



Case Number:	Petition 253 of 2018
Date Delivered:	19 Sep 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Wilfrida Adhiambo Okwany
Citation:	Okiya Omtatah Okioti v Cabinet Secretary, National Treasury & 3 others [2018] eKLR
Advocates:	Mr Marwa for Mutinda for 1st respondent, Mr Kirugi, Mr Ochiel, and Mr Almadi for the 3rd respondent
Case Summary:	<p>The Provisional Collection of Taxes and Duties Act is unconstitutional on grounds of granting legislative power, with respect to Bills on taxes and duties, to the Cabinet Secretary, National Treasury.</p> <p>Okiya Omtatah Okioti v Cabinet Secretary, National Treasury & 3 others</p> <p>Petition No 253 of 2018</p> <p>High Court at Nairobi</p> <p>W A Okwany, J</p> <p>September 19, 2018</p> <p>Reported by Beryl A Ikamari</p>

Jurisdiction-jurisdiction of the High Court-jurisdiction to determine the constitutionality of legislation-claim that enactments were made without following the legislative process and were inconsistent with the provisions of the Constitution-whether the High Court had jurisdiction over such claims-Constitution of Kenya 2010, article 165(3).

Constitutional Law-interpretation of constitutional provisions-interpretation of article 221(1) of the Constitution-timelines applicable to the presentation of budget estimates for both revenue and expenditure to the National Assembly-whether what was to be presented to the National Assembly within the given timeline under article 221(1) of the Constitution included the Finance Bill for the next financial year-Constitution of Kenya 2010, article 221(1); Public Finance Management Act, No 18 of 2012, section 37 & 39.

Statutes-interpretation of statutory provisions-constitutionality of statutory provisions-constitutionality of section 2 of Provisional Collection of Taxes and Duties Act on the giving of statutory effect to a Bill relating to imposition of taxes and duties-whether the provision wrongfully granted the Cabinet Secretary legislative powers, whether it wrongfully exempted taxation Bills from the legislative process provided for in the Constitution, by giving legal effect to the provisions of a taxation Bill that had not been passed into law and whether it purported to amend the Constitution without following the requisite procedures-Constitution of Kenya 2010, article 256 & 255(1)(h); Provisional Collection of Taxes and Duties Act (Cap 415), section 2.

Constitutional Law-interpretation of constitutional provisions-interpretation of article 221 of the Constitution-whether the Finance Bill was part of the estimates of Government expenditure to be included in the Appropriation Bill and whether it ought to be considered and approved at the same time as the Appropriation Bill-Constitution of Kenya 2010, article 221; Public Finance Management Act, No 18 of 2012, section 39 & 41.

Brief facts

The Finance Bill 2018 sought to introduce amendments to the tax regime in order to mobilize revenue and finance the Government's budget of Kshs. 3 trillion. The Finance Bill 2018 had only undergone the First Reading and it was subject to approval or rejection by Parliament but most of its proposals were already being implemented. The Petitioner contended that without undergoing the full legislative process, the Finance Bill 2018 could not be implemented.

The Petitioner stated that only Parliament could enact legislation but Parliament had no capacity to exempt a Bill from any stage of the legislative process. The Petitioner elaborated that all constitutional provisions, with the exception of provisions in the Bill of Rights which could be limited under article 24 of the Constitution, were absolute and were not subject to limitation. In order to exempt a Bill from the legislative process provided for in the Constitution, it would be necessary to amend the Constitution.

The Petitioner challenged the constitutionality of the Provisional Collection of Taxes and Duties Act (PCTDA) on grounds that contrary to article 256 and 255(1) of the Constitution, it gave the Cabinet Secretary to the National Treasury power to temporarily amend the national tax revenue statutes through a Finance Bill without it going through the constitutional legislative process. According to the Petitioner, that was a usurpation of Parliament's legislative powers to directly impose taxes under the provisions of article 221 of the Constitution on budget estimates and the annual Appropriation Bill. The Petitioner asserted that the Provisional Collection of Taxes and Duties Order 2018 (the Order), which was used to give effect to the Finance Bill 2018 even though it had not been passed into law, did not comply with the Statutory Instruments Act.

The Petitioner explained that under article 221(1) of the Constitution and section 37 the Public Finance Management Act 2012 (hereinafter "the PFMA"), a two-month minimum timeline was set for the presentation of budget estimates for both revenue and expenditure to the National

Assembly. The latest that the Finance Bill 2018 could have been tabled before the National Assembly was on April 30, 2018 but it was tabled on June 14, 2018 while the financial year was ending on June 30, 2018.

The Petitioner also averred that the Finance Bill 2018 was not subjected to public participation before its implementation. The requirement for public participation in financial matters was provided for in article 201(1) (a) of the Constitution. The Petitioner added that the Appropriation Act 2018 was unconstitutional as it was not prepared using estimates approved by Parliament. Under article 221(6) of the Constitution an Appropriation Bill could only be developed after the estimates of National Government expenditure, and the estimates of expenditure for the Judiciary and Parliament had been approved by the National Assembly. The Petitioner stated that if the Appropriation Act was quashed, there would be no vacuum as the National Assembly could authorize the withdrawal of money from the Consolidated Fund.

Issues

1. Whether the High Court had jurisdiction to determine a matter which questioned the constitutionality of legislation on the basis of the process leading to its enactment and alleged inconsistency with provisions of the Constitution.
2. Whether there was a violation of the timelines set in article 221(1) of the Constitution and section 37 of the Public Finance Management Act when the relevant Cabinet Secretary presented the Finance Bill 2018 to the National Assembly on June 14, 2018.
3. Whether the Provisional Collection of Taxes and Duties Act was unconstitutional on grounds of granting the relevant Cabinet Secretary legislative powers that allowed him to give effect and implement the provisions of a Bill that dealt with taxes

and duties, without the Bill having been passed into law.

4. Whether the Appropriation Act 2018 was unconstitutional as it was not prepared using estimates approved by Parliament and whether those estimates included the Finance Bill 2018.

Held

1. What was before the Court was not a question on whether the Respondents had fulfilled their constitutional mandate but a question on whether the impugned legislation and its enactment process, met the relevant legal and constitutional thresholds and whether under the circumstances the rights of the citizens had been violated or were threatened with violation. Under article 165 of the Constitution, the High Court had jurisdiction to determine questions relating to violations of fundamental rights and freedoms and also questions relating to whether a law was inconsistent with the Constitution.
2. The Court could interfere with Parliament's legislative role as the question of the validity of a piece of legislation also extended to the manner in which the legislation was enacted. The High Court could assume jurisdiction in relation to a question on the constitutionality of a piece of legislation.
3. Article 221(1) of the Constitution and section 37 of the Public Finance Management Act, provided that two months before the end of the financial year or by April 30th of each year, the Cabinet Secretary responsible for finance had to table before the National Assembly estimates of the revenue and expenditure for the next financial year. Particularly, the requirement under section 37 of the Public Finance Management Act included tabling of any Bills required to implement the National Government budget within that timeline. The tabling of the Finance Bill by

that timeline was not a requirement under article 221(1) of the Constitution but it was a statutory requirement under section 37 of the Public Finance Management Act. Therefore, there was a violation of section 37 of the Public Finance Management Act. The exemption in section 39 of the Public Finance Management Act which exempted the Finance Bill from the Bills to be submitted in time for the assent of the Appropriation Bill on June 30th of each year was not there in section 37 of the Public Finance Management Act, which was a separate provision.

