REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E031 OF 2024 AS CONSOLIDATED WITH PETITION NOS. E032 & E033 OF 2024

–BETWEEN–

THE CABINET SECRETARY FOR THE NATIONAL TREASURY AND PLANNING ..... 1ST APPELLANT

THE ATTORNEY GENERAL ..... 2ND APPELLANT

THE NATIONAL ASSEMBLY ..... 3RD APPELLANT

THE SPEAKER OF THE NATIONAL ASSEMBLY ..... 4TH APPELLANT

KENYA REVENUE AUTHORITY ..... 5TH APPELLANT

–AND–

OKIYA OMTATAH OKOITI ..... 1ST RESPONDENT

ELIUD KARANJA MATINDI ..... 2ND RESPONDENT

MICHAEL KOJO OTIENO ..... 3RD RESPONDENT

BENSON ODIWUOR OTIENO ..... 4TH RESPONDENT

BLAIR ANGIMA OIGORO ..... 5TH RESPONDENT

VICTOR OKUNA ..... 6TH RESPONDENT

FLORENCE KANYUA LICHORO ..... 7TH RESPONDENT

DANIEL OTIENO ILA ..... 8TH RESPONDENT

RONE ACHOKI HUSSEIN ..... 9TH RESPONDENT

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

CLEMENT EDWARD ONYANGO ..... 11TH RESPONDENT

PAUL SAOKE ..... 12TH RESPONDENT

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

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

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

KATIBA INSTITUTE ..... 16TH RESPONDENT

THE INSTITUTE FOR SOCIAL

ACCOUNTABILITY (TISA) ..... 17TH RESPONDENT

TRANSPARENCY INTERNATIONAL KENYA ..... 18TH RESPONDENT

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

SIASA PLACE ..... 20TH RESPONDENT

TRIBELESS YOUTH ..... 21ST RESPONDENT

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

ROBERT GATHOGO KAMWARA ..... 23RD RESPONDENT

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

KENYA MEDICAL PRACTITIONERS'
PHARMACISTS AND DENTIST UNION ..... 25TH RESPONDENT

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

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

FREDRICK ONYANGO OGOLA ..... 28TH RESPONDENT

NICHOLAS KOMBE ..... 29TH RESPONDENT

WHITNEY GACHERI MICHENI ..... 30TH RESPONDENT

STANSLOUS ALUSIOLA ..... 31ST RESPONDENT

HERIMA CHAO MWASHIGADI ..... 32ND RESPONDENT

DENNIS WENDO ..... 33RD RESPONDENT

MERCY NABWIRE ..... 34TH RESPONDENT

BENARD OKELO ..... 35TH RESPONDENT

NANCY OTIENO ..... 36TH RESPONDENT

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

UNIVERSAL CORPORATION LIMITED ..... 38TH RESPONDENT

COSMOS LIMITED ..... 39TH RESPONDENT

ELYS CHEMICAL INDUSTRIES ..... 40TH RESPONDENT

REGAL PHARMACEUTICALS ..... 41ST RESPONDENT

BETA HEALTHCARE LIMITED ..... 42ND RESPONDENT

DAWA LIMITED ..... 43RD RESPONDENT

MEDISEL KENYA LIMITED ..... 44TH RESPONDENT

MEDIVET PRODUCTS LIMITED ..... 45TH RESPONDENT

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

BIOPHARM LIMITED ..... 47TH RESPONDENT

BIODEAL LABORATORIES LIMITED ..... 48TH RESPONDENT

ZAIN PHARMA LIMITED ..... 49TH RESPONDENT

THE SPEAKER OF THE SENATE ..... 50TH RESPONDENT

CONSUMERS FEDERATION OF KENYA (COFEK)... 51ST RESPONDENT

KENYA EXPORT FLORICULTURE HORTICULTURE, AND ALLIED WORKERS UNION ..... 52ND RESPONDENT

DR. MAURICE JUMAH OKUMU ..... 53RD RESPONDENT

—AND—

GAUTAM BHATIA ..... AMICUS CURIAE

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*(Being appeals against the Judgment of the Court of Appeal (**M'Inoti, Murgor & Mativo, JJ.A.**) delivered on 31st July, 2024 in Civil Appeal No. E003 of 2024 as consolidated with Civil Appeal Nos. E106, E021, E049, E064, & E080 of 2024)*

Representation:

Prof. Githu Muigai, SC, Kiragu Kimani, SC,
Mr. Paul Nyamodi & Mr. Mahat Somane for the 1st and 2nd appellants
(*Attorney General's Chambers*)

Mr. Issa Mansur, Mr. Josphat Kuyioni, Mr. Sherrifsam Mwendwa
& Mr. Mbarak Ahmed for the 3rd and 4th appellants.
(*Kuyioni Josphat Advocate)*

Mr. George Ochieng, Ms. Diana Almadi & Mr. Kelvin Jumah for the 5th appellant
(*G. O. Ochieng Advocate)*

Mr. Okiya Omtatah Okoiti the 1st respondent
(*Appearing in person)*

Mr. Eliud Karanja Matindi the 2nd respondent
(Appearing in person)

Mr. Bryson Ometo for the 3rd respondent
(*Rachier & Amollo LLP*)

Mr. Benson Odiwuor Otieno the 4th respondent
(*Appearing in person)*

Mr. Blair Angima Oigoro the 5th respondent
(*Appearing in person*)

Mr. Ian Mbithi for the 6th respondent
(*Okong'o Omogeni & Company Advocates*)

Mr. Sang Cherongis for the 11th respondent
(*Sang Cherongis Law Advocates LLP*)

Mr. Charles Kanjama, SC, Mr. John Leakey & Mr. Noel Okwach for the 13th respondent
(*Okwach & Co. Advocates and Muma & Kanjama Advocates)*

Mr. Ochieng Oginga for the 14th respondent
(*Ochieng Oginga & Company Advocates*)

Mr. Malidzo Nyawa, Dr. Henry Gichana
& Mr. Ray Odanga for the 15th-19th & 22nd respondents
(*Joshua Malidzo Nyawa Advocate)*

Mr. Ochiel Dudley, Mr. Evans Ogada
& Ms. Caroline Muneeni for the 20th & 21st respondents
(*Prof. Migai Akech & Associates Advocates)*

Ms. Mercy Makila for the 24th -27th respondents
(*C. O. Wasonga & Company Advocates)*

Mr. Jotham Arwa & Ms. Marren Adunga for the 38th -49th respondents
(*Rachier & Amollo LLP)*

Mr. David Benedict Omulama for the 52nd respondent
(*Appearing in person*)

Mr. Bosire Bonyi for the *amicus curiae*
(G.B. Bosire & Company Advocates)

No appearance for the 7th -10th, 12th, 23rd, 28th -37th, 50th and 51st respondents

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Three appeals were filed before this Court at the instance of the appellants namely, **SC Petition Nos. E031, E032 & E033 of 2024.** In addition, two cross appeals were filed jointly by the 15th -19th & 22nd respondents and the 38th -49th respondents, respectively. The appeals primarily revolve around whether the Finance Act, 2023 was enacted in line with the prescribed constitutional and statutory parameters; and the reliefs that can issue upon a court finding a statute unconstitutional. Consequently, on 15th August 2024, this Court on its own motion consolidated the appeals and designated **SC Petition No. E031 of 2023** as the lead file. The consolidated appeal challenges the judgment of the Court of Appeal *(M'inoti, Murgor and Mativo, JJ.A.)* dated 31st July, 2024 in **Civil Appeal No. E003 of 2023 as consolidated with Civil Appeal Nos. E016, E021, E049, E064 & E080 of 2023,** which declared, *inter alia,* the Finance Act, 2023 unconstitutional.

B. BACKGROUND

(i) Litigation History

(a) At the High Court

[2] As codified in our laws and is customary, the national budgetary process for a subsequent Financial Year (FY) (which begins on the 1st of July) commences towards the end of the previous FY (which ends on the 30th of June), and entails a

series of vital steps. These steps range from preparation of an annual Budget Policy Statement by the National Treasury, and approval of the same by the Cabinet, submission of estimates of revenue and expenditure of the National Government as well as those of Parliament and the Judiciary for the subsequent FY to the National Assembly for approval, to the enactment of the Appropriation and Finance Acts. This appeal concerns the budgetary making process for the FY 2023/2024, and in particular, the legislative process leading to the enactment of the Finance Bill, 2023 (the Bill) into the Finance Act, 2023 (the Act) upon receiving Presidential assent on 26th June, 2023. Upon that passage, a total of 11 petitions were lodged before the High Court by the 1st-49th respondents, all of which challenged the constitutionality of the Act. The petitions were subsequently consolidated.

[3] The contention against the Act was broadly two-fold; that the legislative process and the contents of the Act were unconstitutional. Firstly, regarding the former, it was argued that the legislative process that resulted in the Act was not subjected to the concurrence process of both Speakers of Parliament (National Assembly and Senate) as envisaged under Article 110(3) of the Constitution; and that the Bill was not considered by the Senate yet it was alleged that it contained matters concerning County Government. It was also urged that public participation with respect to the Bill was not sufficient since most views/proposals arising therefrom were rejected; that new sections introduced by the National Assembly in the Bill by way of amendments, were neither subjected to public participation nor included in the First and Second Reading before the National Assembly contrary to Article 201 of the Constitution; and that contrary to Article 221 of the Constitution, the estimates tabled before the National Assembly were incomplete since the estimates of revenue of the National Government had been omitted.

[4] Secondly, it was postulated that some of the contents of the Act fell outside the scope of a money Bill as delineated under Article 114 of the Constitution. These

provisions included Section 89 which repealed Section 21 of the Statutory Instruments Act that provided for an automatic revocation of a statutory instrument 10 years after its enactment; Section 76 thereof that amended Section 7 of the Kenya Roads Board Act by providing for the composition of Kenya Roads Board; and Section 87 of the Finance Act that amended Section 28 of the Unclaimed Financial Assets Act by providing that a beneficiary may designate a proxy to whom the Unclaimed Assets Authority may make payments in respect of any claim or asset; the introduction of the affordable housing levy by Section 84 thereof was also challenged on the grounds that, the said levy is not contemplated under Article 209(1) of the Constitution. The said section was also impugned on the ground that there was no legislative framework with respect to the administration of the said levy and that the levy was discriminatory in so far as it was intended to be imposed only on employees in formal employment, amongst other reasons.

[5] In addition to the foregoing, it was posited that some of the provisions of the Act which amended various laws relating to taxation violated the Constitution. For example, it was argued that Section 2 as read with Section 21 thereof which amended Section 35 of the Income Tax Act by imposing taxes on entertainment violated the Constitution by usurping the functions of County Government. Section 2 thereof was challenged on the basis of introducing digital monetization as a tax on payments for entertainment, social, literal, artistic, education or any other material electronically through any medium or channel; that the imposition of tax on "winnings" from betting, gaming and lotteries is a function of County Government; Sections 40 to 48 that amended Sections 2, 20, 28, 40, the First and Second Schedule of the Excise Duty Act and introduced a requirement for the remittance of excise duty on betting and gaming within 24 hours of closure of a transaction, as well as excise duty on alcoholic beverages within 24 hours of removal of the goods from the stock room; and Section 33 thereof which amended Section 17 of the VAT Act to introduce 16% VAT on insurance compensation.

[6] In totality, the consolidated petition claimed that the Act was discriminative, punitive and unconstitutional. It sought a declaration that the entire Act is unconstitutional, and in the alternative, a declaration of specific provisions of the Act as being unconstitutional.

[7] In response, the appellants herein, who were some of the respondents in the High Court, stated that the Bill proposed an array of tax modifications to increase revenue so as to meet the government's budget of Kshs.3.6 trillion for the FY 2023/2024. It was contended that the proposals in the Bill were within the provisions of Article 109 (1), (2) and (3) of the Constitution; that the Bill had no direct bearing on matters concerning counties, and therefore, did not require the input of the Senate either by way of concurrence or consideration. Pertaining to public participation, they asserted that the same was adequate since it was conducted directly through submission of 1,080 memoranda by stakeholders, and indirectly through the peoples' elected representatives. As far as the appellants were concerned, the National Government is authorised to impose tax on income, like in the case of the affordable housing levy, by dint of Article 209(1) of the Constitution to support the national housing policy. As for the amendments to the tax legislation, they urged that the amendments were for purposes of broadening the tax base and generating additional revenue for the government. Finally, they maintained that the enactment process and the contents of the Act were within the confines of the law.

[8] The 51st and 52nd respondents herein who were joined in the High Court as interested parties opposed the consolidated petition on more or less similar grounds as the appellants. Dr. Maxwel Miyawa and the 53rd respondent were admitted to the suit as *amici curiae*. They have however not filed any written brief as is required of an *amicus* by the Rules of this Court, nor have they participated in any way in the proceedings before this Court.

[9] By a judgment dated 28th November 2023, the High Court (*Majanja, Meoli & L. Mugambi, JJ.*) found that the consolidated petition turned on six issues namely,

whether the procedural requirements pertaining to the legislative process of the Bill were adhered to; whether the public participation conducted was sufficient; whether certain taxes cited in the petition and as enacted by the Act are unconstitutional; whether Section 84 of the Act which introduced the housing levy is unconstitutional; what reliefs, if any, should the court grant in the circumstances; and who should bear the costs of the consolidated petition?

[10] On the first issue relating to procedural requirements, the court delineated three sub-issues, that is, *whether the Bill was a money Bill in terms of Article 114, and whether it contained matters outside the scope of a money Bill; whether the Bill required the concurrence of the Speaker of Senate; and whether the estimates of revenue and expenditure were included in the Appropriation Act*. Starting with the *first sub-issue,* the court found that the Bill was a money Bill, and that it contained certain matters which were not contemplated under Article 114(3) of the Constitution. In that regard, the learned Judges held that Section 87 of the Act which amended Section 28 of the Unclaimed Financial Assets Act by providing that a beneficiary may designate a proxy to receive payments in respect of any claim or asset; Sections 88 and 89 of the Act which repealed Section 21 of the Statutory Instruments Act on the automatic revocation of statutory instruments after the expiry of 10 years after enactment; and Section 76 of the Act which amended Section 7 of the Kenya Roads Board Act on the composition of the Board were neither incidental nor directly connected to a money Bill. To that extent, the court found those provisions unconstitutional.

[11] *On the second sub-issue*, while appreciating that what it termed as a Bill containing estimates of revenue was not tendered before it, the court ascertained that as part of the budget making process, the estimates of revenue were included in the approved estimates contained in the Appropriation Bill, 2023 and the Appropriation Act, 2023. As for the *third sub-issue*, the court held that having found that the Bill was a money Bill, it could only be introduced and considered in the National Assembly by dint of Article 109(5) of the Constitution. However, the

court was alive to this Court's decision in ***Speaker of the Senate & Another vs. Attorney-General & Another; Law Society of Kenya & 2 Others (Amicus Curiae)*** (Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR) (***Speaker of Senate***), to the effect that it is necessary for both Speakers to agree on the nature of any Bill prior to its introduction in any House. Be that is it may, the court found that the failure by the Speaker of the National Assembly to seek concurrence of the Speaker of the Senate on the nature of the Bill prior to its introduction in the National Assembly did not vitiate the resultant Act as such concurrence is not a requirement under Article 114 of the Constitution.

[12] On *public participation*, the court found that there was real and sufficient public and stakeholders' participation, which the National Assembly considered as evinced by the adoption of some of those proposals in the Act. The court appreciated that there is no express obligation on Parliament to give written reasons for rejecting or approving any proposals received from the public. Nonetheless, the court held that in order to enhance accountability and transparency, it was desirable for the relevant committee of the National Assembly, after conducting public participation, to give reasons for rejecting or adopting proposals. Lastly, on the additional sections introduced by the National Assembly after initial public participation, the court held that Standing Order Nos. 132 & 133 of the National Assembly Standing Orders permit amendments to be made to a Bill at the Committee stage. Furthermore, the court held that it was bound by ***Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing Board & 7 Others***, Civil Appeal No. 11 of 2018; [2018] eKLR (***Pevans Case***), wherein the Court of Appeal affirmed the position that Parliament is not precluded from effecting amendments to a Bill during debate before passing the same.

[13] *On the constitutionality of the amendments to the tax laws*, the High Court found that the provisions identified and cited did not violate the Constitution; the matters raised related to tax policy and administration, which are within the

competence of the legislature; and the said amendments reflected policy choices of the National Government. Lastly, with respect to *Section 84 of the Act that introduced the affordable housing levy*, the court found that there was no comprehensive legal framework for the said levy contrary to Articles 10, 201, 206 and 210 of the Constitution. It also held that the imposition of the said levy against persons in formal employment to the exclusion of non-formal income earners was unjustified, unfair, discriminatory, and in violation of Articles 27 and 201(b)(i) of the Constitution.

[14] In the end, 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."

(b) At the Court of Appeal

[15] The High Court's decision precipitated the filing of 7 appeals before the Court of Appeal, with one appeal being withdrawn thereafter. The remaining six appeals namely, **Civil Appeal Nos. E003, E016, E021, E049, E064 and E080 of 2024** were filed by, the 3rd and 4th appellants, the 28th-37th respondents, the 1st, 2nd, 4th & 5th respondents, the 11th respondent, the 15th -19th & 22nd respondents, and the 1st & 2nd appellants, respectively. Further, three cross appeals were lodged by the 13th respondent, the 38th -49th respondents, and the 15th-19th & 22nd respondents, respectively. These appeals were subsequently consolidated and **Civil Appeal No. E003 of 2024** was designated as the lead file

[16] Cumulatively, the consolidated appeal challenged the High Court's judgment on the grounds that the learned Judges erred by, *holding that the housing levy was discriminatory and unconstitutional; finding that the Act contained some issues which were not related to a money Bill; failing to strike down the entire Act after finding that it contained non-money Bill issues; misinterpreting the nature and scope of public participation; finding that it is 'desirable' that the relevant committees in considering the memoranda presented during public participation give reasons for adopting or rejecting proposals; finding there was sufficient public participation prior to the enactment of the additional sections introduced by the National Assembly, that is, Sections 18, 21, 23, 24, 26, 32, 34, 38, 44, 47, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101 and 102 of the Act; failing to determine whether the enactment of Section 47 (a)(xii) of the Act violated economic and social rights and the right to health under Article 43 of the Constitution; finding that it is necessary for both Speakers of Parliament to agree on the nature of any Bill prior to its introduction in any House; and misinterpreting Articles 109(5)*

and 114(2) of the Constitution by holding that money Bills do not require the mandatory concurrence of the two Speakers.

[17] Further, that the court erred by, *declaring Sections 76, 78, 84, 87, 88 and 89 of the Act unconstitutional; ignoring the pleadings, evidence, and submissions that 'regressive taxes' in the Act are unfair because they disproportionately shift the tax burden to those with lower incomes; holding that the challenged taxes were constitutional as they were matters within the competence of the Legislature and reflected the policy choices of the National Government; failing to find that there was an exclusion of revenue estimates in the budget for the FY 2023/2024, and such exclusion made the Appropriation Act 2023 void ab initio; and failing to determine the question of whether Sections 52 and 63 of the Act that introduce mandatory and expensive electronic tax systems is a threat or violates consumer economic rights of small businesses under Article 46(1)(c).*

[18] The Court of Appeal (*M'inoti, Murgor & Mativo, JJ.A.*) by a judgment dated 31st July 2024, found that the fate of the consolidated appeal depended on nine (9) issues. The first was *whether the challenge to the finding that Sections 84 (Affordable* Housing Levy)*, 88 and 89 of the Act were unconstitutional was moot, and if so, whether the said issue falls within the exceptions to the doctrine of mootness*. In determining this question, the Court of Appeal noted that the Affordable Housing Bill, 2023 was enacted into law on 19th March 2024 to cure the defects identified by the High Court in its judgment, and that it addressed both the comprehensive legal framework and the discrimination issues identified in the aforesaid judgment. Similarly, the court observed that the Statutory Instruments (Amendment) Bill, 2024 which was introduced in the National Assembly addressed the inadequacies identified by the High Court judgment in declaring Sections 88 and 89 of the Act unconstitutional. The appellate court therefore held that there was no live controversy before it requiring it to determine the question of the unconstitutionality of Sections 84, 88 and 89 of the Act.

[19] *On whether the Act contained extraneous provisions which did not fall within a money Bill*, the appellate court affirmed the High Court's decision that indeed Sections 76 and 78 thereof, which amended Section 7 of the Kenya Roads Act, and Section 87 thereof which amended Section 28 of the Unclaimed Financial Assets Act, are unconstitutional as they ought not to have been in a money Bill.

[20] *On whether the Act included provisions which were not in the original Bill that was subjected to public participation*, the appellate court noted that the Act contained substantive provisions which were not in the Bill. Further, that those provisions were neither subjected to public participation nor to the First and Second Reading before the National Assembly. The appellate court held that the instant case was distinguishable from the ***Pevans Case*** on account of the totally new provisions which found their way into the final enactment. Accordingly, the court held that Sections 21, 23, 32, 34, 38, 44, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101 and 102 of the Act, which were introduced post the initial public participation were unconstitutional as they violated Articles 118 and 10 (2) of the Constitution**.**

[21] *On whether the Senate ought to have been involved in the enactment of the Act*, the court upheld the High Court's finding that the Act was a money Bill save for containing some matters that did not fall within the purview of a money Bill. However, the court went on to hold that the foregoing did not change its basic character and substance as a money Bill. Therefore, the court found that the lack of concurrence prior to the introduction of the Bill in the National Assembly did not vitiate the resultant Act since it is not a requirement under Article 114 of the Constitution.

[22] *On public participation*, the appellate court while relying on ***British American Tobacco Kenya, PLC (Formerly British American Tobacco Kenya Limited) vs. Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance and Another (Interested Parties); Mastermind Tobacco Kenya Limited (the affected party)***, SC

Petition No. 5 of 2017; [2019] eKLR (***BAT Case***), found that the public participation exercise conducted by the National Assembly allowed diverse stakeholders an opportunity to present their views on the Bill and was therefore sufficient. It further found that the constitutional requirement for transparency and accountability imposes an obligation upon State organs to inform the general public and stakeholders why their views were not taken into account and why the views of some of the stakeholders were preferred over others. Accordingly, it held that Parliament, after conducting public participation, was obligated to give reasons for rejecting or adopting the proposals received, and failure to do so offended Article 10 (1) and (2) (c) of the Constitution and rendered the process leading to the enactment of the Act flawed.

[23] *On whether estimates of revenue and expenditure were included in the Appropriation Act*, the appellate court observed that, as set out in the National Assembly's Hansard, the Cabinet Secretary, National Treasury as at 15th June, 2023 had not presented the budget proposal, yet the Bill had been introduced in the National Assembly and was at the second reading stage. As a result, the court held that was in violation of Article 220(1) (a) and 221 of the Constitution as read with Sections 37, 39, and 40 of the Public Finance Management Act (PFM Act) for the Bill to be approved before the budget proposal had been presented by the Cabinet Secretary, National Treasury in the National Assembly.

[24] On *whether the High Court abdicated its jurisdiction by holding that it cannot intervene on policy decisions*, the appellate court held that pursuant to Article 165(3) (d)(i) & (ii), the High Court has jurisdiction to hear any question on the interpretation of the Constitution, including the determination of the question whether or not any law or anything said to be done under the authority of the Constitution or any law is inconsistent with the Constitution. Therefore, the court found that the aforementioned jurisdiction is wide enough to cover a policy decision made by a state organ or public body. In the circumstances, the appellate court faulted that the High Court for misapprehending its jurisdiction and

abdicating its authority on to test the constitutionality of "anything" including policy decision said to infringe the Constitution.

