Whether in the absence of any clear provision under the *Excise Duty Act* for levying of Excise Tax on the Petitioner and other players who are non-supplier, importer or manufacturer of goods as provided for under the *Excise Duty Act*, paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 which levies 12.5% excise duty on a player or on placing of a bet/play is unconstitutional null and void?
- viii. Whether the imposition of Gross Gaming Revenue under Section 29A of the Betting Lotteries and Gaming Act [Cap 131) and the imposition Excise Duty of 12.5% under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on wager/stake or a player or on placing of a bet/play on a bet is double taxation in violations of Articles 201 and 209 of *the Constitution* and is therefore null and void.
- ix. Whether the Gross Gaming Revenue under Section 29A of the Betting Lotteries Act (Cap 131) is the excise duty contemplated under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on wager/stake or a player or on placing of a bet/play on a bet?
- x. Whether the multiplicity of taxes imposed on the petitioner and the players amounts to double taxation and are in contravention of Articles Article 201 on Fairness and equitable tax regime, Article 210 on principles on imposition of taxes, Article 20(4)(a) on Equality and Equity and Article 10 on the general principles of good governance and are therefore null and void?
- xi. Whether the multiplicity of taxes imposed on the petitioner and the players are in contravention of Articles 201 on Fairness and equitable tax regime, Article 210 on principles on imposition of taxes, Article 20(4)(a) on Equality and Equity and Article 10 on the general principles of good governance?

The 1st Respondent's Proposed Issues for Determination

28. The following issues were submitted by the 1st Respondent:

- i. What were the factors to consider in determining the constitutionality of a statute?
- ii. The unconstitutionality of Paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015

The 2nd Respondent's Proposed Issues for Determination

29. The following issues were submitted by the 2nd Respondent:

- i. Whether Excise Duty can be legally Charged on the punter's stake without infringing on the Punter's right to Property contrary to Article 40 of *the Constitution* and thus unconstitutional;
- ii. Whether imposition of Excise duty on the Petitioner and the Punters' stake directly, themselves not being manufacturers, producers, suppliers or importer is arbitrary, unconscionable, unlawful and therefore Unconstitutional;
- iii. Whether the Gross Gaming Revenue under Section 29A of the Betting Gaming and Lotteries Act is the excise duty contemplated Under paragraph 4A of Part II of the First Schedule of the Excise Duty 2015;



- iv. Whether Excise duty Charged in addition the 20% withholding tax on winnings amounts to double taxation, is arbitrary, unconscionable, punitive and burdensome and therefore unconstitutional;
- v. Whether the impugned tax violates the Petitioner's right to Property protected under Article 40 of *the Constitution*.
- vi. Whether the imposition of Excise duty on betting together with 20% withholding tax on winnings is discriminatory and contrary to Article 27 of *the Constitution*.
- vii. Whether the imposition of Excise duty on betting and gaming violates the Petitioner's and the Punters' social economic rights thus unconstitutional;

The 3rd Respondent's Proposed Issues for Determination

30. The following issues were isolated by the 3rd respondent:

- i. Whether excise duty was properly levied on stake and whether the same is in breach of any provision of *Excise Duty Act*?
- ii. Whether the imposition of excise duty on betting amounts to double taxation;
- iii. Whether the imposition of excise duty on betting amounts to breach of Article 27 of *the Constitution*?
- iv. Whether the imposition of excise duty on betting amounts to breach of Article 40 of *the Constitution*?
- v. Whether the imposition of excise duty on betting amounts to breach of Article 201(b) of *the Constitution*?
- vi. Whether the imposition of excise duty on betting amounts to breach of Articles 10, 28, 43 and 46 (1) of *the Constitution*
- vii. Whether the imposition of Excise Duty on betting breached Articles 109 and 110 of *the Constitution*

The 5th Respondent's Proposed Issues for Determination

31. The 5th respondent submitted the following issues for determination:

- i. Whether the Excise Duty on the amount wagered/staked is constitutional
- ii. Whether the Excise Duty on stakes, the Withholding Tax on winnings and betting tax on gross revenue charged by different legislations amount to double taxation
- iii. Whether the impugned taxes violate *the constitution*
- iv. Whether the imposition of Excise Duty Tax affects the functions of the County Governments.

The Interested Party's Proposed Issues for Determination.

32. The interested party submitted the following issues:

- i. Whether the issues raised by the petitioner are res judicata in view of the decision in Machakos Petition No. E010 of 2021 – Isaiah Onyango Okello & Cliff Odolo Mboya vs Kenya Revenue



Authority & Others and SC Petition No. 31, 32 and 33 of 2024 – The Cabinet Secretary for the National Treasury and Planning & Others vs Okiya Omtatah & Others.

- ii. Does the imposition of the 12.5% on the amount wagered or staked and requiring payment even before a win violate the right to property?

33.

I I have looked at the proposed issues raised by the parties. I condense the issues for determination as follows:

- I. Does this court have jurisdiction to entertain this petition in view of Supreme Court decision in Petition No. 31, 32 and 33 of 2024 – The Cabinet Secretary for the National Treasury and Planning & Others vs Okiya Omtatah & Others?
- II. Is the petition res judicata in view of the decision in Machakos Petition No. E010 of 2021 – Isaiah Onyango Okello & Cliff Odolo Mboya vs Kenya Revenue Authority & Others?
- III. If the above are affirmative, what are the general factors a court should consider in determining the constitutionality of a statute?
- IV. Whether the imposition of 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on amount wagered/played or staked on the Petitioner and the other players is in conflict with Section 5 of the *Excise Duty Act* and is therefore in contravention of Article 2(4) of *the Constitution*?
- V. Whether the imposition of 12.5 % excise duty on amount wagered/played or staked under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on the Petitioner and the other players and an additional 20% Withholding Tax on Winnings amount to double taxation and is therefore arbitrary and unconscionable, punitive, burdensome and contravenes the principles of public finance and taxation in particular, the Principle of fairness and equity on the sharing of the burden of taxation under Article 201 and also in violation of Article 210 of *the Constitution* on imposition of taxes, Article 20(4)(a) of *the Constitution* on equality and equity and Article 10 on National Values of Good Governance?
- VI. Whether the imposition of 12.5 % excise duty on amount wagered/played or staked under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on the Petitioner and the other players plus an additional 20% Withholding Tax on Winnings and not subjecting the same requirement to similarly situated persons in the country is discriminatory in nature and in contravention of Article 27 of *the Constitution*?
- VII. Whether the imposition of 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on amount wagered/played or staked on the Petitioner and the other players plus and an additional 20% Withholding Tax on Winnings and not subjecting the same requirement to similarly situated persons in the country is in violation of Article 201 on equity, fairness and equality in taxation regimes?
- VIII. Whether the imposition 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on amount wagered/played or staked on the Petitioner and the other players makes it impossible for the players staking on lower



odds to win and instead, drives the wager into losses, thereby arbitrarily taking away the players property in money in violation of their property rights under Article 40 of [*the Constitution*](#)?

- IX. Whether paragraph 4A of Part II of the First Schedule of the [*Excise Duty Act*](#) of 2015 as Amended by Finance Act 2023 affects the functions of the County government under paragraph 4(a) of the Fourth Schedule to [*the Constitution*](#) and accordingly should have been subjected to input of both the National Assembly and the Senate as provided under Article 109 and Article 110 of [*the Constitution*](#) and passing thereof violates Article 110(1)(c) as read with article 110(4) and (5) of [*the Constitution*](#)?
- X. Whether the imposition of Gross Gaming Revenue under Section 29A of the Betting Lotteries and Gaming Act [Cap 131) and the imposition Excise Duty of 12.5% under paragraph 4A of Part II of the First Schedule of the [*Excise Duty Act*](#) of 2015 on wager/ stake or a player or on placing of a bet/play on a bet is double taxation in violations of Articles 201 and 209 of [*the Constitution*](#) and is therefore null and void.
- XI. Whether the Gross Gaming Revenue under Section 29A of the Betting Lotteries Act (Cap 131) is the excise duty contemplated under paragraph 4A of Part II of the First Schedule of the [*Excise Duty Act*](#) of 2015 on wager/stake or a player or on placing of a bet/play on a bet?
- XII. Whether the imposition of Excise Duty on Betting Amounts to breach of Articles 10,28,43 and 46 (1) of [*the Constitution*](#)
- XIII. Who shall bear the costs?

Analysis And Determination

Issue 1: Does this court have jurisdiction to entertain this petition in view of Supreme Court decision in **Petition No. 31, 32 and 33 of 2024 – The Cabinet Secretary for the National Treasury and Planning & Others vs Okiya Omtatah & Others?**

34. It is an old adage that a court of law cannot adjudicate an issue if it is devoid of jurisdiction and the moment it occurs to a court that it has no jurisdiction, it downs its tools. There are numerous case law on this. Nyarangi JA.in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR held: -

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

35. In the case of Agot v Norman & 18 others (Miscellaneous Criminal Application 8 of 2024) [2024] KEHC 8797 (KLR) (23 July 2024) (Ruling) the court similarly held:

“Jurisdiction is primordial in every suit. Jurisdiction is the foundation on which every suit should be founded on. It has to be there when the suit is filed in the first place. It has to be there when the suit is being considered and it has to be there when a Ruling or judgment is being delivered. When at any point in the consideration of a suit, the court determines



that it does not have jurisdiction, it must drop its tools. The court cannot breathe life into a nullity when jurisdiction does not exist.”

36. In *Okong’o v Loibex Builders Limited & 5 others* (Petition E088 of 2024) [2024] KEHC 4855 (KLR) (Constitutional and Human Rights) (25 April 2024) (Ruling), the principle was enunciated thus:

“Jurisdiction is what gives the Court the power to hear a dispute and is given by law. The Supreme Court in *Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others* (2012)eKLR while discussing the issue of jurisdiction rendered itself as follows:

“(68)A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings....”

37. The petitioner, on this issue, submitted that this court has jurisdiction for the Supreme Court in the above cited petitions squarely dealt with the procedure employed in enacting the Finance Act 2023 and in particular whether there was adequate public participation or not; while in this petition, this court is called upon to test the constitutionality of the impugned provision.

38. The 1st respondent did not submit on this aspect. The 2nd respondent also, did not submit on this. The 3rd respondent submitted that the issue as to whether the Finance Act of 2023 was a county government function was wholly determined by the Supreme Court in Petition No. 31, 32 and 33 of 2024 – *The Cabinet Secretary for the National Treasury and Planning & Others vs Okiya Omtatah & Others*, thus this court has no jurisdiction. The 4th respondent never submitted. The 5th respondent extensively submitted on the issue, saying that the decision as to whether the National Assembly should have involved the Senate in the enactment of the Finance Act 2023 which amended among other provisions Paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* has been settled by the Supreme Court and thus is res judicata.

Determination.

39. I am alive to the fact that the High Court, under Article 165 of *the Constitution* retains residual jurisdiction to determine the constitutionality of any law, policy matter or decision within the meaning of Article 165(3)(b) & (d) of *the Constitution*.

40. I am also alive to the doctrine of stare decisis where in simple terms it means that a decision of a Superior Court is binding to the court below. The Supreme Court in *Munya v Kitiinji & 2 others* (Petition 2B of 2014) [2014] KESC 38 (KLR) (30 May 2014) (Judgment) aptly state as follows on the application of stare decisis at para 196:

“Article 163(7) of *the Constitution* is the embodiment of the time-hallowed common law doctrine of stare decisis. It holds that the precedents set by this Court are binding on all other Courts in the land. The application, utility and purpose of this constitutional imperative are matters already considered in several decisions of this Court: *Jasbir Singh Rai v. Tarlochan Singh Rai & Others*, and quite recently, in *George Mike Wanjohi .V. Steven Kariuki & Others* Petition No. 2A of 2014.”