4. Under article 259 of the Constitution, the Court was enjoined to interpret the Constitution in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights and in a manner that contributed to good governance. In exercising its judicial authority, the Court was obliged under article 159 (2) (e) of the Constitution to protect and promote the purposes and principles of the Constitution.
5. In interpreting the Constitution, the Court should be innovative and take into account the contemporary situation of each age and at the same time attach a meaning and interpretation that met the purpose of guaranteeing constitutionalism, non-discrimination, separation of powers and enjoyment of fundamental rights and freedoms. The Constitution made it a mandatory requirement for the Court to construe every piece of legislation in a manner that promoted the spirit, purport and object of the Bill of Rights.
6. The Court had the duty to examine the objects and purport of an Act and to read its provisions, so far as was possible, in conformity with the Constitution. A contextual or purposive reading of an Act had to be faithful to its actual wording. When confronted with legislation which included wording that was not capable of sustaining an interpretation which would render it constitutionally compliant, Courts were required to declare the legislation

unconstitutional and invalid.

7. The Provisional Collection of Taxes and Duties Act (PCTDA) was enacted in 1959 and was a pre-colonial piece of legislation. It was revised in 2015 but it was last amended in 1978. At the time of its enactment, there were no constitutional provisions on taxation. The fact that the PCTDA was pre-colonial did not *prima facie* connote that it was not good law as the most important consideration ought to be whether the Act was still relevant in the existing constitutional dispensation.
8. The drafters of the Constitution intended law-making power to be vested in Parliament except as conferred by the Constitution and legislation. The problem with the PCTDA was that it suspended Parliament's powers to make laws and allowed the Cabinet Secretary to make orders that all or any specified provision of a Bill relating to taxes or duties would have effect as if it were passed into law. The question then was whether the drafters of the Constitution envisaged a scenario where a Bill could be given statutory effect before it was passed into law.
9. The PCTDA appeared to give the relevant Cabinet Secretary legislative power whereas the Constitution was clear on which organ of State had the mandate to make laws. That went against the spirit of the Constitution. If the drafters of the Constitution intended to exempt tax laws, even temporarily, from the rigors of parliamentary approval and presidential assent, the Constitution would have provided for the exemption.
10. By giving the Cabinet Secretary to the National Treasury powers to temporarily amend the national tax revenue statutes through a Finance Bill without requiring it to go through the legislative process detailed in the Constitution, the impugned Act purported to amend the Constitution contrary to the provisions of article 256 as read together with article 255(1) (h) of the Constitution. That went against the spirit of the Constitution wherein the intention was for Parliament to play the legislative role.

The Constitution could not on one hand bestow legislative power on Parliament and on the other hand, take it away through the PCTDA.

11. The law making function was a preserve of Parliament. It was therefore an outright contravention of the Constitution to prematurely purport to implement sections of a Bill that was yet to undergo Parliamentary approval.
12. The safeguards provided in section 4 of the PCTDA relating to refunds of taxes to taxpayers where the Finance Bill was eventually rejected by Parliament were impractical. Some of the proposed taxes related to consumer goods for which no receipts were issued or records kept and a refund where the Finance Bill was rejected would be a mirage under those circumstances.
13. At the time that the Finance Bill 2018 was implemented on a provisional basis, it had not been subjected to public participation. Public participation was one of the national values and principles of governance provided for under article 10 of the Constitution. Public participation was not a mere public relations exercise. The legislative process ought to be a true reflection of public participation so that the end product would be owned by the public and it then bore their seal of approval.
14. The nature of the impugned legislation was such that its effect on the relevant stakeholders and the public could not be downplayed. The legislation in question was intended to impose a tax burden upon certain products/services, which implied that it would create a financial cost element or burden to be borne by the public alongside other stakeholders. Whereas the Respondents alleged that there were consultative meetings in which attendance registers were kept, evidence was not tendered to prove the existence of those meetings. The required threshold for public participation was not met.
15. Section 39(1) of the Public Finance Management Act provided that the National Assembly had to consider the

	<p>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, except the Finance Bill, required to be assented to by the June 30th each year. Section 41 of the Public Finance Management Act provided for the consideration and approval of the Finance Bill no later than 30 days after the passing of the Appropriation Bill. The statutory provisions contemplated that the Finance Bill would not have to be part of the Bills that would be assented to by June 30th of each year.</p> <p>16. Article 221 of the Constitution did not stipulate that the Finance Bill was part of the estimates of Government expenditure that ought to be assented to by June 30th of each year or be included in the Appropriation Bill. For that reason sections 39 and 41 of the Public Finance Management Act were not unconstitutional. Even though it was desirable for the Finance Bill to be considered before or at the same time as the Appropriation Bill, the drafters of the Public Finance Management Act did not provide for that.</p> <p>17. A declaration of constitutional invalidity of the Appropriation Act would not bring Government business to a halt. Article 222(1) of the Constitution provided for a safeguard whereby if the Appropriation Act for a particular year was yet to be enacted, the National Assembly could authorize withdrawal of money from the Consolidated Fund to facilitate Government business until the Appropriation Act was assented to.</p> <p><i>Petition partly allowed.</i></p>
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	-
Docket Number:	-

History Docket Number:	-
Case Outcome:	Petition partially allowed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 253 OF 2018

OKIYA OMTATAH OKOITIPETITIONER

VERSUS

THE CABINET SECRETARY,

NATIONAL TREASURY.....1ST RESPONDENT

THE COMMISSIONER GENERAL,

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

THE NATIONAL ASSEMBLY.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The petitioner herein, **OKIYA OMTATAH OKOITI**, describes himself as a law abiding citizen of Kenya, a public spirited individual and a human rights defender. He brings this petition on his own behalf and in public interest.
2. The 1st respondent is the Cabinet Secretary, the National Treasury, in charge of the national government's department which formulates financial and economic policies and oversees effective coordination of the national government financial operations.
3. The 2nd respondent, the Kenya Revenue Authority is a body corporate with perpetual succession and a common seal established under Section 3 of the Kenya Revenue Authority Act, 2014, charged with the task of assessment and collection of revenue, for the administration and enforcement of the laws relating to revenue.
4. The 3rd respondent is the National Assembly which is one of the two chambers of Parliament of Kenya. The 3rd respondent is sued in this petition for purporting to exempt portions of the Finance Bill from the legislative procedure spelt out in the Constitution.
5. The 4th respondent is the Attorney General of the Republic of Kenya and is described in the petition as a legal adviser and representative of the Government of Kenya, who shall promote, protect and uphold the rule of law and defend the public interest, within the meaning of Article 156 of the Constitution.
6. According to the petitioner Parliament has 3 critical functions as regards public finance namely:
 - a) Resource mobilization through the imposition of taxes and borrowing;

b) Allocation of resources; and

c) Oversight (supervisory functions)

7. The instant petition was precipitated by the reading of the Budget Statement for the financial year 2018/19 by the Cabinet Secretary for the National Treasury, pursuant to which The Finance Bill, 2018 was published. The said Bill contains proposals on taxation and seeks to introduce a number of amendments to the tax regime so as to mobilize revenue to finance the government's budget of an estimated Kshs. 3 trillion. Some of the notable amendments include:

i. Introduction of a presumptive tax targeting the informal sector;

ii. Overhaul of the compensating tax regime;

iii. Robin Hood taxes - tax on money transfers by banks;

iv. One year extension of the tax amnesty;

v. Doubling of the late payment interest charges; and

vi. Repeal of interest rate capping.

8. Notwithstanding the fact that the Budget Statement was the First Reading of the Finance Bill, most of the changes to the taxation regime contained in the said Finance Bill, which are mere proposals and are subject to approval or rejection by Parliament, took effect soon thereafter.