[25] *On whether the increased rates of taxation in the Act violated the economic, social, and consumer rights guaranteed by Articles 43 and 46*, the appellate court found that having already found that the legislative process leading to the enactment of the Act was fundamentally flawed and in violation of the Constitution, it would add no value for it to determine this issue as the provisions challenged under this question, namely Sections 30 to 38, 52 to 63 and 23 to 59 of the Act stood equally vitiated.

[26] Eventually, the Court of Appeal in its final orders dismissed, **Civil Appeals Nos. E003** and **E080 of 2024** pertaining to Section 84 of the Act (the Affordable Housing Levy) and Sections 88 and 89 thereof (the Statutory Instruments Act) on the ground that the issues raised therein had been caught up by the doctrine of mootness. Likewise, it also dismissed the cross-appeals by the 15th-19th & 22nd respondents and the 38th-49th respondents and **Civil Appeal No. E064 of 2024** for being devoid of merit, save to the extent that the High Court misconstrued its jurisdiction under Article 165 (3) of the Constitution when it held that it had no jurisdiction to intervene in policy matters.

[27] The appellate court allowed **Civil Appeal No. E016 of 2024** and the 13th respondent's (LSK) cross-appeal and issued a declaration that Sections 18, 21, 23, 24, 26, 32, 34, 38, 44, 47, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 (a) of the Act which were introduced by the National Assembly post the initial public participation were unconstitutional for not having been subjected to fresh public participation, and having been enacted in total violation of the constitutionally laid down legislative path. The court declined the prayer seeking refund of taxes collected from taxpayers under the said provisions or any other unconstitutional provision of the Act. This was because it found that such relief was not sought before the High Court; and that legislative enactments enjoy presumption of constitutionality up to the moment they are found to be unconstitutional.

[28] The court also found that **Civil Appeal No. E021 of 2021** was merited and accordingly issued a declaration that the enactment of the Act violated Articles 220 (1) (a) and 221 of the Constitution as read with Sections 37, 39A, and 40 of the PFM Act, which prescribe the budget making process, thereby the same was fundamentally flawed and void *ab initio*. On the other hand, **Civil Appeal No. E049 of 2024** partially succeeded to the extent that the appellate court found Parliament is obligated to provide reasons for adopting or rejecting any proposals received from members of the public during public participation process; and that the failure to comply with the same rendered the entire Act unconstitutional.

[29] The court also affirmed the High Court's finding that Sections 76 and 78 of the of the Act which amended Section 7 of the Kenya Roads Act, were unconstitutional, null and void. It also upheld the High Court's finding that concurrence of both houses in the enactment of the Act was not a requirement under Article 114. Consequently, having found that the process leading to the enactment of the Act was fundamentally flawed, the appellate court held that Sections 30 to 38, 52 to 63 and 23 to 59 of the Act stood equally vitiated and unconstitutional. No order as to costs was issued due to the public interest nature of the matter.

(c) At the Supreme Court

[30] As indicated in the opening paragraph of this judgment, three appeals were filed before this Court against the Court of Appeal's judgment (impugned judgment). These appeals were subsequently consolidated.

[31] The consolidated appeal challenged the impugned judgment on the grounds that the appellate court erred by finding that, *the High Court misconstrued and abdicated its mandate under Article 165(3) by holding that it had no jurisdiction to intervene in policy matters; Sections 21, 23, 24(c), 32, 34, 38, 44, 69, 72, 80, 81, 83, 85, 86, 87, 100, 101 and 102 of the Act were unconstitutional for not being subjected to the entire legislative stages and public participation; Parliament is*

obligated to give reasons for rejecting or adopting the proposals received after conducting public participation, and failure to do so offends Article 10(1) and (2) of the Constitution; the estimates of revenue were not included in the Appropriation Bill and the Appropriation Act, 2023 and that the Act violated Articles 220(1)(a) and 221 of the Constitution as read with Sections 37, 39A and 40 of the PFM Act; the question of the constitutionality of affordable housing levy which was introduced by Section 84 of the Act was moot; Sections 76 and 78 of the Act which amended Section 7 of the Kenya Roads Act, were unconstitutional; and *that the entire Act was vitiated and was therefore, unconstitutional.*

[32] Cumulatively, the consolidated appeal seeks the following orders:

i. *The consolidated appeal be allowed.*

ii. *The impugned decision of the Court of Appeal be set aside in its entirety, and be substituted with an order either setting aside part of the High Court judgment of 28th November, 2023 declaring Section 76, 77, 78, 84, 87, 88 and 89 of the Finance Act, 2023 unconstitutional, and/or allowing Civil Appeal No. E003 of 2023.*

iii. *Costs of the consolidated appeal.*

[33] Equally, two cross appeals were filed which faulted the impugned judgment for, *glossing over the pleadings and submissions that "regressive taxes" contained in the Act are unfair because they disproportionately shift the tax burden to those with lower incomes contrary to Articles 10, 27, 26, 43, and 201 of the Constitution which require tax measures to be socially just, fair, equitable, and progressive; holding that the Constitution excluded money Bills from the concurrence process under Article 110 (3) of the Constitution contrary to this Court decision in the* ***Speaker of the Senate****; holding that Senate was excluded from considering the Bill; dismissing the 38th -49th respondents' cross appeal before the Court of Appeal which challenged the constitutionality of Section 47 (a) (xii) of the Act despite declaring Section 47 unconstitutional; and declining to order the refund of all the*

taxes collected under the impugned provisions of the Act despite declaring the same unconstitutional.

[34] The cross appeals seek the following reliefs:

i. *The cross appeals be hereby allowed.*

ii. *A declaration that Article 109(5) of the Constitution only restricts the introduction (and not enactment) of money Bills to the National Assembly.*

iii. *A declaration that the Act is unconstitutional for failure to involve the Senate in its enactment.*

iv. *A declaration is issued that the Act violates Articles 10, 21(3), and 201 of the Constitution which require tax measures to be socially just, fair, equitable, and progressive.*

v. *An order that all taxes collected by KRA from the date of enactment of Act be refunded to the public.*

vi. *The consolidated appeals be dismissed.*

vii. *An order for costs.*

[35] In opposing the appeal, Eliud Karanja Matindi (the 2nd respondent) lodged a preliminary objection on this Court's jurisdiction. The tenor of the objection was that **SC Petitions Nos. E032 & E033 of 2024** did not specify under which limb of this Court's appellate jurisdiction, as delineated by Article 163(4), they are anchored on. Therefore, he contended that this Court lacked jurisdiction to entertain the said appeals.

C. PARTIES' SUBMISSIONS

(i) Appellants' Submissions

[36] Beginning with the preliminary objection, the 3rd, 4th and 5th appellants submitted that it was evident the appeals were filed under Article 163(4)(a) of the Constitution. Furthermore, that constitutional questions in the said appeals were not being raised for the first time but were also considered and determined in the superior courts below. Nonetheless, the 5th appellant contended that its appeal is brought under Article 163(4)(a) though erroneously indicated as 163(4) (b). On their part, the 3rd and 4th appellants asserted that public interest tilts in favour of the Court determining all substantive questions relying on our decision in ***Sonko vs. County Assembly of Nairobi City & 11 Others***, SC Petition No. 11 (E008) of 2022; [2022] KESC 76 (KLR).

[37] The 1st and 2nd appellants on their part argued that it is within the authority of the Legislature to enact legislation governing the manner in which a particular form of tax is administered, and that the High Court is not the appropriate forum to address any alleged inadequacies of such taxes. They maintained that the High Court correctly found that nothing had been placed before it to demonstrate how the amendments to the various tax laws violated the Constitution. Consequently, the High Court could not in the circumstances be faulted for not interfering with policy decisions on the said amendments in line with its decision in ***Kenya Small Scale Farmers Forum & 6 Others vs. Republic of Kenya & 2 Others***, HC Petition No. 1174 of 2007; [2013] eKLR**.** According to the 1st and 2nd appellants, the Court of Appeal failed to take into account the full context leading the High Court to arrive at its conclusion on the extent of judicial intervention in policy decisions. As a result, these appellants averred that the Court of Appeal erred in its interpretation of the scope of judicial intervention in public policy matters in light of the doctrine of political question.

[38] On public participation, the appellants posited that under Section 39A of the PFM Act, the National Assembly has only 61 days to consider and pass a Finance

Bill, with or without amendments. Therefore, in determining whether the public participation undertaken for a Finance Bill is adequate, courts should consider this factor and bear in mind the *ratio decidendi* in ***BAT Case*** wherein this Court held that the adequacy of public participation has to be considered on a case-by-case basis. Consequently, they argued that it is unreasonable to require the National Assembly to subject any provisions introduced in a Finance Bill after public participation to fresh public participation, and to give reasons for adopting or rejecting each memoranda received. In particular, taking into account that with respect to the Bill, the National Assembly received over 1,000 memoranda which had to be considered within the limited period. In their view, such requirements would render it impossible for the National Assembly to pass a Finance Bill within the constitutional and statutory timelines. Besides, they added that the Court of Appeal failed to consider the contents of the supplementary affidavit sworn by the Clerk of the National Assembly on 17th August, 2023 which contained the proposals of the public and stakeholders as well as the report of the Committee demonstrating the reasons for acceptance and rejection of the views submitted by the public.

[39] As far as the appellants were concerned, public participation undertaken with respect to the Bill was adequate. Further, that the ***Pevans Case*** affirmed the position that Parliament has the power during the legislative process to make changes to a Bill post public participation. It was further submitted that the Bill was a culmination of a long, exhaustive and thorough multi-stakeholder process that ensured involvement from the grassroots level to the national government level; and that the National Treasury through the Budget Calendar for the FY 2023/2024 provided repeated instances for members of the public to provide feedback on the fiscal policy prior to and during the drafting of the Bill. Moreover, the appellants asserted that the additional sections in the Act were minor as they did not introduce new tax, create new rights or confer powers to any parties. They urged that the said amendments simply varied applicable tax rates and/or reclassified items that had already been proposed and put to members of the public

for their comments and responses. To that extent, the appellants posited that ***South Africa Iron and Steel Institute Others vs. Speaker of the National Assembly & Others*** [2023] ZACC 18 is distinguishable from the matter at hand.

[40] Furthermore, the appellants claimed that the Court of Appeal failed to take into account the further affidavit of Prof. Njuguna S. Ndung'u sworn on 17th August, 2023, the tenor of which is that revenue estimates were contained in the budget estimates for the FY 2023/2024. Accordingly, they contended that the High Court had arrived at the correct conclusion that the said estimates had been provided. It is urged that the Court of Appeal read Article 221(1) in isolation thereby arriving at the wrong conclusion that revenue estimates form part of the Appropriation Bill. Besides, the 5th appellant contended that the Court of Appeal erred in finding that the alleged shortcomings of the Appropriation Bill/Act affected the constitutionality of the Bill since the two are mutually exclusive.

[41] The appellants averred that while courts can intervene in policy matters to ensure compliance with the Constitution, they are precluded from usurping the policy-making role of the legislative and executive branches. In that regard, they cited ***Waweru & 3 Others (Suing as Official of Kitengela Bar Owners Association) & Another vs. National Assembly & 2 Others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 Others (Interested Parties)***, (Constitutional Petition No. E005 & E001 (Consolidated) of 2021) [2021] KEHC 9748 (KLR) and the ***Pevans Case.*** In their view, the Court of Appeal substituted the policy decision by the Executive and Legislature with its own.

[42] It was urged, in addition, that notwithstanding the enactment of the Affordable Housing Act, the questions of law raised with respect to the findings on the said levy which was introduced in the Act in issue requires this Court's consideration. More so, due to the implication that the High Court's finding would have on future legislations.

[43] It was the appellants' other position that the Court of Appeal failed to consider the impact or consequence of declaring the entire Act unconstitutional on the existing financial framework. Moreover, the court failed to issue an appropriate remedy, thereby creating uncertainty with far-reaching implications on the financial and legislative stability in the country. The case of the ***Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 Others***, Civil Appeal No. 224 of 2017; [2017] eKLR was cited for the proposition that courts must always consider public interest and balance all other factors when crafting a remedy.

In support of the appeal

(ii) 52nd Respondent's Submissions

[44] The 52nd respondent asserted that the **Petition No. E032 and E033 of 2024** are properly before Court as it is discernable that they are brought under Article 163(4)(a) of the Constitution. The said respondent also made reference to Article 159 of the Constitution to urge that this Court ought to administer justice without undue regard to procedural technicalities.

[45] The 52nd respondent further stated that there is no statute, policy or regulations that govern the manner in which public participation should be conducted. Nevertheless, it maintained that public participation with regard to the Act was sufficient pursuant to the prevailing framework. According to this respondent, should this Court uphold the appellate court's decision, it will undermine the independence of the Legislature. It postulated that Parliament ought to be allowed to determine how best to carry out its activities, including public participation and that, the new provisions incorporated into the Act after public participation were in response to the views/proposals raised during public participation, and therefore, the said provisions are not unconstitutional. To buttress the argument, it relies on the ***Pevans Case.***

[46] In conclusion, the 52nd respondent claimed that the Act contains provisions that have a direct positive impact on citizens, and will contribute to lowering the cost of

living. It also urged that in public interest, in the event the Court finds any flaws with the Act, it should invoke its inherent powers to craft appropriate reliefs.

In opposition to the appeal.

(iii) 1st Respondent's Submissions

[47] The 1st respondent supported the Court of Appeal's finding on the High Court's jurisdiction on policy matters. According to him, the requirement that any new amendments introduced into a Bill should be subjected to fresh public participation will not impede the Parliament's legislative role. Likewise, he concurred with the Court of Appeal's finding that the issue(s) on the affordable housing levy was moot. He stated that equally, the said issue was moot both before the Court of Appeal and this Court.

[48] It was his position that the Appropriation Act, 2023 constitutes a national budget which mandates inclusion of both estimates for revenue and expenditure as stipulated under Article 220 (1)(a) of the Constitution. He claimed that when the document titled '**2023/2024 *Estimates of Revenue, Loans and Grants'*** was tabled before the National Assembly together with the estimates of expenditure, only the latter estimates were considered, approved and enacted into law. He added that the estimates of revenue were neither processed nor mentioned and made reference to the **'Report of the Budget and Appropriation Committee on the Estimates of Revenue and Expenditure'** to contend that it did not contain any comments or references regarding estimates of revenue, but exclusively addressed the estimates of expenditure, contrary to Articles 221(3), (4) & (5) of the Constitution, as read together with Section 39(1) & (2) of the PFM Act. He argued that failure by the National Assembly to consider and enact the estimates of revenue into law vide the Appropriation Act, 2023 voided the entire 2023/2024 budget *ab initio*. Therefore, given that the Appropriation Act, 2023 did not include approved estimates of revenue there was no foundational basis for the Finance Act as the latter, in his view, cannot exist independently. In the circumstances, he postulated, the Act cannot purport to collect funds that have not been legally approved through inclusion in the

Appropriation Act, 2023. As a result, he claimed that both the Appropriation and Finance Acts, 2023 are void.

[49] He also maintained that the declaration of the entire Act as unconstitutional cannot cripple the government revenue collection through taxation as the said Act does not substitute or replace the tax statutes in force. In that regard, he stated that the prevailing situation in Kenya following the withdrawal of the Finance Bill, 2024 and the declaration of the Act in issue as unconstitutional meant that the Finance Act, 2022 remains in force.

(iv) 2nd Respondent's Submissions

[50] In reiterating his preliminary objection, the 2nd respondent referred this Court to our decision in ***Daniel Kimani Njihia vs. Francis Mwangi Kimani & Another***, SC Applic No. 3 of 2014; [2015] eKLR with respect to **SC Petition No. E031 of 2024**, and argued that, despite invoking the appellate jurisdiction under which it is moving this Court, it had failed to demonstrate how the Court of Appeal misinterpreted or misapplied specific provisions of the Constitution. Accordingly, he asked this Court to dismiss the consolidated appeal for lack of jurisdiction.

[51] He also opposed the consolidated appeal on more or less similar grounds as the 1st respondent.

(v) The 3rd, 4th, 5th, 6th, 11th, 13th, 14th, 15th -19th, 20th, 21st & 22nd Respondents' Submissions

[52] Similarly, the 3rd, 4th, 5th, 6th, 11th, 13th, 14th, 20th, 21st & 22nd respondents opposed the consolidated appeal on substantially the same grounds as the 1st and 2nd respondents save that the 3rd respondent submitted that the additional sections introduced in the Act by the National Assembly were not strictly amendments. Rather, that they were wholly new independent clauses which were unrelated to the original clauses in the Bill as originally published and subjected to the First and

Second Reading, and the public participation process. The 4th respondent added that once a statute is found to contravene the Constitution, the entire statute is invalidated, and the court's role is not to partially save it. Further, that a court is no way obligated to suspend a declaration of unconstitutionality of a statute as suggested by the appellants.

[53] The 11th respondent called upon this Court to invoke Rule 28(5) of the Supreme Court Rules and review the principles of public participation it had set out in the ***BAT Case***, and adopt the Court of Appeal decision to the effect that Parliament and other state agencies are obligated to give reasons for rejecting or adopting the proposals. In support of that proposition, he argued that Kenyans as the donors of sovereign power are expected to have a bigger say in the legislative process and their views ought to have been captured in the final legislation.

[54] The 11th respondent also submitted that the Court of Appeal was correct to hold that Sections 52 and 63 of the Act, which amended the Tax Procedure Act by inserting Section 23A to introduce a mandatory electronic tax system (eTIMS) are unconstitutional. He explained that the said provisions required persons carrying on business to issue electronic invoices through the system and maintain a record of stocks therein, and that non-compliance would attract a penalty of Ksh.1,000,000/-. He took the position that small businesses, especially those in remote or upcountry areas cannot afford to meet the penalty or procure computers and internet services. This, he argued, would discourage inclusivity and sustainable economic growth in the harsh economic times

(vi) The 24th – 27th Respondents' Submissions

[55] The above respondents averred that they appeared before the National Assembly during public participation and gave their comments on Section 26 of the Act which amended the Income Tax Act by increasing individual tax on income. They implored the Court to examine the objects, purpose and effect of Section 26 of Act to determine whether it conforms with the Constitution. They also urged that the increase of the rate of taxation has an effect of infringing on the right to human dignity, right not to

be held in servitude, right to property, right to fair labour practices and the economic rights of employees. In that regard, they claimed that the increment did not take into account the affected employees' financial obligations, which would potentially require restructuring of amounts due to third parties, placing employers in a fix. To buttress that line of argument ***Kenya Revenue Authority vs. Waweru & 3 Others; Institute of Certified Public Accountants & 2 Others (Interested Parties)*** Civil Appeal No. E591 of 2021 [2022] KECA 1306 (KLR) was cited. Likewise, they asserted that Section 26 of the Act was discriminatory and in contravention of Article 27 of the Constitution in so far as it varies new individual tax rates for earnings between Kshs. 6,000,000 to Kshs. 9,000,000 to 32.5% and income above Kshs. 9,000,000 at the rate of 35%.

Cross- Appeals

(vii) The 15th -19th & 22nd Respondents' Submissions

[56] The 15th - 19th and 22nd respondents contended that the tax measures in the Act were enacted in violation of firstly, Article 2(3) of the United Nations Declaration on the Right to Development, 1986 which requires States to promote the adoption of economic and social measures that improve the wellbeing of the people. Secondly, Article 8 of the Constitution which requires the State to take appropriate economic and social reforms to eradicate all social injustices. Thirdly, the Guiding Principles on Extreme Poverty and Human Rights, 2012 (par. 53) which provide that fiscal policies on revenue collection should adhere to equality and non-discrimination. It was also urged that that the tax measures in the Act are regressive as they tax low-income earners more than high-income earners, and go against the doctrine of non-retrogression which prohibits States from taking actions that reduce or limit socio-economic rights that are already being enjoyed. The respondents claimed that the said tax measures also called for increase of taxes on fuel and food during an economic slump. To support their argument, they cited ***Navtej Singh Johar vs. Union of India Ministry of Law and Justice***, AIR 2018 Supreme Court 4321. and ***Gurcharan Singh vs. Ministry of***

Finance (Department of Revenue), Government of India, W.P. (C) 5149/2021, CM No. 16554/2021. Accordingly, they submitted that the aforementioned foreign jurisprudence speaks to the fact that courts can intervene in matters of tax policies where they violate the Bill of Rights and the principles of good governance.

[57] It was their other position that the Court of Appeal erred in holding that a money Bill does not require the concurrence of the Speakers of both houses prior to its enactment. Besides, they urged that some of the provisions of the Act touched on county functions and powers. For instance, they cited Section 86 that amended Section 31 of the Alcoholic Drinks Control Act and Section 84 introducing the housing levy. It was asserted that Article 109(3) as read with Article 110(1)(a) of the Constitution is the ultimate determinant of which Bills must be presented for concurrence by the Speakers of both Houses to determine whether a Bill affects the functions and powers of county governments. Towards that end, it was argued that taxation affects both the National and County Governments and therefore, any Bill on taxation must be subjected to the concurrence of both levels of government.

(viii) The 38th - 49th Respondents' Submissions

[58] The said respondents took issue with the Court of Appeal dismissing their cross-appeal. They urged that the said cross-appeal had challenged the constitutionality of Section 47 (a) (xii) of the Act, and the same court had found the entire Section 47 as unconstitutional. Therefore, they averred that the dismissal was a complete departure from the *ratio decidendi* of the impugned judgment.

[59] Pertaining to the refund of taxes collected under the Act, the respondents maintained that it is the natural consequence of the declaration of the Act as unconstitutional. To support their case, they cited ***Norton vs. Shelby County*** 118 U.S. 425 91186) and ***Benjamin Leonard Mcfoy vs. United Africa Company Limited*** [1962] ALL ER 1169 to urge that an unconstitutional action is inoperative as though it had never been taken. Furthermore, they claimed that

every action, including collection of taxes, founded on an illegality or unconstitutionality suffers the same fate from the date of collection as it was unauthorized in the first place. As to whether that issue was raised at the High Court, the respondents submitted that the issue of refund arose out of the necessary implication of the declaration of the Act as unconstitutional by the Court of Appeal.

In support of the Cross-Appeals

(ix) The 20th & 21st Respondents' Submissions

[60] The 20th and 21st respondents supported the 15th -19th and 22nd respondents' cross appeal on similar grounds as the said respondents.

In opposition to the Cross Appeals

(x) The Appellants' Submissions

[61] In opposing the cross appeal, the appellants reiterated their submissions in support of the consolidated appeal. However, the 5th appellant added that the prayer for refund of taxes was never pleaded, canvassed or determined in the High Court. In any event, the said appellant maintained that by virtue of the presumption of constitutionality of statutes any revenue which was collected pursuant to the Act is deemed to have been properly collected. In that regard, reference was made to ***Ndyanabo vs. Attorney General*** [2001] EA 495.

(xi) Amicus Curiae Submissions

[62] By a ruling dated 30th August, 2024 Gautam Bhatia was admitted to these proceedings as an *amicus curiae*. The amicus curiae's brief touched on two issues: *whether the national value of public participation entails an obligation upon State organs to give reasons in the event that they choose to reject the suggestions that have emanated from the public; and if, after one round of public participation, a Bill is substantively amended by the National Assembly, whether there is an obligation to subject the amended provisions and/or new provisions*

to further public participation. The *amicus* wholly agreed with the determination of the Court of Appeal on those issues.