41. The Apex Court in *Asanyo & 3 others v Attorney-General* (Petition 7 of 2019), [2020] KESC 62 (KLR) (10 January 2020) Judgment) expounded the objectives of the doctrine of stare decisions at para 34 as follows:
- “The objective scenario bears the lesson that there is need for fidelity to the principle of stare decisis, a bearing that ensures that Judges reach substantially the same legal conclusions that were reached in previous cases, when considering similar legal issues this creates certainty, clarity, predictability and legitimacy within the law. On that basis, the decision of this court in Petition 21 of 2015 was binding upon the Court of Appeal in Civil Appeal No. 260 of 2014.”
42. In order to ascertain whether the issues raised by the petitioner were decided in the said Petition No. 31, 32 and 33 of 2024 – *The Cabinet Secretary for the National Treasury and Planning & Others vs Okiya Omtatah & Others*, I have to look at the judgment of the Supreme Court and the history of litigation in Court of Appeal and High Court.
43. In the High Court, the petitioners, among other provisions challenged the amendment introduced by the Finance Act of 2023 in Sections 40 to 48 of the First and Second schedule of the *Excise Duty Act* and introduced a requirement for remittance of excise duty on betting and gaming within 24 hours of the closure of the transaction and amendment of the *income tax Act* which introduced tax on winnings from betting, gaming and lotteries, thus usurping a function of County Government and in totality called for the entire Act to be declared unconstitutional or in the alternative the cited specific provisions of the Act.
44. After hearing the petition, the High Court issued the following orders:
- i. Sections 76 and 78 of the Finance Act, 2023 amending Section 7 of the *Kenya Roads Act*, 1999; Section 87 of the Finance Act, 2023 amending Section 28 of the *Unclaimed Financial Assets Act*, 2011 and Sections 88 and 89 of the Finance Act, 2023 which repeal Section 21 of the *Statutory Instruments Act* are all unconstitutional, null and void.
 - ii. A declaratory order be and is hereby issued that Section 84 of the Finance Act, 2023 violates Article 10(2)(b) and (c) and 201 of *the Constitution* and is therefore unconstitutional, null and void.
 - iii. An order of prohibition is hereby issued prohibiting the respondents from charging, levying or in any way collecting tax, otherwise known as the 'Affordable Housing Levy' on the basis of the aforesaid Section 84 of the Finance Act, 2023.
 - iv. All other prayers in the consolidated petition not specifically granted are hereby dismissed.
 - v. This being a public interest litigation, each party shall bear its own costs of the petition.
45. The High Court’s decision triggered the filing of seven appeals before the Court of Appeal. Upon hearing them, the Court of Appeal declared the entire Finance Act of 2023 unconstitutional principally due to the flawed nature of the procedure followed in its enactment.
46. The judgment of the Court of Appeal resorted to three appeals before the Supreme Court. After hearing the consolidated appeals, the Supreme Court faulted the Court of Appeal of declaring the



entire Finance Act of 2023 unconstitutional and gave the following declarations. Of relevance to this case is paragraph 246:

“(e) A finance bill is a money Bill contemplated under Article 114 of *the Constitution*;

(f) The speaker of the National Assembly and the speaker of Senate concurred that the Finance Bill of 2023 does not concern County Government”

47. From that decision of the Supreme Court, it is clear that the issue of whether the Finance Act of 2023 was a County Government function or not, was settled and this court is bound by that decision as required by the doctrine of stare decisis. Therefore, it has no jurisdiction to entertain such issue.

48. The Supreme Court (in Petition No. 31, 32 and 33 of 2024 – The Cabinet Secretary for the National Treasury and Planning & Others vs Okiya Omtatah & Others) did not declare the amendment introduced to Paragraph 4A of Part II of the first schedule of the *Excise Duty Act* 2015 unconstitutional. The amendment introduced and which was challenged, was the requirement that the Excise Duty Tax on betting and gaming, should be remitted to the government within 24 hours of closure of a transaction. The challenge in that case was specific to the amendment.

49. In this petition, the petitioner is challenging the constitutionality of the entire paragraph 4A of Part II of the first schedule of the *Excise Duty Act* of 2015 as amended by the Finance Act 2023.

50. Though some aspects of that Act have been challenged previously, it can also be challenged from a different angle/dimension; like in the present case. For matters on constitutional interpretation on constitutionality of an enactment of parliament can be challenged from different dimensions.

51. As it was discussed in the following cases: In Dina Management Ltd -v-County Government of Mombasa SC Petition 8 E010 of 2021 in a similar case the Supreme Court held that:

“Whereas the two suits concern the suit property, the main issue for determination in ELC Petition 12 of 2017 was whether the suit property is a public utility and it challenged the manner in which the suit property was alienated and subsequently allocated to the 1st registered owner and the conversion to freehold property. On the other hand, the main issue in HCCC No. 131 of 2011 was whether the suit property was a beach plot and on a riparian reserve and whether blocking the Plaintiff’s view to the ocean and sea breeze by the appellant was actionable. The issues for determination in ELC Petition 12 of 2017 were therefore not substantially in issue in HCCC No. 131 of 2011. Further, the 2nd to 6th respondents were not parties in HCCC No. 131 of 2011 and the court’s findings were inconclusive due to the absence of the state organs, specifically, the Registrar of Titles to enable the court make a determination. The parties in ELC Petition 12 of 2017 are different from those in HCCC No. 131 of 2011 save for the appellant.”

52. In Mercy Muneo Kingoo & another v Safaricom Limited & another (2016) eLR where Chitembwe J (as he then was) held;

“My view on the issue of estoppel is that where the dispute involves interpretation of a statutory provision which is alleged to be in contravention of *the Constitution*, similar cases can be brought to court but based on a different dimension. A petitioner can say that a certain provision of a statute is unconstitutional as it violates a certain Article of *the Constitution*. That dispute can be determined but another party is not barred from asking the same court to declare the same statutory provisions as unconstitutional as it was



passed without public participation or that it violates another Article of *the Constitution*. In other words, res judicata cannot be applied generally in relation to interpretation of *the Constitution* or a statute. There is also the simple fact that one judge can declare a certain statutory provision as unconstitutional while another judge declares the same provision as constitutional. In such a case, res judicata cannot apply. A good example is the issue relating to section 40 (3) of the *County Governments Act*, 2012. In the case of Stephen Nendela V Count Assembly Of Bungoma & 4 Others [2014] eKLR Justice Mabeya declared that section as unconstitutional. Justice Byram Ongoya dealt with the same issue in two case namely George Maina Kamau V County Assembly Of Muranga & 2 Others [2016] Eklr And Richard Bwogo Birir V Narok County Government & 2 Others [2014] e KLR. The judge did not declare section 40 (3) of the *County Governments Act* as unconstitutional. I also dealt with the same issue in the case of Amina Rashid Masoud V The Governor, Laumu County & Others Malindi Constitution Petition No. 10 of 2016 and I held that section 40 (3) was not unconstitutional. All these cases were based on similar facts and involved the constitutionality of section 40 (3) of the *County Governments Act*. The Richard Bwogo Birir Case ended in the Court of Appeal (Nyeri Civil Appeal No. 74 of 2014). The Court of Appeal did not deal on the issue of the constitutionality of the section."

53. From the above, I find that this court has jurisdiction to consider the constitutionality of the provision from the angle that it is challenged by the petitioner. What the court cannot do, is to consider the challenge from the point which has already been settled by the Supreme Court when it affirmed the decision by the High Court of dismissing the challenge to that provision in its judgment. I have replicated in paragraph 44, and the supreme court's judgment replicated in paragraph 46.

Issue 2 : Is the petition res judicata in view of the decision in Machakos Petition No. E010 of 2021 – Isaiah Onyango Okello & Cliff Odolo Mboya vs Kenya Revenue Authority & Others?

54. On the second issue of res judicata, I won't labour a lot on it, for this court, presided by Hon. Justice P.J.O Otieno, in a ruling dated 24th November 2023, declared that the issues raised in Machakos Petition No. E010 of 2021 – Isaiah Onyango Okello & Cliff Odolo Mboya vs Kenya Revenue Authority & Others, were not fundamentally similar to the issues raised in this petition for the Petition in Machakos was challenging violations of Articles 3, 10, 20, 21, 23, 40, 43, 47 & 201 of *the Constitution* while this Petition in addition challenges the contravention of Articles 1, 2 (4), 3(1), 26, 28, 24, 27, 46(1)(c), 186, 189 & 209 of *the Constitution*. Therefore, the issues in this petition are not res judicata.
55. The 3rd respondent herein, was given leave to appeal against the said ruling and by the time of writing this judgment, the outcome of the Appeal has not been communicated to this court. Therefore, the ruling still stands.
56. To give a different interpretation, as called upon by the 3rd and 5th respondents, will be an exercise which might bring chaos to otherwise a well-settled principal that matters already litigated should not be re-litigated.
57. In the case of Mumira v Attorney General (Constitutional Petition E007 of 2020), [2022] KEHC 271 (KLR) (8 April 2022) (Ruling) the court held thus:

“Res Judicata is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again.



This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions.

Res Judicata can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.”

58. I therefore proceed and consider the issues raised by the petitioner, 1st, 2nd, 3rd, 5th respondent and interested party.

Issue 3: If the above are affirmative, what are the general factors a court should consider in determining the constitutionality of a statute?

59. In Petition No. 31, 32 and 33 of 2024 – The Cabinet Secretary for the National Treasury and Planning & Others vs Okiya Omtatah & Others, the Supreme Court set out the factors a court should consider in determining whether to declare a statute or part thereof as unconstitutional as follows:

- i. There is a general but rebuttable presumption that a statutory provision is consistent with *the Constitution*.
- ii. The party that alleges inconsistency has the burden of proving such a contention.
- iii. In construing whether statutory provisions or part thereof offend *the Constitution*, courts must subject the same to an objective inquiry as to whether they conform with *the Constitution*.
- iv. The court must determine the object and purpose of the impugned statute and consider the mischief which the statute sought to cure and/or arrest.
- v. The court must clearly set out what provision is unconstitutional by juxtaposing the offending provision against *the Constitution*.
- vi. A court must clearly and with precision explain the finding of unconstitutionality.
- vii. The court must consider the effect of that declaration and, where necessary, suspend the application of that unconstitutionality for a prescribed time to allow for parliament to change the law by either making it achieve its purpose without being unconstitutional or by removing the unconstitutional provision.

60. The above determinants were also discussed by the superior courts of other countries like the Canadian Supreme Court in the case of R v Big M Drug Mart Ltd, [1985] 1 SCR 295, cited by CIC, enunciated this principle as follows;

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.”

61. The US Supreme Court in US vs Butler, 297 US 1 [1936] expressed itself as follows:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to



lay the article of *the Constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of *the Constitution*; and, having done that, its duty ends."

62. The Supreme Court of India in *State of MP v Rakesh Kohli & ano* 11 May, 2012, stated as follows: -

"While dealing with constitutional validity of a taxation law enacted by parliament or state legislature, the court must have regard to the following principles:

- i. there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature
- ii. no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found;
- iii. the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as the parliament and state legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence;
- iv. hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law; and
- v. in the field of taxation, the legislature enjoys greater latitude for classification."

63. Further considerations to be borne in mind are that it is the constitutional mandate under Article 209 of *the Constitution* of the National Government to impose taxes like income tax, excise tax, and others. And further, that for any tax to be imposed, waived or varied, under Article 210 of *the Constitution*, there must be a legislation enacted by the parliament pursuant to Article 209(2).

64. When a court is also interpreting a statute on taxation, it should bear in mind that every adult citizen has an obligation to pay tax, payment of tax is not a burden, neither is it an act of depriving the tax payer his/her property and the government of the day is entitled to impose and collect the due tax for it is the tax collected which enables the government of the day to meet its bargain in the social contract between itself and the people who surrendered their sovereign power to it .

65. The provisions of any statute should be read and interpreted holistically, for the court to deduce the exact purpose and object of the statute. In *The Engineers Board of Kenya v Jesse Waweru Wahome & others* Civil Appeal No 240 of 2013 the court held as follows: -

"One of the canons of statutory interpretation is a holistic approach... no provision of any legislation should be treated as "stand alone." An act of Parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act. "

66. The imposition and the collection and use of the collected tax should align to the requirements of Article 201 of *the Constitution*.



Issue 4: Whether the imposition of 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 on amount wagered/played or staked on the Petitioner and the other players is in conflict with Section 5 of the Excise Duty Act and is therefore in contravention of Article 2(4) of the Constitution?

67. The petitioner, on this issue, submitted that section 5(1)(a) of the Excise Duty Act provides that Excise duty should be charged on excisable goods manufactured in Kenya by a licensed manufacturer. The petitioner and other punters are not manufacturers; thus, it was unjust and unreasonable and utter violation of Article 2(4) of the Constitution for such a tax to be imposed upon him and other punters.