9. On 5th July 2018 a motion under the title "Approval of Provisional Taxation Measures for the Financial Year 2018/2019" was moved in the National Assembly under the Committee of Ways and Means, thus:

That pursuant to the provisions of Articles 94(5) and 210(1) of the Constitution this House-

a) Approves the provisional collection of taxes relating to

i. Income Tax;

ii. Value Added Tax;

iii. Excise Duty

iv. Miscellaneous Fees and Levies; and

b) Resolves that in accordance with section 3 of the Provisional Collection of Taxes and Duties Act (Cap 415), the collection commences on the dates specified in the Provisional Collection of Taxes and Duties Order, 2018 (Legal Notice No. 128 of 2018).

THE PETITIONER'S CASE

10. The petitioner's case is contained in the amended petition dated 3rd August 2018, supporting affidavit and supplementary affidavit dated 3rd August 2018 as well as written submissions dated 6th August 2018. It is the petitioner's case that statutes, including tax statutes, can only be enacted or be amended by Parliament through the legislative process laid out in the Constitution, which requires them to be presented as a Bill before the House for First and Second Reading, followed by a scrutiny of the Bill by

the relevant House Committee and finally a Third Reading before adoption by Parliament. The approved Bill is then forwarded to the President for assent. And once the Bill is assented to, it becomes law and then it is published as the Finance Act. The petitioner submitted that the Finance Bill 2018 has neither been approved by Parliament nor assented to by the President, hence, it remains a proposal and, therefore, the Bill or any part thereof cannot be implemented.

11. The petitioner's case is that only Parliament can impose taxes and authorize public borrowing as all the other persons and institutions with powers to collect taxes do so on the basis of delegated authority. To the petitioner, only Parliament can, under the Constitution, make laws through the legislative procedures that are expressly set out in the constitution and that Parliament has no capacity to exempt any Bill from the said legislative procedure as such an exemption would require the amendment of the Constitution in accordance with the provisions of Articles 256 and/or 257 as read together with Article 255(1) (h) of the Constitution. It is against this backdrop that the petitioner challenges the Provisional Collection of Taxes and Duties Act No. 44 of 1959 (hereinafter "**the PCTDA**") on the basis that it purports to amend the Constitution contrary to Article 256 as read with Article 255(1) (h) by giving the Cabinet Secretary to the National Treasury powers to temporarily amend the national tax revenue statutes through a Finance Bill without having it first go through the legislative process provided for under the Constitution.

12. It was therefore the petitioners position that the PCTDA effectively allows the Cabinet Secretary to usurp legislative powers of Parliament to directly impose taxes as through the provisions Article 221 of the Constitution, on budget estimates and annual Appropriation Bill were, suspended and do not apply during the period when the PCTDA is in force.

13. The petitioner moved this Honourable Court through the petition dated 3rd August in which he sought the following reliefs:

i. A declaration that by presenting the Financial Bill 2018 to the National Assembly on 14th June 2018, while the financial calendar ends on 30th June 2018, the Cabinet Secretary misconducted himself and violated Article 221(1) of the Constitution of Kenya 2010, and he also violated Section 37 of the Public Finance Management Act, 2012 which sets the 30th April deadline for the Cabinet Secretary to table the budget estimates for approval by Parliament.

ii. A declaration that by applying the Provisional Collection of Taxes and Duties Act Cap 415 in its current form, the Treasury and the Kenya Revenue Authority violate Articles 3(1) and 47(1), and Section 7(1) of the Sixth Schedule to the Constitution.

iii. A declaration that by failing to repeal the Provisional Collection of Taxes and Duties Act Cap 415, whose impact is tantamount to suspending Article 210(1) of the Constitution, Parliament violates its obligations under Articles 3(1) and 93(2) as read together with 94(5) of the Constitution, and also violates Articles 255(1) (h) and 256 of the Constitution.

iv. A declaration that the Provisional Collection of Taxes and Duties Act No.44 of 1959 (Chapter 415 of the Laws of Kenya) is unconstitutional and, therefore, invalid, null and void.

v. A declaration that the Finance Bill 2018, or any parts or provisions thereof, including on taxation, cannot be implemented before the Bill becomes the Finance Act after it goes through the parliamentary legislative process laid out in the Constitution for approval and adoption by Parliament, and assent by the President.

vi. A declaration that the Appropriation Act 2018; the Provisional Collection of Taxes and Duties Order, 2018 (Legal Notice No. 128 of 21st June 2018); and the exemption accorded the Finance Bill in Section 39(1) of the Public Finance Management Act 2012 are unconstitutional and, therefore, invalid, null and void.

vii. An order compelling the respondents not to implement the Finance Bill 2018 or any parts thereof, including on taxation, unless and until the same is adopted by Parliament and assented to by the President to become law.

viii. An order quashing the Provisional Collection of Taxes and Duties Act No.44 of 1959 (Chapter 415 of the Laws of Kenya), for being unconstitutional and, therefore, invalid, null and void.

ix. An order quashing the Appropriation Act 2018; the Provisional Collection of Taxes and Duties Order, 2018 (Legal Notice No. 128 of 21st June 2018); and the exemption accorded the Finance Bill in Section 39(1) of the Public Finance Management

Act 2012 for being unconstitutional and, therefore, invalid, null and void.

x. An order compelling the respondents to pay to the petitioner the costs of this suit.

xi. Any other relief the court may deem just to grant.

14. The petitioner submitted that the basis structure of the Constitution of Kenya is that there is no mechanism for limiting its provisions which lie outside the Bill of Rights. In this regard he stated that whereas Article 24 of the Constitution provides mechanisms for limiting the enjoyment of rights and fundamental freedoms in the Bill of Rights no tools exist for limiting other provisions of the Constitution on which are absolute.

15. The petitioner cited Article **94(5)** of the Constitution which gives Parliament the mandate to make laws and **Article 93 (2)**, which provides that the National Assembly and the Senate shall perform their respective functions in accordance with the Constitution. The petitioner contends that since procedures for enacting legislation in Parliament are expressly set out in the Constitution, Parliament has no capacity in law to exempt any Bill from the said legislative procedure. Any exemptions would require the approval by Parliament through amendments to the Constitution in accordance to Articles 256 and/or 257 as read together with Article 255(1) (h) of the constitution.

16. The petitioner considers it contemptuous and unconstitutional that the Provisional Collection of Tax and Duties Act No.44 of 1959 (Cap 415) (hereinafter "**the PCTDA**"), an ordinary statute enacted in the colonial days, purports to amend the Constitution contrary to Article 256 as read together with Article 255(1) (h) of the Constitution by giving the Cabinet Secretary to the National Treasury powers to temporarily amend the national tax revenue statutes through a Finance Bill without having it first go through the legislative process detailed hereinabove. The petitioner contends that the PTDA effectively allows the Cabinet Secretary to usurp the legislative powers of Parliament to directly impose taxes as though Article 221 of the Constitution was suspended and does not apply during the period when the PCTDA is in force.

17. It was submitted that due to Kenya's prescriptive Constitution, it is not possible to give statutory effect to the Finance Bill through the impugned Act and that either there was to be a statute, the Finance Act, which has been enacted through the procedure for enacting legislation in Articles 109 to 116, inclusive, or there was no statute. The petitioner took issue with the expression contained in section 2 of the PCTDA, "*to give statutory effect*" which according to the petitioner, is anathema to the doctrine of due process which is a key pillar of the Constitution. He therefore submitted that temporary amendments to the Finance Act, 2017, for whatever period, by the Finance Bill 2018, through the PCTDA, are inconsistent with the provisions of Articles 210(1) of the Constitution, as read with Article 201(a), 22(4) &(5), and Articles 109 to 116 of the Constitution.