[63] He submitted that more recent Constitutions have moved away from the assumption that the role of the people is limited to periodically choosing their representatives and authorizing them to act on their behalf. He argued that there must be forms of accountability and participation that are direct and continuing. In other words, that the people must be involved in the process of constitutional change, law making, and administrative action. He highlighted that the architecture of power created by the Pre- 2010 Constitution made the effective practice of plural politics impossible. He added that public participation was one of the fundamental demands at the heart of the movement for a new constitutional settlement, and in particular, the Draft Constitution of Kenya, 2004 (*Bomas Draft*), contained an entire chapter on public participation. He pointed out that one of the reasons for rejection of the Draft Constitution of Kenya, 2005 (*Wako Draft*) was the exclusion of public participation, and an attempt to impose a top-down Constitution on the People.

[64] The *amicus* stated that this Court has always been guided by the overarching principle that if the right to public participation means anything it is that the People must be treated as active agents in shaping decisions about public power, and not as passive receptacles, whose role is simply to affirm decisions that have already been taken by public authorities. He submitted that in the ***Attorney-General & 2 Others vs. Ndii & 79 Others; Dixon & 7 Others (Amicus Curiae)*** (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (**the *BBI Judgment*),** it is that principle that guided the Court in interpreting the scope and ambit of Article 257 of the Constitution.

[65] He enumerated the following elements as doctrinal signposts for public participation: *the Constitution's commitment to representative democracy means that the results of public participation are not binding upon the representatives; however, that being the case, it becomes particularly easy for legislators to*

reduce the public participation requirement to a cipher, by complying with the formal processes for public participation, but – in substance – ignoring the public's views entirely; it is therefore crucial for there to exist certain built-in procedural and substantive safeguards that ensure meaningful engagement; and these safeguards ought not to be of such a nature that the legislative process is entirely stymied, or brought to a near-complete halt.

[66] On the obligation to give reasons, the *amicus* asserted that this is a vital safeguard that ensures that public participation is meaningful. He added that whereas views from public participation cannot be binding on the Legislature, the challenge is to ensure that the Legislature meaningfully engages with people's views, and does not simply record them as a pro-forma exercise, while ignoring them in substance. Further, that the obligation requires a form of public justification, which he stated carries crucial benefits that include: mitigating power imbalance between the representatives and the people, and provides a barrier against arbitrary or *mala fide* decision-making; increases transparency and accountability in decision-making, which is the purpose of the public participation guarantee; and ensures that the people have been reasonably engaged, and not ignored. He equated the obligation to give reasons as the legislative equivalent of the doctrine of meaningful engagement applied in eviction cases and the doctrine of proportionality used to assess the constitutionality of rights-infringing legislation. The *amicus* submitted that the obligation to give reasons is part of the "culture of justification," which is an integral element of transformative constitutionalism.

[67] He averred that trivial or clerical amendments do not need to be put through another round of public participation; nor do amendments that have been made in response to the results of public participation. In conclusion, he submitted that there is an obligation upon State organs to give reasons for rejecting the results of a public participation process and this obligation need not extend to every single comment received. He however noted that the requisite State organ should be free

to synthesize different questions, and to respond thematically. He also posited that if a bill has received substantive alterations, the amended portions must have a second round of public participation before the publication of the Bill.

D. ISSUES FOR DETERMINATION

[68] Having considered the pleadings, the impugned judgment, and the parties' respective submissions, this Court framed the following nine issues as arising for its determination:

i. *Whether the Court has jurisdiction to hear and determine SC Appeals Nos. E032 and E033 of 2024.*

ii. *Whether the Finance Act, 2023 was subject to the concurrence process under Article 110(3) of the Constitution.*

iii. *Whether fresh public participation should be undertaken where Parliament amends provisions of a Bill or introduces new provisions in a Bill after initial public participation.*

iv. *Whether Parliament has an obligation, upon conclusion of the public participation exercise, to provide detailed reasons for accepting or rejecting views, and whether failure to give reasons vitiates the legislative process and invalidates the legislation passed.*

v. *Whether the Appropriation Act, 2023 contained the estimates of revenue.*

vi. *Whether the question of the validity of Section 84 of the Finance Act, 2023 (Affordable Housing Levy) is moot.*

vii. *Whether a court has jurisdiction to test the legality of policy positions taken by the Executive and Parliament in the legislative*

process; and if so, whether the impugned sections of the Finance Act relating to various tax legislations are unconstitutional.

viii. *What considerations should a Court take into account in declaring a statute as unconstitutional, and what consequential orders ought a court issue upon making a declaration of unconstitutionality of a statute or parts thereof?*

ix. *What remedies should issue?*

E. ANALYSIS

i. Whether the Court has jurisdiction to hear and determine SC Appeals Nos. E032 and E033 of 2024

[69] As a matter of practice, this Court has to independently satisfy itself that any appeal brought pursuant to the Court's jurisdiction under Article 163(4) of the Constitution or under any other provision is properly before it. However, in the instant case, the jurisdiction of this Court to hear and determine **SC Petition Nos. E032 & E033 of 2024** has been questioned by the 2nd respondent who raised a preliminary objection. The gist of the objection is that the appeals did not specify which limb of this Court's appellate jurisdiction, as delineated by Article 163(4), they are anchored on. On their part, the 3rd, 4th and 5th appellants admitted the omission but nonetheless, contended that it was evident from the holistic reading of the appeals that they were filed under Article 163(4)(a) of the Constitution, and that the constitutional questions therein were considered in the superior courts below. In addition, it was argued that the two appeals in issue had since been consolidated with **Petition No. E031 of 2024.**

[70] Starting with the last argument on consolidation, it goes without saying that an order consolidating cases before a court, such as in this case, is purely a procedural issue. This Court highlighted the purpose of consolidation in ***Law***

Society of Kenya vs. Centre for Human Rights & Democracy & 12 Others, SC Petition No 14 of 2013; [2014] eKLR, declaring that:

> ***"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties."***

Consolidation is meant to avoid multiplicity of suits by enabling a court to dispose at the same time matters that are related and arise from the same set of facts or subject matter, raise similar issues of law, involve the same parties, and ensue from the same judgment. In no way can such a procedural step be understood to be sanitizing anything in the consolidated matters that would have otherwise been found to be an anomaly in the absence of such a consolidation. As such, the argument by the 3rd, 4th and 5th appellants that this Court has jurisdiction to determine their appeals simply because they are consolidated with **Petition No. E031 of 2024** in which this Court's jurisdiction has properly been invoked is untenable.

[71] Be that as it may, we confirm from the record that both **SC Petition No. E033** and **E034 of 2024** are expressed to be brought pursuant to *inter alia*, *"Article 163(4)(a) & (b)"* of the Constitution. The two limbs of the appellate jurisdiction of this Court under Article 163(4)(a) and (b) of the Constitution are distinct, either 'as of right' on the constitutional issues; or on 'matters of general public importance', respectively. Consequently, a litigant is under strict obligation to categorize his or her case, indicating the constitutional or legal category under which he or she is moving the Court. Moreover, in a litany of cases, we have repeatedly cautioned advocates and litigants alike, who desire to come to this Court, that they must specifically invoke and state the correct provisions. Failure by a party to bring their appeal within the jurisdictional ambit of either limb has been met with the fate of dismissal. See ***Suleiman Mwamlole Warrakah & 2 Others vs. Mbwana & 5 Others*** (Petition 12 of 2018) [2018] KESC 76 (KLR)

and ***Daniel Kimani Njihia vs. Francis Mwangi Kimani & Another***, SC Application No. 3 of 2014; [2015] eKLR.

[72] This Court has consistently been emphatic regarding this jurisdictional prerequisite for various reasons; first, to avoid leaving it to conjecture for the Court to wander in the maze of pleadings to ascertain by way of elimination which of the two limbs of Article 163(4) a litigant intends to invoke. See ***Ibren vs. Judges and Magistrates Vetting Board & 2 Others*** (Petition 19 of 2018) [2018] KESC 75 (KLR). Second, the applicable considerations and principles for each of the limbs are different. See ***Fahim Yasin Twaha vs. Timamy Issa Abdalla & 2 Others,*** SC Application No. 35 of 2014; [2015] eKLR. Finally, the rules of pleadings dictate that parties succinctly define the issues for determination to avoid the element of surprise to the other parties. See ***Sonko vs. County Assembly of Nairobi City & 11 Others*** (*supra*).

[73] However, taking into account the two appeals in issue, we note that they raise constitutional questions that arose and were considered and determined by the superior courts below. Specifically, the grounds raised in **Petition No. E032 of 2024** involve the interpretation of the mandate of the High Court under Article 165(3) of the Constitution; whether the sections of the Act that were introduced post-public participation were enacted in a manner that violated Articles 10(1) & (2) and 118 of the Constitution; and whether the Act violated Articles 220(1)(a) and 221 of the Constitution. Equally, **Petition No. E033 of 2024** raises grounds involving the interpretation of whether the provisions which were introduced to the Act post-public participation contravened Articles 10(2) and 118 of the Constitution, and whether there was a breach of Articles 220 and 221 of the Constitution in the enactment of the Act. All these questions were the subject of judicial determination before the superior courts below. Moreover, we find that the said questions are of grave public interest with far-reaching ramifications under our constitutional framework.

[74] In this regard, the decision in ***Ibren vs. Judges and Magistrates Vetting Board & 2 Others*** *(supra)* is distinguishable. Therein, not only had the appellant failed to properly invoke this Court's jurisdiction but also there were clearly no questions of constitutional interpretation or application before the superior courts below. However, the circumstances of the instant case, are similar to ***Karua vs. Independent Electoral and Boundaries Commission & 3 Others*** (Petition 3 of 2019) [2019] KESC 26 (KLR) wherein despite the appellant failing to properly invoke this Court's jurisdiction, it was demonstrated, without the Court wandering in the maze of pleadings, or relying on conjecture that the appeal raised issues of constitutional interpretation. In the instant case, the appellants have demonstrated as directed by this Court in ***Lawrence Nduttu & 6000 Others vs. Kenya Breweries Ltd. & Another,*** SC Petition No. 3 of 2012; [2012] eKLR, how their respective appeals involved application or interpretation of the Constitution and the manner in which the Court of Appeal erred in determining those very questions. To that extent therefore, it is our finding that this Court has jurisdiction to determine the two appeals under Article 163(4)(a) of the Constitution. However, we must emphasize that this Court abhors inelegant drafting and will not hesitate to strike out, as it has done before, pleadings that makes it difficult to discern which limb of Article 163(4) is being invoked or where there are obvious and glaring errors made in a pleading.

ii. Whether the Finance Act, 2023 was subject to the concurrence process under Article 110(3) of the Constitution

[75] Both the High Court and Court of Appeal unanimously found that the Finance Act, 2023 is a money Bill, and therefore, not subject to the concurrence process under Article 110 (3) of the Constitution. In particular, the Court of Appeal pronounced itself as follows:

> ***"... application of Article 110 (3) of the Constitution to Bills concerning counties and the exclusion of the same provision from application to Bills concerning the National***

Government rendered Article 110(3) of the Constitution applicable only to Bills concerning counties, and that it is to these Bills alone that the concurrence process would be subjected."

[76] Without repeating the parties' submissions, the appellants agreed with the superior courts below on this aspect. On their part, the respondents opined that there is a distinction between introduction and consideration of Bills in Parliament. The respondents also argued that all Bills, including the Finance Bill must undergo the concurrence process. Besides, they reiterated that the Bill contained clauses concerning County Government and the Senate should have been involved in its enactment. As a result, we find that two issues arise from the parties' arguments, *to wit*, whether the Bill was a money Bill, and whether the same was subjected to the concurrence process.

[77] On whether the Bill is a money Bill, we are of the view that this calls for the interpretation of the Bill to discern the intention of the Legislature. This further entails consideration of the words employed by the Legislature, as appreciated in ***Law Society of Kenya vs. Attorney General & Another***, SC Petition No. 4 of 2019, [2019] KESC 16 (KLR), and the context thereof as aptly set out in the Supreme Court of India's often-cited case of ***Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and Others*** (1987) 1 SCC 424.

[78] The preamble to the Act provides that, '*it is an Act of Parliament to amend the laws relating to various taxes and duties; and for matters incidental thereto'*. The primary objective of the Act is to amend provisions of statutes which relate to various taxes and duties. Additionally, our perusal of the Act reveals that it introduced a raft of tax measures, amendments and repeal of various provisions of existing tax legislations, variation and repeal of charges to public funds, investment and appropriation of public funds, and administrative procedures in relation to raising and imposition of taxes. Consequently, we concur with and

affirm the finding by the superior courts below that the substratum of the Bill is in line with Article 114(3) of the Constitution, and therefore, it is a money Bill. Equally, we concur with the superior courts below that notwithstanding the fact that the Bill contained extraneous matters which fell outside the parameters of a money Bill, that by itself did not change its character as a money Bill. Further, we agree with the determination of the Court of Appeal that the inclusion of a non-fiscal matter in a money Bill is only permissible if it is incidental or ancillary to a matter specified in sub-clauses 114 (3)(a) to (d). It is not enough for such a matter to be merely subordinate or remotely related but there must be a clear nexus to the main subject.

[79] Having found that the Bill is a money Bill, the next issue is whether it was subjected to the concurrence process. Article 110(3) explicitly demarcates the concurrence process with respect to Bills as herein under –

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

[80] We have taken note of the communication between the Speaker of the National Assembly, Hon. Moses Wetangula, and the Speaker of the Senate, Hon. Amason Kingi. By a letter dated 2nd May, 2023 the Speaker of the National Assembly informed the Speaker of the Senate of the publication of the Bill, and the fact that it did not concern County Government. In response, vide a letter dated 3rd May, 2023 the Speaker of the Senate concurred that the Bill does not concern County Government. We are also alive to the fact that the Speaker of the Senate later on wrote a letter dated 15th June, 2023 contending that the Bill was a Bill concerning County Government, thereby reversing his position expressed in the earlier letter. In turn, the Speaker of the National Assembly by a letter dated 20th June, 2023 reminded the Speaker of the Senate of the previous correspondence exchanged between them which jointly resolved that the Bill does not concern

County Government. Subsequently, the Speaker of the Senate wrote a letter dated 21st June 2023, withdrawing and repudiating his letter dated 15th June, 2023. By the very same letter, the Speaker of the Senate reiterated that the Bill does not concern County Government. While it is not clear why the Speaker of Senate had at one point a change of heart, we find that the summation of the correspondence between the two Speakers clearly and explicitly demonstrate that there was concurrence that the Bill does not concern County Government.

[81] Having pronounced ourselves as herein above, the 15th-19th & 22nd respondents' cross appeal as far as the issue of lack of concurrence with respect to the Bill fails.

iii. Whether fresh public participation should be undertaken where Parliament amends provisions of a Bill or introduces new provisions in a Bill after initial public participation

[82] The Constitution promotes the ideals of self-government and self-rule, as reflected in Article 4(2), which establishes Kenya as a multi-party democracy. Article 1(1) declares that the sovereign power belongs to the people of Kenya; and that that power can be exercised only in accordance with the Constitution. Article 1(2) further proclaims that the people may exercise their sovereign power either directly or indirectly through their democratically elected representatives. In its direct democracy aspect, the Constitution provides for citizens to participate in referenda on certain constitutional amendments as outlined in Article 255. Additionally, it promotes a participatory approach to governance, with Article 10(2)(a) identifying '*democracy and participation of people*' as national values and principles of governance. This is reinforced by specific constitutional obligations, such as the duty imposed on Parliament under Article 118(1)(b) to facilitate public participation and involvement in its legislative and other business.

[83] Conversely, the Constitution also provides for indirect democracy. In that regard, Article 1(3) states that sovereign power is delegated to specified State

organs, including Parliament and the legislative assemblies of County Government. Moreover, Article 94(1) of the Constitution provides that *"[t]he legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament"*. This speaks to the representative aspect of democracy, which grants elected representatives the discretion to make legislative decisions on behalf of the people they represent with the legislative discretion being balanced by the Constitution's commitment to participatory governance.

[84] This constitutional framework acknowledges that, while the complexities of a modern state require decision-making by representatives, these processes must involve meaningful public participation to achieve democratic legitimacy. These two facets of our democracy should not be seen as conflicting with each other but as complementary. By integrating representative and participatory democracy, the Constitution upholds the principle that citizens have a right to participate in governance and that decisions should be rooted in public reasoning and deliberation. This approach ensures that the government remains responsive to its people, mandating the active involvement of citizens in governance processes.

[85] Since the promulgation of the 2010 Constitution, Kenyan courts have developed rich jurisprudence on the essence, scope, and application of public participation as a principle of governance in Kenya. In particular, this Court has in the past considered the centrality of the principle of public participation and laid down signposts, coordinates, guardrails and search lights to be used by courts when adjudicating and determining cases on alleged infringement and violation of the value and principle of public participation.

[86] For instance, ***In the Matter of the National Land Commission*** (Advisory Opinion Application 2 of 2014) [2015] KESC 3 (KLR), this Court held that public participation constituted one of the checks and balances in the discharge of the obligations that the Constitution has assigned various government

institutions. In the words of *Mutunga, CJ & P.* (Concurring Opinion) at paragraph 352:

> ***"The participation of the people is a constitutional safeguard, and a mechanism of accountability against State organs, the national and county governments, as well as commissions and independent offices. It is a device for promoting democracy, transparency, openness, integrity and effective service delivery. During the constitution-making process, the Kenyan people had raised their concerns about the hazard of exclusion from the State's decision-making processes. The Constitution has specified those situations in which the public is assured of participation in decision-making processes. It is clear that the principle of public participation did not stop with the constitution-making process; it remains as crucial in the implementation phase as it was in the constitution-making process."***

[87] In one of its leading decisions on public participation, this Court in the ***BAT Case*** underscored that public participation and consultation is a living constitutional principle that goes to the tenet of the sovereignty of the people. The Court observed at paragraph 96 that:

> ***"... we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments."***

[88] The Court then proceeded to lay down the guiding principles for public participation as outlined below:

> "
>
> ***(i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.***
>
> ***(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.***
>
> ***(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.***
>
> ***(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.***
>
> ***(v) Public participation is not an abstract notion; it must be purposive and meaningful.***
>
> ***(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case-to-case basis.***

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

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

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

a. Clarity of the subject matter for the public to understand;

b. Structures and processes (medium of engagement) of participation that are clear and simple;

c. Opportunity for balanced influence from the public in general;

d. Commitment to the process;

e. Inclusive and effective representation;

f. Integrity and transparency of the process;

g. Capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

[89] It is important to point out at the outset that in the matter under consideration in this consolidated appeal, the superior courts below established

and were in agreement that at the early stages of the legislative process, the Bill was subjected to sufficient public participation. This finding was not challenged in the consolidated appeal or cross appeals before this Court. The only two aspects of public participation that have been challenged relate to the contention that after the public participation exercise, the National Assembly introduced into the Bill new provisions, which amendments were not subjected to public participation and secondly, that the National Assembly did not assign reasons for accepting and rejecting views received in the course of public participation. This last question is discussed separately later in this judgment as an independent issue.

[90] Upon reviewing the submissions and pleadings before the Court, it is our considered view that to adequately address the framed question, a number of sub-questions need to be answered by the Court. These sub-questions are:

a) *Should substantive amendments consequent to the process of public participation and intended to give effect to views and suggestions from the public participation process be subjected to a fresh round of public participation?*

b) *Is a Finance Bill a time-bound piece of legislation? If so, is it reasonable to require the National Assembly to conduct a fresh round of public participation for amendments giving effect to proposals from an earlier public participation exercise given the time-sensitive nature of the legislation?*

c) *Did Sections 18, 21, 23, 32, 38, 44, 69, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 of the Act fail to undergo the entire legislative process, and are therefore unconstitutional?*

We will consider each of these sub-questions in turn.

a) Whether a fresh round of public participation is required when new provisions are introduced in a bill through amendments after public participation has already taken place

[91] The superior courts below agreed on the fact that there were new provisions, which did not undergo public participation as they were introduced into the Bill during the Committee stage. However, the two superior courts below parted ways on whether these amendments should have undergone fresh public participation. It is important to point out at the outset that the Court of Appeal's judgment refers to 18 new provisions in certain parts of the impugned judgment, and in other parts to more than 18 new provisions. For clarity, the disputed provisions are 21 in number, falling under two categories. The first category are 17 new provisions which were not in the original Bill. The said provisions were enacted as Sections 18, 21, 23, 32, 38, 44, 69, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 of the Act. The second category are 4 provisions, that is, Sections 24, 26, 47, and 72 of the Act, which though were in the original Bill, were subjected to extensive amendments before enactment.

[92] For the High Court, there was no obligation for fresh public participation on amendments to Bills. It held that it was bound by the ***Pevans Case*****,** where the Court of Appeal held that once the National Assembly has heard the views of members of the general public and stakeholders on a Bill, it is not precluded from effecting amendments to the Bill during debate before it is passed. Further that, the Court of Appeal found a contrary position would amount to curtailing the legislative mandate of the National Assembly. Of relevance, the High Court at paragraph 157 of its judgment stated–

> "***By its nature public participation is intended to explore new issues that may be raised, interrogate and understand existing ones which may lead to revision or refinement of the Bill through new proposals and amendments. We are bound by the holding in Pevans case (supra) that once the***

National Assembly has heard the views of members of the general public and stakeholders on the Bill, it is not precluded from effecting amendments to the Bill during debate before it is passed, as a contrary position would amount to curtailing the legislative mandate of the National Assembly. The National Assembly was not required to re-submit the amendments to public participation on narrow issues that were within what was contemplated within the Objects and Memorandum of the Bill."

[93] The Court of Appeal on its part disagreed with the above finding by the High Court and held that those amendments ought to have undergone fresh public participation as they were '*substantive*' amendments. In the relevant part at paragraph 159 of the Court of Appeal's judgment it held:

"It appears the High Court never interrogated the facts before the High Court in the Pevans case. Clearly, the facts in the Pevans case as highlighted above are distinguishable from the facts in these appeals. Unlike in the Pevans case, in the instant case, totally new provisions of the law which were not subjected to public participation and were not contained in Finance Bill, 2023 which was subjected to public participation found their way into the final enactment. Contrary to the law, the 18 new provisions did not go through the entire legislative stages. They were not subjected to the First and Second Reading. These are impermissible serious legislative flaws. Therefore, their purported enactment into law was imperfect and a mockery to the legislative process contemplated in the Constitution and the Standing Orders."

[94] Before us, the appellants contended that the Court of Appeal overturned its decision in the ***Pevans Case*** while the respondents contended that the Court of Appeal merely distinguished its earlier pronouncement. We have considered the Court of Appeal's judgment in the ***Pevans Case*** and observe that in the relevant holding, the Court of Appeal categorically expressed itself as follows:

> ***"It is common ground that up to the point when the National Assembly passed the Bill on 30th May 2017, it was preceded by adequate public participation. As published, the Bill proposed a tax rate of 50%. Proposals were made, ranging from adopting a tax of 50%, 35% and retaining the tax as it was under the 2016 Finance Act. With respect, we agree with the learned judge that there was no need for further public participation on the narrow issue of the percentage of the tax. It must be appreciated that after the National Assembly has heard the views of members of the public and industry stakeholders on a Bill, it is not precluded from effecting amendments to the Bill, before finally passing it. Those amendments do not necessarily have to agree with the views expressed by the people who have been heard, so long as the views have been taken into account. See Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others (2013) eKLR. In our view, it would bring the legislative process to a complete halt and undermine Parliament's ability to discharge its constitutional mandate if, after having facilitated public participation on a Bill, Parliament is required to adjourn its proceedings every time a member proposes an amendment to the Bill, so that further public participation can take place on the particular proposed amendment.*** [Emphasis added]

It is on the authority of this statement that the High Court concluded that, being bound by that decision, no further public participation was required for amendments made subsequent to public participation.