68. He cited the case of Republic v Commissioner General, Kenya Revenue Authority; Ex -parte Equator Bottlers Limited [2020] eKLR, delivered on 30th October, 2020, by Justice P. Nyamweya, where the Court stated that;

“In this respect, the definitions of various relevant terms in this case are provided for in section 2 of the Act as follows:

"excisable goods" means goods manufactured in Kenya or imported into Kenya on which an excise duty is imposed under this Act;

"excisable value" means ex-factory selling price or the value determined in accordance with section 127C;

"excise duty" means a duty of excise imposed on goods manufactured in Kenya or imported into Kenya and specified in the Fifth Schedule;

A literal and strict interpretation of these terms in the circumstances of this case are that it must be manufactured or imported into Kenya..."

69. The 1st respondent took a similar position with the petitioner and submitted that punters and bookmakers are not manufacturers; and that a punter should only be taxed when there is a win for there is an income of gain made and not when a player places a bet. He cited the case of Commissioner of Income Tax v. Shoorji Vallabhdas and Co[1962]46 ITR 144 (SC) where the Supreme Court of India elucidated the concept of accrual and similar position held in the case of Commissioner of Income Tax v. Excel Industries Ltd (2013) 358 ITR 295 (SC) where it was stated as follows:-

“No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a hypothetical income, which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account”

70. It further submits that it is absurd to levy the 12.5% excise tax upon placing of a bet before the occurrence of the event and when the event does not occur, the punter receives the staked money back less the 12.5% excise duty tax.

71. It is the 1st respondent's submission that there is no justifiable reason as to why there exists no refund of the 12.5% Excise Duty Tax in such an instance, considering that the betting event did not proceed.



This aspect of the impugned tax is punitive in nature and operates to unfairly penalize the Petitioner and other punters. The 1st respondent avers that paragraph 4A of Part II of the First Schedule of the Excise Duty Act, 2015, unlawfully deprives the Petitioner of its property in contravention of Article 40 of the Constitution, and is therefore ipso facto unlawful and unconstitutional.

72. It placed reliance in the case of *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* [2018] eKLR where the court observed that:

“The imposition of the excise duty is bound to have an impact on the rights under Article 43 (1). Tax inherently infringes the right to property, being an expropriation of one’s hard-earned money. It follows that for the tax to be lawful, the law introducing it must not only be lawful, but it must meet the Article 24 analysis test in that it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

73. The 2nd respondent similarly supports the petitioner’s case and submits that excise duty is a consumption tax, and an indirect tax chargeable on goods and services and that there is no service offered through mere staking since in a game of chance, the service is only crystalizes after the event.

74. It further submits that excise duty cannot be charged at the time of staking in games of chance because, unlike other services, betting, gaming, and lotteries contracts are special contracts that only get complete at the conclusion of the event staked. The betting operator cannot claim the amount deposited or staked as their own until the event staked for occurs. For that reason, the staked amount remains the property of the punter until the event is complete.

75. The 2nd respondent further submits that it is only Kenya in the world where excise duty is charged on monies staked in a game of chance, making the tax an unlawful and arbitrary tax.

76. It further submits that excise duty cannot be legally charged on the punter’s stake without establishing whether there is a win or a loss.

77. It is also the position of the 2nd respondent that there is no economic value to the 1st and 2nd respondents on the stake, therefore the stake by itself cannot form part of any taxable amount for it is neither a gain nor a profit to the supplier.

78. Further, in paragraph 25 of its submissions, the 2nd respondent notes the following:

- i. The punter can stake for event that will occur in future and the bookmaker cannot lay claim to part or all of the amount staked until the event occurs.
- ii. In case the event staked is cancelled, the amount staked remains the property of the punter and the bookmaker cannot lay claim to part or whole of it.
- iii. During the process of the event, say a game, and the event is aborted before completion, the event becomes void and once again, the amount staked remains the property of the punter and never of the bookmaker.
- iv. The Punter can choose to cancel the stake at anytime before the event is completed.



- v. The service offered by the bookmaker is never complete until the event staked is played and completed. Otherwise, the amount staked remains fully the property of the punter. Indeed, in case of the win, there is a payout to the punter less withholding tax and in case of a lose, the staked amount becomes the property of the bookmaker liable to Gross gaming Revenue.
79. On whether paragraph 4A of Part II of the First Schedule is in conflict with Section 5 of the [Excise Duty Act](#), it notes that though excisable services supplied in Kenya by a licensed person are provided for under Section 5(1) of the [Excise Duty Act](#), the tax is unreasonable and arbitrary for the taxing authority cannot bypass intermediary (business) and demand payment of direct tax directly from consumers.
80. He referred the court to several authorities, which are mostly from foreign jurisdiction.
81. The 3rd respondent's submission on this issue faults the petitioner, 1st respondent, 2nd respondent and the interested party's position for selectively reading the [Excise Duty Act](#) 2015.
82. He referred the court to Section 5(1), Section 15, 16, 9.
83. Section 5(1)(b) states that excise duty should be levied on excisable services supplied in Kenya by a licensed person.
84. Section 4(a) lists betting as one of the excisable services and provides that excise duty on betting should be 12.5% of the amount waged or staked. Part II of the First Schedule of the [Excise Duty Act](#) as amended by the Finance Act 2023 provides for excisable services. Therefore, it is wrong for the petitioner to say that the law does not provide for such tax.
85. The 3rd respondent submits that Section 15, 16 of the [Excise duty Act](#) provide for the licensing of who to supply the services.
86. The 5th respondent took the position taken by the 3rd respondent and submitted that Paragraph 4A of Part II of the First Schedule of the [Excise Duty Act](#) aligns with Section 5 of the [excise duty act](#), thus they are not in conflict but they compliment each other and that under Section 6(3) of the [excise duty act](#), provides the point at which the excise duty is charged, that is at the point of placing the wager or the stake.
87. The interested party, on this issue, took the position taken by the petitioner.

Determination

88. I have looked at the rival submissions and the cited authorities and the provisions of the [Excise Duty Act](#). Section 4, 5, and 6 of the [Excise Duty Act](#) 2015 states:

“

“ 4. Time of supply of importation

- (1) The time of supply of excisable services shall be the earlier of—
- (a) the date on which the services are performed;
 - (b) the date on which the invoice for the supply of the services is issued; or
 - (c) the date on which payment for the supply of the services is received, in whole or part.



- (1A) In relation to a betting transaction, the time of supply shall be the time a person wagers or stakes money on a platform or other medium provided by a bookmaker.

[Act No. 23 of 2019, s. 24.]

- (2) The time of importation of excisable goods shall be—
- (a) for excisable goods cleared for home use directly at the port of importation, or goods entered for removal to an inland station and there cleared for home use, at the time of customs clearance;
 - (b) for excisable goods removed to a licensed warehouse subsequent to importation, at the time of final clearance from the warehouse for home use;
 - (c) for excisable goods removed from an export processing zone or special economic zone for home use, at the time of removal for home use; or
 - (d) in any other case, at the time the excisable goods are brought into Kenya.

Part II — Liability For Excise Duty

5. Imposition of excise duty

- (1) Subject to this Act, a tax, to be known as excise duty, shall be charged in accordance with the provisions of this Act on—
- (a) excisable goods manufactured in Kenya by a licensed manufacturer;
 - (b) excisable services supplied in Kenya by a licensed person; or
 - (c) excisable goods imported into Kenya.
- (2) Excise duty shall be charged at the rate specified in the First Schedule for the excisable goods or services in force at the time the liability arises for excise duty as determined under section 6.
- (3) The excise duty payable—
- (a) under subsection (1)(a), shall be payable by the licensed manufacturer;
 - (b) under subsection (1)(b), shall be payable by the licensed person making the supply; or
 - (c) under subsection(1)(c), shall be payable by the importer of the excisable goods.

6. Timing of liability for excise duty



- (1) The liability of a licensed manufacturer for excise duty on excisable goods manufactured in Kenya shall arise at the time of removal of the goods from the manufacturer's factory.
- (2) For the purposes of this Act, excisable goods that are consumed in a licensed manufacturer's factory shall be treated as removed from the factory at the time of consumption.
- (3) The liability of a licensed person for excise duty on excisable services shall arise at the time of the supply of the services.
- (4) The liability of an importer for excise duty on excisable goods imported into Kenya shall arise—
 - (a) for petroleum products, at the time of importation or such other time as may be specified by the Cabinet Secretary by notice in the gazette; or
 - (b) for any other excisable goods, at the time of importation.
- (5) A licensed person shall pay the liability for excise duty arising under subsection (1) or (3), as the case may be, in accordance with section 36.
- (6) An importer shall discharge the liability for excise duty referred to in subsection (4) in accordance with section 36. “

89. From my reading of the whole of Section 5, it is clear that it is not in conflict with Paragraph 4A of Part II of the [Excise Duty Act](#) 2015 on imposing 12.5% on excise duty on the amount waged or staked on the petitioner and other players for the levying of excise duty on services supplied by the book makers is provided for in Section 5(1)(b). Secondly, Section 5(3)(b) as read with Section 4(1A) and section 6(3) provide that book makers shall collect and pay the excise duty at the point the punter wagers/ places the stake.
90. The 1st and 2nd respondents agree that the excise duty is a consumption tax and that the obligation to collect and remit the same is on them for they are the suppliers.
91. It is a cardinal principle of the law on interpretation of a statute that all the provisions of the statute should be read in a holistic manner but not in isolation. Had the petitioner, the 1st and 2nd respondents, and the interested party given section 5 and the entire act of the [Excise Duty act](#) a holistic interpretation they would not say that Paragraph 4A of Part II of the First Schedule of the [Excise Duty Act](#) of 2015 on imposing 12.5% excise duty on the amount waged/played/staked on the petitioner and the other players is in conflict with Section 5 of the [Excise Duty Act](#) for want of provision that betting services supplied to punters are subject to the levy of excise duty. Therefore, it is my finding that Paragraph 4A of Part II of the First Schedule of the [excise duty act](#) of 2015 as amended by the Finance Act of 2023 is not in contravention of Article 2(4) of [the Constitution](#) which provides that any law, including customary law, that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid. (See the court holding In The Engineers Board of Kenya v Jesse Waweru Wahome & others Civil Appeal No 240 of 2013 supra)
92. The petitioner submitted that Section 3 of the [Income Tax Act](#), Section 5 and Section 9 of the [Excise Duty Act](#) are vague as they can attract different interpretations.



Section 3 of the *Income Tax Act* states:

“

“3.

- (1) Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.
- (2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of -
 - (a) gains or profits from –
 - (i) a business, for whatever period of time carried on;
 - (ii) employment or services rendered
 - (iii) a right granted to another person for use or occupation of property;
 - (b) dividends or interest;
 - (c)
 - (i) a pension, charge or annuity; and
 - (ii) any withdrawal from, or payments out of, a registered pension fund, or a registered provident fund or a registered individual retirement fund; and
 - (iii) any withdrawals from registered home ownership savings plan.
 - (ca) income accruing from a business carried out over the internet or an electronic network including through a digital marketplace;
 - (d) Deleted by Act No. 14 of 1982, s.17
 - (e) an amount deemed to be the income of a person under this Act or by rules made under this Act;
 - (f) gains accruing in the circumstances prescribed in, and computed in accordance with, the Eighth Schedule. (g) subject to section 15(5A), the net gain derived on the disposal of an interest in a person, if the interest derives twenty per cent or more of its value, directly or indirectly, from immovable property in Kenya; and



- (h) a natural resource income;
- (2A) The Cabinet Secretary shall make regulations to provide for the mechanisms of implementing the provisions of subsection (2) (ca).
- (3) For the purposes of this Section –
 - (a) "person" does not include a partnership;
 - (b) a bonus or interest paid by a designated co-operative society, as defined under section 19A, shall be deemed to be a dividend;
 - (ba) “digital marketplace” means an online or electronic platform which enables users to sell or provide services, goods or other property to other users.
 - (c) for the purposes of subsection (2)(g) and section 15(5A) -
 - (i) “immovable property” means a mining right, an interest in a petroleum agreement, mining information or petroleum information;
 - (ii) “net gain”, in relation to the disposal of an interest in a person, means the consideration for the disposal reduced by the cost of the interest; and
 - (iii) the terms “consideration”, “cost”, “disposal”, “interest in a person”, “mining information”, “mining right”, “person”, “petroleum agreement”, and “petroleum information” have the meaning assigned to them in the Ninth Schedule.”