18. On Article 116 of the Constitution, the petitioner submitted that without the Presidential assent to a Bill that has been approved by Parliament, the said Bill remains a mere proposal with no force of law in which case, without the President assenting to change to the Finance Act 2017, the said Act cannot be amended.

19. The petitioner relied on the decision in the case of **Law Society of Kenya v Attorney General & Another [2016] eKLR**, wherein it was held that even Parliament itself cannot enact substantive legislation via miscellaneous amendment Bills and that only minor, non-controversial amendments are allowed to be made that way. In the cited case, the court expressed itself thus:

"It is therefore clear that both on policy and good governance, which is one of the values and principles of governance in Article 10 of the Constitution, which values and principles form the foundation of our state and Nation as decreed in Article 4(2) of the Constitution, omnibus amendments in the form of Statute Law Miscellaneous legislations ought to be confined only to minor non-controversial and generally house- keeping amendments."

20. It is submitted that the Provisional Collection of Taxes and Duties Order 2018 (the Order) did not comply with Statutory Instruments Act.

21. It was the petitioner's further submission that the 1st respondent violated the timelines set in the Constitution and the Public Finance Management Act for submitting budget estimates to parliament. He argued that under Article 221(1) of the Constitution and section 37 the Public Finance Management Act 2012 (hereinafter "**the PFMA**"), a two-month minimum timeline is set for the

presentation of budget estimates for both revenue and expenditure to the National Assembly. According to the petitioner, the said provisions of the Constitution and the PFMA allow for ample time for the Cabinet Secretary to table the Finance Bill alongside other estimates so that the Bill can be considered by the National Assembly in time before the start of the Financial Year. In view of the said provisions, the petitioner submitted that the 1st respondent violated both the Constitution and the PFMA when he presented the budget estimates much later and outside the two month minimum time frame.

22. The petitioner contended that the 1st respondent presented the first part of the estimates on 3rd May 2018 without the Finance Bill, and added that on 14th June 2018, the 1st respondent presented the second and final part of the estimates as contained in the Finance Bill 2018.

23. The petitioner also submitted that the Finance Bill 2018 was not subjected to public participation before implementation. He cited Article 201(1) (a) of the Constitution which provides that there shall be openness and accountability, including public participation in financial matters. The petitioner also referred to Article 221(5) of the Constitution which provides that the Finance Bill be subjected to public participation before it is enacted into law.

24. The petitioner also submitted that Pursuant to Article 221(6) of the Constitution an Appropriation Bill can only be developed after the estimates of national government expenditure, and the estimates of expenditure for the Judiciary and Parliament have been approved by the National Assembly. He argued that because the Bill was not prepared using estimates approved by the National Assembly, the resultant appropriation Act 2018 is a nullity in law for the violations of the express provisions of the PFMA and the Constitution. He submitted that there will be no vacuum created should the court quash the Appropriation Act 2018 because Article 222(1) of the Constitution, on expenditure before the annual budget is passed, provides that if the Appropriation Act for a financial year has not been assented to, or is not likely to be assented to, by the beginning of that financial year, the National Assembly may authorize the withdrawal of money from the Consolidated Fund.

1ST AND 4TH RESPONDENTS' CASE

25. The 1st and 4th respondents opposed the petition through Grounds of Opposition dated 8th August 2018, a replying and further affidavit of Dr. Kamau Thugge dated 27th July 2018 and 3rd August 2018 respectively, and written submissions dated 30th July 2018.

26. Dr. Thugge averred that the National Treasury forwarded its submission of Budget Estimates for the FY 2018/2019 on 26th April 2018 which was well within the constitutional and statutory timelines. He further stated that contrary to the petitioner's claim that there was no adequate public participation in the entire process leading to the budget, there was adequate public participation as exhibited in a bundle of documents which he attached to his further affidavit and marked as annexure "KT-8"

27. Counsel for the 1st and 4th Respondents submitted that Budget estimates for the National Government, Parliament and the Judiciary were presented to the National Assembly well in time for the Appropriation Bill which was tabled on 03 May 2018, passed and later assented into law on 29 June 2018. He further stated that the Provisional Collection of Taxes and Duties Order, 2018 was duly published and approved by the National Assembly as required by the Statutory Instruments Act. It was therefore submitted that the instant petition is based on misrepresentation of facts and the law.

28. Counsel submitted that the enactment of the PCTDA, the introduction of the Finance Bills every year in the National Assembly after the presentation of the Budget so as give effect to the financial proposals of the Government of Kenya for the period immediately following financial year and the passing of the Finance Act 90 days after its presentation to the National Assembly is in sync with Article 201(1) of the Constitution.

29. Counsel argued that the budget process complied with the Constitution and the PFMA. It was submitted that sections 37, 38 and 39 of the PFMA operationalize Article 221 of the Constitution by setting out the procedure for submission of budget estimates and related documents for approval. Counsel countered the petitioner's argument on the unconstitutionality of the impugned PCTDA, stating that the said Act, and PCTD Order, 2018 fall squarely within the provisions of article 210 (1) of the Constitution which recognises that tax may be imposed, waived or varied as provided by legislation. In this regard, counsel referred to the decision in the case of **Republic v Commissioner of Domestic Taxes (Large Tax Payers Office) & Another Ex-Parte British American Tobacco Kenya Limited [2015] eKLR** wherein the court stated:-

“The other exception to the general rule is with respect to the Provisional Collection of Taxes and Duties Act (Cap 415). The general rule is that no person ought to be taxed without a particular legal regime permitting the same. However, the preamble to the said Act provides that it is an “Act of Parliament to give statutory effect for limited periods, the orders of the Minister imposing any new tax or duty or rate of tax or duty, or creating any new allowance, or altering or removing any existing tax or duty, or such rate or allowance.” I therefore agree with the Respondent’s position that the objective of the Act is to give statutory force to tax measures pronounced in the Finance Bill pending enactment of the Act. The Act therefore allows the Government a limited leeway of ensuring there exist necessary safeguards on provisional basis awaiting the passing of the Finance Act. It is therefore an exception to the rule against taxation without substantive legislation. The Act therefore ensures that the Finance Bill acquires the force of law on provisional basis. That being the position, the Bill is deemed to be the law for the limited period and all persons who are obliged to pay taxes or duty thereunder must comply therewith. It is therefore no excuse that the Act is yet to be enacted. Any person who fails to comply with a clearly worded Finance Bill is liable to penal consequences arising therefrom.”

30. Counsel also cited the decision in the case of **Africa Rafiki Ltd & 2 others v Nairobi City County Government & 3 Others [2015] eKLR** where the High Court found that the Nairobi County Provisional Collection of Revenue Act, 2003, a law similar to the PCTDA, was passed in accordance with the Constitution and would therefore allow the enforcement of the provisions of the Nairobi City County Finance Bill 2014.

31. It was submitted that Article 94(5) of the constitution, which provides that no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation contemplated legislation like the PCTDA, which authorises the relevant Cabinet Secretary to formulate an order imposing provisional taxes. He equated PCTDA to Article 222 (1) of the Constitution which allows for the withdrawal of money from the Consolidated Fund based on the Appropriation Act before the Act is passed into law. It was further contended that Kenyan courts have on numerous occasions approved the application and enforcement of the PCTDA.