[95] On the application of the doctrine of *stare decisis*, the High Court cannot be faulted for relying on the principle established in the ***Pevans Case***, which specifically indicated that a fresh round of public participation was not necessary for amendments made to a Bill after the public participation process. While the Court of Appeal was within its rights to distinguish the circumstances of the impugned case from those in the ***Pevans Case***, courts should consider the legitimate expectations that accrue to duty bearers based on previously established legal pathways.

[96] In the ***BBI Judgment***, *Koome CJ & P*, observed as follows on the due path that courts should follow when overruling or distinguishing previous decisions that duty bearers had already relied upon. She held thus:

> ***"[341] My view is that common law doctrines like the stare decisis doctrine must be interpreted in a manner that promote and give effect to the values and principles of the Constitution. In the instant case, the two superior courts below, unfortunately did not take into account the value and principle of the rule of law enshrined in Article 10(2)(a) that commands compliance with court orders before making a decision that has the effect of penalizing IEBC for relying on a declaratory finding by a High Court. IEBC cannot be faulted as its actions then were supported by the Isaiah Biwott Case. Although the said decision was not binding on the High Court or the Court of Appeal, it created a legitimate expectation by IEBC that carrying out business with three Commissioners complied with the law.***
>
> **...**

[343] The significance of the above is that where a state organ or private individual acts in compliance with a court decision, like IEBC did in this case, it ought not be punished by a subsequent court's decision declaring such actions illegal based on a differing interpretation of the law.

[344] In circumstances where a High Court in a later case, like in the instant case, disagrees with an earlier finding by another bench of the High court, the best approach is for the court to craft and mount appropriate remedies taking into account contextual considerations like the reliance placed by public bodies and private individuals on earlier court decisions. In such instances, the High Court ought to opt for the remedy of "prospective overruling" or "suspending the declaration of invalidity" and stipulate that the effect of its decision will apply prospectively."

[97] We would add that courts should be sensitive and alert to the need to ensure that undue burden is not imposed on duty bearers for actions taken that can be deemed to flow from a reasonable reading of past decisions from the courts. In such circumstances, when a court distinguishes its past decisions in a manner that can be read strictly to be a departure from past pronounced position in law, it would be appropriate for the court to stipulate that such pronouncements will apply prospectively.

[98] In comparative practice, the Supreme Court of India has recently in the case of ***Mineral Area Development Authority & Ano. vs. M/S Steel Authority of India & Ano.***, Civil Appeal Nos. 4056-4064 of 1999 [2024 INSC 607] held as follows:

"***The doctrine of prospective overruling is applied when a constitutional court overrules a well-established precedent***

by declaring a new rule but limits its application to future situations. The underlying objective is to avert injustice or hardships."

[99] Similarly, the United States' Supreme Court in ***Chevron Oil Company vs. Huson***, 404 US 97 (1971) identified three separate factors to be considered while deciding the applicability of prospective overruling to be: "**(i)** ***the decision to be applied prospectively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not foreshadowed; (ii) the court must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard the operation of the rule; and (iii) whether the application of non-retroactivity avoids substantial inequitable results, injustice or hardships."*** [Emphasis added]

[100] Accordingly, given the *ratio decidendi* in the ***Pevans Case***, if the court intended to modify its position, it should have indicated so directly and addressed the question whether its new position would apply prospectively. It was therefore in error for the court to make an about-turn over three years after making the original decision without affording duty bearers sufficient time to adjust to the new position.

[101] We appreciate that no party before this Court contests the finding that there were 17 new provisions introduced to the Bill in the post-public participation phase of the law-making process. Where the parties disagree and what is in contestation before this Court, is the purport and tenor of these amendments, and whether it is a legal requirement that when such new provisions are introduced mid-way through the legislative process, after the initial public participation process, such amendments should be subjected to a fresh round of public participation.

[102] The Constitution provides for public participation in the law-making process by stipulating in Article 118(1) as follows:

> *"118(1) Parliament shall—*
>
> (a) *conduct its business in an open manner, and its sittings and those of its committees shall be in public; and*
>
> (b) *facilitate public participation and involvement in the legislative and other business of Parliament and its committees."*

[103] The above provision imposes a duty on Parliament to facilitate public participation and involvement in the legislative process. We note that to give effect to this constitutional edict, the National Assembly has through its Standing Order No. 127 on '*Committal of Bills to Committee and Public participation*' provided for public participation in the following terms:

> "
>
> *(1) A Bill having been read a First Time shall stand committed to the relevant Departmental Committee without question put.*
>
> *(1A) Save for a Finance Bill, the Speaker may refer various provisions of a Bill proposing to amend more than one statute in its principal provisions to the relevant Departmental Committees in accordance with their mandates.*
>
> *(2) Notwithstanding paragraph (1), the Assembly may resolve to commit a Bill to a select committee established for that purpose.*
>
> *(3) <u>The Departmental Committee to which a Bill is committed shall facilitate public participation on the Bill through an appropriate mechanism, including</u>—*
>
> *...*
>
> *(3A) The Departmental Committee shall take into account the views*

and recommendations of the public under paragraph (3) in its report to the House.

(4) Subject to Standing Order 129 (Second Reading of a Bill to amend the Constitution) the Chairperson of the Departmental Committee to which a Bill is committed or a Member designated for that purpose by the Committee shall present the Committee's report to the House to inform debate within thirty calendar days of such committal and upon such presentation, or if the Committee's report is not presented when it becomes due, the Bill shall be ordered to be read a Second Time on such day as the House Business Committee shall, in consultation with the Member or the Committee in charge of the Bill, appoint.

(4A) The Speaker may extend the period for public participation under paragraph (4) where various provisions of a Bill proposing to amend more than one statute in its principal provisions are referred to separate Departmental Committees under paragraph (1A).

(4B) Paragraph (4) shall not apply to or in respect of—

a) an Appropriation Bill, a Supplementary Appropriation Bill, a Finance Bill, a Consolidated Fund Bill, a County Allocation of Revenue Bill, a Division of Revenue Bill, an Equalization Fund Appropriation Bill and a County Governments Additional Allocations Bill; or

b) a Bill to amend the Constitution in respect of its Second and Third Reading.

(5) If for any reason, at the commencement of the Second Reading the report of the Committee has not been presented, the

Committee concerned shall report progress to the House and the failure to present the report shall be noted by the Liaison Committee for necessary action.

(6) Despite paragraph (1)—

a) the Speaker may direct that a particular Bill be committed to such committee as the Speaker may determine.

b) *a Consolidated Fund Bill, an Appropriation Bill or a Supplementary Appropriation Bill shall be committed to the Budget and Appropriation Committee."* [Emphasis added]

[104] It is with all these facts in mind that we must now turn to consider and determine whether the National Assembly was under an obligation to subject the new provisions of the Bill introduced after the public participation process to a fresh round of public participation. In order to determine whether the National Assembly met the obligations imposed on it under Article 118(1) of the Constitution, the principles laid down by this Court in the ***BAT Case*** take centre stage. In particular, the following passages extracted from that judgment are apposite:

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

Further, the Court explained that:

> "***Public participation is not an abstract notion; it must be purposive and meaningful."***

[105] The implication of the foregoing principles is that the process of public participation ought not be reduced to a mere symbolic box-ticking ritual with no influence in the legislative process. We are also of the considered view that the approach we take on this question should be one that ensures that public participation is '*purposive and meaningful*' and not one that empties the Constitution of its meaning. Bearing in mind that a constitution does not subvert itself, it would be a contradiction for the Constitution to provide for public participation, and at the same time allow totally new provisions, unrelated to the provisions that had been subjected to public participation to be introduced midway through the legislative process by way of amendments, as well as insulate such provisions from the requirement of public participation. This would create room for mischief whereby a duty bearer can withhold some provisions from being subjected to public participation, only to introduce such provisions at the tail-end of the law-making process. This could not have been the intention of the framers when they introduced in the Constitution the concept of public participation.

[106] In addressing a similar question, the High Court in ***Kenya Bankers Association vs. Attorney General & Another; Central Bank of Kenya (Interested Party)***, HC Petition No. 427 of 2018; [2019] eKLR addressed the need to distinguish between minor (narrow) amendments and substantive amendments to determine whether a provision introduced post-public participation ought to undergo a fresh round of public participation. The High Court took the position that unlike minor amendments, substantive amendments to a Bill post public participation required further public participation. It held thus at paragraph 71:

> "***The averment that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. However, where major amendment is introduced and where is contrary to the purpose of the Bill the position may be different.***"

[107] We agree with the above persuasive decision of the High Court. We are also persuaded by the comparative decision of the Constitutional Court of South Africa in ***South African Veterinary Association vs. Speaker of the National Assembly and Others*** (CCT27/18) [2018] ZACC 49 which appreciated a distinction between what it considered 'material' amendments that would require further public participation, and what it called 'technical or semantic' amendments that would not require further public participation.

[108] Flowing from the foregoing, it emerges that in determining whether a new provision or an amendment to a Bill in the post-public participation phase should be subjected to a fresh round of public participation, a number of principles ought to be taken into account: Firstly, the breadth and character of amendments to a Bill post-public participation is of importance. There is a distinction between substantive (material) amendments and minor (trivial/inconsequential/ clerical/incidental) amendments. Secondly, the breadth and character of amendments form a basis for a consideration of whether or not Parliament has an obligation to conduct further amendments. Thirdly, as an established rule, where minor amendments have been made to a Bill, further public participation on those amendments would be unnecessary.

[109] In addition, we find that it is important to demarcate what is meant by a substantive amendment. Roger Rose, in **the Commonwealth Legislative Drafting Manual** (2017, Commonwealth Secretariat) at p. 115, observes that "***substantive amendments make the changes necessary to implement proposed changes in policy***". This point is evident in the approach by the Supreme Court of India in ***Sree Sankaracharya University of Sanskrit and others vs. Dr. Manu and another***, 2023 INSC 539, where a substantive amendment is defined as one intended to change the law, as opposed to merely clarifying or explaining the previous law.

[110] Similarly, H. Khurana and S. Vasudevan, in **Clarificatory Amendments to Indian Tax Laws** (2022, International Tax Review), describe 'substantive

amendments' as those that "***modify existing rights, impose new obligations, or impose new duties, or attach a new disability***". Additionally, the Supreme Court of Canada, in ***Bathurst Paper Limited vs. Minister of Municipal Affairs of New Brunswick***, [1972] S.C.R. 471, held that an amendment is presumed to be substantive unless it is shown that only language improvements, meant solely to enhance drafting, were intended. Therefore, a substantive amendment is to be understood as one that changes the substance or meaning of an existing provision, particularly by addressing policy questions, altering the purpose, scope, or content of a provision, by adding new provisions or removing old ones.

[111] In contrast, V.C.R.C. Crabbe in **Legislative Drafting** (Cavendish Publishing, 1993) at p. 189, defines 'minor amendments' drawing from section 2 of the English statute The Consolidation of Enactments (Procedure) Act, 1949, to mean "***amendments of which the effect is confined to resolving ambiguities, removing doubts, bringing obsolete provisions into conformity with modern practice, or removing unnecessary provisions or anomalies that are not of substantial importance, and amendments designed to facilitate improvement in the form and manner in which the law is stated ...***". Similarly, Lawrence E. Filson and Sandra L. Strokoff, in **The Legislative Drafter's Desk Reference** (CQ Press, 2008) at p. 60, further differentiate substantive amendments from technical and conforming amendments by noting that "***technical and conforming amendments are never substantive—they are merely the device the drafter uses to clean up the inconsistencies in the law created by the substantive things the bill does. And [do not touch on] policy questions***".

[112] To determine whether the final version of a Bill is a substantive amendment of a previous version or not, the two versions should be compared. In this respect, we have examined the first category of the impugned 17 new provisions of the Act

being Sections 18, 21, 23, 32, 38, 44, 69, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 which are totally new provisions and were not in the original Bill. Having done so, we note the following:

i. Section 18 amended Section 28A of the Income Tax Act by inserting the words "*or other manufacturing activities including refining*" immediately after the words "*human vaccines*"; and inserted the word "*and*" at the end of paragraph (b). Section 28A of the Income Tax Act creates a special operating framework arrangement, providing that companies under three specified categories shall be subject to the rate of tax specified in the special operating framework arrangement with the Government. The import of Section 18 of the Finance Act, 2023 is to expand the categories of beneficiaries under Section 28A of the Income Tax Act beyond the previous limitation of the category of manufacturers of human vaccines to other manufacturing activities including refining. The amendment, by the addition of the conjunction '*and*' changes the qualification parameter to qualify for the special operating framework by requiring a company to meet the criteria under (a), (b) and (c) in Section 28A of the Income Tax Act. Having analyzed the implications of this amendment, we are convinced that it gives effect to policy choices and goes beyond being merely clarificatory or polishing of legislative language. In effect, it is a substantive amendment.

ii. Section 21 amended Section 35 of the Income Tax Act by introducing amongst others provisions, taxation of digital content monetization, sales promotion, marketing and advertising services. It also provided that a person who receives rental income on behalf of the owner of the premises shall deduct tax therefrom. These amendments give effect to policy choices and go beyond being merely clarificatory and in effect, is a substantive amendment.

iii. Section 23 amended Section 133 of the Income Tax Act. It introduced a new provision to the effect that: '*The Income Tax Act is amended in Section*

133(6), by deleting the expression 31st December 2023' and substituting it with '*31st December, 2024*'. Section 133 of the Income Tax Act provides for '*Repeals and transitional*' while sub-section 133(6) provides thus: '*Notwithstanding the repeal of the Second Schedule, the provisions of paragraph 24 E of the repealed Schedule shall continue to be in force until 31st December, 2023'*. Looking at this amendment, we deem it as being merely clarificatory as to the date when paragraph 24E of the repealed Schedule would apply. We thus find that this amendment was not a substantive one.

iv. Section 32 amended Section 12 of the Value Added Tax Act by inserting a new subsection which reads; '*subject to sub-section (1), in the case of the national carrier, the time of supply shall be the date on which the goods are delivered or services performed'*. Being a provision on imposition of value added tax on supplies, this change on treatment of the national carrier, is a policy choice and goes beyond being merely clarificatory or polishing of legislative language. We therefore find that this amendment was substantive in nature.

v. Section 38 amended the Second Schedule of to the Value Added Tax Act which provides for zero-rated supplies. The effect of the amendments was to remove the supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent in weight from the category of zero-rated supplies. It also added to the category of zero-rated supplies being the exportation of taxable services, inbound international sea freight offered by a registered person, liquefied petroleum gas, all tea and coffee locally purchased for the purpose of value addition before exportation subject to approval by the Commissioner-General, the supply of locally assembled and manufactured mobile phones, the supply of motorcycles of tariff heading 8711.60.00, the supply of electric bicycles, the supply of solar and lithium ion batteries, the supply of electric buses of tariff

heading 87.02, inputs or raw materials locally purchased or imported for the manufacture of animal feeds, and bioethanol vapour (BEV) Stoves classified under HS Code 7321.12.00 (cooking appliances and plate warmers for liquid fuel). These are very substantive amendments.

vi. Section 44 amended Section 36 of the Excise Duty Act, 2015 by introducing a new subsection (1A) which provides that in the case of a licensed manufacturer of alcoholic beverages, excise duty shall be payable to the Commissioner within twenty-four hours upon removal of the goods from the stockroom. This amendment has a significant ramification on how licensed manufacturers of alcoholic beverages pay excise duty and is in the nature of a policy choice and therefore a substantive amendment.

vii. Section 69 amended Section 5 of the Miscellaneous Fees and Levies Act, 2016, by deleting subsection (4). The deleted sub-section provided that '*The Commissioner shall, by notice in the Gazette, adjust the specific rate of export levy annually to take into account inflation in accordance with the formula specified in Part III of the First Schedule*'. This change in the power of the Commissioner is a substantive amendment.

viii. Section 79 amended Section 5 of the Kenya Revenue Authority Act, 1995, in subsection (2A), by deleting the words '*for the better carrying out of its functions'* and substituting the same with *'the staff of the Authority, general public and other jurisdictions'*. The amended subsection 2A reads thus after the amendment: '*The Authority may establish an institution to provide capacity building and training the staff of the Authority, general public and other jurisdictions'*. Looking at this provision, it is in the nature of a clarificatory or explanatory amendment intended to explain in a clear and detailed manner the intended beneficiaries of the capacity building or training programmes and is therefore not a substantive amendment.

ix. Section 80 amended Section 13 of the Kenya Revenue Authority Act, 1995 by inserting under sub-section (1) thereof the words *'and Deputy*

Commissioners' immediately after the word '*Commissioners'*; and by deleting sub-section (2) thereunder. The import of the amendment in sub-section 1 is to provide that: '*The Board shall appoint, to the service of the Authority, such Commissioners and Deputy Commissioners as may be deemed necessary'*. This amendment was intended to bring the appointment of Deputy Commissioners within the mandate of the Board. This in our view was a substantive amendment. In addition, the deleted sub-section 2 provided thus: '*The Commissioner-General shall, with the approval of the Board, appoint such heads of departments as may be required for the efficient performance of the functions of the Authority'*. This amendment changed the powers of the Commissioner-General and is therefore a substantive amendment.

x. Section 81 amended the First Schedule to the Kenya Revenue Authority Act, 1995 by inserting the following new item - '*13. The Alcoholic Drinks Act, 2010'*. The First Schedule of the Act gives effect to Section 5 of the Act, by providing a list of written laws for which the Kenya Revenue Authority shall administer and enforce for the purpose of assessment, collection, and accounting of all revenues in accordance with those laws. Therefore, the amendment, by adding the Alcoholic Drinks Act, 2010 as amongst the laws that the Kenya Revenue Authority would administer and enforce, was a substantive amendment.

xi. Section 82 amended Section 25B of the Retirement Benefits Act in sub-section (1) by deleting the words '*sixty per cent'* appearing in paragraph (eb) and substituting therefor the words '*thirty three percent'*. Section 25B of the Retirement Benefits Act provides for '*requirements for registration of administrators'*. The amended sub-section 1(eb) provides thus: '*No applicant for registration as a scheme administrator shall be registered unless such applicant - has at least sixty percent of its paid-up share capital owned by Kenyan citizens unless the applicant is a bank or an insurance*

company'. The change of the prescribed share capital owned by Kenyan citizens for scheme administrators from sixty per cent to thirty three per cent and is therefore a substantive amendment.

xii. Section 83 amended Section 38 of the Retirement Benefits Act by inserting a new sub-section, (1A). The provision reads that subject to sub-section (1) (b), where a fund is set up exclusively for the purpose of investing sharia compliant funds, the fund shall be exempted from the guidelines. Section 38 of the Retirement Benefits Act provides for '*restriction on use of scheme funds*'. By introducing a new sub-section 1A exempting funds set up exclusively for the purpose of investing sharia compliant funds from the guidelines on restrictions on use of scheme funds was a substantive amendment.

xiii. Section 85 amended Section 2 of the Alcoholic Drinks Act by inserting the definition of '*minimum input cost*' to mean input cost published by Kenya Revenue Authority through excise regulations. By introducing a definition and vesting the authority to prescribe the '*minimum input cost*' to the discretion of the Kenya Revenue Authority, the amendment was rendered a substantive one.

xiv. Section 86 amended Section 31 of the Alcoholic Drinks Control Act in sub-section (2) by inserting a new paragraph, that is, (c) '*a person shall not sell, manufacture, pack or distribute alcoholic drinks at a price below the minimum input cost'*. Section 31 of the Alcoholic Drinks Control Act provides for selling of alcoholic drinks in sachets. The amendment prescribed minimum price for the sale, manufacture, packing or distribution of alcoholic drinks, this was a substantive amendment.

xv. Section 100 amended Section 4 of the Special Economic Zones Act by deleting sub-section 4 and substituting thereof the following new subsection – (4) '*A special economic zone shall be a designated geographical area which may include both customs controlled area and non-customs*

controlled area where business enabling policies, integrated land uses and sector-appropriate onsite and off-site infrastructure and utilities shall be provided, or which has the potential to be developed, whether on a public, private or public-private partnership basis, where development of zone infrastructure and goods introduced in customs-controlled area are exempted from customs duties in accordance with customs laws'. Section 4 of the Special Economic Zones Act provides for '*declaration of special economic zones'*. The deleted provision provided thus: '*A special economic zone shall be a designated geographical area where business enabling policies, integrated land uses and sector-appropriate on-site and off-site infrastructure and utilities shall be provided, or which has the potential to be developed, whether on a public, private or public-private partnership basis, where any goods introduced and specified services provided are regarded, in so far as import duties and taxes are concerned, as being outside the customs territory and wherein the benefits provided under this Act apply'*. This change in the definition of '*special economic zone'* was certainly a substantive amendment.

xvi. Section 101 amended Section 6 of the Special Economic Zones Act in paragraph (b) by deleting the word '*Kenya*' and substituting thereof the words '*the customs territory'*; and inserting a proviso, '*Provided that – (i) goods whose content originates from the customs territory shall be exempt from payment of import duties; and (ii) goods whose content partially originates from the customs territory shall pay import duties on the non-originating component subject to the customs procedures'*. Section 6 of the Special Economic Zones Act provides for '*goods to be considered as exported and imported into Kenya'*. The amended sub-section provided: Unless otherwise provided under this Act, or any other written law — '*goods which are brought out of a special economic zone and taken into any part of the customs territory for use therein or services provided from a special economic zone to any part of the customs territory shall be deemed to be*

imported into Kenya'. This amendment had the impact of changing what goods are considered to be exported or imported into the country and we therefore hold that it was a substantive amendment.

xvii. Section 102 amended Section 24 of the Export Processing Zones Act by inserting the following proviso at the end of paragraph (b) – '*Provided that – (i) goods whose content originates from the customs territory shall be exempt from payment of import duties; and (ii) goods whose content partially originates from the customs territory shall pay import duties on the non-originating component subject to customs procedures*'. Section 24 of the Export Processing Zones Act provides for '*goods deemed to be exported and imported into Kenya'*. The amendment had the effect of extending the categories of goods exempt from payment of import duty to include foods whose content originates from the customs territory, and also specifying that goods whose content partially originates from the customs territory shall pay import duties on the non-originating component. This amounts to a substantive amendment.