Section 5 of the [Excise Duty Act](#) state as follows:

“5. Imposition of excise duty

- (1) Subject to this Act, a tax, to be known as excise duty, shall be charged in accordance with the provisions of this Act on—
 - (a) excisable goods manufactured in Kenya by a licensed manufacturer;
 - (b) excisable services supplied in Kenya by a licensed person; or
 - (c) excisable goods imported into Kenya.



- (2) Excise duty shall be charged at the rate specified in the First Schedule for the excisable goods or services in force at the time the liability arises for excise duty as determined under section 6.
- (3) The excise duty payable—
 - (a) under subsection (1)(a), shall be payable by the licensed manufacturer;
 - (b) under subsection (1)(b), shall be payable by the licensed person making the supply: or
 - (c) under subsection(1)(c), shall be payable by the importer of the excisable goods.”

Section 9 of the *Excise Duty Act* states:

“9. Excisable value

- (1) This section shall apply where the First Schedule specifies a rate of excise duty payable by reference to the excisable value of excisable goods or services.
- (2) The excisable value of excisable goods imported into Kenya shall be the sum total of the following amounts—
 - (a) the customs value of the goods as determined under the East African Community Customs Management Act, whether or not any duty of customs is payable on the goods; and
 - (b) the amount of duty of customs (if any) payable on the goods under the East African Community Customs Management Act, 2004 (No. 1 of 2005).
- (3) The excisable value of excisable goods manufactured in Kenya shall be the ex-factory selling price of the goods, but not including —
 - (a) the value added tax payable on the supply of the goods;
 - (b) the cost of excise stamps, if any; or
 - (c) the cost of returnable containers.
- (4) Subject to subsections (5) and (6), the excisable value of excisable services shall be—
 - (a) if the excisable services are supplied by a registered person in an arm's length transaction, the fee, commission, or charge payable for the services; or
 - (b) in any other case, the open market value of the services.



- (5) The excisable value of excisable services shall not include the value added tax, if any, payable on the supply of the services.
- (6) The excisable value of excisable services specified in item 4 of Part II of the First Schedule shall not include interest or an insurance premium.”

93. I have read the sections. Section 3 talks of imposition of income tax from gains and profits derived from various activities. Section 5 talks of imposition of Excise Duty imposed on excisable goods manufactured in Kenya by a licensed manufacturer, excisable services supplied in Kenya by a licensed person, or excisable goods imported into Kenya. It does not talk of tax on profits or gains(income). Section 9 of the [Excise Duty Act](#) talks of excisable value of the goods or services liable for excise duty and the rates of tax to be imposed.
94. The words used in those sections are very straight, clear, and to me, they cannot have any other definition or interpretation apart from the meaning envisaged by the National Assembly when it enacted the two statutes. The intended meaning of the words in those sections are in tandem with the import/object and purpose which led to the enactment of the [Excise Duty Act](#) and [Income Tax Act](#) as amended from time to time.

Issue 5: Whether the imposition of 12.5 % excise duty on amount wagered/played or staked under paragraph 4A of Part II of the First Schedule of the [Excise Duty Act](#) of 2015 on the Petitioner and the other players and an additional 20% Withholding Tax on Winnings amount to double taxation and is therefore arbitrary and unconscionable, punitive, burdensome and contravenes the principles of public finance and taxation in particular, the Principle of fairness and equity on the sharing of the burden of taxation under Article 201 and also in violation of Article 210 of [the Constitution](#) on imposition of taxes, Article 20(4)(a) of [the Constitution](#) on equality and equity and Article 10 on National Values of Good Governance?

95. The Petitioner submits that the imposition of 12.5% (currently amended to 15%) excise duty on amount wagered/played or staked under Paragraph 4A of Part II of the First Schedule of the [Excise Duty Act](#) of 2015 on himself and other players and additional 20% Withholding Tax on Winnings amount to double taxation and contravenes Articles 201, 210, 20 (4) (a) and 10 of [the Constitution](#) of Kenya, 2010.
96. He avers that the impugned paragraph 4A of Part II of the First Schedule of the [Excise Duty Act](#) of 2015 violates the principle of fair sharing of the burden of taxation set under article 201(b)(1) of [the Constitution](#) of Kenya, 2010, as it unfairly targets Punters like the Petitioner herein and other millions of Kenyan Punters who are in loss making positions to pay taxes from their capital while thriving investors pay taxes from their profits, and leave their capital base intact.
97. It is his position that no profit is made by the Petitioner and other punters from the amount wagered/staked hence condemning them to pay 12.5% from the said amounts and further taxing them additional 20% withholding tax on winnings is amounts to double Taxation contrary to Article 201 of [the Constitution](#). He placed reliance on Kenya Revenue Authority v Waweru & 3 others; Institute of Certified Public Accountants & 2 others (Interested Parties) (Civil Appeal E591 of 2021) [2022] KEA 1306 (KLR) where the Court of Appeal held as follows;

“66 levying of minimum tax on gross turnover as opposed to gains or profit would lead to a situation where a loss-making tax payer, would bear a heavier burden than other taxpayers contrary to article 201 of [the Constitution](#). Little wonder then that the learned Judge pointed out that the appellants were well equipped with the necessary mechanisms to carry out



auditing in order to determine entities that are avoiding payment of tax. We share the same sentiments with the respondent on this aspect that punishing entities who are already battling with a stifled economy because of a few miscreants is the epitome of unfairness. Taking into consideration both the purpose and effect of the impugned legislation, we are inclined to adopt the sentiments expressed in the Canadian case of *The Queen v Big M Drug Mart Ltd*, 1986 LRC (Const) 332, that both the purpose and effect can invalidate legislation. Given the nature of the tax, and the circumstances under which it is to be levied, makes the purpose irrational, miscalculated, and does not reflect the spirit of article 201(b)(i) of *the Constitution*.

98. The petitioner submits that the levying of Excise Tax of 12.5% on placing a bet by a player as opposed to gains or winnings or profit totally disagree with the finding in *Kenya Revenue Authority v Waweru & 3 others; Institute of Certified Public Accountants & 2 others (Interested Parties)* (Civil Appeal E591 of 2021) [2022] KECA 1306 (KLR) and will consequently mean that the taxation burden on Petitioner and/or any citizen placing any bet will be heavier than on other taxpayers which will further contradict Article 201 of *the Constitution* of Kenya which is one of the provisions this petition is anchored on.
99. The Petitioner submits that Article 10 of *the Constitution* of Kenya, 2010 sets out in mandatory terms the National Principles of governance which bind all State organs, state officers, public officers and all persons whenever any of them interprets *the Constitution*, enacts, applies or interprets any law, makes or implements public policy decisions. He further submits that the relevant national values and principles of governance to this Petition include equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the Rule of Law among others. It is the Petitioner's averment that the impugned paragraph 4A of Part II of the First Schedule of Exercise Duty Act of 2015 as applied to Section 3 of the *Income Tax Act*, Section 5 and 9 of *Excise Duty Act* is vague to the extent that it presents a situation where the provisions of the law are open to more than one possible interpretation contrary to Article 10 of *the Constitution*.
100. The 1st respondent took the position of the petitioner.
101. The 2nd respondent, on this issue, also adopted the position taken by the petitioner and further submits that the impugned provision offends Article 201(b)(i) of *the Constitution* which requires the burden of taxation to be shared fairly. The import of the impugned provision is that the punter is taxed at both entry and exit for the amount staked, remains the property of the punter and the amount won also remains the property of the punter. Further, that there is no other activity, sport or otherwise in Kenya where a participant is taxed at the entry and at the exit. This offends Article 27 of *the Constitution* which talks of equality. It referred the court to the case of *Republic vs Kenya Revenue Authority Ex Parte W.E.C Lines Ltd* [2008] eKLR and *K.T Moopil Nair v State of Kerala* AIR 1961 SC 552.
102. The 3rd Respondent in its submissions has referred the court to its Affidavit at par. 135 where it has provided a visual comparison of withholding tax on winnings and excise duty and at par. 136 has provided a visual comparison of GGR and excise duty on stake. It summarised the tables presented as follows:
 - i. Excise duty is borne by the Punters and not the Bookmakers. Excise duty and GGR cannot amount to double tax as the Bookmaker bears GGR. The bearers of the two taxes are different;
 - ii. The withholding tax on winnings is on the income which is derived from the bet. Just like all incomes derived income derived in Kenya, income from betting is also taxed, the tax point for the same is very different, while withholding tax is imposed on the income, excise duty is



imposed at the point of seeking the betting service. It is a charge on the service, and not on the income.

- iii. Excise duty, and withholding tax on winnings are different tax heads with different tax points. Excise Duty is a consumption tax and has nothing to do with income tax.
103. It further submitted that neither the Petitioner nor the 2nd Respondent shows how these two taxes are taxes of similar nature being imposed on the stake to warrant the discussion around the concept of double taxation.
104. It referred the court to the definition in Black's Law Dictionary, 6th Ed. of double taxation as:
- “the taxing of the same item or piece of property twice to the same person, or taxing it as the property of another person and again as the property of another, but this does not include the imposition of different taxes concurrently on the same property or income (e.g. federal and state income taxes), nor the taxation of the same property to different persons with different interests in it or when it represents different values in their hands.....”
105. Further on what double taxation is, it cited the case of Kenya Pharmaceutical Association & Another vs. Nairobi City County and the 46 Other County Governments & Another [2017] eKLR, where the Court found that payment of trade license to the Respondents and professional license fees to the professional body did not amount to double taxation also referred the court to the case of Cantonment Board, Poona v. Western India Theatres Ltd., AIR 1954 Bom 261 where the Court held that being levied two taxes of different nature does not amount to double tax. The court therein stated as follows:
- “But we fail to understand that there is anything in our Constitution which prevents double taxation being levied. It is quite true that if ordinarily a Provincial Legislature wanted to levy for itself a tax, it would not pass two laws levying two different duties in respect of the same subject-matter, in this case an entertainment. There is nothing to prevent the Provincial Legislature from charging in respect of entertainments as much tax as it likes. It would not therefore dream of passing of two Acts levying two separate entertainments duties.
-When a similar question arose before the Judges of the Nagpur High Court in the case of - Mulji Sicka & Co. v. Dist. Council, Bhandara', AIR 1945 Nag 171 (B), they found themselves unable to accept the contention that there was anything in *the Constitution* which required them to hold that a tax was illegal on the ground that it involved double taxation in respect of the same subject-matter, and with respect we are in agreement with the view which had been expressed in that case.”
106. In summary, it said that:
- i. it there follows that for double taxation to exist, taxation must be carried on the same person, same item, same tax head and within the same financial year. Absence of any of the aforementioned critical components of double taxation means that the same is not double taxation.
 - ii. Double taxation occurs when the same income or financial transaction is taxed twice. In the case of withholding tax on winnings and excise duty on stakes, the taxes are applied to different events (stakes vs. winnings) and different tax bases (consumption vs. income). Therefore, they do not constitute double taxation.



107. It was their submission that in the case of GGR tax and excise duty on stakes, the taxes are applied to different events (operator's revenue vs. player's stakes), on different persons (bookmaker v punter), and on different tax bases (net revenue vs. stakes). Therefore, they do not constitute double taxation.
108. In the current case it submitted that the only tax imposed on betting at the point of placing the wager (bet) in a betting transaction is excise duty. No other excise tax or indirect tax is imposed at that time. If the same bet wins, the win is subject to income tax (withholding tax on betting) but the amount staked is deducted before computation of the income tax. There is therefore no double taxation. And further that double taxation does not make a law unfair or unconstitutional in itself as was held by the Superior Court in India in the case of Karnataka Bank Ltd Vs Union Of India where it was stated that:

It is also necessary to point out that even if it is held that the impugned Act amounts to levying tax on income and it is traceable to Entry 82 of List-i of Schedule-VII, still we are of the view that the said Act is not liable to be struck down as unconstitutional on the ground urged by the learned counsel appearing for the Appellant.....The Hon. Supreme Court in the case of Jain Bros. (supra) has taken the view that double taxation is not alien to fiscal statute. In this connection, it is useful to refer to the observation made by the Hon'ble Supreme Court at paragraph 6 of the Judgment which reads as hereunder:

It is not disputed that there can be double taxation if the legislature has distinctly enacted it. It is only when there are general words of taxation and they have to be interpreted they cannot be so interpreted as to tax the subject twice over to the same tax (vide Channell, J., in *Stevens v. Durban-Roddepoort Gold Mining Co. Ltd.* STC 402. *The Constitution* does not contain any prohibition against double taxation even if it be assumed that such a taxation is involved in the case of firm and its partners after the amendment of section 23(5) by the Act of 1956. Nor is there any other enactment which interdicts such taxation. If any double taxation is involved the legislature itself has, in express words, sanctioned it. It is not open to any one thereafter to invoke the general principles that the subject cannot be taxed twice over."