2ND RESPONDENT’S CASE

32. In response to the petition, the 2nd respondent filed Grounds of Opposition dated 7th August 2018, a replying affidavit and further affidavit of Mr. Simon Mwilu (a manager within the 2nd Respondent’s Domestic Taxes department) dated 27th July 2018 and 9th August 2018 respectively, and written submissions dated 7th August 2018.

33. It was averred in the said replying affidavit and further submitted by counsel for the 2nd respondent that the 2nd Respondent should be allowed to continue with the implementation of the Finance Bill, 2018 as it had complied with the Provisions of Section 37, 38 and 39 of the Public Finance Management Act (PFMA). It was submitted that adequate public participation took place before the drafting of the Finance Bill, 2018 as the Cabinet Secretary invited and received proposals from the general public and other stakeholders. In this respect, the 2nd respondent attached copies of letters of invitation of members of the public and attendance register to the replying affidavit as annexures MO-1 and MO-2 respectively.

34. It was averred that the budget estimates for the financial year 2018/ were presented to the National Assembly on 30th of April 2018 vide a letter dated the 26th April 2018, and the budget estimates tabled on 3rd May 2018, having been submitted earlier on before the deadline of the 30th April 2018. A copy of the Letter from the Cabinet Secretary of Finance dated the 26th of April 2018, and a copy of the National Assembly Official Report of the 3rd of May 2018 were attached to the replying affidavit and marked MO-1. The 2nd respondent contended that it is these budget estimates that were included in the Appropriation Bill and therefore all the Constitutional provisions were complied with in arriving at the Appropriation Bill assented to on the 29th of June 2018. The 2nd respondent maintained that it could therefore not be said that the Appropriation Act 2018 is unconstitutional for reasons that the budget estimates were tabled on 3rd May 2018 and the budget statement was tabled on the 14th of June 2018.

35. It was submitted that the budget statement was presented and tabled before the National Assembly on 14th June 2018 pursuant to the provisions of Section 40 (2) of the PFMA which requires the CS National Treasury to take into account international obligations under the East African Community Treaty that requires that the budget statements of all the East African Community Partner States be presented and tabled in the respective parliaments on the same day, 14th June 2018.

36. It was further submitted that the Cabinet Secretary for the National Treasury vide Legal Notice No. 128 of 2018 rightly invoked the provisions of Section 2 of the PCTDA thereby giving effect to the provisions of the Finance Bill, 2018. Counsel argued that

contrary to assertions by the Petitioner that there was no public participation before the implementation of the Finance Bill, 2018, by dint of Article 1 (2), 94 (1) and 95 (1) and (2), the people's representatives participated in the process when the Committee of Ways and Means tabled the motion on "***Approval of Provisional Taxation Measures for the Financial Year 2018/2019***". Since the motion was subsequently adopted, the 2nd respondent contends that there was no violation of Article 210(1) of the Constitution which simply requires that the National Assembly sanctions taxes before they are imposed on the tax payers.

37. It was submitted that Section 4 of the PCTDA provides safeguards for refund of taxes collected in the event that the Finance Bill is not passed by Parliament.

3RD RESPONDENT'S CASE

The 3rd respondent filed the following documents in response to the petition:-

i. A Replying Affidavit dated 18th July 2018 sworn by **Michael Sialai**, the Clerk of the National Assembly and filed on 30th July 2018.

ii. Written submissions dated 3rd August 2018 and,

iii. Further submissions dated 8th August 2018.

38. Mr. Kuiyoni, learned counsel for the 3rd respondent, submitted that the budget estimates were submitted by the Cabinet Secretary responsible for Finance to the National Assembly on **28th April, 2018**, two days earlier than the 30th April deadline provided for by the law. He observed that the presentation of the budget estimates should not be misinterpreted or confused with the introduction of the Finance Bill which the Petitioner appeared to be referring to. He contended that the Finance Bill, 2018 had complied with all the relevant legislative requirements, such as Articles 221(1), 221(6), section 37, 40(3), 40(4) of the PFMA and the National Assembly Standing Orders number 235, 235(1), 244C, 245.

39. Counsel submitted that the Finance Bill was before the House after it had gone through the first reading on 3rd July 2018 before it was subsequently committed to **the Departmental Committee on Finance and National planning and Trade** for scrutiny by way of requesting for memoranda from the public as is mandated by **standing order no. 127 (3)** and **Article 118** of the Constitution. He contended that the Bill was at the time undergoing public participation with the facilitation of the National Assembly, and argued that the petition was therefore premature.

40. It was contended that the National Assembly was well within its mandate to consider the legal notice which was presented before it by the Cabinet Secretary and that Parliament was neither reduced to a bystander nor the Constitution violated as alleged by the Petitioner. Counsel argued that the PCTDA does not violate any article of the Constitution, and that Courts had, in other instances, previously approved the application and enforcement of the PCTDA. For this argument, counsel also referred to the case of **Republic vs. Commissioner of Domestic Taxes (Large Tax Payers Office) & another Ex-parte British American Tobacco Kenya Limited (supra)**.

41. It was submitted that that the decision to amend or repeal any law is a matter that falls squarely within the mandate of the National Assembly and that this court cannot interfere with the law making process since Parliament has its own Standing Orders which guide its business and operations.

42. It was further submitted that an order declaring the Appropriations Act, 2018 unconstitutional would result in the immediate closure of all government operations thereby resulting in the total shut down of every public unit which is not what the Constitution of Kenya 2010. It was also submitted that anyone who had overpaid tax pursuant to the impugned legislation(s) would have recourse under Section 47 of the Tax Procedures Act No. 29 of 2015, which provides for refund for eligible persons once a tax has been revised. Counsel submitted that it was therefore in public interest that this Court declines to grant the orders sought in the petition.

DETERMINATIONS

43. I have considered the pleadings filed herein, the parties' respective submissions and the authorities that they cited. I note that the main issues that present themselves for determination are as follows:-

- a) Whether this court has the jurisdiction to entertain this matter.
- b) Whether the 1st respondent violated the Article 221(1) of the Constitution and section 37 of the PFMA by presenting the Finance Bill 2018 to the National Assembly on 14th June 2018.
- c) Whether the PCTDA is unconstitutional and therefore invalid, null and void.
- d) Whether the Finance Bill or any parts or provisions thereof, including taxation, can be implemented before the Bill goes through the parliamentary legislative process for approval and assent by the president.
- e) Whether the Appropriation Act 2018, the Provisional Collection of Taxes and Duties Order, 2018 (Legal Notice No. 128 of 21st June 2018) and the exemption accorded the Finance Bill in Section 39(1) of the PFMA are unconstitutional and therefore invalid, null and void.

44. On jurisdiction to entertain this matter, and more specifically to 'interfere' with the legislative process, I find that it is not disputed that State has the obligation to collect taxes, and that Parliament therefore has the obligation to legislate to this effect. Indeed, Article 209(1) of the Constitution empowers the national government to impose taxes. The respondents' case was that the impugned legislation(s) was not intended to harm the public but rather intended to facilitate the fulfilment of the responsibility of the State to collect taxes.

45. My humble view is that the importance of taxation and the collection of taxes for any government cannot be gainsaid. The respondents' position was that this court should not interfere with the legislative process. To my mind however, what is before this Court is not a question on whether the respondents have fulfilled/are fulfilling a constitutional mandate but rather, whether the impugned legislation(s), and the processes leading thereto, met the relevant legal and constitutional thresholds, and whether the citizen's rights have been violated and/or are threatened with violation in the circumstances of this case.