[113] We have also looked at the second category of impugned 4 provisions, which though in the original Bill, were subjected to extensive amendments before enactment. These are Sections 24, 26, 47, and 72 of the Act. We interrogate each of the 4 provisions below:

i. Section 24 of the Act was in the original Bill as clause 22, however new amendments were made to paragraphs 71, 72 and 73 of the First Schedule of the Income Tax Act. The First Schedule to the Income Tax Act provides for '*exemptions*'; while part 1 thereof provides for '*income accrued in, derived from or received in Kenya which is exempt from tax*'. The impugned amendment introduced the following new categories: '*71. Income earned by a non-resident contractor, sub-contractor, consultant or employee involved in the implementation of a project financed through a one hundred percent grant under an agreement between the Government and*

the development partner, to the extent provided for in the Agreement: Provided that the non-resident is in Kenya solely for the implementation of the project financed by the one hundred percent grant; 72. Gains on transfer of property within a special economic zone enterprise, developer and operator; and 73. Royalties, interest, management fees, professional fees, training fees, consultancy fee, agency or contractual fees paid by a special economic zone developer, operator or enterprise, in the first ten years of its establishment, to a non-resident person'. These amendments were substantive.

ii. Section 26 of the Act, on amendments to the Third Schedule to the Income Tax Act, was clause 24 in the original Bill. While the original Bill had four categories on the individual rates of tax, the Act introduced a fifth category being – '*On the next Kshs. 3,600,000 - 32.5%*'. The Third Schedule to the Income Tax Act provides for '*rates of personal reliefs and tax*'. The introduction of a new tax band was a substantive amendment.

iii. As for Section 47 of the Act on amendments to the First Schedule of to the Excise Duty Act, this provision was originally clause 43 of the Bill, and was substantively amended by the introduction of additional items in the Act. For example, the additional items included: (iv) by deleting the following description '*Motorcycles of tariff 87.11 other than motorcycle ambulances and locally assembled motorcycles'* and substituting therefor the following new description '*Motorcycles of tariff 87.11 other than motorcycle ambulances, locally assembled motorcycles and electric motorcycles'*; (v) in the item of tariff description '*Imported Glass bottles (excluding imported glass bottles for packaging of pharmaceutical products)*' by deleting the rate of excise duty of *'25%'* and substituting therefor the rate of excise duty of '*35%*'; (vi) in the item of tariff description '*Imported Alkyd*' by deleting the rate of excise duty of '*10%*' and substituting therefor the rate of excise duty of '*20%*'; (vii) in the item of tariff description '*Imported Unsaturated*

polyester' by deleting the rate of excise duty of '*10%*' and substituting thereof the rate of excise duty of '*20%*'; (viii) in the item of tariff description '*Imported Emulsion VAM'* by deleting the rate of excise duty of '*10%*' and substituting thereof the rate of excise duty of '*20%*'. (ix) in the item of tariff description '*Imported Emulsion - styrene Acrylic*' by deleting the rate of excise duty of '*10%*' and substituting thereof the rate of excise duty of '*20%*'; (x) in the item of tariff description '*Imported Homopolymers'* by deleting the rate of excise duty of '*10%'* and substituting thereof the rate of excise duty of '*20%*'; (xi) in the item of tariff description '*Imported Emulsion B.A.M.*' by deleting the rate of excise duty of '*10%*' and substituting thereof the rate of excise duty of '*20%*'. The First Schedule of the Excise Duty Act provides for '*rates of excise duty*'. It means that the amendment had the effect of changing rates of excise duty on the identified items and these were therefore substantive amendments.

iv. Lastly, with respect to Section 72 of the Act, on amendments to the table appearing in Part I of the First Schedule to the Miscellaneous Fees and Levies Act, was clause 70 in the original bill. However, there were substantive changes with additional items added in the Act. These additional items include: (j) by deleting the expression '*80% or USD 0.55kg'* appearing in tariff no. 4301.60.00 and substituting therefor the expression '*50% or USD 0.32/kg whichever is higher'*; (k) by deleting the expression '*80% or USD 0.55/kg*' appearing in tariff no. 4301.30.00 and substituting therefor the expression '*50% or USD 0.32/kg whichever is higher'*; and (z) by deleting the tariff description together with the rate of export levy corresponding to tariff number '*4101.40.00'*. The First Schedule to the Act provides for '*rates of excise duty*' with part 1 being a table on '*excisable goods'*. The changes in rates of excise duty were substantive amendments.

[114] Going by the distinction we have made herein above between 'substantive' amendments, and 'minor/technical/inconsequential' amendments, given the

preceding analysis of each of the impugned provisions, we hold that two new provisions being Sections 23 and 79 were minor/technical amendments. However, we further hold that, the other 15 new provisions being Sections 18, 21, 32, 38, 44, 69, 80, 81, 82, 83, 85, 86, 100, 101, and 102 were substantive amendments. With respect to the 4 amended provisions, being amendments to Sections 24, 26, 47 and 72, we find that all the amendments were also substantive amendments.

c) Should substantive amendments consequent to the process of public participation and intended to give effect to views and suggestions from the public participation process be subjected to a fresh round of public participation?

[115] The fact that the new provisions introduced into the Bill after the process of public participation are substantive amendments is not the end of the question as to whether they should be subjected to a fresh round of public participation. A second consideration comes to the fore, in this aspect we draw from the Constitutional Court of South Africa which held in the case of ***South African Iron and Steel Institute and Others vs. Speaker of the National Assembly and Others*** [2023] ZACC 18 at paragraph 2 as follows:

> "***The central issue in this case is whether material amendments to a Bill without further public involvement passes constitutional muster. There are two aspects that must be addressed: first, whether the amendments are material, and second, whether these amendments triggered the need for further public involvement."*** [Emphasis added]

[116] We are persuaded that a court has a duty to consider whether the subject substantive amendments triggered the need for further public participation. It is with this in mind that we need to answer the question whether substantive amendments consequent to the process of public participation, and intended to give effect to views and suggestions from the public participation process, ought to be subjected to a fresh round of public participation.

[117] Our starting point, once again, must be the principles articulated in the ***BAT Case***. This Court, in that case, established as a guiding principle the requirement that:

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

[118] This means that there is an obligation on Parliament to consider and give effect to the proposals, views, suggestions, and input from the process of public participation. Therefore, it is our considered opinion that it would be circuitous and not amount to prudent use of public resources to expect the National Assembly to subject proposals, views, suggestions, and input from the public participation exercise to a fresh round of public participation. We are also persuaded by the position taken by the High Court in ***Law Society of Kenya vs. Attorney General & Another***, HC Petition No. 3 of 2016; [2016] eKLR, where the Court stated thus at paragraph 245:

> ***"Whereas it is true that what were introduced on the floor of the House were amendments as opposed to a fresh Bill, it is our view that for any amendments to be introduced on the floor of the House subsequent to public participation, the amendments must be the product of the public participation and ought not to be completely new provisions which were neither incorporated in the Bill as published nor the outcome of the public input."*** [Emphasis added]

In that regard, we agree with the submissions by the *amicus curiae* that amendments which have been made in response to the results of public participation do not need to be subjected to another round of public participation.

[119] Furthermore, as regards the 17 new provisions not in the original Bill, and the 4 original provisions subjected to amendments, we note that the Speaker of the National Assembly in his affidavit dated 30th June, 2023 and filed before the High Court, averred that all the impugned amendments to the Bill were introduced in line with the Standing Orders; informed by the views obtained during public participation; considered by the National Assembly and enacted as Sections 18, 21,23,24,26,32,34, 38,44,47,69, 72,79, 80, 81, 82, 81, 83, 85, 84, 86, 100-101, and 102 of the Act..

[120] The Clerk of the National Assembly, for his part in paragraph 74 of his replying affidavit dated 17th August, 2023 and filed before the High Court clearly outlined the stakeholders whose views informed each of the amendments which are now expressed as 18, 21,23,24,26,32,34, 38,44,47,69, 72,79, 80, 81, 82, 83, 85, 86, 100, 101 of the Act. In summary, the replying affidavit of the Clerk outlined contributions from various stakeholders and the specific amendments they informed as follows: Sections 18 to 23 were based on proposals by Ashford Partners; Section 24 was based on the views by LSK; Section 26 was based on suggestions by Erastors Chogo, Mwangi & Kamwara LLP, Grant Thornton Associates, Deloitte, ICPAK, EY, Cabinet Secretary, National Treasury & Economic Planning during public hearings, Taxwise, Okoa Uchumi, and CDH (Cliffe, Decker, Hofmeyr); Section 32 was based on a proposal by Westminster Consulting; Section 34 was based on a proposal by GNG Law, Section 38 was based on proposals by Free Kenya Movement, Andersen, Anjarwalla & Khana, Grant Thornton Associates, Institute of Public Finance, Democracy Trust Fund, University of Nairobi Women Economic Power Hub, ICPAK, PCEA, Okoa Uchumi, Clean Cooking Association of Kenya, CSPEN, KPMG Consultants, Andersen, Ernest & Martin Associates, PWC, Association of Micro Finance Institutions,

International Chamber of Commerce, Basic Go/E-Mobility Kenya Limited and Kenya Association of Manufacturers; Section 44 was as a result of the presentation by Alcohol Prevention Task Force; Section 69 by Cliffe, Decker, Hofmeyr; Section 72 by National Treasury & Economic Planning during public hearing; Section 79 was based on a proposal by Kenya National Union of Nurses; Section 81 was consequential to amendment of Section 44; Section 83 was based on a suggestion by KPMG; Section 85 was based on the views presented by Alcohol Prevention Task Force; and Sections 101 and 102 on the views by Kenya Wines Agencies.

[121] It is instructive to note that the foregoing averments by the Speaker and the Clerk of the National Assembly were never challenged before the High Court, the Court of Appeal, and even before this Court. Consequently, we accept it as an established fact that the new provisions were introduced and amended to give effect to the views from public participation. Therefore, to hold that fresh public participation was necessary would negate the guiding principles from this Court in the ***BAT Case*** that public participation should be real and meaningful.

d) Is the Finance Bill a time-bound piece of legislation? If so, is it reasonable to require the National Assembly to conduct a fresh round of public participation for amendments giving effect to proposals from an earlier public participation exercise given the time-sensitive nature of the legislation?

[122] In our view, another consideration on whether the impugned amendments triggered the need for further public involvement, is the nature of a Finance Bill. One of the factors that the High Court took into consideration in determining whether there was need for further public participation on the subject amendments to the Bill is the time-bound nature of a Finance Bill. In this respect, the High Court held as follows at paragraph 158 of its judgment:

> ***"Having considered the relevant facts and the record and bearing in mind that the Finance Bill is a time-bound***

legislation, we are satisfied that the public participation process conducted by the National Assembly was sufficient." [Emphasis added]

We note that the Court of Appeal did not address its mind to this question. Before us, the appellants urged us to consider the unique time-bound nature of a Finance Bill in considering whether there was need to subject the impugned amendments to a further round of public participation.

[123] In the ***BAT Case***, this Court established the standard that duty bearers must meet, and the threshold courts should use to determine whether duty bearers have fulfilled their obligation with respect to public participation. This threshold is set at a reasonableness standard. In its guiding principles on public participation, this Court defined this threshold as follows:

> ***"Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case-to-case basis."***

This Court also proceeded to guide as follows:

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

[124] In an approach that chimes with the considerations this Court set out in the ***BAT Case***, the Constitutional Court of South Africa has in ***Mogale and Others vs. Speaker of the National Assembly and Others*** (CCT 73/22) [2023] ZACC 14 held at paragraph 37 that there are three factors that ought to be considered in determining whether the process adopted by a duty bearer in facilitating public participation was reasonable. The Court held thus:

"***In determining whether conduct has been reasonable in the context of public participation the following factors are of particular importance:***

a) What Parliament itself has determined is reasonable, and how it has decided it will facilitate public involvement;

b) The importance of the legislation and its impact on the public; and

c) ***<u>Time constraints on the passage of a particular bill, and the potential expense</u>.***" [Emphasis added]

[125] Timelines, whether statutory or constitutional, and the cost implications of the modes and approach to public participation should be taken into account in deciding whether Parliament has complied with its obligation to ensure and facilitate public participation. Therefore, where evidence is proffered demonstrating that Parliament was required to pass a Bill within a specified period of time, this factor will be accorded weight in determining the reasonableness of the measures put in place to facilitate public participation over the concerned Bill. It is within this framework that we must analyze the appellants' contention that the Court of Appeal ought to have appreciated and taken into account the unique nature of a Finance Bill, as a time-bound legislation, in determining whether the National Assembly satisfied its duties to facilitate public participation and involvement in the legislative process under Article 118 of the Constitution, and whether it would have conducted fresh public participation within the timelines set.

[126] It is not in dispute that a Finance Bill is an exceptional piece of legislation that is not considered in the same manner as other legislation. Section 39A of the PFM Act sets out certain salient steps and timelines to be adhered to in the legislative process for consideration and passage of a Finance Act. Section 39A of

PFM Act enjoins the Cabinet Secretary responsible for the National Treasury to submit to the National Assembly, on or before the 30th day of April, a Finance Bill setting out the revenue raising measures for the National Government. Thereafter, the relevant committee of the National Assembly is required to introduce the Bill in the National Assembly. Under Section 39A of the PFM Act, the National Assembly, for its part must consider and pass the Bill, with or without amendments, in time for it to be presented for assent by the President on the 30th day of June each year. Consequently, the National Assembly only has 61 days to consider and pass a Finance Bill, with or without amendments. Therefore, when considering whether the public participation utilized for the passing of a Finance Bill is adequate, courts should consider the very limited time that the National Assembly has to consider and pass the Bill under Section 39A of the PFM Act.

[127] Based on the foregoing, we hold that given the unique legislative route of enacting a Finance Bill, it is unreasonable to require the National Assembly to subject provisions introduced as a result of public participation to a fresh round of public participation before a Finance Bill can be considered by the National Assembly. Such a requirement would make it impractical for the National Assembly to comply with Section 39A of the PFM Act and to pass a Finance Bill within 61 days.

e) Did Sections 18, 21, 23, 32, 38, 44, 69, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 of the Finance Act, 2023, fail to undergo the entire legislative process and are therefore unconstitutional?

[128] The last aspect of this issue relates to the Court of Appeal's finding that the failure of the impugned new provisions to go through the entire legislative process, that is, being subjected to First and Second Reading, was an impermissible serious legislative flaw. In the relevant part, the Court of Appeal held at paragraph 159 thus:

> "***Contrary to the law, the 18****(sic)* ***new provisions did not go through the entire legislative stages. They were not subjected to the First and Second Reading. These are impermissible serious legislative flaws. Therefore, their purported enactment into law was imperfect and a mockery to the legislative process contemplated in the Constitution and the Standing Orders.***"

[129] It is important to appreciate that a key feature of the legislative process is the ability of legislators to propose and make amendments to a Bill. Amendments allow legislators to refine the Bill, add and subtract, improving its workability and addressing any omissions in the original draft. It also provides an opportunity for legislators to present alternative proposals, enabling them to express different policy and political viewpoints on the issues the Bill addresses and to ensure the proposals are not inconsistent with the Constitution. In essence, the ability to propose amendments reflects the core legislative and representative roles of lawmakers. See in this regard: Michael Zander, **The Law-Making Process** (6th Ed., Cambridge University Press, 2004) pp. 81-84; and HB Ndoria Gicheru, **Demise and Rebirth of Parliament: A Kenyan Approach** (LawAfrica, 2017) p. 263.

[130] This brings to the fore the question as to whether it is a requirement for amendments to a Bill to be subjected to the First and Second Reading. The starting point is the Constitution, which at Article 124(1) provides that:

> "*Each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.*"

In effect, Standing Orders are written rules of procedure under which Parliament regulates its proceedings, just as courts have their own rules. See ***Mate & Another vs. Wambora & Another*** (Petition 32 of 2014) [2017] KESC 1 (KLR).

The answer to the question whether there was failure to subject certain clauses of the Bill to the First and Second Reading, and if so whether that failure rendered them unconstitutional lies on the construction of the Standing Orders. As this Court has held in the ***Speaker of the Senate Case*** at paragraph 61:

> ***"While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.*** [Emphasis added]

[131] It is a glaring omission that in the impugned judgment, the Court of Appeal failed to identify the particular Standing Order that was breached by the failure to subject amendments to the Bill to the First and Second Reading. On our part, we have looked at Part XIX of the **National Assembly's Standing Orders** (6th Edition), that provide for '*Public Bills*', running from Standing Order 113 to 154, and cannot see any provision, imposing a requirement for amendments to Bills to be subjected to First and Second Reading. We therefore find that there is no requirement for amendments to Bills to undergo First and Second Reading. Consequently, the National Assembly did not breach its Standing Orders or the law in the manner in which it processed the impugned amendments to the Bill.

[132] In conclusion, we hold that where new amendments, though substantive, are introduced pursuant to views gathered during public participation, then in such circumstances, Parliament is not required to undertake fresh public participation. Furthermore, bearing in mind the time-sensitive nature of a Finance

Bill, it would be unreasonable to require or subject amendments intended to give effect to proposals and suggestions from a public participation exercise to another fresh round of public participation.

[133] We further hold that, the new provisions, being Sections 23 and 79 were minor/technical amendments and not substantive amendments. We also hold that the impugned 15 new substantive provisions introduced in the Bill during the Committee Stage, being Sections 18, 21, 32, 38, 44, 69, 80, 81, 82, 83, 85, 86, 100, 101, and 102; and the amendments to the 4 provisions amended during the Committee Stage, being Sections 24, 26, 47 and 72 of the Bill, were made to give effect to suggestions and views from the public participation exercise. It follows therefore that they were not required to undergo a fresh process of public participation. Accordingly, we allow the appellants' appeal on this question, and hold that the National Assembly did not violate the Constitution in amending the Bill to give effect to the proposals, views and suggestions from the public participation process.

iv. Whether parliament has an obligation upon conclusion of the public participation exercise to provide detailed reasons for accepting or rejecting views, and whether failure to give reasons vitiate the legislative process and invalidates the legislation passed

[134] Upon reviewing the submissions and pleadings before the Court, it is our considered view that to adequately address this overarching framed question, two sub-questions must be answered by this Court. These sub-questions are:

a) Is there a legal obligation on Parliament to provide detailed reasons for accepting or rejecting views upon conclusion of a public participation exercise?

b) Did the National Assembly comply with its obligations under Article 10(2)(c) of the Constitution to reasonably ensure

transparency and accountability in the processing of public proposals, views, input and suggestions regarding the Finance Bill, 2023?

We will consider these two sub-questions in turn.

(a) Is there a legal obligation on Parliament to provide detailed reasons for accepting or rejecting views upon conclusion of a public participation exercise?

[135] On this issue, he High Court, at paragraph 154, held that:

> "***The petitioners also complained that some of the submissions by members of the public were rejected without giving reasons. The enactment of Finance Act is a legislative process and in discharge of its legislative mandate, the National Assembly passed it. <u>There is no express obligation on Parliament to give written reasons for adopting or rejecting any proposals received from members of the public</u>. Nonetheless, we think that in order to enhance accountability and transparency, it is desirable that the relevant committee, after conducting public participation gives reasons for rejecting or adopting proposals received."*** [Emphasis added]

[136] This finding was reversed by the Court of Appeal, which held that, considering the national values and principles of governance in Article 10(2)(c) of the Constitution—particularly the values of accountability and transparency—Parliament has a duty to provide reasons for adopting or rejecting public views. The Court of Appeal stated as follows at paragraph 187 of its judgment:

> ***"Accountability, one of the principles in Article 10 (2) (c) means that officials must explain the way in which they***

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

[137] Given these competing findings by the two superior courts below, it is now upon this Court to determine whether there is a legal obligation on Parliament to provide detailed reasons for accepting or rejecting public views. Before this Court, most respondents supported the view adopted by the Court of Appeal, arguing that, pursuant to Article 10(2)(c) of the Constitution—particularly the values of accountability and transparency—Parliament is obligated to give reasons for rejecting or accepting views. Additionally, the 3rd and 5th respondents contended that this obligation also arises from Article 47(2) of the Constitution, which enshrines the right to be given written reasons for any action to a person who has been or is likely to be adversely affected by administrative action.

[138] We will begin with the assertion by the 3rd and 5th respondents that Article 47(2) imposes this obligation on Parliament. As the provision states: “*If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action*.” This right is qualified by the requirement that it applies in the context of “*an administrative action*.” This raises the question: Is a legislative process an

administrative action within the meaning of Article 47 of the Constitution? Our emphatic answer is no.

[139] We note that Parliament does exercise administrative powers in some of its functions including investigations, recommendations, and findings by its respective committees or approval of appointments to public office. However, the process of legislating is not administrative in character. As we outlined in ***Ethics and Anti-Corruption Commission & Another vs. Tom Ojienda, SC T/a Prof. Tom Ojienda & Associates Advocates & 2 Others*** (Petition 30 & 31 of [2019] (Consolidated)) [2022] KESC 59 (KLR) where we delimited the scope of 'administrative action', and held as follows at paragraph 57:

> ***"By stipulating that the legislation so contemplated has to among other things, promote efficient administration, the Constitution leaves no doubt that an "administrative action" is not just any action or omission, or any exercise of power or authority, but one that relates to the management of affairs of an institution, organization, or agency. This explains why such action is described as "administrative" as opposed to any other action. The Concise Oxford Dictionary (9th Ed) defines the word "administrative" as "concerning or relating to the management of affairs" Black's Law Dictionary, (11th Ed) defines "administrative action" to mean "a decision or an implementation relating to the government's executive function or a business's management". Burton's Legal Thesaurus (4th Ed) defines the adjective "administrative" to mean among others, "directorial, guiding, managerial, regulative, supervisory."***

[140] In essence, administrative action is the application or implementation of law to specific factual circumstances, usually after legislation has been enacted. Administrative powers, in this sense, are generally lower-level powers exercised

after the legislative process. Put differently, the exercise of administrative powers is the implementation of law, not its creation.

[141] In comparative practice, the question of whether the process of enacting legislation amounts to '*administrative action*' was considered by the Constitutional Court of South Africa in ***Fedsure Life Assurance Ltd vs. Greater Johannesburg Transitional Metropolitan Council*** 1998 (12) BCLR 1458 (CC). In rejecting the view that legislating amounted to administrative action, the Court held at paragraph 42:

> "***The enactment of legislation by an elected local council acting in accordance with the Constitution is, in the ordinary sense of the words, a legislative and not an administrative act. There is no "fit" between the exercise of such powers by elected councillors and the provisions of [section 24 in the Interim Constitution on the right to administrative justice].***"

[142] We agree with the above reasoning and reiterate that the exercise of legislative powers does not amount to administrative action, and Article 47(2) of the Constitution cannot be the basis for an obligation on Parliament to provide reasons for accepting or rejecting views gathered during the public participation process in the law-making process.

[143] We have also considered Article 118(1) of the Constitution and based on the textual markers therein, Parliament's duty is to "*facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*" As is plain from its wording, this provision only imposes a duty to facilitate public participation and involvement in the legislative process and therefore cannot be the basis for the argument that the National Assembly is under an obligation to provide reasons for accepting or rejecting public views.

[144] We now turn to the question of whether this obligation arises from the values and principles of governance stipulated in Article 10(2) of the Constitution. As noted earlier, it is Article 10(2) upon which the Court of Appeal based its finding that Parliament is obligated to provide reasons for accepting or rejecting public views.

[145] In addressing whether this duty arises from the national values and principles of governance—particularly the values and principles of transparency and accountability in Article 10(2)(c)—we consider, first the nature of obligations arising from such values and principles. ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** (Advisory Opinions Application 2 of 2012) [2012] KESC 5 (KLR), this Court noted thus at paragraph 54:

> ***"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an***

interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm." [Emphasis added]

[146] In effect, this Court highlighted the need to avoid interpreting broad constitutional values and principles, such as those articulated in Article 10(2) of the Constitution as though they were prescribed normative rules. Values and principles act as guiding frameworks, outlining the considerations that duty bearers, such as Parliament, should take into account when making decisions. However, they do not define specific duties or actions. In this respect, values and principles are inherently open-textured, meaning they provide direction without prescribing exact steps to be taken by duty-bearers. See in this regard Ronald Dworkin, ***Taking Rights Seriously*** (Harvard University Press, 1978) p. 26; and Robert Alexy, ***A Theory of Constitutional Rights*** (Oxford University Press, 2020) pp. 44-93; and Marcelo Neves, **Constitutionalism and the Paradox of Principles and Rules** (Oxford University Press, 2021) pp. 10-17.