Further, in the case of *Avinder Singh* (supra), the Hon'ble Supreme Court while repelling the contention that double taxation is not permissible, at paragraph 4 of the judgment has observed as follows:

"....A feeble plea that the tax is bad because of the vice of double taxation and is unreasonable because there are heavy prior levies was also voiced. Some of these contentions hardly merit consideration, but have been mentioned out of courtesy to counsel. The last one, for instance, deserves the least attention.

There is nothing in article 265 of *the Constitution* from which one can spin out the constitutional vice called double taxation. (Bad economics may be good law and vice versa). Dealing with a somewhat similar argument, the Bombay High Court gave short shift to it in *Western India Theatres*. Some undeserving contentions die hard, rather survive after death. The only epitaph we may inscribe is: Rest in peace and don't be re-born. If on the same subject-matter the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure save where other prohibitions exist....."

109. The 3rd respondent further faulted the Petitioner for not showing which other excise tax or tax of similar nature that is levied on stake so as the Court to find double taxation. Further, that the Petitioner has not only failed to provide an explanation on how double tax arise but also failed to discharge the burden of showing that indeed double taxation exist at the point of placing a wager.



110. The 3rd respondent averred that the only other tax borne by the Punter, which is a direct tax (Income Tax) is the withholding tax on winnings. This is a direct tax and it is imposed on successful bets and charged on net winning after deducting the amount of the bet. It is not imposed at the point of placing a wager but after the game of the bet is complete and only on successful punters. It averred that this is a tax on the income of the punter and not a tax on the betting service as excise duty thus, the two are very distinct and are not imposed concurrently hence no double tax.

111. It referred the court to the case of Isaiah Onyango (Supra) at par. 236 where the High Court held as follows:

“I have considered the rivalling arguments and I do not find any merit in the submissions made on behalf of the petitioners. Excise duty is clearly a different levy from withholding tax which is income tax. Whereas the two tax may well impose burdens on the tax payer, that does not make them unconstitutional unless the imposition violates article 201 of *the Constitution*.”

112. Thus, according to the 3rd respondent there are no two taxes of similar nature imposed on the same betting service at the same time to arrive at a conclusion that there is possibility of double taxation.

113. The 5th respondent started by submitting on the definition of what amounts to double taxation and referred the court to the case of Republic v County Government of Nyandarua; County Assembly of Nyandarua (Interested Party), Nyandarua Recreational & Entertainment Self Help Group & 12 others (Ex-parte) [2019] KEHC 3639 (KLR), where Hon. Justice Wendo held as follows:

“What is double taxation? Black’s Law Dictionary 5th Edition, 1979, defines double taxation: “To constitute ‘double taxation’, that tax must be imposed on the same property by the same governing body during same taxing period and for same taxing purpose.”

And Justice Mativo in Kenya Pharmaceutical Association & Another v Nairobi City County and the 46 Other County Governments & Another [2017] KEHC 3281 (KLR) who defined double taxation as follows:

“28. What is the definition of double taxation? Double tax is the taxing of the same income twice. I do not think payment of trade license to the Respondents and professional license fees to the professional body amounts to double taxation.”

114. It submitted that the discernible features of double taxation include taxing the same income or activity twice for the same tax purposes and for the same tax period. It highlighted that the impugned taxes seek to tax different activities or income, the burden is borne by different persons and the taxation is imposed at different stages of betting transactions. The different taxes are as follows:

- (i) Excise Duty on the amount wagered/staked borne by the punter and accrued at the time of placing a bet successfully provided under the *Excise Duty Act*;
- (ii) Withholding tax on winning, less the amount staked borne by the punter who wins a bet and accruing at the time of paying a winning bet provided under the Income Tax; and
- (iii) Betting Tax charged on the gross gaming revenue, less the amount paid to customers as winnings provided under the *Betting, Lotteries and Gaming Act* Cap.

115. The three taxes are levied on different individuals/entities, at various stages of betting transactions, and on distinct activities or sources of income. The taxes are further charged by different legislations passed



by the National Assembly in accordance with the Constitution. The taxes target different and specific transactions/income earned by different persons in betting transactions.

116. The 5th respondent further submitted that Excise Duty is applied to the amount staked, serving as a service fee charged by the bookmakers to the punters for accessing the betting platform and that this tax is only incurred when a punter places a bet which has been placed successfully, and it is paid by the punter at the point of placing the bet. Withholding Tax, on the other hand, applies on winnings and is charged on only to the punter whose bet wins. When calculating the amount of withholding tax, the stake which is subject to excise duty is deducted, so the withholding tax is based on the net winnings. Lastly, Betting Tax is charged on the gross revenue generated from gaming activities, which is the total amount collected by bookmakers from punters' stakes, minus the total amount paid out to punters as winnings. Therefore, betting tax is net gaming revenue after deducting the amount paid out to punters for winning bets.
117. The 5th respondent averred that the Excise duty is a consumption tax borne by the punters when they access a betting platform and place a bet successfully, withholding tax is an income tax borne by the punter whose bet wins and the bookmaker must withhold and remit the same finally, betting tax is an income tax borne by the bookmaker on the revenue they collect from betting activities.
118. It was submitted by the 5th respondent that in order to avoid double taxation on the same activity or income, the Income Tax Act and the Betting, Lotteries, and Gaming Act stipulate that when calculating withholding tax and betting tax, certain deductions apply. Specifically, the amount staked by punters is deducted when calculating withholding tax, and the amount paid by bookmakers to punters for winning bets is deducted when calculating betting tax. This means that both the withholding tax, which is charged on the income of punters for their winnings, and the betting tax, which is charged on the revenue collected by bookmakers, are assessed on the income after deducting the staked amounts and payouts for winnings.
119. It averred that the definition of "winning" refers to the payout minus the stake, which is used to calculate withholding tax. "Gaming revenue" is defined as the gross turnover minus the amount paid out to customers as winnings. This distinction helps eliminate the possibility of double taxation on the same income or transaction. Therefore, punters only pay Excise Duty on stakes placed, bet winners only pay withholding tax and bookmakers pay betting tax. No person is charged twice for the same transaction or income, as each of the three transactions to which the disputed taxes apply is charged at a different stage, on a different transaction or income, and to a different person.
120. The 5th respondent contended that the three contested taxes do not subject the Petitioner to double taxation, as each tax applies to a different aspect of the transaction at different stages. A punter who places a bet and loses is only responsible for paying the excise duty. Conversely, a punter whose bet wins must pay excise duty on the stake, as well as withholding tax on the winnings, after deducting the amount staked. Bookmakers are subject to a betting tax, which is calculated after deducting the amount paid out as winnings.
121. The court was referred to the case of Kenya Revenue Authority v Waweru & 3 Others; Institute of Certified Public Accountants & 2 Others (Interested Parties) (Civil Appeal E591 of 2021) [2022] KECA 1306 (KLR) (2 December 2022) Judgment) where the Court of Appeal in determining whether double taxation has been proved, stated that the Court ought to consider the nature of tax, circumstances under which it is levied and the period in which it is levied. The Court held as follows:

“ 37. In view of the foregoing, it is clear to us, that the court ought to have considered the nature of the tax, the circumstances under which it is levied, and the period



in which it is levied. We therefore find that, on this limb, the learned judge misconstrued the manner in which the tax was to be effected; considered the sole issue of the tax burden, without taking into account that the imposition of different taxes concurrently did not necessarily result in double taxation."

122. Similarly, the High Court in *Commissioner of Domestic Taxes v Sidian Bank Limited* (Tax Appeal E110 of 2021) [2023] KEHC 18382 (KLR) (Commercial and Tax) (31 May 2023) Judgment) found that where tax is subjected to different incomes, the issue of double taxation cannot arise. The Court found as follows:

" 30. ..However, in this case, there are two different incomes; for Safaricom it is the fees charged to its customers for the money transfer services and for the Respondent, it is the commission received from Safaricom for acting as its agent/super-agent. The fees charged by Safaricom to its customers and the Excise Duty derived from the said fees has nothing to do with the commission income received by the Respondent and the Excise Duty that is expected to be remitted from it. If for example, the Bank is also to pay a commission from this commission received by Safaricom to its sub-agent, that sub-agent will also have to pay Excise Duty on it or such relevant taxes from this income. I therefore find that the issue of double taxation does not arise in this case. This ground of appeal by the Respondent therefore fails."

123. The High Court in *Okello & Another v National Assembly & 2 Others; Shop & Deliver Limited t/a Betika & 7 Others* (Interested Parties); *Kiragu & 2 Others* (Cross Petitioner) ((suing on behalf of, as the Chairperson, Secretary and Treasurer respectively of, the Association of Gaming Operators of Kenya)) (Constitutional Petition E010 of 2021) [2022] KEHC 3059 (KLR) (6 May 2022) (Judgment), while addressing the issue of whether Excise Duty on stakes and Withholding Tax on winnings from betting transactions constitute double taxation, concluded that the two are distinct taxes, paid by different entities. Therefore, they do not amount to double taxation. The Court held as follows:

" 289. Since the excise duty, which is paid at the point the punter wagers or places the stake, and the withholding income tax, paid upon winning, are two distinct taxes paid by different people, the issue of double taxation does not arise."

124. It averred that these decisions by the Superior Court confirmed that when taxes are imposed on different taxable events or different sources of taxable income-regardless of them stemming from the same economic activity-there is no double taxation. This principle also applies to betting activities, where the taxes in question are aimed at different transactions and incomes. Punters do not share the tax burden with bookmakers, and vice versa, so the issue of double taxation does not occur. Excise duty on stakes and the withholding tax on winnings paid by punters are unrelated to the betting tax that bookmakers pay hence they cannot be said to amount to double taxation.

125. The interested party adopted the submissions by the petitioner.

Determination.

126. I have looked at the submissions made by the parties, and the cited authorities. The *Excise Duty Act* does not define what double taxation is. Therefore, it follows that anyone seeking to know what double taxation is, will fall back to the Black's Law Dictionary if called upon to solve a legal issue.



127. The petitioner has not defined what is double taxation in his submissions. He only submitted that subjecting punters to excise duty at the time of staking and to withholding tax on their wins amounts to double taxation.
128. The 1st, 2nd respondent and the interested party have also not attempted to define what double taxation is.
129. The 3rd respondent and the 5th respondent took time and submitted on what amounts to double taxation. They referred the court to the definition in the Black's Law Dictionary which I have reproduced in the analysis herein above so there is no need to reproduce it again.
130. The 3rd and 5th respondents also referred to the court to decisions of superior courts on what amounts to double taxation. I have looked at the decisions; I have no better definition to give to the meaning of double taxation other than the ones given in the Black's Law Dictionary and expounded in the decisions by my colleagues in the cited cases. (See Kenya Pharmaceutical Association & Another vs. Nairobi City County and 46 Other County Governments & Another [2017])
131. Therefore, I adopt the meaning of the word double taxation as submitted by the 3rd and 5th respondents.
132. Now, the question to answer is whether imposing 12.5% excise duty on amount wagered/played or staked under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 on the Petitioner and the other players and an additional 20% Withholding Tax on Winnings amount to double taxation.
133. The flow from the submissions of the 3rd and 5th respondents and decisions they have referred this court to, it is clear that there cannot be double taxation when the tax is imposed on different activities and on different points. Even if the activities arise from one transaction. The excise Duty Act has clearly shown at what point each impugned tax can be levied.
134. The Excise Duty is levied against the punter at the point he places the stake for this is the time the book maker supplies the service. Section 4(1A) of the Excise Duty Act provides that the bookmakers shall collect and pay the excise duty at the point the punter wagers or places the stake. In relation to a betting transaction, the time of supply shall be the time a person wagers or stakes money on a platform or other medium provided by the book maker. While section 6(3) provides that the liability of a licenced person for excise duty on excisable services shall arise at the time of supply of the services.
135. This means that the book maker (supplier) is required to collect the excise duty at the time he supplies the service and collect the withholding tax when there is a win, which is treated as an income.
136. To me, these are clearly separate activities though undertaken under the same transaction of betting (staking, supply and winning).
137. Therefore, it is my finding that imposing excise duty on the stake and collecting withholding tax on a win does not amount to double taxation. Excise Duty is governed by Excise Duty Act, and Withholding Tax is governed by Income Tax.
138. The other question to answer is whether the imposition of the two taxes is arbitrary, unconscionable, punitive, burdensome.
139. According to Black's Law Dictionary, arbitrary is defined as 'Ordinarily, "arbitrary" is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act would be one performed without adequate determination of principle and one not founded in nature of things.



140. The enactment of the impugned statutes went through public participation. Similarly, the challenged provisions of the statutes went through the same procedure. Reasons for the enactment were given; that is to increase revenue and discourage betting. So, there is no way it can be said that the government arbitrarily and out of bad faith imposed the taxes. The government did not wake up one day and imposed the taxes; all the necessary procedures were adhered to. And as noted elsewhere, it is the constitutional duty of the government of the day to impose and collect tax. So, it is my finding that the imposition of the taxes was not done arbitrarily.
141. Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties, to a contract together with contract terms which are unreasonably favourable to the other party.
142. Betting is a choice game. If one does not want to pay the lawfully imposed taxes, then they have no business engaging in the game. Therefore, the question of unconscionability does not arise.
143. Punitive means ‘Relating to punishment; having the character of punishment or penalty; inflicting punishment or a penalty;
144. So long as taxes are lawfully imposed and collected, the citizenry who are supposed to pay a specific tax has an obligation to pay the tax as a duty, but not a punishment. Taxes might be punitive, but lawful.
145. Burdensome refers to a thing that is difficult, onerous, operose, oppressive, ponderous.
146. It is not a burden to pay tax, it is a constitutional obligation. For it is from the taxes paid, that we expect the government to fund services to its people. If one chooses to bring himself or herself or finds himself/ herself into a bracket where a certain tax is leviable, then one has no choice other than to pay the tax.
147. The last question to answer on this one, is whether the imposition of the impugned tax contravenes the principles of public finance and taxation, in particular the principle of fairness and equity on sharing on the burden of taxation under Article 201 and also in violation of Article 210 of *the Constitution* on imposition of taxes, Article 20(4)(a) of *the Constitution* on equality and equity, Article 10 on national values and good governance.
148. Article 201 of *the Constitution* states:
- “201. The following principles shall guide all aspects of public finance in the Republic—
- (a) there shall be openness and accountability, including public participation in financial matters;
- (b) the public finance system shall promote an equitable society, and in particular—
- (i) the burden of taxation shall be shared fairly;
- (ii) revenue raised nationally shall be shared equitably among national and county governments; and
- (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;



- (c) the burden and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;
- (d) public money shall be used in a prudent and responsible way; and
- (e) financial management shall be responsible, and fiscal reporting shall be clear.”

149. Of relevance on this article, is that *the constitution* requires there be public participation when it comes financial matters like imposing and collecting taxes. The Supreme Court in Petition No. 31, 32 and 33 of 2024 – The Cabinet Secretary for the National Treasury and Planning & Others vs Okiya Omtatah & Others declared that there was public participation in enactment of the Finance Bill 2023, which amended paragraph 4A of Part II of the First Schedule of the *Excise Duty Act*, creating the impugned tax. The petitioner has not provided particulars of breach of other provisions of that Article save for saying that himself and other punters shoulder a heavy burden of taxation. They are double taxed, a claim which I have overruled elsewhere in this judgment.

150. Article 210 of *the Constitution* states:

“Imposition of tax.

210.

- (1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation.
- (2) If legislation permits the waiver of any tax or licensing fee—
 - (a) a public record of each waiver shall be maintained together with the reason for the waiver; and
 - (b) each waiver, and the reason for it, shall be reported to the Auditor General.
- (3) No law may exclude or authorise the exclusion of a State officer from payment of tax by reason of—
 - (a) the office held by that State officer; or
 - (b) the nature of the work of the State officer.”

151. The impugned Excise Duty Tax and Income Tax were imposed through legislation namely *Excise Duty Act* of 2015 and *Income Tax Act* as periodically amended as provided for by Article 210 of *the Constitution*.

152. Article 20(4) of *the Constitution* states:

- “(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—
 - (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
 - (b) the spirit, purport and objects of the Bill of Rights.”



153. The petitioner and other punters have not demonstrated how the government has breached this article. Paying a lawful tax does not degrade or lower anyone's dignity. There is no evidence to show that by paying the tax, they become less equal than other persons in society and how it has impeded their freedom.

154. Article 10 of *the Constitution* of Kenya states:

“ 10.

- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
 - (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.
- (2) The national values and principles of governance include—
 - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development.”

155. Similarly, under this article, the petitioner has not availed any material to this court to find that the imposition of the impugned taxes breached the provisions of this article.

Issue 6: Whether the imposition of 12.5 % excise duty on amount wagered/played or staked under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on the Petitioner and the other players plus an additional 20% Withholding Tax on Winnings and not subjecting the same requirement to similarly situated persons in the country is discriminatory in nature and in contravention of Article 27 of *the Constitution*?

155. The petitioner submits that the act of the 3rd Respondent of implementing the impugned Paragraph 4A of Part II of the First Schedule of the Excise Duty of 2015 on the Petitioner and the other players plus an additional 20% Withholding Tax on Winnings and not subjecting the same requirement to other class of tax payers, it violates the Petitioner's and other Kenyan Punters' freedom from discrimination under Article 27 of *the Constitution* of Kenya, 2010 in view of the fact that other legislative provisions require taxpayers to pay their taxes with the tax burden shared fairly and not discriminatorily.

156. The Petitioner submits respectfully that paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 violates the petitioners' right to freedom from discrimination under article 27 of



the Constitution of Kenya, 2010 to the extent that the impugned paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 impose tax burden on other punters and not other games such as horse racing.

157. The Petitioner referred the court to the case of *Kenya Bankers Association v Kenya Revenue Authority* [2018] KEHC 9028 (KLR) where the court held that the taxpayers must be treated fairly so that discrimination between one group of taxpayers and another does not arise.

158. The 1st respondent did not submit on this aspect. The 2nd respondent submitted as follows:

- a. No other person within the republic of Kenya is subjected to taxes on their capital.
- b. Secondly, the concurrent taxation of the punter-first on the stake through Excise Duty and again on the winnings through Withholding Tax-constitutes a unique and onerous tax burden not imposed on other forms of investment, leisure, or entertainment. A stock trader or casino patron, for instance, is not subjected to both entry and exit taxation in this fashion.
- c. Thirdly, the effect of the dual taxation is to unfairly penalize and profile persons engaged in sports betting, thereby treating them unequally under the law when compared to participants in other commercial or recreational sectors or persons.
- d. Additionally, there is no Jurisdiction around the world whether punters' stake is subjected to excise duty at the point of staking.

159. The 2nd respondent submitted the dual tax structure imposed on punters-Excise Duty on stakes and Withholding Tax on winnings—is not only economically oppressive but also constitutionally discriminatory and It violates Article 27 of *the Constitution* by imposing a disproportionate burden on individuals involved in betting, compared to those in other economic or recreational activities.

160. The 3rd respondent submitted that this ground was fully dealt with by the Court in *Isaiah Onyango* (Supra) and that Article 27 applies to persons and not a sector or a service; it envisions equal protection and equal benefit of the law by all persons irrespective of their political, economic, cultural and social sphere. Article 27(4) states as follows:

“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.

161. Hon Nyamu J. in *Republic V Minister For Finance & 2 Others* [2006] eKLR, stated the following with regards to discrimination while quoting the Black's Law Dictionary: -

“Blacks Law Dictionary 6th edition at page 467 defines discrimination as follows.

Discrimination: "In constitutional law, the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favoured no reasonable distinction can be found. Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured - see *Baker U California Land Titles DC Cal*, 349 F Supp 235, 238, 239.”



162. The impugned provision levies excise duty on all betting services, no Punter has been accorded different treatment as such it cannot be said to be discriminatory. It does not have exemption for anyone or any of the groups identified by *the Constitution*.
163. The Petitioner and in particular the 2nd Respondent, seem to allege discrimination not because any class of punters are treated differently but because sectors like stock exchange does not attract excise duty. Discrimination is on a person not a sector. Persons of the same sector being treated differently.
164. They don't contest that the provision provide equal treatment for all punters.
165. The 3rd respondent cited the case of State of Bombay V FN Balsara AIR 1951 SC 318 at p 3268, which decision was based on the opinion of Professor Willis' Constitutional Law, Im Ed. at 578, it was stated that:
- “The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred & in the liabilities imposed. The inhibition of the amendment...was designed to prevent any person or class of persons from being singled out as a special subject for discriminating & hostile legislation.' It does not take from the states the power to classify either in the adoption of police laws or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, & nullifies what they do only when it is without any reasonable basis.”
166. Further, it submitted that the current case is not on differentiation, but it is a case of trying to compare apples and oranges. The different sectors are fundamentally different, they have no nexus, and *the Constitution* does not envisage discrimination for sectors but persons.
167. It referred the court to the decision of the Superior Court in Waweru & 3 others v National Assembly & 2 others;(Constitutional Petition E005 & E001 (Consolidated) of 2021) wherein the Court stated as follows:
- “Article 27 applies to persons and not a sector; it envisions equal protection and equal benefit of the law by all persons irrespective of their political economic, cultural and social sphere.”
168. And to a three-bench decision In Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] KEHC 8772 (KLR) where the judges held as follows:
- “It is thus recognised that it is lawful to accord different treatment to different categories of persons if the circumstances so dictate. Such differentiation, however, does not amount to the discrimination that is prohibited by *the Constitution*.”
169. The impugned provision is applicable to both the local and international betting companies hence the submission that the international companies are exempt is misguided. As long as the betting services is offered within the Republic of Kenya, the betting company have an obligation to comply.



170. It also cited the case of Republic V Minister For Finance & 2 Others[2006] where it was held that: The Tax law which has been challenged is being applied or has been applied to all taxable persons throughout the country and therefore the challenge on the grounds of discrimination must fail.

171. The Petitioners in the Karnataka Bank Ltd. vs Union Of India on 12 August, 2003, also alleged discrimination. The Court elaborated on the concept of discrimination by the legislature in fiscal policy and in taxation laws and stated as follows: -

“ 19. In *Khandige Sham Bhat v. Agricultural Income Tax Officer* AIR 1963 SC 591, this court laid down the tests to find out whether there are discriminatory provisions in a taxing statute. Therein this court observed that in order to judge whether a law was discriminatory what had primarily to be looked into was not its phraseology but its real effect. If there was equality and uniformity within each group, the law could not be discriminatory, though due to fortuitous circumstances in a peculiar situation some included in a class might get some advantage over others, so long as they were not sought out for special treatment. Although taxation laws could be no exception to this rule, the Courts would, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the legislature in the matter of classification so long as there was no transgression of the fundamental principles underlying the doctrine of classification. The power of the legislature to classify must necessarily be wide and flexible so as to enable it to adjust its system of taxation in all proper and reasonable ways.”

172. The 3rd respondent submitted from the law laid down by the Honourable Supreme Court in the decisions referred above, that it is clear that the test could only be one of the palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience; the burden is on the person to establish the invalidity of the legislation. Therefore, in the light of the tests referred to above, if the validity of the impugned legislation is examined, the impugned Act cannot be nullified by this court on the ground that the provisions of the Act contravenes the right guaranteed to the appellant under article 14 of *the Constitution* of India. Therefore, the third submission of Sri Sarangan is also liable to be rejected." Further no evidence of discriminatory enforcement has been placed before the Court or that the 3rd and 5th Respondents have granted any special treatment to the international betting platforms. The burden lay squarely on the petitioner.

173. The Supreme Court discussing the burden of proof in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR opined as follows:

Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;"

and Section 109 of the Act declares that,

"the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."



174. This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden” of proof before the Respondents are invited to bear the evidential burden....

- a. It is the contention of the 3rd and 5th respondents that the impugned provision levies excise duty on all betting services in Kenya. It does not provide for different treatment for any class of Punters or Bookmakers.

175. Further it has not been shown that the 3rd Respondent has in anyway in the implementation of the same treated a class of Bookmakers or Punters different from the others. It has not been shown that any differential treatment is granted to offshore platforms, as long as the offshore platforms offer the betting services in Kenya they are liable to pay excise duty. The issue of discrimination must fall on this ground.

176. On the issue that the said provision is discriminatory as it levied on money held as opposed to winnings, the same has already been explained above (see section named: What is stake and why is it different from the betting wallet/Punters betting account). It is established that once stake is made the Punter loses the legal right to the said amount hence this is not amount held. This is amount which has been paid to enable the Punter participate in a bet. It is the charge that allows the Punter to access the betting transaction.

177. Winnings in a betting transaction arise way after the betting service has been supplied, therefore it cannot be the proper taxing point. Section 9(4) of the Excise Duty further state that excise duty on a service is on the fees, charge for the services, winnings does not fit this provision. This can therefore not be said to be discriminatory in anyway.

178. The Court should also take note that in the computation of income tax on winnings, the amount staked is deducted from the winning before tax is computed i.e. income tax on winnings from betting is on the net winning (after deducting the amount staked) and not on the gross winning.

179. On the issue that the law requires paying on taxes on their waged investment whether they win or loss and similar treatment is not accorded to persons who invest in stocks, on treasury bills and bonds, unit trust.

180. Further the 3rd respondent submitted that Article 27 envisions equal protection and equal benefit of the law by all persons irrespective of their political economic, cultural and social sphere does not relate to items.

181. Betting, treasury bills and bonds, unit trust are not persons but items. It has also not been shown that they are of the same class. They are very distinct issues and not comparable. The court was referred to the case of *Willis v The United Kingdom* where the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations. The court stated that discrimination is:-

“...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available members of society.”



182. The Petitioners have not shown that when they get involved in treasury bonds, stocks or unit trust they are accorded a different treatment from the others. It cannot therefore be said that levying excise duty on betting is discriminatory as there is no similar tax for treasury bonds, stocks or unit trust.
183. Further choosing which item to levy excise duty is a purely a policy issue. The court is being called about to appraise the decision to satisfy itself whether other items ought also to be levied excise tax. The same falls outside the mandate of this Court. In *Kenya Association of Stock Brokers and Investment Banks v Attorney General & another* High Court, Nairobi, Pet. 22 of 2015 (2015) eKLR Mumbi Ngugi J held:
- “In effect, the petitioner is challenging the wisdom of re-introducing capital gains tax in Kenya, and inviting the Court to make a finding thereon. This, however, is not within the mandate of this Court. As observed by the Court in the case of *Kenya Small Scale Farmers Forum and 6 Others u Republic of Kenya and 2 Others*, Petition No 1174 of 2007-
- Firstly, it has to be borne in mind that this court is not called upon to carry out an appraisal of the impugned agreement or negotiations to satisfy itself whether or not they are good for Kenya. Those are matters of policy of which this court is not best suited to handle. The dissenting decision of the Supreme Court in *U.S u Butler*, 297 U.S. 1 (1936), is apposite in this regard that; “...courts are concerned only with the power to enact statutes, not with their wisdom.... For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.”
184. In *Ndora Stephen v Minister for Education & 2 Others*, Nairobi High Court Petition No. 464 of 2012, Mumbi Ngugi, J. correctly observed that:
- “The formulation of policy and implementation thereof were within the province of executive. Questions which are in their nature exclusively political should never be adjudicated upon by courts. In the instant case, the trial court directed that State policies and programs on the provision of shelter and access to housing for marginalized groups be presented to the trial court. What would the trial court do with such policies if tabled? Would the court interfere or evaluate the soundness of the policy? A court should not act in vain and issue orders and directions that it cannot implement. In making orders and directions in relation to Article 43 (1) of *the Constitution*, the provisions of Article 20 (5) (c) of *the Constitution* must be borne in mind. Article 20 (5) (c) stipulates that the court may not interfere with a decision by a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion.”
185. The 3rd respondent submitted that it is advisable for courts to practice self-restraint and discipline in adjudicating government or executive policy issues. Precautionary principle should be exercised before delving and wading into the political arena, which is not the province of the courts.
186. It is the 3rd respondent’s contention that the two main criteria that will influence the justiciability of an issue or otherwise are firstly, whether there is a clear constitutional commitment and mandate to a particular government organ to make a decision on the issue, and secondly, even where such a constitutional mandate exists, whether the nature of the issue and dispute is such that it is more effectively resolved by conventional political methods of majoritarian decision-making rather than by a deliberative constitutional judgment. This will include situations where a Court lacks the capacity to develop clear and coherent principles to govern litigants' conduct.



187. It cited the decision of Odunga, J in *Isaiah Onyango (Supra)* when faced with the same issues and after undertaking a detailed analysis of the same issues raised herein under the same circumstances held as follows as par.
250. I therefore agree that taxes need not look the same and that selective taxes may be applied to different sectors for different reasons, such as to address distribution and equity hence the tax need not be similar to another for it to be rational and not discriminatory
260. For the court to uphold the plea for discrimination, it must be shown that persons or entities undertaking similar activities are taxed at different rates. Differential taxation schemes are therefore not necessarily unconstitutional..... in this case the petitioners have not proved the existence of unfair discrimination to warrant the court to intervene."
188. The 3rd Respondent submits that this Court would not be the best forum to make a decision which services or goods ought to be levied excise and which ought not to. The obligation to impose tax is preserved for the Parliament and if their wisdom and policy of the day requires them to impose excise on betting service and not any other service, that decision should rest with Parliament and not the Court.
189. The 5th respondent submits that The Petitioner's argument regarding discrimination and the lack of fairness and equality in the imposition of the contested taxes is based on the claim that other individuals are not subjected to the same taxes. However, an analysis of Part II of the First Schedule of the Excise Duty shows a list of excisable services along with their applicable excise duty rates. Further examination reveals that all activities related to sports betting, lotteries, and prize competitions listed under Paragraphs 4A, 4B, 4C, and 4D are subject to the same excise duty rate of 15% These activities are similar and are treated consistently in terms of taxation; therefore, the argument that the Excise Duty on stakes is treated differently is misguided.
190. In the same vein, the withholding tax charged on winning under the *Income Tax Act* applies a uniform tax rate of 20% for both residents and non-residents as provided under paragraphs 3(i) and 5(i) of Head B of the Third Schedule to the *Income Tax Act*. The Act treats all winnings from betting gaming, lottery, prize competition, gambling or similar transactions under the *Betting, Lotteries and Gaming Act* (Cap. 131) equally. The allegations that only persons participating in sports betting are being discriminated is misdirected.
191. The interested party did not submit on this aspect.

Determination.

192. I have looked at the rival submissions and the authorities cited. Article 27 of *the Constitution* states as follows:
- “ Every person is equal before the law and has the right to equal protection and equal benefit of the law
- Equality includes the full and equal enjoyment of all rights and fundamental freedoms”
193. It is clear that this article relates to persons; not items or sectors. (See the holding in *Kenya Revenue Authority v Waweru & 3 Others; Institute of Certified Public Accountants & 2 Others (Interested Parties) (Civil Appeal E591 of 2021) [2022] KECA 1306 (KLR)*).
194. The petitioner and other punters he is representing, and the 1st and 2nd respondent and other book makers are not saying that the impugned tax has been imposed on them alone; such that other punters



and book makers in the industry do not pay such tax. If this was the scenario, then the aspect of discrimination as persons as alluded in Article 27 will arise.

195. I have also looked at the law. Part II of the First Schedule of the *Excise Duty Act* lists excisable services along with applicable excise duty rates. Paragraphs 4A, 4B, 4C and 4D list activities related to sports, betting, lotteries and prize competitions and all of them are subjected to the same rate of tax. These activities are similar, and the law treats them the same when it comes to taxation so there is no discrimination.
196. The withholding tax charged on winning under the *income tax Act*, sets a uniform tax rate of 20% for both residents and non-residents as provided under paragraph 3(i) and 5(i) of Head B of the Third Schedule to the *Income Tax Act*. The *Income Tax Act* treats all wins from betting, gaming, lotteries, prize competitions, Gambling, or similar transactions under the *Betting, Lotteries and Gaming Act* Cap 131 the same.
197. Therefore, the petitioner and the parties supporting have failed to show how the impugned provisions discriminate them.
198. As elsewhere stated in this judgment, it is not the constitutional mandate of this court, to formulate policies on which activities/groups/persons/sectors/entities to impose tax on. It is the mandate of the executive to formulate the policy and it is the mandate of parliament to translate the policies into legislation. What informs the formulation of such policies, it is not a question this court can answer. So long as the policy is formulated in accordance with *the constitution*, this court has no business to interfere with such a policy. Similarly, the court has no business to gauge the soundness of a legislation so long as the due process which led to its enactment was constitutional and its purpose and the end effect does not breach the people's rights as enshrined in *the Constitution*.
199. The impugned provisions apply to all punters and book makers who carry out the betting activities in Kenya and outside Kenya.
200. The petitioner and the supporting parties have not shown how the enactment and implementation of the impugned provisions have contravened Article 27 of *the Constitution* they claim to have been contravened.

Issue 8: Whether the imposition of 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on amount wagered/played or staked on the Petitioner and the other players plus and an additional 20% Withholding Tax on Winnings and not subjecting the same requirement to similarly situated persons in the country is in violation of Article 201 on equity, fairness and equality in taxation regimes?

201. This issue is intertwined with Issue on whether the impugned provisions treat the petitioner, the 1st and 2nd respondents, and the interested party differently.
202. The law treats the people in the class of the petitioner and the 1st and 2nd respondent, and the interested party on equal basis when it comes to imposition of the impugned taxes.

Issue 9: Whether the imposition 12.5 % excise duty under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on amount wagered/played or staked on the Petitioner and the other players it impossible for the players staking on lower odds to win and instead, drives the wager into losses, thereby arbitrarily taking away the players property in money in violation of their property rights under Article 40 of *the Constitution*?



203. The petitioner submitted that the impugned taxation, which forces the petitioner and other punters to pay double taxes is a gross violation of their right under Article 40(3) of *the Constitution* which provides that “The state shall not deprive a person of property of any description; or of any interest in, or right over property of any description”
204. Further, that the imposition of 12.5% excise duty under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on amount wagered/played or staked on the Petitioner and the other players is a clear violation to the right to property under Article 40 (1) & (2), it is the Petitioner's submissions that such taxation and/or levy affects this right to property by subjecting the net when they place a bet or play notwithstanding if they win or lose their money, the tax is levied on just a mere fact of placing a bet.
205. The Petitioner's avers that the imposition of the tax on an amount wagered notwithstanding whether a punter loss is punitive as it is based on total deposits, therefore the levy is tantamount to arbitrarily taking away their property. It impossible for the players staking on lower odds to win and instead, drives the wager into losses, thereby arbitrarily taking away the players property in money in violation of their property rights under Article 40 of *the Constitution*,2010.
206. The 1st respondent submitted that there is no justifiable reason why there exists no refund of the 12.5% Excise Duty Tax in such an instance because the betting event did not proceed. This is one aspect of the impugned tax, which is punitive and meant to penalize the petitioner and other punters unfairly. We submit that paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 unlawfully deprives the Petitioner of its property in contravention of Article 40 of *the Constitution*, and as such ipso facto unlawful and unconstitutional.
207. The 2nd respondent submitted that excise duty cannot be charged on the amount charged on the punter's stake, it is oppressive, regressive, arbitrary and contrary to the Provisions of Article 201 of *the Constitution* as read together with Articles 40 for the following reasons:
- i. The punter can stake for event that will occur in future and the bookmaker cannot lay claim to part or all of the amount staked until the event occurs.
 - ii. In case the event staked is cancelled, the amount staked remains the property of the punter and the bookmaker cannot lay claim to part or whole of it.
 - iii. During the process of the event, say a game, and the event is aborted before completion, the event becomes void and once again, the amount staked remains the property of the punter and never of the bookmaker.
 - iv. The Punter can choose to cancel the stake at anytime before the event is completed.
 - v. The service offered by the bookmaker is never complete until the event staked is played and completed. Otherwise, the amount staked remains fully the property of the punter. Indeed, in case of the win, there is a payout to the punter less withholding tax and in case of a lose, the staked amount becomes the property of the bookmaker liable to Gross gaming Revenue.
208. The 3rd respondent submitted that The Petitioner alleges that the imposition of excise duty on betting seeks to deprive them of their money just by merely being punters who desire to participate in a game of betting.
209. The 2nd Respondent at par. 17 and 19 of their submissions, indicate that the stakes remain the property of the Punter until the game of chance occurs hence the same cannot be subject to tax.