46. Article 165 of the Constitution is clear in its provisions and needs no explanation. The said Article bestows jurisdiction on this Court as follows:

(3) Subject to clause (5), the High Court shall have--

(b) jurisdiction to determine the question whether a right or fundamental right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

i) the question whether any law is inconsistent with or in contravention of this Constitution;

ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.

47. The Constitutional Court of South Africa in the case of **Doctors for life International v Speaker of the National Assembly and others CCT 12/05 [2006]** stated that the South African Constitution imposes certain obligations on the exercise of legislative authority. The said court explained the extent of the jurisdiction of the Court, notably stating that the question of validity of a statute/legislation was to be determined by the courts as provided by the Constitution. The court went further to explain that a statute may be invalid for at least two reasons namely;

a) because its provisions are in conflict with a right in the Bill of Rights; or

b) because it was adopted in a manner that is inconsistent with the provisions of the Constitution.

48. Guided by the foregoing decision, I do not agree with the respondents’ submissions that this Court will be interfering with the legislative role of Parliament since the question of validity also extends to the manner in which legislation is enacted, and the legislative role comes with constitutional obligations.

49. I am guided by the sentiments of Chief Justice Marshall of the U.S.A, in *Cohens vs. Virginia 19 U.S. 264 (1821)* thus;

“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty.”

Article 23(1) of the Constitution provides that:

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

50. The instant petition raises questions of violation/ threat of violation of rights under the Constitution and I therefore find that this Court has jurisdiction to entertain it.

Timelines

51. On the issue of whether the 1st respondent complied with the two-months’ timeline set by the provisions of Article 221(1) of the Constitution and section 37 of the PFMA for presentation of the budget estimates for both revenue and expenditure to the National Assembly, I note that it was not disputed that the budget estimates for the National Government, Parliament and Judiciary were presented to the National Assembly in April 2018 well in time for the Appropriation Bill which was then tabled on 3rd May 2018. The petitioner contended that the Finance Bill 2018 ought to have been presented together with the budget estimates while the respondents held a contrary view.

Article 221(1) of the Constitution provides that:

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

Section 37 of the PFMA provides: (2) *The Cabinet Secretary shall submit to the National Assembly, by the 30th April in that year, the following documents—*

- a)
- b) *the budget estimates excluding those for Parliament and the Judiciary;*
- c) *documents supporting the submitted estimates; and*
- d) *any other Bills required to implement the national government budget. (Emphasis)*

The Finance Bill 2018 defines itself as:

A Bill for AN ACT of Parliament to amend the law relating to various taxes and duties and for matters incidental thereto.

52. From the above provisions and definition of the Finance Bill, I find that there is no express requirement under Article 221(1) that the Finance Bill be presented by 30th April of each financial year, section 37 of the PFMA sets the 30th April deadline for the Cabinet Secretary to table the budget estimates and related Bills for approval by the National Assembly and for that reason I find that there was a violation of Section 37 of the PFMA. I further find that even though section 39 of the PFMA exempts the Finance Bill from the Bills to be submitted in time for the Appropriation Bill to be assented to by 30th June of each year, no such exemption is made under section 37 of the said Act.

IMPUGNED LEGISLATION

53. It is my view that the main issue for determination in this petition is the **Constitutionality of the Provisional Collection of Taxes and Duties Act** and by extension, the constitutionality of the of the implementation of the Finance Bill 2018. This court has also been called upon to determine the constitutionality of the Appropriation Act and certain sections of the PFMA.

54. I appreciate that determining the issues raised by the petitioner will involve the interpretation of the various sections of the said Acts that are alleged to be unconstitutional and also the relevant provisions of the Constitution that are alleged to be offended by the sections complained of. To effectively address the said issues, this court is alive to the fact that there are principles governing such interpretation.

55. In interpreting the constitution, the first port of call is the Constitution itself. *Under Article 259 of the constitution, the court is enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 159 (2) (e) of the Constitution to protect and promote the purposes and principles of the Constitution. Through case law, various courts in different jurisdictions have also expressed themselves on the manner in which the provisions of the Constitution and Acts should be interpreted.*

56. In the case of **Paul Ssemogerere and Others vs. The Attorney General, Constitutional Appeal no. 1 of 2002) [2004] UGSC10** the Supreme Court of Uganda held that it is a cardinal rule in constitutional interpretation that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. The court further held that constitution must be read as an integrated and cohesive whole.

57. In the case of **Ndyanabo vs. Attorney General [2001] 2 EA 485** the Tanzania Court of Appeal held:-

“We propose to allude to general provisions governing constitutional interpretation. These principles may, in the interest of brevity, be stated as follows; first, the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As Mr. Justice E.O Ayoola, former Chief Justice of Gambia stated..... “A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document.” Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our democracy not only functions but grows, and the will and dominant aspirations of the people prevail. Restrictions of fundamental rights must strictly be construed.”

58. In **Kigula and Others vs. Attorney-General [2005] 1 EA 132** the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows (1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realise the full benefit of the rights guaranteed; (4) that in determining constitutionality

both purpose and the effect are relevant; and (5) that Article 126(1) of the Constitution of the Republic of Uganda enjoins Courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people. See also **Besigye and Others vs. The Attorney-General [2008] 1 EA 37** and **Foundation for Human Rights Initiatives vs. Attorney General HCCP NO. 20 of 2006 (CCU) [2008] 1 EA 120.**

59. The recognition of the sanctity of the Constitution and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in the case of **Anthony Ritho Mwangi and another vs. The Attorney General Nairobi Criminal Application no. 701 Of 2001** where the court stated:-

“Our Constitution is the citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and the rule of law.”

60. The principles applicable in the construction of statutes, on the other hand, were outlined in the case **Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR** wherein at paragraph 63-64 Mativo, J. stated:-

“There are important principles which apply to the construction of statutes such as:- (a) presumption against "absurdity" – meaning that a court should avoid a construction that produces an absurd result;(b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces "unworkable or impracticable" result; (c) presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result and (d) the presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result and, lastly,(e) the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," " economic", "social" and "political" or "otherwise."

61. My understanding of the foregoing jurisprudence is that in interpreting the Constitution, the court should be innovative and take into account the contemporary situation of each age and at the same time attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms. In doing so, the court is under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution. Our Constitution requires a purposive approach to statutory interpretation and introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights.

62. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. When confronted with legislation which includes wording not capable of sustaining an interpretation that would render it constitutionally compliant, courts are required to declare the legislation unconstitutional and invalid. As it stands, this exposition is generally accepted, but it must be said that context is everything in law, and obviously one needs to examine the particular statute and all the facts that gave rise to it. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.

63. Bearing in mind the requirement that that legislation be read in conformity with the Constitution, I now turn to consider the issue of Constitutionality of the PCTDA, the Appropriation Act and some sections of PFMA and whether by applying the PCTDA in implementing the Finance Bill 2018, the respondents violated the provisions of the Constitution. The petitioner’s case was that contrary to the provision in Article 210(1) of the Constitution which stipulates that *“No tax or licensing fee may be impose, waived or varied except as provided by legislation,”* the impugned PCTDA defines itself at its preamble as *“An act of Parliament to give statutory effect for limited periods to orders of the Minister imposing any new tax or duty or rate of tax or duty, or creating any new allowance, or altering or removing any existing tax or duty, or any such rate or allowance.”*

Section 2 of the said Act states that:

“ if the bill is published in the gazette whereby, if such bill were passed into law, any tax or duty, or any rate, allowance or administrative or general provision in respect thereof, would be imposed, created, altered or removed, the Minister may, subject to this Act and notwithstanding the provisions of any other written law relating to taxes and duties, make an order that all or any

specified provisions of the Bill relating to taxes or duties shall have effect as if the Bill were passed into law.”

64. Contrary to the 2nd respondent’s assertion that the word ‘legislation’ is not defined in the Constitution, I note that under Article 260 legislation is defined as follows;

“Legislation” includes-

a) an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or

b) a law made by an assembly of a county government, or under authority conferred by such a law;

Article 94(5) provides that:-

No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

65. In the instant case, the question which then arises is whether the Finance Bill fits the description of a legislation, within the meaning of the word ‘legislation’ as defined by the Constitution. According to the respondents, the impugned proposals in the Finance Bill were made by the cabinet secretary under the authority of the PCTDA and in line with the provisions of section 2 thereof.

66. From the very outset it is noteworthy that the impugned Act is a pre-colonial legislation having been enacted way back in 1959 a couple of years before Kenya attained its independence. I find that, contrary to the respondents’ assertion that that the impugned Act was revised in 2015 and thus amended to be in tandem with the current Constitution, revision of an Act does not connote and amendment as it is evident from a perusal of the said Act that the last time it was amended was in 1978. It is to be noted that the context under which the impugned Act was enacted, under the old constitutional dispensation, when there were no provisions in the Constitution relating to taxation as opposed to the current dispensation. My take, however, is that the mere fact that the PCTDA is a pre-colonial Act does not *prima facie* connote that it is not good law as the most important consideration ought to be whether the said Act is still relevant in the current constitutional dispensation.

67. In view of my above observations, I find that it is necessary to juxtapose the provisions of the PCTDA with the current Constitution in determining its constitutionality. In doing so, I find that Section 7 of the Sixth Schedule to the Constitution is a good starting point. The said section stipulates as follows:-

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

If, with respect to any particular matter-

a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

68. Taking a purposive approach to the interpretation of the totality of the above provision and other provisions of the Constitution relating to the power to make laws, it is clear to me that the drafters of the Constitution intended that the power to make laws be vested in Parliament except where such power is conferred by the Constitution or by legislation.

69. In my humble view the real problem with the PCTDA is that it has the effect of suspending the power vested in Parliament to make laws by allowing the Cabinet Secretary to make an order that all or any specified provisions of the Bill relating to taxes or

duties, in this case the Finance Bill, to have effect as if the Bill were passed into law. The big question therefore is whether the drafters of our current Constitution envisaged a scenario where a Bill can be given ‘*statutory effect*’ before it is passed into law as the PCTDA purports to do.

70. My finding is that allowing/entertaining the provisions of the impugned Act in the current constitutional dispensation is untenable and would go against the spirit of the new Constitution. I say so because whereas the impugned Act appears to give legislative power to the Cabinet Secretary, the Constitution is clear on which organ of state has the mandate to make laws. I hasten to add that nowhere in the current Constitution is the Cabinet Secretary mandated to make tax laws or to make orders through a Bill relating to taxes or duties that shall have effect as if the Bill were passed into law. Article 153 (4) (a) of the Constitution provides that Cabinet Secretaries shall act in accordance with the Constitution. In my humble view, if the intention of the drafters of the Constitution was to exempt tax laws, even temporarily, from the rigors of having to go through the parliamentary approval and presidential assent, nothing would have been easier than for the Constitution to stipulate as much.

71. I further find that by enacting Section 7 of the 6th Schedule of the Constitution, the drafters of the Constitution had the foresight to envisage instances where conflicts would arise between the already existing legislation, as is the case with the PCTDA, and the Constitution, by making a provision at Article 2(4) which stipulates that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

72. I have also considered that respondents’ argument that Courts have, in other instances, such as in the case of **Africa Rafiki Ltd. (supra)** and **Republic vs. Commissioner of Domestic Taxes (Large Tax Payers Office) & another Ex-parte British American Tobacco Kenya Limited (supra)**, previously approved the application and enforcement of the PCTDA. I respectfully note that in the said cited cases, the constitutionality of the PCTDA was not one of the issues in contention and for that reason, the court was not called upon to address its mind to it as is the case in this petition.

73. Having regard to the above provisions of the Constitution especially Article 94(5) thereof, I hold the firm view that the Constitution cannot be interpreted in such a manner as to mean that the PCTDA grants power to the Cabinet Secretary to legislate on behalf of Parliament. One of the cardinal rules of construction in constitutional interpretation is to avoid unlikely or impractical outcomes. For the above reason it is important that Article 94(5) be read together with all other provisions in the same Constitution and relevant laws while bearing in mind the fact that the Constitution is the supreme law.

74. To my mind therefore, by giving the Cabinet Secretary to the National Treasury powers to temporarily amend the national tax revenue statutes through a Finance Bill without having it first go through the legislative process detailed in the Constitution, the impugned Act purports to amend the Constitution contrary to the provisions of Article 256 as read together with Article 255(1) (h). My finding is that this goes against the spirit of the Constitution, which intended that the legislative role be played by Parliament, as provided under Articles 93(1) 94(1), 95(3), 96(2), and 109-113. In my considered view, the Constitution cannot, on one hand, explicitly bestow legislative power on Parliament, and on the other hand, take away that power through the PCDTA. For the above reason, I cannot hesitate but find that the impugned Act, and for clarity purposes the PCTDA, is unconstitutional.

Finance Bill

75. Turning to the issue of the Constitutionality of the implementation of the Finance Bill, it is important to point out that pursuant to the PCTDA, and the ensuing PCTDA Order, the provisions of the Finance Bill were/are to come into force on different dates between 1st July 2018 and 1st January 2019. This court notes that some of the amendments introduced by the Bill have already taken effect despite of the Order issued by this Court on 19th July 2018 which had the effect of suspending the implementation of the impugned Bill pending the hearing and determination of this petition. It is worthy to note that this Court was vindicated in its said decision to suspend the implementation of the said Bill when Parliament, after debating and deliberating on it rejected some of its proposals relating to money transfer also referred to as “*The Robin Hood Tax*”. The said rejection by Parliament of some of the proposals contained in the impugned Bill reinforces this court’s finding that the law making function is the preserve of Parliament and it is therefore an outright contravention of the provisions of the Constitution to prematurely purport to implement sections of a Bill that was yet to go through the parliamentary approval.

76. The importance of having proper laws in taxation matters was emphasized in the case of **Okiya Omtatah Okioti v Commissioner General, Kenya Revenue Authority & 2 others [2018] eKLR** where the court observed that:

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

77. It is also important to point out that the Constitution enjoins Parliament to make laws only in accordance with the national values and principles of governance among them equity and fairness in the distribution of tax burden, equality and non-discrimination, equal protection before the law, sanctity of property, good governance, integrity, transparency, and accountability.

78. The respondents argued that the PCTDA at Section 4 thereof provides for safeguards in respect to refund of taxes to taxpayers who may have paid taxes pursuant to a finance bill that is eventually rejected by Parliament as was the case with the Robin Hood tax. My humble view is that Section 4 of PCTDA is a provision that is impractical if not impossible to implement considering that in the instant case, some of the proposed taxes in the impugned Bill are in respect to consumable products that are purchased by the common man (*aka wanjiku*) for which no receipts are issued or records kept in which case the suggestion that a refund can be made in the event the bill is rejected may be a mere mirage or wishful thinking.