[147] Based on this proposition, courts should be careful to distinguish between values and principles on the one hand, and normative rules on the other hand, to avoid overprescribing duties from principles and values which are by nature open-textured. We draw from the words of Robert Alexy, a Legal Philosopher in his publication '**Constitutional Rights and Proportionality'** (2014) 22 *Revus - Journal for Constitutional Theory and Philosophy of Law* 51, at page 52 that:

"Rules are norms that require something definitively. They are definitive commands. Their form of application is

subsumption. If a rule is valid and if its conditions of application are fulfilled, it is definitively required that exactly what it demands be done. If this is done, the rule is complied with; if this is not done, the rule is not complied with. By contrast, principles are optimization requirements. As such, they demand that something be realized 'to the greatest extent possible given the legal and factual possibilities."

It follows that values and principles are *optimizing commands* that allow duty bearers to come up with suitable measures for fulfilment of the obligations that they impose, without dictating definitive or specific actions that they ought to take.

[148] We therefore hold that, while there is no express obligation on Parliament to provide reasons for accepting and/or rejecting proposals/views made during a public participation exercise, as a matter of good practice, it must nonetheless put in place reasonable measures to guide how Parliament considers and treats the proposals, views, suggestions, and comments received during such exercises. Parliament should adopt reasonable measures to achieve this objective.

(b) Did the National Assembly comply with its obligations under Article 10(2)(c) of the Constitution to reasonably ensure transparency and accountability in the manner it processed public proposals, views, input and suggestions regarding the Finance Bill, 2023?

[149] Considering the discretion vested in Parliament in fulfilling its constitutional duties under the values and principles of governance outlined in Article 10(2) of the Constitution, the role of the courts is limited to reviewing whether the measures put in place by Parliament are reasonable, and in conformity with the Constitution and law. With this in mind, we now turn to examine whether the National Assembly took reasonable steps to ensure transparency and

accountability in its consideration of proposals, views, and suggestions arising from the public participation process in relation to the Bill.

[150] In our view, for the National Assembly Committee's Report to meet the threshold of reasonable measures for promoting transparency and accountability in the treatment of proposals from public participation, it must be clear enough to enable those who submitted their views to understand that their input was considered and given due attention. Moreover, we agree with the proposal by *amicus curiae* that Parliament is not required to respond individually to every public comment or submission. Since public participation in the legislative process typically raises certain core themes and concerns, Parliament has the discretion to group similar views into thematic areas and address them collectively.

[151] It is from this perspective that we will now assess the National Assembly's Departmental Committee on Finance and National Planning's 'Report on the Consideration of the Finance Bill (National Assembly Bill No. 14 of 2023)' to determine whether it meets the aforementioned standards. In other words, we must answer whether the Committee's Report serves as a reasonable feedback mechanism that facilitates accountability and transparency in providing the public with feedback on the fate of their proposals, views, input, and suggestions during the public participation process.

[152] An examination of the Report by the Departmental Committee on Finance and National Planning on the Consideration of the Finance Bill (National Assembly Bill No. 14 of 2023), dated 13th June 2023, reveals an outline of submissions from stakeholders who participated in the public participation exercise. The Report on page 9 indicates that the Committee received 1080 memoranda from different stakeholders.

[153] In chapter three of the 260 paged Report, the Committee responds to views from the stakeholders. In summary, this chapter runs from page 21 to page 256 of the Report, a whopping 235 pages. It contains a consideration of views from 161 persons and organizations. It also contains a list of emails from different persons.

Under each of the 161 persons and organizations, the Report outlines the proposal made and the Committee's observation on whether to accept or reject the proposal.

[154] By way of example, we wish to highlight part of the responses from the Committee. The Committee received more than 30 proposals from Anjarwalla & Khanna LLP and it provided observations on acceptance or rejection of each of the proposals. For instance, on the proposal to delete clause 4 of the Bill, the Committee rejected the proposal but amended the provision on the reason that increasing the period of claiming foreign exchange losses from 3 years to 5 years would provide enough time to claim the assets. Green Light provided 3 proposals, and the Committee offered its observations rejection of two of the proposals and acceptance of one of the proposals. The Law Society of Kenya provided more than 20 proposals, and the Committee provided observations on each of the proposals. The Institute of Economic Affairs made more than 10 proposals, and the Committee provided observations on acceptance or rejection of each of the proposals. PWC provided more than 10 proposals, and the Committee provided observations for acceptance or rejection of each of the proposals. This Court has taken note of the fact that this was the approach that the Committee adopted in the Report for each of the proposals that the various stakeholders made.

[155] For the email submissions, they are grouped in clusters with the first cluster of 87 emails relating to submissions objecting to the introduction of the Housing Levy; the second cluster of 2 emails are those supporting the introduction of the housing levy; the third cluster of 9 emails are those opposing the introduction of 16% VAT on fuel; fourth cluster of 3 emails are those opposing the introduction of the rate of 35% payee on income above Kshs. 500,000; and finally, the fifth cluster of 137 emails calling for the rejection of the Finance Bill, 2023 in its entirety. In each of these clusters, save for the last cluster calling for the rejection of the Bill in its entirety, the Committee considered and made an observation on each of the proposals.

[156] To highlight the considerations of the email submissions by the Committee, regarding the 87 emails submissions cluster objecting to the introduction of the housing levy, the Committee made the observation that it considered reducing the housing levy from 3% to 1.5%. The Committee also responded to 2 emails supporting the introduction of housing levy on the account that it will create jobs. The Committee also responded to 9 emails opposing the introduction of 16% VAT on fuel. While rejecting their proposal the Committee observed existing VAT rates were not standard and thus intended to harmonize the rate to 16% including for petroleum products. Further, the Committee responded to 3 emails opposing the introduction of 35% PAYE on income above Kshs 500,000. The Committee made the observation that it had made an amendment that 32.5% PAYE would be imposed on income between Kshs. 500,000 and Kshs. 800,000. For amounts above Kshs. 800,000, 35% PAYE would be imposed. The reason provided was to enable the government to raise money. The Committee also acknowledged receipt of 137 emails relating to the rejection of the Bill in its entirety.

[157] Having gone through the Report by the Departmental Committee on Finance and National Planning with a fine-tooth comb, we make the observation that to a large extent the Report strives to explain the reasons for accepting or rejecting various proposals. As a public document, it is accessible to members of the public, ensuring that institutions and individuals who participate in public participation exercises related to the Bill can access it.

[158] Further, despite the absence of an express requirement to provide individual reasons for accepting or rejecting views received during public participation, the Report by the Departmental Committee on Finance and National Planning upholds the principles of transparency and accountability as espoused under Article 10(2)(c) of the Constitution. As the *amicus* noted, when Parliament receives thousands of views during public participation, it may consider clustering them into themes to address the concerns raised by the people. Therefore, there is no

justification for imposing an additional burden on Parliament to respond directly to each individual involved in the public participation process.

[159] We therefore hold that there is no sufficient basis to invalidate a public participation exercise on the grounds that Parliament did not provide reasons to every individual participant on how their proposals, suggestions, and input was treated. In the circumstances of the case at hand, the National Assembly's Departmental Committee on Finance and National Planning's 'Report on the Consideration of the Finance Bill (National Assembly Bill No. 14 of 2023)' meets the threshold of a reasonable measure that promotes transparency and accountability in how the National Assembly treated the proposals, views and suggestions from the public on the Finance Bill, 2023.

[160] Before concluding this section, it is important to note that to enhance transparency and accountability in the law-making process, the public should be able to track and monitor the legislative process at every stage. As a Bill progresses through the various stages of the law-making process, the public must be kept informed, and different versions of the Bill should be made available for their review. This is based on the understanding that access to information is essential for ensuring transparency and accountability. For instance, there is currently no mechanism for making the version of a Bill approved at the Third Reading available to the public before it is presented to the President for assent. We, therefore, recommend that Parliament establish procedures to ensure that there is a mechanism to ensure all versions of a Bill, at every stage of the law-making process, are accessible to the public in a simple format for their information and scrutiny.

[161] In the end we hold that the National Assembly, complied with the duty to promote transparency and accountability in how it dealt with the proposals, suggestions, views and input from the public participation exercise on the Bill. We therefore allow the appeal on this question and reverse the findings of the Court of Appeal and substitute thereof with a finding that the National Assembly did not

violate Article 10(2)(c) of the Constitution in the consideration and approval of the Bill.

v. Whether the Appropriation Act, 2023 contained the Estimates of Revenue

[162] On this issue, the High Court noted that the 1st-7th respondents herein, who were petitioners in **HC Petition No. E181 of 2023**, contended that the Appropriation Bill,2023 that was tabled before the National Assembly did not contain estimates of revenue hence the budget was incomplete, and the resultant Finance Act, unconstitutional. Specifically, by their amended petition they averred that -

> *"47P. The Finance Act is enacted to authorise measures to collect revenue estimates contained in the Appropriation Act. Hence, the omission of estimates of revenue from an Appropriation Act renders both the Appropriation Act and the resultant Finance Act unconstitutional as the two laws would contravene the express and very prescriptive requirements of Articles 220(1)(a) and 221(1) of the Constitution, which require the budget to contain revenue estimates.*
>
> ...
>
> *47R. The National Government's Budget Estimates for the FY 2023/2024 had a fatal anomaly to the extent that, contrary to Articles 220(1) and 221(1) of the Constitution of Kenya, 2010, they (the estimates) did not contain revenue estimates. The estimates for recurrent and development expenditure show that the budget is balanced and will be financed by taxes, loans and grants. The expenditure estimates declared show that the entire recurrent expenditure and part of the development expenditure will be financed by taxes. Only the deficit in the development expenditure will be financed by loans and grants (i.e. in line with the requirements in Article 220(1)(b) of the Constitution, that estimates shall contain the*

proposals for financing any anticipated deficit for the Financial Year 2023/2024.

47S. Unfortunately, as stated elsewhere above, attempts by the 1st petitioner (1st respondent herein) to have the National Assembly cure the fatal anomaly were ignored, and the National Assembly proceeded to approve an unconstitutional 2023/2024 national budget, then an unconstitutional Appropriation Act, 2023 and finally an unconstitutional Finance Act, 2023."

[163] Consequently, they sought *inter alia*,

> *"122.1(i) The National Government's Budget Estimates for the FY 2023/2024 are void ab initio for lacking revenue estimates.*
>
> *122.1(j) The annual Appropriation Act, 2023 is void ab initio for lacking revenue estimates.*
>
> *122.1 (k) The failure to meet the set constitutional threshold on the contents of the budget, under Articles 220 (1)(a) and 221(1) of the Constitution voided the 2023/2024 budget-making process from that point onwards.*
>
> *122.1(l) Since Parliament did not, vide the Appropriation Act, 2023, approve any estimates of tax revenues to be collected from the public, there is no basis for the same Parliament to enact any measures to collect taxes vide the Finance Act, 2023.*
>
> *122.1(m) The 2023/2024 budget estimates of the national executive, and the Appropriation Act, 2023, are void ab initio in their entirety for containing ineligible expenditure.*
>
> *122.1(n) The consideration and approval of incomplete documents by the National Assembly compromised the quality of public participation."*

[164] The High Court found that the estimates of revenue and estimates of expenditure were part of the budget-making process. Further, that although what it termed as a Bill containing the estimates of revenue was not tendered before it, the court ascertained that as part of the budget-making process, the estimates of revenue were included in the approved estimates contained in the Appropriation Bill and the Appropriation Act, 2023 as published in the Kenya Gazette Supplement Nos. 87 of 15th June, 2023 and 98 of 26th June, 2023 respectively. Consequently, the High Court determined that the assertion that there was a procedural flaw arising from want of compliance with the requirement regarding estimates of revenue in the budget process was without foundation and therefore rejected.

[165] Conversely, the Court of Appeal held that the High Court had fallen into a grave error for arriving at the aforementioned conclusion. The appellate court, on its part, pronounced itself as follows:

> ***"206. It is admitted in the Hansard that by the time the Finance Bill was coming up for Second Reading as expressed by Hon. (Dr.) Otiende Amolo SC., the Budget Proposals had not been done and the proposal by the Cabinet Secretary had not been presented in the House and that is the sole reason why Hon. (Dr.) Otiende Amolo SC stood on a point of order on 15th June 2023 and posed a question which triggered the Speaker's ruling to the effect that the National Assembly was obligated to prioritize the Finance Bill over the presentation of a Budget Statement by the Cabinet Secretary for the National Treasury. The budget-making process is spelt out in Article 221 and the provisions of the PFM Act reproduced earlier. The only option is for the National Assembly to follow the path carefully delineated by the Constitution and the PFM Act. Any other path, no matter how expedient it may be, is not***

only unconstitutional, but it is littered with substantive procedural flaws and highly impermissible unconstitutional transgressions all of which will end with an illegal outcome. Nothing good can come out of an illegality, no matter how attractive it may be.

207. Accordingly, we find that the estimates of revenue were not included in the Appropriation Bill and the Appropriation Act, 2023 as published in the Kenya Gazette Supplement Nos. 87 of 15th June 2023 and 98 of 26th June 2023 respectively. It is also noteworthy that as at 15th June 2023, the Cabinet Secretary, National Treasury had not presented the Budget Proposal, yet the Finance Bill, 2023 had been introduced in the National Assembly and was at the Second Reading. In the circumstance, we find that it was a violation of Article 220(1) (a) and 221 as read with sections 37, 39, and 40 of the PMF Act for the Appropriation Bill/Act to be approved before the Budget Proposal had been presented by the Cabinet Secretary National Treasury in the National Assembly.

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

[166] Based on the foregoing, it is necessary to determine the procedure for the consideration of the estimates of revenue and expenditure, and whether they should be included in an Appropriation Bill.

[167] Article 220(1)(a) of the Constitution stipulates that estimates of revenue and expenditure are mandatory elements of the budgets of both the National and County Government. The provision provides as follows:

"(1) Budgets of the national and county governments shall contain—

(a) estimates of revenue and expenditure, differentiating between recurrent and development expenditure; …"

[168] While Article 221 of the Constitution provides as follows:

"221.

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

2) The estimates referred to in clause (1) shall—

(a) include estimates for expenditure from the Equalisation Fund; and

(b) be in the form, and according to the procedure, prescribed by an Act of Parliament.

3) The National Assembly shall consider the estimates submitted under clause (1) together with the estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary under Articles 127 and 173 respectively.

4) Before the National Assembly considers the estimates of revenue and expenditure, a committee of the Assembly shall discuss and review the estimates and make recommendations to the Assembly.

5) In discussing and reviewing the estimates, the committee shall seek representations from the public and the recommendations shall be taken into account when the committee makes its recommendations to the National Assembly.

6) When the estimates of national government expenditure, and the estimates of expenditure for the Judiciary and Parliament have been approved by the National Assembly, they shall be included

in an Appropriation Bill, which shall be introduced into the National Assembly to authorize the withdrawal from the Consolidated Fund of the money needed for the expenditure, and for the appropriation of that money for the purposes mentioned in the Bill.

7) *The Appropriation Bill mentioned in clause (6) shall not include expenditures that are charged on the Consolidated Fund by this Constitution or an Act of Parliament."* [Emphasis added]

[169] The PFM Act further elaborates this process. Section 36(1) thereof places the role of managing the budget process at the national level in the hands of the Cabinet Secretary. This is further elaborated by Section 37 (1) which provides that the Cabinet Secretary shall within a period allowing time to meet the deadlines specified in Section 37 submit to Cabinet for its approval two things: budget estimates and other documents supporting the budget; and the draft bills required to implement the national budget. Section 37(2) provides that the Cabinet Secretary shall submit to the National Assembly by the 30th April in that year three crucial documents: the budget estimates excluding those for Parliament and Judiciary (as these are done by the respective accounting officers); documents supporting the submitted estimates; and any other bills required to implement the national government budget.

[170] As to the form and procedure these estimates are to take, Article 221(2) (b) of the Constitution leaves this to be determined by statute. Section 38(1)(b) of the PFM Act provides the format that budget estimates shall include:

"

i. *a list of all entities that are to receive funds appropriated from the budget of the national government;*

ii. *estimates of revenue allocated to, and expenditures projected from, the Equalisation Fund over the medium term, with an explanation of the reasons for those revenue allocations and expenditures and how these estimates comply with the policy*

developed by the Commission on Revenue Allocation under Article 216(4) of the Constitution;

iii. *all revenue allocations to county governments from the national government's share in terms of Article 202(2) of the Constitution, including conditional and unconditional grants;*

iv. *all estimated revenue by broad economic classification*;

v. *all estimated expenditure, by vote and by programme, clearly identifying both recurrent and development expenditures; and*

vi. *an estimate of any budget deficit or surplus for the financial year and medium term and the proposed sources of financing; …"*

[171] While Section 38(3) of the PFM Act requires the Cabinet Secretary to ensure the expenditure appropriations and the budget estimates in an Appropriation Bill are presented in a way that a) is accurate, precise, informative and pertinent to budget issues; and b) clearly identified the appropriations by vote and programme, Section 38 is also relevant as it outlines the other budgetary documents to be submitted to the National Assembly alongside the budget estimates. These include the budget summary which further contains a summary of budget policies, an explanation of how the budget relates to fiscal responsibility principles and financial objectives, and a memorandum by the Cabinet Secretary explaining how the resolutions adopted by the National Assembly on the Budget Policy Statement (BPS) under Section 25(7) have been taken into account. Other documents also include information regarding loans made by the National Government, an estimate of principal, interest and other charges to be received by the National Government in the FY in respect of those loans; information regarding loans and guarantees made to and by the National Government, an estimate of principal, interest and other charges to be paid by the National Government in the FY in respect of those loans; information regarding any payments to be made and liabilities to be incurred by the National Government for which an Appropriation

Act is not required which shall include the constitutional or national legislative authority for any such payments or liabilities; and a statement by the National Treasury specifying the measures taken by the National Government to implement any recommendations made by the National Assembly with respect to the budget for the previous financial year(s).

[172] As for consideration by the National Assembly, the Constitution provides that this is to happen at two levels: Article 221 (4) of the Constitution stipulates that before the National Assembly considers the estimates of revenue and expenditure, a committee of the Assembly shall discuss and review the estimates and make recommendations. Article 221(6) goes on to provide that once the estimates of expenditure by the National Government, Judiciary and Parliament have been approved, they are then to be included in the Appropriation Bill. This latter provision is silent on the estimates of revenue. This position is supported by Section 37(9) of the PFM Act which stipulates that once the budget estimates and other documents have been approved by the National Assembly, the Cabinet Secretary shall prepare and submit an Appropriation Bill of the approved estimates to the National Assembly. While Section 39(1) and (2) provides as follows:

> *"*
>
> 1) *The National Assembly shall consider the budget estimates of the national government, including those of Parliament and the Judiciary, with a view to approving them, with or without amendments, in time for the Appropriation Bill and any other relevant Bills, required to implement the budget to be assented to by the 30th June each year.*
>
> 2) *Before the National Assembly considers the estimates of revenue and expenditure, the relevant committee of the National Assembly shall discuss and review the estimates and make recommendations to the National Assembly, taking into account the views of the Cabinet Secretary and the public on the proposed recommendations."*

[173] From the foregoing provisions, it is evident to us that the estimates of revenue are not required to be presented in an Appropriation Bill. The preparation and tabling of the estimates of revenue before the National Assembly, precede the preparation and tabling of the Appropriation Bill. Further, and in line with Sections 37 and 39 of the PFM Act, it is only after the National Assembly has considered and approved the estimates of revenue and estimates of expenditure that an Appropriation Bill and any other relevant Bills, required to implement the budget and assented to by the 30th June is prepared, tabled, and approved. Indeed, ***In the Matter of Council of Governors*** when confronted with determining whether the National Assembly can enact an Appropriation Act prior to the enactment of the Division of Revenue Act, this Court held as follows:

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

budget and Appropriation Bills, on the basis of the Division of Revenue Bill passed by Parliament under Article 218 of Constitution."

[174] Arising from the afore stated provisions, it clear to us that the estimates that eventually make it into the Appropriation Bill are not the estimates of revenue. Rather, it is only the estimates of expenditure. This is supported by the definition of an appropriation act found at Section 2 of the PFM Act which provides as follows:

> *"Appropriation Act" means an Act of Parliament or of a county assembly that provides for the provision of money to pay for the supply of services; …"*

In any event, the purpose of an Appropriation Act is to provide for the provision of money to pay for the supply of services, therefore the estimates of revenue have no place in such an Act.

[175] The above position is further reinforced by Regulation 37 of the Public Finance Management (National Government) Regulations that provides as follows:

> *"Appropriation Bills shall provide for—*
>
> *a) the Votes and programs of the financial year;*
>
> *b) financial provision in respect of certain activities of the national governments during that financial year; and*
>
> *c) enabling the withdrawal out of the Consolidated Fund, or any other national public fund."*

[176] Applying these provisions of the law to the facts before the Court, our examination of the Hansard of the National Assembly confirms that indeed the estimates of revenue were contained in a document titled "*Estimates of Revenue, Grants and Loans for the Financial Year 2023/2024"* which was tabled before the National Assembly on 27th April, 2023. This was three days before 30th April, 2023

and therefore in line with the constitutional timelines of presentation at least two months before the end of each FY. A further perusal of the Hansard of the National Assembly revealed that the Report of the Budget and Appropriations Committee on its consideration of the Estimates of Revenue and Expenditure for the FY 2023/2024 was tabled before the National Assembly on 6th June, 2023.

[177] Having read the Report, we note that paragraphs 20 and 21 thereof read as follows:

> *"20. With regard to revenue, the National Treasury has maintained its BPS proposal of enhancing ordinary revenue collection as a share of GDP from 15.1% in 2022/23 to 15.8% in 2023/24. The ordinary revenue projection for FY 2023/24 is Kshs. 2,571.2 bullion which represents a 17 percent increase relative to the expected 2022/23 FY collection. The Committee notes with concern that this revenue target is quite ambitious, taking into account that historically, ordinary revenue has grown at an average of around 10%. Further, the downward revision of GDP growth projection is indicative of a concomitant reduction in revenue collection.*
>
> *21. The fiscal deficit including grants as a share of GDP is expected to decline from 5.7 percent (Ksh.824.0 billion) in 2022/23 to 4.1 percent (Ksh.663.5 billion) in 2023/24. The committee notes however, that this projected reduction in the deficit is partially attributed to an ambitious projection in tax revenue collection. Should the revenue collection target not materialize, it will necessitate a downward revision in expenditure through a supplementary budget."*

[178] Though the focus above was primarily placed on the estimates of expenditure, it confirms that the estimates of revenue were considered by a Committee of the Assembly in line with Article 221(4) of the Constitution. From the Hansard of the National Assembly, this Report of the Budget and Appropriations Committee on Budget Estimates for the National Government, the

Judiciary and Parliament for the Financial Year 2023/2024 was debated extensively before it was finally adopted by the National Assembly on 8th June, 2023. It is these estimates of expenditure that then formed the Appropriation Bill, 2023 that was tabled before the National Assembly on 20th June, 2023 and thereafter passed by the National Assembly on 22nd June, 2023 and assented to by the President on 26th July, 2023.