210. It is important to state that the betting transaction is not the only service being subjected to excise duty under the EDA. The First Schedule to the Act provide a list of goods and services which are all subject to excise duty.
211. The right to property under Article 40 of *the Constitution* is not one of the absolute right under Article 25 of *the Constitution*; hence, it can be limited under reasonable and legally sound grounds. Taxation is one of the grounds under which the right to property can be limited and therefore it is vital to appreciate the nexus between taxation and enforcement of rights by the State. *The Constitution* establishes a social contract between the State and its citizens. Under the Social Contract the State guarantee the Bill of Right while the People pay taxes to enable the State undertake this mandate.
212. The 3rd respondent further submits that the High Court when faced with similar issue in *Basco Products (K) Limited & 4 others v National Assembly & 3 others; Kenya Association of Manufacturers (Interested party) (Petition E 286 of 2021) [2022] KEHC 168 Makau J* stated that:
- “It is imperative to take notice that citizenry in order to enjoy all the rights under *the constitution* surrenders a part of their property as taxes and duty and the said surrender cannot be said to be unconstitutional. It is clear that taxes are a form of raising revenue sanctioned by *the Constitution* and the imposition of taxes does not deprive the Petitioners of the right to property provided under Article 40 of *the Constitution* and as such the Petitioner's allegations that they have bene deprived of their property by paying taxes has no basis in law. The payment of taxes is an obligation imposed on all businesses and individuals. I am alive to the fact that if this Honourable Court was to uphold the Petitioners' arguments, it would open the flood gates of litigation since nearly all businesses and individuals would raise similar issues about taxation with possible abandonment of the need to pay taxes which no country can do without levying taxes.”
213. The 3rd Respondent submits that the stake is the charge that allows the Punter to take part in a bet, as explained in the Affidavit at par. 10 to 21. Just like for any other charge or fee for any service or the good, you lose the title to the fee or the charge upon giving it to the service provider and the service provider has then an obligation to issue you with the service. The Punter loses the legal title to the amount wagered or staked, he cannot therefore claim that levying excise duty on the stake is arbitrary deprivation of property while he has lost the right to the said property already.
214. The tax in question is on the amount wagered or staked and not the money held by the Punter in the betting wallet. The argument advanced that levying excise duty on stake is akin taxing money held by the Punter is therefore very misleading.
215. At the end, the 3rd respondent submitted that It is clear from the foregoing that taxation is the vessel used by the Government to respect, promote and fulfil the fundamental rights envisioned under the Bill of Right under *the Constitution* & other recognised human rights instruments, and taxation itself cannot be said to be a breach of the same rights.
216. The 5th respondent submitted that on the issue of whether taxation can amount to depriving the petitioner of his property rights, several superior courts decisions apply. The Court of Appeal in *Pharmaceutical Manufacturing (K) Co Ltd, Kumar Shah, Utamchand G. Shah, Christine D' Souza v Commissioner General of Kenya Revenue Authority, Attorney General & Commissioner of Customs*



Services (Civil Appeal 283 of 2014) [2017] KECA 683 (KLR) (Civ) (10 March 2017) (Judgment) in rejecting the assertion that taxation deprives a person their property held as follows:

“The unfettered power of the national Government under Article 209 to impose, waive or vary any form of taxation, be they income tax, value-added tax, customs duties and other duties on import and export goods or excise tax, is subject only to one qualification; that no tax may be imposed, waived or varied except as provided by legislation. It cannot be a violation of *the Constitution* if *the Constitution* itself has permitted it. It cannot, similarly constitute arbitrary deprivation or an infringement of a right to property if the deprivation, if any, is in accordance with the law.”

217. The High Court in the case of Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA Workers Union) V Kenya Revenue Authority & 3 Others [2014] eKLR held as follows:

“34. Finally, the imposition of taxes is a constitutional imperative and the power impose taxes is reposed in the legislature. The imposition of tax by statute cannot, itself, amount to arbitrary deprivation of property contrary to Article 40 of Constitution.”

218. Similarly held in the case Bidco Oil Refineries Limited v Attorney General & 3 other [2013] eKLR the Court held that the collection of taxes through the procedures provided by the law cannot constitute an arbitrary deprivation of property. The Court states as follows:

“55. ..Since statutory application is really the issue here, the consideration whether Article 47(1) has been violated is dispositive. In any case, the collection of taxes through the procedures provided by the law cannot, at least in the circumstances of this case, constitute an arbitrary deprivation of property.”

219. In the case of Basco Products (K) Limited & 4 others v National Assembly & 3 others; Kenya Association of Manufacturers (Interested party) (Petition E 286 of 2021)[2022] KEHC 168 (KLR) (Constitutional and Human Rights) (24 February 2022), the Court at paragraph 77 stated that:

“It is imperative to take notice that citizenry in order to enjoy all the rights under *the constitution* surrenders a part of their property as taxes and duty and the said surrender cannot be said to be unconstitutional. It is clear that taxes are a form of raising revenue sanctioned by *the Constitution* and the imposition of taxes does not deprive the Petitioners of the right to property provided under article 40 of *the Constitution* and as such the petitioner's allegations that they have been deprived of their property by paying taxes has no basis in law. The payment of taxes is an obligation imposed on all businesses and individuals.”

220. On similar question of whether taxes on stakes on winning on betting deprive the punters of their property was answered by the High Court in Okello & Another v National Assembly.

221. The interested party submitted that the imposition of the 12.5% on the amount waged or staked and requiring payment even before a win violates the right to property.

a. It is not disputed that the impugned Finance Act, 2023 which came into force on 1st July 2023, imposed new tax regulations and rates, which requires among others, betting companies to pay Excise Duty of 12.5% of the amount waged or staked.



- b. The payment of the duty is not is not pegged to a win or loss by the player. It is pegged to the wage or stake. It is only after a win (following a successful stake) that a gaming company is able to pay to the player the amount that she has won. It is at this point that it is also able to pay the tax. If the stake is lost, then there is no winning amount to be paid to a player.
- c. The introduction of the 12.5% means that a gaming company will be obligated to pay the rate even where a stake is lost. In this case, the gaming company will have to pay the amount from its own funds even without a win. The use of its own funds then affects its right to property without any compensation from the State.

Determination

222. The parties' submissions on this issue requires one question to be answered. Does the punter lose any property in the betting process?
223. The *excise duty act*, has defined what a stake is. This is the money the punter pays to access the service supplied by the book maker. So, the moment he pays the money, the money goes to the book maker. The book maker then allows him to participate in the game. In the event the game does not occur, the punter is refunded back the money he paid for the service. The cited authority by the 3rd and 5th respondents Okello & Another v National Assembly (Supra) has correctly analysed this position. I do not need to belabour on the same. I fully align myself to that reasoning.
224. The Court in finding that the Petitioners were not deprived of their property by the imposition of taxes on betting held as follows in paragraph 267:
- “In this case, however, I have found that the levy of excise duty on stakes is proper and lawful. In any case once a punter stakes a bet, unless the bet is postponed or cancelled, he loses property over his state even if he loses the bet. Where the bet is cancelled or postponed, he is entitled to refund of his stake. Accordingly, he is not arbitrarily deprived of his property by the mere fact that excise duty is levied on the stake.”
225. The petitioner's submission that imposing excise duty to punters who stake lower odds subjects them to losses for it is hard for them to win, therefore depriving them of their property in terms of money. As earlier observed elsewhere in this judgment, betting is a game of choice and chance. When one elects to place a stake, he knows very well that he might win or lose. So, if one loses, he/she should be able to take it in his/her own stride. Further, it is my view that it does not depend on the amount one stakes. It depends on one's luck to win, but not the amount staked. Similarly, for one to lose, it does not matter the amount you have staked.
226. Payment of Excise Duty does not depend on winning or losing. What matters is that a punter has been offered a platform (service) to participate by the book maker, and he/she has participated and payment of tax cannot amount to deprivation of property as envisaged under Article 40 of *the Constitution*.
227. Lastly, the money staked does not amount to investment or capital; such that it cannot be subjected to tax. As illustrated elsewhere, this is the money paid by the punter in order to access the services offered by the book maker. To me, an investment is where someone puts his/her resources having a legitimate expectation to gain. But betting, one is not investing. He is engaging in a game of chance. You either lose or win.



228. Therefore, it is my finding that the losses suffered by the punters who stake lower odds, the act of losing cannot be attributed to the 3rd and 5th respondents such that it can be said to have violated the rights of the losing punter as provided for under Article 40 of *the Constitution* which provides:

“that every person has the right, either individually or in association with others, to acquire and own property and that Parliament shall not enact a law that permits the State or any person.

- (a) To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
- (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4)”

Issue 10: Whether paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 as Amended by Finance Act 2023 affects the functions of the County government under paragraph 4(a) of the Fourth Schedule to *the Constitution* and accordingly should have been subjected to input of both the National Assembly and the Senate as provided under Article 109 and Article 110 of *the Constitution* and passing thereof violates Article 110(1)(c) as read with article 110(4) and (5) of *the Constitution*?

229. This issue has already been determined as the first issue.

Issue 11: Whether the imposition of Gross Gaming Revenue under Section 29A of the Betting Lotteries and Gaming Act [Cap 131) and the imposition Excise Duty of 12.5% under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on wager/stake or a player or on placing of a bet/play on a bet is double taxation in violations of Articles 201 and 209 of *the Constitution* and is therefore null and void.

230. I have looked at the submissions by the parties on this one. They mirror the submissions on whether there is double taxation when excise duty is levied on a punter upon staking and when withholding tax is levied on a punter upon winning. The difference is clearly discernible in this, just like in the earlier one. Gross Gaming Revenue under Section 29(a) of the Betting Lotteries and Gaming Act (Cap 131) is a distinct tax just like Excise Duty. It is levied on the betting companies while the excise duty is levied on punters. Therefore, it cannot amount to double taxation. Similarly, it is not the same tax.

Issue 12: Whether the Gross Gaming Revenue under Section 29A of the Betting Lotteries Act (Cap 131) is the excise duty contemplated under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 on wager/stake or a player or on placing of a bet/play on a bet?

231. These are two different taxes. Gross Gaming Revenue is managed under *income tax Act* and Excise Duty levied on stake is a tax levied on a service applied.

Issue 13: Whether the imposition of Excise Duty on Betting Amounts to breach of Articles 10,28,43 and 46 (1) of *the Constitution*

232. The petitioner and the 1st respondent never submitted on this issue. It is trite law that whoever alleges a violation of a constitutional right, the onus is on him to prove so.



Issue 14: Costs

233. This being a petition brought on behalf of the petitioner and other punters within and out of the country, it fits the bill of a public interest matter. I therefore order that each party to bear its own costs.

Disposition

234. Having carefully considered the petition, the responses filed by the respondents, the submissions by the parties and the cited authorities, I make the following orders:

- I. I find that the petition has no merit.
- II. All declarations sought are declined.
- III. All orders sought are declined, save that this being a petition brought for the interest of the public, I order that each party to bear its own costs.
- IV. Right of appeal 30 days.
- V. Typed copy of proceedings and judgment be supplied to the parties upon payment of requisite court fees.

DATED, SIGNED AND DELIVERED BOTH VIRTUALLY AND IN OPEN COURT AT KAKAMEGA THIS 31ST DAY OF JULY, 2025.

S.N MBUNGI

JUDGE

In the presence of :

Khandabi for 5th respondent present in court

Mr. Ochieng and Limiso for the 3rd respondent present in court

Mr. Mola holding brief for Willis Otieno for the petitioner and Ndolo for the 1st respondent present online

Eboso for the 2nd respondent present online

Ms. Munene holding brief for Muriithi for the interested party present online

Court Assistant – Fred Owegi