79. I reiterate that the issue for determination before this court is not the constitutionality of the Finance Bill *per se* but its implementation, on provisional basis, before the Bill is passed into law on the basis that the PCTDA allows the provisional implementation. As I have already observed in this judgment, Article 2(4) of the Constitution is categorical that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

80. The dangers of implementing a Bill that has not been passed into law becomes even more prominent when one considers that such a Bill, had not, as at the time it was being implemented on a provisional basis, been subjected to public participation which our Constitution obligates the state, and indeed Parliament to facilitate in its legislative and other process and indeed those of its committees. In the instant case, it was not in dispute that the Finance Bill was yet to be subjected to public participation. There is the duty imposed on state organs to provide meaningful opportunities for public participation in the process and the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. Article 10 of the Constitution expressly provides that public participation is one of the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

81. Courts have held that public participation is not a mere public relations exercise and that for that reason, the legislative process ought to be true reflection of the public participation so that the end product is owned by the public as it then bears their seal of approval. The position was appreciated in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** as follows:

“If legislation is infused with a degree of openness and participation, this will minimize dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.”

82. In the instant petition, I have considered the nature of the impugned legislation(s) and I find that its effect on the relevant stakeholders and the public cannot be downplayed. The nature and impact of the impugned legislation(s) plays a key role in determining the degree of public participation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. The legislation in question is intended to impose a tax burden upon certain products/services, which implies that it will create a financial cost element or burden to be borne by the public alongside other stakeholders. Whereas the respondents alleged that the relevant stakeholders were consulted in meeting for which attendance registers have been availed by the respondents, I note that no evidence or minutes of the said meetings were availed before this court to enable me ascertain if indeed they were held

and the nature of deliberations that were conducted. In the circumstances I find that the required threshold for public participation was not satisfied.

83. I have already found that the PCTDA is inconsistent with the provisions of the Constitution and consequently, I find that the act(s) of passing legislation without regard to the Constitution is invalid and needless to say, any legislation emanating therefrom is unconstitutional. I therefore find that the implementation of the Finance Bill, or its part thereof, through the Provisional Collection of Taxes and Duties Order, before the same has been passed by Parliament and assented to by the President is similarly unconstitutional.

Appropriation Act

The Public Finance Management Act defines “**appropriation**” to mean;

- (a) authority granted by Parliament to pay money out of the Consolidated Fund or out of any other public fund; or
- (b) authority granted by a county assembly to pay money out of the relevant County Revenue Fund or out of any other county public fund; and

“**Appropriation Act**” is an Act of Parliament or of a county assembly that provides for the provision of money to pay for the supply of services;

Section 12(2) (a) of the PFMA provides that the National Treasury shall “promote transparency, effective management and accountability with regard to public finances in the national government.”

Section 12 (3) provides that “the National Treasury shall take such other action, not inconsistent with the Constitution, as will further the implementation of this Act.”

Section 35(1) (g) of the PFMA provides for the enactment the appropriation Bill and any other Bills required to implement the National government’s budgetary proposals, as part of the budget process for the National Government in any financial year. Section 35(2) requires the Cabinet Secretary to ensure public participation in the budget process provided for under subsection (1).

Section 37 of the Act provides;

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

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

(b) documents supporting the submitted estimates; and

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

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

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

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

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

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

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

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

(a) Shall ensure that members of the public are given an opportunity to participate in the preparation process; and (b) may make and publish rules to be complied with by those who may wish to participate in the process.

84. The **Appropriations Act** was assented to on 29th June 2018 and took effect on 1st July 2018. The Finance Bill 2018, which is one of the Bills required to implement the national government budget is however exempted under section 39 of the PFMA from the Bills to be assented to by 30th June each financial year. The petitioner's case was that section 39(1) and 41 of the PFMA are unconstitutional as while the former exempts the Finance Bill from being considered alongside other budget estimates in time for the Appropriation Bill, the latter suggests that the Appropriation Act can be enacted before the Finance Act thereby contravening the provisions of Article 221(6) of the Constitution.

85. The respondents' position, on the other hand, was that the impugned sections 39 and 41 of the PFMA operationalize Article 221 of the Constitution by setting out the procedure for submission of budget estimates and related documents for approval.

86. Section 39(1) of the PFMA stipulates that:

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

Section 41 of the Act provides that:

Not later than ninety days after the passing of the Appropriation Bill, the National Assembly shall consider and approve the Finance Bill with or without amendments.

Article 221(6) on the other hand stipulates that:

When the estimates of the 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.

87. A reading of Article 221 of the Constitution does not reveal that the Finance Bill is part of the estimates of government expenditures that ought to be assented to by 30th June each year or be included in the Appropriation Bill so as to justify the petitioner's argument that sections 39 and 41 of the PFMA are unconstitutional. In fact, as I have already found in this judgment, the Finance Bill is defined as a Bill for an Act of Parliament to amend the law relating to various taxes and duties which, to my mind, cannot be said to be estimates of government expenditures to be included in the Appropriation Bill. My humble view is that even though it could have been desirable that the Finance Bill be considered before or at the same time with the Appropriation Bill, the drafters of the PFMA thought otherwise and since there is no constitutional imperative that the Finance Bill precedes the Appropriation Bill, I am unable to find that the Appropriation Act is unconstitutional.

88. My findings on the constitutionality of the Appropriation Act notwithstanding, I find that the respondents' argument that declaring the Appropriations Act unconstitutional would bring government business to a halt to be untrue because **Article 222(1) of the Constitution** provides a fallback position as follows:

If the Appropriation Act for a financial year has not been assented to or is not likely to be assented to, by the beginning of that

financial year, the National Assembly may authorize the withdrawal of money from the Consolidated Fund.

89. A reading of Article 222 shows that the lawmakers were alive to the fact that there could be instances where the enactment of the Appropriation Act could be delayed and therefore made provisions to take care of such an eventuality by empowering the National Assembly to authorize the withdrawal of money from the Consolidated Fund to facilitate government business until such a time that the Appropriation Act is assented to.

Conclusion

90. In conclusion therefore, having considered the petition, the responses and submissions by counsel for the parties, the authorities relied on by parties and also having considered the applicable law, I am persuaded that the Provisional Collection of Taxes and Duties Act Cap 415 and the Provisional Collection of Taxes and Duties Order, 2018(Legal Notice No. 128 of 21st June 2018) fail the constitutional test of validity. In the premise therefore, this petition partially succeeds and I make the following orders which I find appropriate;

1. A declaration that by presenting the Finance Bill 2018 to the National Assembly on 14th June 2018, while the financial calendar ends on 30th June 2018, the Cabinet Secretary violated Section 37 of the Public Finance Management Act, 2012 which sets the 30th April deadline for the Cabinet Secretary to table the budget estimates and any other Bills required to implement the national government budget for approval by the National Assembly.

2. A declaration that the Provisional Collection of Taxes and Duties Act No.44 of 1959 (Chapter 415 of the Laws of Kenya) is unconstitutional and, therefore, invalid, null and void.

3. A declaration that the Finance Bill 2018, or any parts or provisions thereof, including on taxation, cannot be implemented before the Bill becomes the Finance Act after it goes through the parliamentary legislative process laid out in the Constitution for approval and adoption by Parliament, and assent by the President.

4. A declaration that the Provisional Collection of Taxes and Duties Order, 2018 (Legal Notice No. 128 of 21st June 2018) is unconstitutional and, therefore, invalid, null and void.

Dated, Signed and Delivered in open court at Nairobi this 19th Day of September 2018

W. A. OKWANY


JUDGE

In the presence of:

Mr Marwa for Mutinda for 1st respondent

Mr Kirugi, Mr Ochiel, and Mr Almadi for the 3rd respondent

Court Assistant – Kombo

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