[179] Sections 39A and 40 of the PFM Act on their part provide the pathway that the Finance Bill takes. Section 39 provides as follows:

> *"39A. Submission, consideration and passing of Finance Bill*
>
> 1) *The Cabinet Secretary shall submit to the National Assembly, on or before 30th April, the Finance Bill setting out the revenue raising measures for the National Government.*
>
> 2) *Following submission of the Finance Bill by the Cabinet Secretary, the relevant committee of the National Assembly shall introduce the Bill in the National Assembly.*
>
> 3) *The National Assembly shall consider and pass the Finance Bill, with or without amendments, in time for it to be presented for assent by 30th June each year.*
>
> 4) *Any recommendations made by the relevant committee of the National Assembly or resolution passed by the National Assembly on revenue matters shall—*
>
> a. *ensure that the total amount of revenue raised is consistent with the approved fiscal framework;*
>
> b. *take into account the principles of equity, certainty and ease of collection;*

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

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

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

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

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

[180] Section 40 in addition provides as follows:

"40. Submission and consideration of budget policy highlights and the Finance Bill in the National Assembly

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

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

3) *On the same date that the budget policy highlights and revenue raising measures are pronounced, the Cabinet Secretary shall submit to Parliament a legislative proposal, setting out the revenue raising measures for the national government, together with a policy statement expounding on those measures.*

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

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

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

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

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

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

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

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

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

6) *The recommendations of the Cabinet Secretary in subsection (5)(f) shall be included in the report and tabled in the National Assembly."*

[181] Based on the foregoing, two things are apparent. First, the enactment of an Appropriation Bill is in no way tied to that of a Finance Bill. The submissions by counsel for the appellants are correct with respect to the pathways of the Finance Bill and the Appropriation Bill being different. Second, the estimates of revenue are also not included in the Finance Bill.

[182] Consequently, we agree with the Court of Appeal to the extent that we find that the estimates of revenue were not included in the Appropriation Bill and the Appropriation Act, 2023 as published in the Kenya Gazette Supplement Nos. 87 of 15th June 2023 and 98 of 26th June 2023 respectively. Our point of divergence with the Court of Appeal, is that it is not a legal requirement that the estimates of revenue be included in the Appropriation Bill or Act. Rather, they are to be considered and approved alongside the estimates of expenditure by the National Assembly, before the Appropriation Bill. Once approved, the Appropriation Bill is prepared and contains estimates of expenditure.

[183] Accordingly, we allow the Appellant's appeal on this question and make a finding that the National Assembly followed the prescribed procedure in enacting the Appropriation Act, 2023.

vi. Whether the question of the validity of Section 84 of the Finance Act, 2023 (Affordable Housing Levy) is moot

[184] The issue of the affordable housing levy originated in the trial court in **Petition No. 181 of 2023** filed by the 1st respondent. The said levy was

introduced by Section 84 of the Act which amended Section 31 of the Employment Act and introduced Section 31B therein. The levy was challenged on the grounds that such a levy/tax was not contemplated under Article 209(1) of the Constitution; there was no legislative framework to guide the administration of the said levy or criteria for determining who is entitled to benefit from the same; the levy was discriminatory as far as it was to be imposed only on employees in formal employment; the 5th appellant's mandate did not include the collection/receipt of such a levy, and that the Cabinet Secretary, Ministry of Lands, Public Works, Housing and Urban Development could not give KRA such mandate as purported by the public notice dated 3rd August, 2023 in a local daily, amongst others.

[185] In determination of this issue, the High Court found that the housing levy supported the national policy on affordable housing and that the said policy did not interfere with the functions of the county government. However, the High Court found that the levy lacked a comprehensive legal framework by virtue of being introduced through an amendment of the Employment Act, which was in violation of Articles 10, 201, 206 and 210 of the Constitution. Moreover, the trial court held that the imposition of the housing levy against persons in formal employment to the exclusion of other non-formal income earners to support the national housing policy was without justification, unfair, discriminatory, irrational, and arbitrary and in violation of Articles 27 and 201(b)(i) of the Constitution. Equally, it was held that the levy was not one of the taxes that the 5th appellant is empowered to collect; and the notice issued by the 5th appellant informing the public that it had been appointed by the Cabinet Secretary, Ministry of Lands, Public Works, Housing and Urban Development to collect the housing levy did not have any legal basis under the Kenya Revenue Authority Act.

[186] Subsequent to the decision of the High Court, in December 2023, the Affordable Housing Bill (National Assembly Bills No. 75 of 2023) was tabled before the National Assembly to address the concerns raised by the High Court. The Bill went through the legislative process, received Presidential assent on 19th March,

2024 and commenced on 22nd March, 2024. The Court of Appeal found that the Affordable Housing Act was necessitated by the High Court judgment. Further, that the concerns observed by the High Court had been addressed by the Affordable Housing Act. Consequently, the appellate court was satisfied that there was no live controversy on the question of the constitutionality of Section 84 of the Act as the concerns raised had been rendered moot by the enactment of the Affordable Housing Act.

[187] Now before us, the 1st and 2nd appellants argue that despite the enactment of the Affordable Housing Act, the legal questions arising from the findings on the affordable housing levy introduced in the Act still warrant this Court's consideration; and the underlying legal issue remains significant for the reason that finance laws will continue to be enacted in the future. Therefore, they invited this Court to find that the Court of Appeal acted in error and that this issue is alive and should be determined.

[188] This Court has addressed the doctrine of mootness in the case of ***Institute for Social Accountability & Another vs. National Assembly & 3 others*** (Petition 1 of 2018) [2022] KESC 39 (KLR) where we expressed that:

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

[189] Subsequently, in the case of ***Dande & 3 Others vs. Inspector General, National Police Service & 5 others*** (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) we held that:

> ***"The doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. An appeal or an issue is moot when a decision will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical."***

[190] Bearing these principles in mind, has the actual and substantial dispute regarding the affordable housing levy been resolved or spent, thus making the issues purely academic? As correctly noted by the Court of Appeal, the issue of the affordable housing levy was a live controversy before the High Court. However, taking a cue from the decision rendered by the High Court, the National Assembly sought to remedy the pitfalls noted by the court by entrenching the affordable housing levy in legislation *to wit*, the Affordable Housing Act. The purpose of the Act was to give effect to Article 43(1) (b) of the Constitution; to provide a framework for development and access to affordable housing and institutional housing. However, by the time the dispute was at the Court of Appeal, the Affordable Housing Act was already in force. It follows that by the subsequent enactment of the Affordable Housing Act, all issues relating to the affordable housing levy were overtaken by the subsequent legislation. As such, we find that

by the time the Court of Appeal was considering the consolidated appeal before it, there was no live issue relating to the affordable housing levy. Had the Court of Appeal, for instance, made any findings on the legal framework of the levy or the discriminative nature of the levy as contended by the parties or even the fact that the 5th appellant had been designated to collect the levy, that decision would have been in vain as there would have been no practical effects on the rights of the parties.

[191] We understand the 1st and 2nd appellants to be arguing that because a Finance Act will always be enacted in the future with subsisting affordable housing legislation in place, it then becomes necessary for this Court to determine the underlying issue. In our considered view, this would in a strict sense amount to placing the cart before the horse and pre-empting what the Legislature would enact as law. For good order, the only sensible approach would be to challenge that particular provision in court as and when such an issue would arise, bearing in mind that courts do not make orders in vain or decide on matters that are abstract, academic, or hypothetical. Finally, we are also alive to the fact that the Affordable Housing Act is subject of **HC Petition No. E154, E173, E176, E181, E191 of 2024**, which, at the time of the hearing of this consolidated appeal, was pending before the High Court. However, in the course of penning down this judgment, the High Court delivered its judgment on the said matter. In the circumstances, the less we say about it the better as the avenue of lodging an appeal against the High Court decision is still open to the parties therein.

vii. Whether a court has jurisdiction to test the legality of policy positions taken by the Executive and Parliament in the legislative process; and if so, whether the impugned sections of the Finance Act, 2023 relating to various tax legislations are unconstitutional

[192] The 1st and 2nd appellants contended that taxation measures contained in the Act were an exercise of executive policy formulation by the National

Government, an exclusive power and function related to national economic policy and planning set out in the Fourth Schedule to the Constitution. To them, the dispute involves a policy matter relating to taxation hence is non-justiciable, resolvable as a political dispute in Parliament to the exclusion of the court. Accordingly, provisions in the Act on amendments to the Income Tax Act, Tax Procedures Act, the Betting, Gaming and Lotteries Act, the Kenya Roads Act, the Employment Act and the Statutory Instruments Act were all construable to be within public policy, and therefore within the legislative remit of the National Government. The introduction of the housing levy was particularly rationalised as a policy decision to address affordable housing deficit in the country as contemplated under Article 209 as read with Section 7(3)(a) of the Housing Act.

[193] The High Court found favour with this argument asserting that courts have been slow to interfere with tax legislations in view of the merger of policy and legislation. The court was persuaded with the findings in ***State of MP vs. Rakesh Kohli & Another*** AIR 2012 SCC 2351 (11 May, 2012) and in ***Waweru & 3 Others (suing as officials of Kitengela Bar Owners Association) & Another vs. National Assembly & 2 Others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 Others (Interested Parties)*** [2021] KEHC 9748 (KLR).

[194] Weighing the specific provisions of the Act in so far they adumbrate policy decisions on taxation as against the High Court's duty under Article 165(3)(b)(d)(i) and (ii) of the Constitution the court was categorical that neither laws nor policies are immune from scrutiny by the court.

[195] Eventually, the High Court considered each of the provisions of the Act and concluded that Section 26 thereof amending the Third Schedule of the Income Tax Act relating to withholding tax bands; Section 7 amending Section 10 of the Income Tax Act relating to withholding tax; Section 33 amending Section 17 of the VAT Act to introduce 16% VAT on insurance compensation and Part II; Sections 30 to 38 of the Act which amended Sections 5, 8, 12, 17, 31, 34, 43, First and Second Schedule

of the VAT Act imposing varying or removing VAT on specific goods and services and varying the VAT rates applicable and how VAT Tax would administered, were mere policy choices of the National Government that did not warrant the court's intervention.

[196] This finding was challenged before the Court of Appeal by way of a cross-appeal by the 15th - 22nd respondents. The gist of their cross-appeal was that it faulted the High Court for misinterpreting Articles 10 and 165 (3) of the Constitution on its jurisdiction to test the constitutionality of anything including policy, and finding that the Act was "a policy" and not "a law" over which the court had jurisdiction. The High Court was further faulted for holding that in view of the merger of policy and legislation, it had no jurisdiction to interfere with tax legislation, contrary to the principles of public finance, equal protection of law, fairness and judicial authority under Articles 10, 27,159 165, 201 and 259; and for adopting an economic policy which does not reflect the financial status of the majority. A further argument was made of the abdication by the High Court of its jurisdiction to test the constitutionality of "anything" including policy said to infringe the Constitution. Reliance was placed on ***Kenya Tea Growers Association & 2 Others vs. The National Social Security Fund Board of Trustees & 13 Others*** [2024] KESC 3 Page 38 of 120 (KLR) in which the Supreme Court affirmed the High Court's jurisdiction under Article 165 of the Constitution.

[197] In its judgment, the Court of Appeal found that the High Court had misinterpreted Articles 10 and 165(3) of the Constitution effectively abdicating its jurisdiction to test the constitutionality of 'anything', including policy said to infringe the Constitution. A court ought not to intervene in matters policy where the relevant State organ acts within the law. Accordingly, the High Court was found to have erred in making a blanket statement suggesting that courts ought not to intervene in all policy matters. Despite this finding, the notices of cross appeal by

the 15th -19th & 22nd and 38th to 49th respondents and **Civil Appeal No. E064 of 2024** were held to be devoid of merit and were dismissed.

[198] The issue has now found itself before this Court and as a ground of appeal, the Court is being called upon to pronounce itself of the High Court's jurisdiction to test the legality of policy decisions taken by the Executive and Parliament in the legislative process; and if so, whether the impugned sections of the Act relating to various tax legislations are unconstitutional. From the above context, there appears to be a consensus from the parties that courts have jurisdiction to intervene in policy matters, which are in the exclusive jurisdiction of the Executive and the Legislature. However, this jurisdiction is confined to allowing the other arms of government the liberty to carry out their mandates without unnecessary judicial intervention. The superior courts below properly appraised this jurisdiction in their respective judgments.

[199] The point of departure appears to be the extent and applicability of the said jurisdiction to the present dispute. Several fronts have been presented. First, there is an argument on whether a court can intervene where a policy is exclusively challenged without the resultant legislative framework. That is to say, can a policy be challenged where the policy has not been converted into a legal instrument in statute? Secondly, and specific to the present matter, the extent of the circumscribed jurisdiction. Under this limb, there are competing schools of thought on the court's involvement, based on existing jurisprudence. There are instances of total deference where the court steers clear of making any pronouncements on policy matters and other instances of what was termed by one of the parties herein as total interference where the court not only countermands the policy but goes further to substitute it with its own preference.

[200] Governments operate through policy directives made at various levels. As we noted in ***Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated))***[2014] KESC 53 (KLR) (29 September 2014) (***CCK Case***):

> ***"[285] The Policy document is a general statement of aspirations which the Government wished to commit, or had committed itself to. Judicial notice has to be taken of the fact that the Government, in the normal discharge of its duties, does churn out policy statements, guidelines, and sessional papers as frameworks within which to conduct public affairs, and to deliver goods and services to the people."***

Part 1 of the Fourth Schedule to the Constitution sets out the functions of the National Government which includes formulating policies on various aspects like the national economic policy and planning, education, housing, and energy. While some of the policies are founded on the constitutional imperatives deriving from the above functions, others are made pursuant to legislative requirements. For instance, within the ICT sector, the Kenya Information and Communications Act, (Cap 411A) under Section 5A empowers the Minister to issue to the Communication Commission of Kenya policy guidelines of a general nature, relating to the provisions of the Act.

[201] On the other hand, the national values under Article 10 of the Constitution apply to State organs, state officers, public officers when they make or implement public policy decisions. Article 232 of Constitution on values and principles of public service includes involvement of the people in the process of policy making.

[202] As the parties noted, the courts have previously grappled with challenges to the policy measures including the apex court. In the ***CCK Case***, the issue revolved around the implementation of the ICT policy and Task Force Report by the State officers, public officers and others. In our judgment, we appreciated the statutory duty of the Minister to issue policy guidelines under Section 5A of the Kenya Information and Communications Act. Though we considered allegations of violations of the Constitution, we exercised restraint by not only referring the matter back to the policy makers to re-evaluate the policy issues in contention, but

also directed the judgment to be delivered to the Clerks of the National Assembly and the Senate for possible legislative intervention.

[203] In ***Martin & 106 Others vs. Engineers Registration Board & 7 others; Egerton University & Another (Interested Parties)*** (Petition 19 of 2015 & 4 of 206 (Consolidated) [2018] KESC 54 (KLR) this Court was more erudite in elucidating the court's circumscribed jurisdiction in matters policy in the following terms:

> "***As a court, we agree that when it comes to matters of policy formulation, we have a very minimal role to play, in matters education and especially professional training. However, we are cognizant of the fact that where such policy decisions affect the fundamental rights and freedoms protected by the Constitution, then those actions invite this Court and courts in general to intervene and safeguard those rights and freedoms. In this regard, see Community Advocacy and Awareness Trust & 8 Others vs. Attorney General & 6 Others [2012] eKLR where it was held that the court is not the appropriate forum for issuing guidelines."*** [Emphasis added]

In that case, the Engineers Registration Board (the Board) had argued that the degrees the petitioners held were not from universities accredited to issue engineering degrees. No evidence has been tendered that even, had the Board correctly interpreted its mandate, the petitioners, or some of them would not have qualified to be registered. All this situation arose out of the transition of a campus into a fully-fledged University while the petitioners were still undertaking their undergraduate studies in Engineering. Taking into account the unique situation of the circumstances, we were constrained to direct the Board to register the petitioners as engineers

[204] In a subsequent case of ***Moi University vs. Zaippeline & Another*** (Petition 43 of 2018) [2022] KESC 29 (KLR), we were also urged not to descend into the arena of policy-making. This Court reiterated its legal position on non-justiciability of matters involving policy by stating as follows:

> "***As we conclude, we note that the appellant urged us, just as was the case before the superior courts below, not to descend into policy making. Like the superior courts below, we are aware of the legal position on non-justiciability of matters involving issues of policy in academic matters and/or elsewhere, which are left to the bodies entrusted therewith by statute or regulations.***" [Emphasis added]

The Court has also previously expressed itself on non-justiciability of a case based on the political question doctrine in the context of separation of powers doctrines. (See ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** (Petition 3 of 2018) [2021] KESC 34 (KLR).

[205] To rehash our position in ***Institute for Social Accountability Case***, separation of powers ought not to be treated or viewed as an end in itself but aimed at the fulfilment of the form of governance and vision of the state that Kenyans aspired to as represented in the national values and principles of governance under Article 10 of the Constitution. This makes the question as to whether the legislative structure of an institution reinforces/promotes or detracts from the national values and principles articulated in the Constitution to have a bearing on whether the separation of powers is violated or not. See ***In the Matter of the Principle of Gender Representation***, at paragraph 54.

[206] Given the foregoing analysis, in the ***Institute for Social Accountability Case*** we adopted a two-pronged test to assess whether a particular allocation of mandate, function, or power to a public agency or institution amounts to an unconstitutional intrusion that threatens or violates the

separation of powers. The two limbs of the test are: (a) whether the mandate, functions or powers of the subject state agency, or institution unjustifiably strays into the nucleus, core functions, or pre- eminent domain that are the exclusive competence of another branch of government from a functional point of view; and (b) whether the exercise of the subject assigned mandate, functions, or powers will harm or threaten the realization of the national values and principles articulated in the Constitution.

[207] In South Africa, it is generally accepted that executive government policies are better challenged politically and not judicially. In ***National Treasury & 5 Others vs. Opposition to Urban Tolling Alliance & 4 Others*** [2012] ZACC 18 the Constitutional Court stated as follows:

> ***"[93] It is undisputed that in July 2007 the Cabinet approved the Gauteng Freeway Improvement Project and the concomitant basis for its funding, e-tolling, after extensive investigation and a report to it on the issue. It is national executive and treasury policy not to use fuel levy-type funding for these kinds of projects. None of this was, or could be, attacked on review in this Court. The playing field for the contestation of executive government policy is the political process, not the judicial one."***

[208] The Constitutional Court of South Africa has proceeded to demarcate the courts' role in reviewing policy questions in ***International Trade Administration Commission vs. SCAW South Africa (Pty) Limited*** 2012 (4) SA 618 (CC) at paragraph 95 thus:

> "***Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function***

by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

[209] Our position therefore remains what we have consistently stated in the decisions we have made reference to, that as a rule of thumb, courts should restrain from intervening in policy matters. However, the High Court under Article 165 of the Constitution retains residual jurisdiction to test the constitutionality of policy decisions, whether or not translated into laws, as we observed in ***Kenya Tea Growers Association Case***:

"Having said so, we have to emphasize that the High Court retains the residual jurisdiction to determine whether any law is inconsistent with the Constitution within the meaning of Article 165, bearing in mind the provisions of Article 165(5)(b). It must also be restated that the High Court (as between it and courts established under Article 162 of the Constitution), has the original and exclusive jurisdiction (<u>without exception</u>) to hear and determine applications for redress of denial, violation, or infringement of rights and fundamental freedoms in the Bill of Rights pursuant to Articles 22 and 23 of the Constitution (See Supreme Court Judgment in the County Assemblies Forum v Attorney General & others; Pet No 22 of 2017, at Paragraph 56)." [Emphasis added]

This means that while the courts should exercise judicial restraint, the framers of the Constitution made it possible for litigants to not only approach court, without exception, for redress of fundamental freedoms in the Bill of Rights but also to invoke the residual jurisdiction in respect of interpreting the Constitution and determining whether any law or anything said to be done under the authority of the Constitution is inconsistent with or contravenes the Constitution. We need not re-emphasize the transformative nature of our Constitution particularly the context and foundation within which it was promulgated.

[210] From the above rendition of the law, it is evident that constitutional challenge is not limited to the laws enacted but extends to anything done under the Constitution and the exercise of constitutional powers. Just like the doctrine of constitutional avoidance, exhaustion of existing mechanisms and non-justiciability, it is only when the court has been moved that it should make an inquiry into whether it should exercise its jurisdiction as sought and if so to what extent. This inquiry should bear in mind the unlimited reliefs contemplated under Article 23 of the Constitution in relation to the enforcement of the Bill of Rights. In doing so, the courts would be able to contemplate whether a policy directive under challenge passes the constitutional muster.

[211] In our view therefore, nothing turns on whether a policy is manifested through a law or flows from a given policy, as a policy may be made pursuant to a statutory requirement. What remains evident is that the National Government and Parliament are bestowed with constitutional mandates and functions on one hand, and the courts with the mandate of interpreting or testing them against the Constitution on the other hand. These are distinct but interdependent roles that have to be undertaken under the current design of the Constitution. Since all arms of government serve the same people, the policy makers through exercise of public participation should endeavour to make policies that are consistent with the Constitution and resonates with the people.

[212] Where the courts intervene, they should strive to sustain policy recommendations by the Executive and Legislature except in situations where the policy is outrightly unconstitutional and remedial measures need to be taken in the meantime, especially in the realm of public policy.

[213] Turning to the present case, we note that the Act by its very nature is a testament of the national economic policy and planning contemplated under the Fourth Schedule. It contains the governments revenue raising measures for the upcoming financial year being an annual statutory and constitutional process of budgeting. While this may be seen as the National Government's own policies that it seeks to implement, it is reduced into the legislative proposals set out in a Finance Act. On the face of it, the provisions contain proposals for tax and related revenue raising proposals affecting different existing statutes. We do not therefore envisage a situation where a process undertaken in furtherance of constitutional requirements and the proposed amendments to various statutes can be inoculated from a constitutional challenge on account of being a policy matter. In this instance, the challenge to the legal provision impliedly amounted to a challenge of the National Government policy.

[214] Courts have previously struck down statutes for being unconstitutional despite being a representation of the underlying policy by the National Government. From the record, we are satisfied that the High Court's finding on its jurisdiction under Article 165 of the Constitution notwithstanding, it went ahead to consider the specific provisions under challenge as amounting to policy matters, ultimately satisfying itself on the constitutionality of each of them. On its part, the Court of Appeal, despite finding that the High Court abdicated its jurisdiction under Article 165 of the Constitution did not overturn these findings on the constitutionality of the said provisions. In dismissing the cross appeal by the 15th - 19th & 22nd respondents, the Court of Appeal affirmed the High Court's findings on unconstitutionality. We see no reason to interfere with these findings by the

superior courts below and take it that the two courts meant the same thing *albeit* expressed in a semantically different manner.

[215] Having pronounced ourselves as herein above, the 15th -19th & 22nd respondents' cross appeal before this Court, in so far as they sought a declaration that the Act violates Articles 10, 21(3), and 201 of the Constitution, is dismissed. The said cross appeal consequently fails.

viii. What considerations should a Court take into account in declaring a statute unconstitutional and what consequential orders ought a court issue upon making a declaration of unconstitutionality of a statute or parts thereof

[216] The Supreme Court of India in the case of ***Government of Andhra Pradesh & Others vs Smt. O. Laxmi Devi*** Civil Appeal No. 8270 of 2001 held at paragraph 36 that invalidating an Act of the Legislature is a serious step that should be taken with extreme caution since it ***"thwarts the will of the representatives of the people; it exercises control, not on behalf of the prevailing majority, but against it."*** The court further relied on the journal article by Prof. James Bradley Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' **Harvard Law Review**, 1893. Professor Thayer recognizes that a court has the power to declare a statute unconstitutional. However, in view of the doctrine of separation of powers, he cautions that a court should only declare a statute as being unconstitutional where that is the *only* rational answer so that there is no doubt that indeed the material statute is unconstitutional. The Supreme Court of India adopted this rationale so much so that the Court held that where there could be two views whether the statute could be constitutional or unconstitutional, the latter must prevail. The wisdom or unwisdom, justice or injustice of the law of the statute is not for the court to determine, as long as the Legislature acted within its scope of mandate.

[217] We are persuaded by the foregoing rationale as Kenya is a democracy. Article 1(2) of the Constitution provides that the People of Kenya may exercise their sovereign power either *directly*, or *indirectly* through their democratically elected representatives. Therefore, any legislation enacted is deemed to be responsive to the needs of the people. The legislation in question should always be viewed against the prism that the laws were enacted to cure a problem. This then informs the foundation that a legislation or a provision thereof will be deemed to be constitutional, unless otherwise proved.

[218] In ***Law Society of Kenya vs. Attorney General & Another,*** SC Petition No. 4 of 2019 [2019] KESC 16 (KLR), we set out the parameters for declaring a statute or a provision thereof as being unconstitutional. The parameters are as follows:

> *"*
>
> ***i. There is a general rebuttable presumption that all laws conform to the Constitution. The onus to prove otherwise is on the party so alleging.***
>
> ***ii. There is a general presumption that when enacting the legislation in question, the Legislature was alive to the needs of Wanjiku. Therefore, the law as formulated reasonably meets those needs.***
>
> ***iii. The true essence of the statute -purpose and effect of a statute and/or statutory provision must be considered. It entails discerning the intention of the drafters and the Court can consider the historical background of the said law."***

[219] Likewise, the Supreme Court of India in ***State of M.P. vs. Rakesh Kohli & Another***, Civil Appeal No. 684 of 2004 restated the guidelines as follows:

“

a. ***That a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;***

b. ***That there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;***

c. ***That it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;***

d. ***That the legislature is free to recognize decrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;***

e. ***That in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and***

f. ***That while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the***

Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

[220] It follows therefore from the above holdings that, the proper procedure before reaching such a manifestly far-reaching finding, is for there to have been a specific plea for unconstitutionality raised before the appropriate court. This plea must also be precise to a section or sections of a definite statute. The court must then juxtapose the impugned provision against the Constitution before finding it unconstitutional and specify the reasons for such a finding. **See *Robert Alai vs. The Hon. Attorney General & Another***, HC Petition No. 174 of 2016; [2017] eKLR.

[221] Furthermore once a Court is satisfied that a statute or provision is unconstitutional, the next step is to make a declaration to that effect. In Kenya, the position is that the impugned statute is no longer deemed to exist and cannot be the subject of adjudication. See the ***BBI Judgment*.** The effect of a declaration of unconstitutionality is that the status *quo ante* is restored. ***See Senate & 2 Others vs. Council of County Governors & 8 Others***, SC Petition No. 25 of 2019; [2022] KESC 7 (KLR) (***Senate Case***).

[222] Looking at the present case, the Court of Appeal correctly cautioned itself that there is a rebuttable presumption of the constitutionality of a statute. However, after finding that the process of enacting the Act flouted the provisions of the Constitution and the PFM Act, the Court of Appeal found it unnecessary to consider whether various provisions of the Act relating to tax legislations violated the Constitution beyond the procedural aspects.

[223] The next thorny issue raised by the appellants was that the Court of Appeal failed to consider the impact or consequence of declaring the entire Act

unconstitutional on the existing financial framework. They further submitted that the Court of Appeal failed to issue an appropriate remedy and therefore, created uncertainty with far-reaching implications on the financial and legislative stability in the country.

[224] Having declared the entire Act unconstitutional, and going by our decision in the ***Senate Case***, it means that the status *quo ante* was reinstated, that is, the Finance Act, 2022. However, there still remains the issue of the tax that was collected under the Act. It is public knowledge that Finance Acts are always enacted in the context of the annual budget cycle, and the Court of Appeal's decision was delivered post the financial year. In addition, the Finance Act, 2024 was not enacted. In the circumstances, was the declaration of invalidity of the Act in its entirety proper in the circumstances?

[225] Where a declaration of invalidity poses an existential crisis, courts around the world have tailored mechanisms for handling the same. One among them is the remedy of suspension of invalidity. This phrase made its inaugural appearance in 1985 when the Supreme Court of Canada in ***Re Manitoba Language Rights, [1985] 1 SCR 721, 19 DLR*** held that most laws of the province of Manitoba were unconstitutional and void *ab initio* for failure to publish them in both French and English and only publishing them in English. However, to avoid a vacuum, lawlessness and anarchy, the Court in furtherance of the rule of law, suspended the judgment to allow Manitoba to comply with the constitution. It further preserved any rights that accrued under the laws existing at the time.

[226] Similarly, in 1992, the Supreme Court of Canada in the case of ***Schachter vs. Canada, [1992] 2 S.C.R. 679***, acknowledged the supremacy of the Canadian Constitution as per Section 52(1) of the Constitution Act, 1982. It went further to find that where a particular law was declared unconstitutional, a Court then had to interrogate the following 3 questions**: a)** what was the extent of inconsistency; **b)** could the inconsistency be dealt with alone or were the other parts of the legislation linked to it; and **c)** whether the declaration of invalidity

should be temporarily suspended. The Court also held that Section 52(1) of the Constitution grants Canadian courts "***... flexibility in determining what course of action to take***" upon discovering that a certain law was unconstitutional including, suspending declarations of invalidity.

[227] Brian Bird in 'The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity" (2019) 42 **Manitoba Law Journal** 23-49 considers the practice in Canada of suspending declarations of invalidity under Section 33 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, also called the '*notwithstanding clause'*. He notes that suspended declarations of invalidity operate by suspending the validity of a declaration of unconstitutionality as opposed to immediate implementation and gives the legislature a chance to cure the malady. The justification for suspended declarations of invalidity is where such declaration would create lawlessness and chaos.

[228] In the ***Schachter Case***, the Canadian Supreme Court set the criteria to guide the courts in determining whether to issue suspended declaration of invalidity as follows:

i. *Whether a declaration of unconstitutionality poses a potential danger to the public.*

ii. *Where a declaration of unconstitutionality threatens the rule of law.*

iii. *Where the law is unconstitutional for failure to include all categories of people it should reasonably include so that the suspension allows legislature to determine whether to extend or cancel the benefits in the 'underinclusive' law.*

[229] In ***R vs. Albashir, 2021 SCC 48***, the Supreme Court of Canada again held that the purpose of suspension of a declaration of invalidity is tested against the parameters of whether the declaration must operate retroactively or prospectively. It cited the case of ***Canada (Attorney General) vs. Bedford***,

2013, SCC 72, [2013] 3 S.C.R. 1101, where it was held that the law criminalizing living off the proceeds of sex work was unconstitutional. The court in the ***Bedford Case*** however issued a suspended declaration of deregulation of sex workers to protect them (sex workers). The Court set out three guidelines to be applied when interpreting constitutional remedies: constitutionalism, rule of law and separation of powers.

[230] The principles for consideration before suspending a declaration of constitutional invalidity were also laid out in the case of ***Ontario (Attorney General) vs. G***, 2020 SCC 38 by the majority of the Court as follows:

> ***"... As I will explain, when legislation violates the Charter, courts have been guided by the following fundamental remedial principles, grounded in the Constitution, in determining the appropriate remedy, applying them at every stage:***
>
> ***a. Safeguarding rights.***
> ***b. Compelling public interest in constitutionally compliant litigation.***
> ***c. Public entitlement to the benefit of legislation.***
> ***d. Different arms of government play different institutional roles."***

[231] Notably, even the Judges who dissented in the ***Ontario Case (Supra)***, agreed that declarations of invalidity could be suspended where there was a threat to the rule of law and where it was in the public interest. The contest was the abuse of the remedy of suspension. That Court further set forth the following guidelines when crafting an appropriate remedy:

i. Determining the extent of invalidity.

ii. Determining what form the declaration should take.

iii. Legislature's intention to have enacted the law in the manner proposed by the Court.

[232] In ***Phumeza Mlungwana & 9 Others vs. The State & Anor***; [2018] ZACC 45, the Constitutional Court of South Africa stated that an order declaring a legislation invalid may only be suspended if:

a) The declaration of invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship;

b) There are multiple ways in which the Legislature could cure the unconstitutionality of the legislation; and

c) The right in question will not be undermined by suspending the declaration of invalidity.

[233] In ***Coetzee vs. Government of the Republic of South Africa***, ***Matiso and Others vs. Commanding Officer***, ***Port Elizabeth Prison and Others***, (CCT19/94, CCT22/94) [1995] ZACC 7), Sachs, J. expressed himself as follows on the appropriateness of granting a suspension order:

"The words 'in the interests of justice and good government' are widely phrased and, in my view, it would not be appropriate, particularly at this early stage, to attempt a precise definition of their ambit. They clearly indicate the existence of something substantially more than the mere inconvenience which will almost invariably accompany any declaration of invalidity, but do not go so far as to require the threat of total breakdown of government. Within these wide parameters the Court will have to make an assessment on a case-by-case basis as to whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect than

would be the case if the measure were kept functional pending rectification. No hard-and-fast rules can be applied."

[234] In ***Limpopo Province vs. Speaker of the Limpopo Provincial Legislature and Others***, (CCT 94/10); [2012] ZACC 3; 2012 (4) SA 58 (CC); 2012 (6) BCLR 583 (CC) (22 March 2012), the Constitutional Court of South Africa, faced with a case for declaring a statute unconstitutional, stated that in order to determine whether the declaration should take immediate effect, the following had to be considered:

"

1. ***If an immediate invalidation will result in a legislative lacuna, where no remaining legislation or regulations adequately deal with the issue, the Court will suspend the invalidation. A legislative lacuna may affect the interests of good government.***

2. ***A Court should readily allow parties to consult, where they have indicated they intend to do so. This consultation should be done in a manner that does not cause undue administrative disruption in the interim.***

3. ***Prejudice- whether there will be any countervailing considerations of hardship or harm that would result from the continued operation of the statutes.***

4. ***Period of suspension: under this, the court should consider the following:***

    a. ***The government's conduct;***

    b. ***Whether there is any legislation in the pipeline; and***

c. The nature and severity of the continuing infringement."

See also ***Estate Agency Affairs Board vs Auction Alliance (Pty) Ltd and Others***, (CCT 94/13); [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC).

[235] The concept of suspended declarations of invalidity is not new in Kenya. See ***Marilyn Muthoni Kamuru &; 2 Others vs. Attorney General &Another,*** HC Petition 566 of 2012; [2016] eKLR and ***Centre for Rights Education and Awareness &2 Others v Speaker of the National Assembly & 6 Others***, HC Petition 371 of 2016; [2017] eKLR. The Supreme Court has also pronounced itself on these issues see ***Mary Wambui Munene vs. Peter Gichuki King'ara & 2 Others*** Petition No. 7 of 2014; [2014] eKLR and ***Suleiman Said Shahbal vs. Independent Electoral and Boundaries Commission & 3 Others,*** SC Petition No. 21 of 2014; [2014] eKLR. In our context, the suspension of a declaration of invalidity finds its anchor in Article 23 of the Constitution which provides for the various reliefs available for violations for the Bill of rights. The word 'includes' means that the list is not exhaustive. Article 259(4)(b) of the Constitution stipulates that the word "*includes*" means "*includes, but is not limited to*".

[236] From the above analysis it is clear that a cautious approach would apply, such that a suspended declaration should only be issued where in the public interest, there exists a set of facts that are very unique and demand for that suspended declaration, such as to avoid a vacuum in the law, a threat to the rule of law, lawlessness, chaos or anarchy. Certainly, it may apply to the questions posed hereinabove as to resolving a possible crisis in the public law policy and practice.

[237] Applying the foregoing to the instant appeal, it is important to note that a Finance Bill is required to implement the budget of the nation. It sets out the revenue raising measures for the national government. It follows, that under the Act revenue was raised in the manner set out therein. It is also expected that the

State has collected taxes under the Act and expended the same. As postulated by the 5th appellant, some of it was collected indirectly like VAT.

[238] In view of the foregoing, we are of the view that the Court of Appeal ought to have gone a step further and fashioned a remedy to suit the peculiar circumstances of the case. It was not enough to merely make a declaration of invalidity and leave it at that. As indicated elsewhere in this judgment, the range of reliefs provided for under Article 23(3) is not exhaustive. The wording ***"In any proceedings brought under Article 22, a court may appropriate relief, including-..."*** is only indicative and refers to a range of reliefs that may be ordered. To our minds, the preferred remedy would have been to suspend the declaration of invalidity to allow Parliament take remedial measures.

[239] A question may then arise as to whether a legislation or provision automatically becomes invalid upon expiry of the period of suspension. In our view, Article 23(3) of the Constitution gives a wide latitude as to the nature of orders that can be issued for violations of constitutional rights. In that connection, depending on the circumstances, a court should extend the suspension of declaration of invalidity at its discretion, considering all factors. The Constitutional Court of South Africa extended the period of suspension of invalidity in the case of ***Speaker of the National Assembly & Another vs. Women's Legal Centre trust & Others***; [2024] ZACC 18. The Court held:

> ***"[17] This Court has the power to grant extension orders in respect of orders made in terms of section 172 of the Constitution. According to section 172(1)(b), courts are afforded a wide discretionary power to grant a just and equitable remedy if it is in the interests of justice to do so. In New Nation II, 11 dealing with a second application for an extension of the period of suspension of the declaration of invalidity, this Court held that—***

'[a] proper case justifying the need for an extension must be made out because the effect of suspending the operation of a declaration of invalidity is to preserve law which has been found unconstitutional and void, usually, as was the case here, to afford Parliament opportunity to remedy the defect.'"

The Court also delineated the following factors for consideration:

a) The adequacy of the reasons provided for the failure to comply with the extended suspension period;

b) Prejudice if the relief sought is or is not granted; and

c) The prospects of curing the constitutional defects within the new deadline or, more generally, the prospects of complying with the deadline.

Evidently, the court's hands are not tied when dispensing justice.

[240] Within this context, we deem it necessary to outline the following guidelines, which we draw from our own previous decisions and persuasive decisions from other jurisdictions to assist courts, in the event that a declaration of unconstitutionality of a statute or part of thereof, is to be made:

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.*

[241] Once the declaration has been made, the next phase is what consequential orders to issue. The following guidelines may be helpful where the court is minded to issuing a suspension of declaration of invalidity:

i. *Suspension of invalidity is a remedy that ensures the just and equitable relief, while ensuring that there is no disruption to the regulatory aspects of the statutory provision that is invalidated.*

ii. *The declaration of invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship.*

iii. *Whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect than would be the case if the measure were kept functional pending rectification.*

iv. *Whether there are multiple ways in which the Legislature could cure the unconstitutionality of the legislation.*

v. *The right in question will not be undermined by suspending the declaration of invalidity.*

vi. *Whether the suspension would be in interests of justice and good government, that is, whether the declaration of invalidity causes more than an inconvenience but no go so far as to require the threat of total breakdown of government.*

vii. *A court must balance the interests of the successful litigant in obtaining immediate constitutional relief and the potential of disrupting the administration of justice.*

viii. *Whether there will be any countervailing considerations of hardship, prejudice or harm that would result from the continued operation of the statutes.*

ix. *Period of suspension: under this, the court should consider the following:*

a. *The government's conduct;*
b. *Whether there is any legislation in the pipeline; and*
c. *The nature and severity of the continuing* infringement.

ix. What remedies should issue?

[242] It is common ground that the Court of Appeal, unlike the High Court, declared the entire Act as unconstitutional on the basis that the legislative process that led to its enactment was fundamentally flawed and in violation of the Constitution. However, based on this Court's findings in the eight (8) issues herein above, we find conversely that the legislative process (public participation and concurrence) was in accordance with the constitutional edicts. In particular, we find that the Bill underwent the concurrence process under Article 110(3) of the Constitution; the Bill being a money Bill did not require consideration by the Senate; and the Bill was subjected to public participation which was adequate and satisfactory taking into account the circumstances of enacting a

Finance Act. To that extent, we find there was no basis to declare the entire Act unconstitutional.

[243] Consequently, the order that commends itself is an order setting aside the Court of Appeal's judgment save for the finding that the questions relating to Sections 84 (Affordable Housing Levy) 88 and 89 (Statutory Instruments Act) of the Act were moot. Further, with regard to the impugned contents of the Act, we uphold the High Court judgment to the extent that Sections 76 and 78 of the Act amending Section 7 of the Kenya Roads Act, 1999; Section 87 of the Act amending Section 28 of the Unclaimed Assets Act, 2011 are unconstitutional as they were neither incidental nor directly connected to a money Bill.

[244] It is instructive to note that the 38th -49th respondents through their cross appeal raised the issue of refund of taxes paid by virtue of the impugned Act, which the Court of Appeal declared unconstitutional. Taking into account our findings in the preceding paragraphs, to the effect that the Court of Appeal erred in declaring the entire Act unconstitutional, the prayer for refund of taxes paid as sought, fails. Equally, the cross appeal by the 38th – 49th lacks merit and is dimissed.

F. CONCLUSION & SUMMARY OF FINDINGS

[245] The budget process is the most relevant and important economic event, not only to the government but more so to the people in whom the sovereign power lies. It is for this reason that all the questions raised and determined in this appeal revolve around the people. The focus on the people in the budget making process must be balanced against the government's constitutional mandate to facilitate and realize a strong and acceptable fiscal outlook for the economy. To achieve the balance the budget planning and preparation system and strategies must be in strict conformity with the Constitution and the law. The process does not end with the budget making but extends beyond to ensuring both expenditure control and transparency in the government; where resources go to specific areas targeted in the budget for the people and the people see the outcome and are satisfied. That way there will be no mistrust in government budgeting.

[246] Consequently, the following is a summary of our findings:

a) This Court has jurisdiction to determine the SC Petition Nos. E032 & E034 of 2024 under Article 163(4)(a) of the Constitution.

b) The question relating to Section 84 (Affordable Housing Levy) of the Act is moot.

c) Sections 76 and 78 of the Act amending Section 7 of the Kenya Roads Act, 1999; Section 87 of the Act amending Section 28 of the Unclaimed Assets Act, 2011 are unconstitutional as they were neither incidental to nor directly connected to a money Bill.

d) The prayer for refund of taxes paid, fails.

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, 2023 does not concern County Government.

g) Two new provisions being Sections 23 and 79 were minor/technical amendments. However, the other 15 new provisions being Sections 18, 21, 32, 38, 44, 69, 80, 81, 82, 83, 85, 86, 100, 101, and 102 were substantive amendments. In addition, amendments to Sections 24, 26, 47 and 72, were also substantive amendments.

h) Where new substantive amendments are effected pursuant to public participation, Parliament is not required to undertake fresh public participation.

i) Bearing in mind the time-sensitive nature of a Finance Bill, it is untenable to require or subject amendments intended to give effect to proposals and suggestions from a public

participation exercise to another fresh round of public participation.

j) Parliament exercises administrative powers in some of its functions including investigations, recommendations, and findings by its respective committees or approval of appointments to public office. However, the exercise of legislative power does not amount to administrative action, and Article 47(2) of the Constitution cannot be the basis for an obligation on Parliament to provide reasons for accepting or rejecting views gathered during public participation in the law-making process.

k) While there is no express obligation on Parliament to provide reasons for accepting and/or rejecting proposals/views made during a public participation exercise, as a matter of good practice, it must nonetheless put in place reasonable measures to ensure it considers and treats the proposals, views, suggestions, and comments received during such an exercise.

l) The National Assembly's Departmental Committee on Finance and National Planning's 'Report on the Consideration of the Finance Bill (National Assembly Bill No. 14 of 2023)' met the threshold of a reasonable measure for considering proposals, views and suggestions from the public, with respect to the public participation exercise conducted on the Finance Bill, 2023.

m) In line with Article 221 (6) of the Constitution estimates of revenue are not a component of the Appropriation Act. The preparation and tabling of the estimates of revenue and expenditure precede the preparation and tabling of the Appropriation Bill.

n) The estimates of revenue and expenditure for the FY 2023/2024 were tabled and considered before the National Assembly as required by law.

o) Generally, courts should refrain from intervening in policy matters. However, 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.

p) In determining whether to declare a statute or part thereof as unconstitutional, a court should take into account the following factors:

- ***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.

q) The criteria that ought to guide a court in determining whether to issue a suspension of declaration of invalidity is as follows:

i. Suspension of invalidity is a remedy that is in the nature of a just and equitable relief, while ensuring that there is no disruption to the regulatory aspects of the statutory provision that is invalidated.

ii. The declaration of invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship.

iii. Whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect than would be the case if the measure were kept functional pending rectification.

iv. Whether there are multiple ways in which the Parliament could cure the unconstitutionality of the legislation.

v. The right in question will not be undermined by suspending the declaration of invalidity.

vi. Whether the suspension would be in the interest of justice and good government, that is, whether the declaration of invalidity causes more than an

inconvenience but not go so far as to require the threat of total breakdown of government.

vii. A court must balance the interests of the successful litigant in obtaining immediate constitutional relief and the potential of disrupting the administration of justice.

viii. Whether there will be any countervailing considerations of hardship, prejudice or harm that would result from the continued operation of the statute.

ix. In determining the period of suspension, the court should consider the following matters:

(a) The government's previous conduct;

(b) Whether there is any related legislation in the pipeline; and

(c) The nature and severity of the continuing infringement.

[247] Additionally, we deem it fit to issue the following recommendations:

a) Parliament ought to put in place a legislative framework to regulate the process of public participation as envisaged under the Constitution.

b) Parliament ought to put in place measures to ensure that all versions of a Bill, at every stage of the law-making process, are accessible to the public for their information and scrutiny.

c) As a matter of good practice, Parliament should put in place reasonable measures for the consideration of proposals, views, suggestions, and comments received during a public participation exercise.

F. COSTS

[248] Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate of & 4 Others***; SC Petition 4 of 2012; [2013] eKLR, we find that due to the public interest nature of this matter each party should bear their own costs.

G. ORDERS

[249] In the premise, we issue the following orders:

1. ***The preliminary objection on this Court's jurisdiction is overruled.***
2. ***The consolidated appeal partially succeeds to the following extent:***
   a) ***We hereby set aside the Court of Appeal's finding declaring the entire Finance Act, 2023 unconstitutional.***
   b) ***We uphold the following findings by the Court of Appeal:***
      i. ***That the question relating to Section 84 (Affordable Housing Levy) introduced by the Finance Act, 2023 before the Court of Appeal was moot.***
      ii. ***That Sections 76 and 78 of the Act amending Section 7 of the Kenya Roads Act, 1999; Section 87 of the Act amending Section 28 of the Unclaimed Financial Assets Act, 2011 are unconstitutional as they were neither incidental to nor directly connected to a money Bill.***

3. ***The 15th -19th & 22nd and 38th - 49th respondents' cross appeals are hereby dismissed.***
4. ***Each party will bear their costs of the consolidated appeal and cross appeals.***
5. ***We hereby direct that the security for costs deposited in the consolidated appeal be refunded to the depositor(s).***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **29th** day of **October**, 2024.

.....

M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....	.....
P.M. MWILU	**M.K. IBRAHIM**
DEPUTY CHIEF JUSTICE &	**JUSTICE OF THE SUPREME COURT**
VICE PRESIDENT OF THE	
SUPREME COURT	
.....	.....
S. C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA