

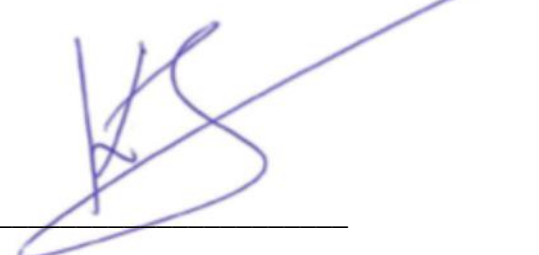
REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION NO. E032 OF 2024

THE NATIONAL ASSEMBLY 1ST APPELLANT
THE SPEAKER OF THE NATIONAL ASSEMBLY 2ND APPELLANT
VERSUS
OKIYA OMTATAH OKOITI & 55 OTHERS.....RESPONDENTS

PETITION TO SUPREME COURT

Being an appeal against the judgment of the Court of Appeal sitting at Nairobi (Hon. Mr. Justice K. M’Inoti, Hon. Lady Justice A.K. Murgor, Hon. Mr. Justice J. Mativo; delivered on 12th July 2024 in Civil Appeal No. E002 of 2023 as consolidated with Civil Appeal No. E016, E021, E049, E064 and E080 all of 2023

DATED at NAIROBI this _____ 2nd _____ day of _____ August _____, 2024.



KUYIONI N. JOSPHAT,
ADVOCATE FOR THE PETITIONERS
Admission Number: P.105/9661/12

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION NUMBER **OF 2024**

THE NATIONAL ASSEMBLY 1ST APPLICANT

THE SPEAKER OF THE NATIONAL ASSEMBLY 2ND APPLICANT

VERSUS

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 JURIST-KENYA (IC) 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

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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	10
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	20
LAB AND ALLIED LIMITED	46TH RESPONDENT	
BIOPHARM LIMITED	47TH RESPONDENT	
BIODEAL LABORATORIES LIMITED	48TH RESPONDENT	
ZAIN PHARMA LIMITED	49TH RESPONDENT	
THE CABINET SECRETARY FOR THE NATIONAL TREASURY AND PLANNING	50TH RESPONDENT	
THE HON. ATTORNEY GENERAL	51ST RESPONDENT	
THE SPEAKER OF THE SENATE	52ND RESPONDENT	
COMMISSIONER-GENERAL, KENYA REVENUE AUTHORITY	53RD RESPONDENT	30
CONSUMERS FEDERATION OF KENYA (COFEK)	54TH RESPONDENT	
KENYA EXPORT FLORICULTURE, HORTICULTURE, AND ALLIED WORKERS UNION	55TH RESPONDENT	
DR. MAURICE JUMAH OKUMU	56TH RESPONDENT	

(Being an appeal against the judgment of the Court of Appeal sitting at Nairobi (Hon. Mr. Justice K. M’Inoti, Hon. Lady Justice A.K. Murgor, Hon. Mr. Justice J. Mativo; delivered on 12th July 2024 in Civil Appeal No. E002 of 2023 as consolidated with Civil Appeal No. E016, E021, E049, E064 and E080 all of 2023)

BETWEEN

THE NATIONAL ASSEMBLY1ST APPELLANT

THE SPEAKER OF THE NATIONAL ASSEMBLY 2ND APPELLANT

VERSUS

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THE SPEAKER OF THE SENATE	52 ND RESPONDENT	
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KENYA EXPORT FLORICULTURE, HORTICULTURE, AND ALLIED WORKERS UNION	55 TH RESPONDENT	
DR. MAURICE JUMAH OKUMU	56 TH RESPONDENT	

PETITION OF APPEAL

(Articles 22, 159, 163 (4)(a) & (b), 201(d), 210(1), 226(5), 227(1) & 259 of the Constitution of Kenya; Section 3, 15A, 21, 23, 23A and 24 of the Supreme Court Act, 2011; Rules 3, 31 and 32 of the Supreme Court Rules 2020, and all other enabling provisions of the law)

TO:

THE SUPREME COURT OF KENYA

SUPREME COURT BUILDING,

CITY HALL WAY

NAIROBI.

The Humble Petition of The National Assembly and The Speaker of the National Assembly is as follows:

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A) STATEMENT OF THE FACTS RELIED UPON

1. The Finance Bill, 2023 (the Finance Bill) was published on 28th April 2023 in the Kenya Gazette No. 56 (National Assembly Bill No. 14 of 2023). It was tabled before the National Assembly on 4th May, 2023 for the first reading. A public notice inviting members of public and relevant stakeholders for public participation was put in the print media on 7th and 8th May, 2023, calling for comments on the Bill to be presented to the Departmental Committee on Finance and National Planning. Upon completion of the public participation exercise, the Departmental Committee on Finance and National Planning presented its report on the Bill to the National Assembly on 13th June, 2023.

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2. The Bill was presented to the House on 14th June, 2023 for the Second Reading. On 20th June, 2023 it came up for the Third Reading. The National Assembly passed the Bill on 23rd June, 2023 with some amendments. His Excellency the President assented to the Bill on 26th June, 2023. The Finance Act, 2023 (the Finance Act) commenced on 1st July, 2023.

3. The Finance Bill, 2023 precipitated the filing of Constitutional Petitions challenging the constitutionality of legislative process leading to the Constitution Petition No. E181 of 2023 Consolidated with E211 of 2023, E217 of 2023, E219 of 2023, E221 of 2023, E227 of 2023, E228 of 2023, E232 of 2023, E234 of 2023, E237 of 2023 and E254 all of 2023. The Respondents herein also faulted several provisions contained in the said Act on grounds

that they were in violation of the Constitution and the Public Finance Management Act, 2012.

4. On 7th August, 2023 all the eleven Constitutional Petitions were consolidated by this Court and Constitutional Petition No. E181 of 2023 was set as the lead file.
5. The National Assembly and the Speaker of the National Assembly, the Petitioners herein, argued that due process was followed in enacting the Act. They further argued that they considered all views received from the public and stakeholders, and as a result, some amendments were proposed to the Bill, as contained in the report by the National Assembly's Departmental Committee on Finance and National Planning.
6. On 28th November 2023, a three-judge bench of the High Court comprising of Hon. Justice David Majanja (Presiding), Hon. Justice Lawrence Mugambi and Hon. Lady Justice Christine Meoli delivered its judgment on the consolidated petition (*Nairobi High Court Constitutional Petition No. E181 of 2023 consolidated with Petitions Nos. E211, E217, E219, E221, E227, E228, E232, E234, E237 and E254 all of 2023*).

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i. Summary Determination by the High Court

7. In determining the issue whether the Finance Bill, 2023 was a money Bill or contained matters falling outside the scope of a money Bill. The Court applied the pith and substance test set by the High Court and the Court of Appeal in *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR. In finding that the pith and substance of the Finance Bill, 2023 fell within the definition of a money Bill under Article 114 of the Constitution.
8. The Court further adopted the definition of the word “*incidental*” from Black’s Law Dictionary, that is, for a provision to be incidental, “*it must have a rational connection to the money Bill definition under Article 114 of the Constitution*”. Applying this test to the 102 provisions of the Finance Act, 2023 challenged by the Petitioner the court held that the Finance Bill, 2023 was a money Bill but contained matters which are not money Bill matters, to wit, amendments to the Kenya Roads Board Act (sections 76 and 78 of the Finance Act, 2023); amendment to the Unclaimed Financial Assets Authority Act (section

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87 of the Finance Act, 2023) and the Statutory Instruments Act (sections 88 and 89 of the Finance Act, 2023) such matters are therefore unconstitutional.

9. As to whether the Appropriation Bill, 2023 contain Estimates of Revenue and Expenditure as required by the Constitution and the Public Finance Management Act, the Court held that Articles 220 and 221 apply to the budget making process and the Estimates of Revenue and Expenditure were published in the Kenya Gazette and were considered and approved by the National Assembly.
10. The Court also found that the Finance Bill, 2023 was a money Bill under Article 114 of the Constitution as it dealt with taxation which is a function of the national government. Therefore, under Article 96(2) and 114 of the Constitution, concurrence of the Speaker of the Senate was not required. Even though the Speakers of the Houses of Parliament had concurred that the Finance Bill, 2023 was a money Bill and did not require consideration by the Senate. 10
11. Determining the question of public participation, the Court applied the principles set by the Supreme Court of Kenya in *Re the National Land Commission* (public participation is a form of checks and balances on arms of government) and *the BAT case* (public participation must be reasonable and not illusory) to the facts and resoundingly found that the National Assembly had adduced ample evidence to demonstrate that there was sufficient public participation in the enactment of the Finance Act, 2023. Public participation carried out by the National Assembly was therefore facilitative and reasonable in the circumstances. The Honourable court also noted that the National Assembly is not precluded from making amendments to the Finance Bill, during the committee stage and after public participation. 20
12. The Court appreciated that under Article 94(1), 209 and 210 (1), the National Assembly has broad powers to levy taxes through legislation, including imposition of taxes under the finance Act. In doing so, the National Assembly is required to have a rational connection to a legitimate purpose set to be achieved in any imposition of tax.
13. On the constitutionality of the housing levy the court held, that the housing levy introduced under section 84 of the Finance Act, 2023 is unconstitutional for lack of a comprehensive 30

legal framework contrary to Article 10(2) and 201 of the Constitution, and discriminatory and arbitrary contrary to Article 27 and 201 of the Constitution.

14. The High Court held Sections 76, 77, 78, 84, 88 and 89 of the Finance Act, 2023 are unconstitutional.

ii. Proceedings at the Court of Appeal

15. The Speaker of the National Assembly and the National Assembly filed an Appeal against part of the Judgment of the High Court relating to declaration of unconstitutionality of sections 76, 77, 78, 84, 88 and 89 of the Finance Act, 2023.

16. Following the said dismissal, the appeals were set down for hearing and were heard on 18th April, 2024 before Hon. Mr. Justice K. M’Inoti, Hon. Lady Justice A.K. Murgor and Hon. Mr. Justice J. Mativo. On 31st July, 2024, judgment was delivered on the appeal.

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17. The court identified the following issues for determination:

- a. Whether the grounds in Civil Appeals Nos. E003 of 2024 and E080 of 2024 challenging the finding that sections 84, 88 and 89 of the Act are unconstitutional has been caught up by the doctrine of mootness, and, if the answer is in the affirmative, whether the said issue falls within the exceptions to the said doctrine.**

18. On this issue, the Court declined to determine the issue on merit. The Court held that the question of the declaration of unconstitutionality of section 84 of the Act which introduced the Affordable Housing Levy without a legal framework and whether the levy was discriminatory has been rendered moot by the enactment of the Affordable Housing Act, 2024.

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19. On the issue relating to the declaration that sections 88 and 89 of the Act unconstitutional is also moot. These are the provisions which repealed section 21 of the Statutory Instruments Act, the consequence being that unlike before, statutory instruments shall not expire automatically ten years after their commencement.

20. The Court took judicial notice of the fact that subsequent to the impugned judgment, the **Statutory Instruments (Amendment) Bill, 2024**, was introduced in the National Assembly. It went through the First Reading on 14th February 2024. Notably, the principal object of the Bill is to amend the Statutory Instruments Act, Cap. 2A to provide the timelines for the making of regulations to ensure implementation of laws passed by Parliament.
21. The Court was therefore persuaded that the issues relating to the Affordable Housing Act (section 84) and the Statutory Instruments Act (sections 88 and 89) are now moot and did not render its determination on merit.

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b. Whether the Act was a money Bill and whether it contained provisions which ought not to have been included in a money Bill contrary to Articles 114 (3) & (4)

22. On this issue, the Court found that the fact that the amendment have a bearing on the financial burden on public money cannot be the basis of bringing the amendment within the purview of a money Bill. Also, payment under the Unclaimed Assets Act to a designated proxy cannot bring the amendments within the ambit of a money Bill as defined by Article 114 (3).
23. Accordingly, the Court agreed with the decision of the High Court and held that the learned judges correctly held that the impugned provisions were a money Bill, though they contained matters which did not fall within the ambit of Article 114 (1) (3) (4). Accordingly, the court affirmed the trial court's finding that sections 76, 78 and 87 of the Act are unconstitutional for containing matters that ought not to have been in a money Bill.

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c. Whether the Act included provisions which were not in the Finance Bill, 2023, which was subjected to public participation

24. The issue before Court was whether the 18 amendments which were not in the Finance Bill, 2023 which was subjected to public participation were introduced on the floor of the House. The Court found that the Act contained substantive provisions which were not in the Finance Bill, 2023. These new provisions were never subjected to public participation nor did they go through the First and Second Reading.

25. The Court also noted substantive amendments to sections 26, 38, 47 and 72. Therefore, the court held that it is beyond doubt that the Act contained substantive provisions which were not in the Finance Bill, 2023. These new provisions were never subjected to public participation nor did they go through the First and Second Reading. The key question here is whether a Bill that has undergone the process of public participation, First and Second Reading can be altered or amended at the Committee stage or on the floor of the House beyond the scope of the original Bill by introducing substantive new provisions.

26. The Court held that the impugned 18 new provisions of the law were improperly enacted and they by-passed the laid down legislative process. They suffer from procedural and constitutional deficiency. They are still born. They cannot be allowed to remain in our law books. Accordingly, the Court found that sections 21, 23, 32, 34, 38, 44, 69, 72, 80, 81, 83, 85, 86, 87, 100, 101 and 102 of the Act are unconstitutional.

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d. Whether the Senate ought to have been involved in the enactment of the Act, 2023.

27. The Court found that the dominant feature in the Act was taxes, which fall within the competence of the National Assembly. The inclusion of matters alien to a money Bill did not alter the true character of the Bill.

28. The Court found that that the Constitution has removed money Bills from the enactment processes to which national government or Bills concerning counties are subjected, including the concurrence process under Article 110 (3).

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29. Consequently, the Court found that the lack of concurrence prior to the introduction of the Finance Bill, 2023 in the National Assembly did not vitiate the resultant Act. This is because concurrence is not a requirement under Article 114.

e. Whether there was sufficient public participation in the enactment of the Act and whether Parliament is obligated to give reasons for adopting or rejecting views given by members of the public during public participation

30. The Court acknowledged that there is no doubt that the public participation exercise conducted by the National Assembly allowed diverse stakeholders an opportunity to present their views on the Bill.

31. The Court 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 theirs.

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32. Accordingly, the Court found that Parliament after conducting public participation is obligated to give reasons for rejecting or adopting the proposals received. The import of this finding is that the ensuing Act offended Article 10 (1) and (2) (c). It is therefore our conclusion that failure to adhere to the dictates of Article 10 (1) and (2) (c) renders the process leading to the enactment of the Act flawed.

33. The Court therefore issued the following orders:

- i. The Appellants' Appeals in Civil Appeal Nos. E003 of 2024 and E080 of 2024 against the findings that section 84 (the Affordable Housing Levy) and sections 88 and 89 (the Statutory Instruments Act) are unconstitutional are hereby dismissed on grounds that the said issues have been caught up by the doctrine of mootness, therefore, they present no live controversies.
- ii. The notices of cross-appeal by the 15th to 22nd and 38th to 49th Respondents and Civil Appeal No. 064 of 2024 are devoid of merit and the same are hereby dismissed, save that we find that the High Court misconstrued its mandate under Article 165 (3) by holding that it had no jurisdiction to intervene in policy matters.
- iii. The Notice of Cross-appeal by the 13th Respondent (LSK) is hereby allowed in the following terms: (a) a declaration be and is hereby issued decreeing that sections 24

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(c), 44, 47 (a) (v), 100 and 101 of the Finance Act, 2023 introduced post-public participation are unconstitutional and void for having been enacted in a manner that bypassed the laid down legislative stages including Page 118 of 120 publication, First Reading, Second Reading and contrary to Articles 10 (1) & (2) and 118 of the Constitution and Standing Orders.

- iv. Civil Appeal No. E016 of 2024 is allowed to the extent that a declaration be and is hereby issued 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 of the Finance Act No. 4 2023 introduced post-public participation to amend the Income tax Act, Value Added Tax Act, Excise Duty Act and Miscellaneous Fees and Levies Act, Kenya Revenue Authority Act, Retirement Benefits Act, Alcoholic Drinks Control Act of 2010, Special Economic Zones Act and Export Processing Zones Act are unconstitutional, null and void for not having been subjected to fresh public participation and having been enacted in total violation of the constitutionally laid down legislative path; 10
- v. The prayer seeking the refund of taxes collected under 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 Finance Act, No. 4 of 2023 or under any other unconstitutional section of the Finance Act, No. 4 of 2023 be accounted for and refunded to the tax payers is refused on grounds that:- (a) it was not pleaded in the Petition before the High Court, therefore it is improperly before this Court; and (b), legislative enactments enjoy presumption of constitutionality up to the moment they are found to be unconstitutional in terms of Article 165 (3) of the Constitution. 20
- vi. Civil Appeal No. E021 of 2021 is merited. Accordingly, we hereby issue a declaration that the enactment of the Page 119 of 120 Finance Act, 2023 violated Articles 220 (1) (a) and 221 of the Constitution as read with sections 37, 39A, and 40 of the PFMA which prescribes the budget making process, thereby rendering the ensuing Finance Act, 2023 fundamentally flawed and therefore void ab initio and consequently unconstitutional.
- vii. Civil Appeal No. E049 of 2024 partially succeeds in terms of the following orders: 30
 - (a) a declaration be and is hereby issued that in conformity with Article 10 (1) &

(2) (c), Parliament is obligated to provide reasons for adopting or rejecting any proposals received from members of the public during public participation process;
 (b) a further declaration is hereby issued that the failure to comply with this constitutional dictate renders the entire Finance Act, 2023 unconstitutional.

viii. We affirm the finding by the High Court that sections 76 and 78 of the Finance Act, 2023 amending section 7 of the Kenya Roads Act, 1999; are all unconstitutional, null and void.

ix. We uphold the finding by the High Court that concurrence of both houses in the enactment of the Finance Act, 2023 was not a requirement under Article 114.

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i. Having found that the process leading to the enactment of the Finance Act, 2023 was fundamentally flawed and in violation of the Constitution, sections 30 to 38, 52 to 63 and 23 to 59 of the Finance Act, 2023 stand equally vitiated and therefore unconstitutional.

ii. The issues urged in these consolidated appeals are of great interest to the public and transcend the interests of the parties, therefore we make no order as to costs.

B. SUMMARY OF THE GROUNDS FOR THE INSTANT PETITION

34. The Supreme Court, as the ultimate guardian and custodian of the Constitution, has jurisdiction to intervene and vacate the orders of the Court of Appeal. The Supreme Court as the apex Court is entrusted with the primary responsibility of safeguarding, upholding, protecting and interpreting the Constitution by the people of Kenya. The Petitioners herein, invoke this Honourable Court's inherent authority and jurisdiction to intervene and vacate the impugned judgment of the Court of Appeal delivered on 26th January, 2024 in *Civil Appeal No. E002 of 2023 as consolidated with Civil Appeal No. E016, E021, E049, E064 and E080 all of 2023*).

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35. In essence, the Petitioners seek the intervention of the Supreme Court to overturn the Court of Appeal Judgment based on the following grounds:

- a. The Learned Judges of the Court of Appeal erred in finding that the High Court misconstrued its mandate under Article 165 (3) by holding that it had no jurisdiction to intervene in policy matters;
 - b. The Learned Judges of the Court of Appeal erred in finding that sections 24 (c), 44, 47 (a) (v), 100 and 101 of the Finance Act, 2023 were introduced after public participation and therefore were enacted in a manner that bypassed the laid down legislative stages including publication, First Reading, Second Reading and contrary to Articles 10 (1) & (2) and 118 of the Constitution and Standing Orders;
 - c. The Learned Judges of the Court of Appeal erred in finding 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 of the Finance Act No. 4 2023 introduced post-public participation to amend the Income tax Act, Value Added Tax Act, Excise Duty Act and Miscellaneous Fees and Levies Act, Kenya Revenue Authority Act, Retirement Benefits Act, Alcoholic Drinks Control Act of 2010, Special Economic Zones Act and Export Processing Zones Act are unconstitutional, null and void for not having been subjected to fresh public participation and having been enacted in total violation of the constitutionally laid down legislative path; 10
 - d. The Learned Judges of the Court of Appeal erred in finding that in conformity with Article 10 (1) & (2) (c), Parliament is obligated to provide reasons for adopting or rejecting any proposals received from members of the public during public participation process; 20
 - e. The Learned Judges of the Court of Appeal erred in finding that the failure to provide reasons for adopting or rejecting any proposals received from members of the public during public participation amounts to non-compliance with the constitutional dictate of public participation and thus renders the entire Finance Act, 2023 unconstitutional.
 - f. The Learned Judges of the Court of Appeal erred in finding that the enactment of the Finance Act, 2023 violated Articles 220 (1) (a) and 221 of the Constitution as read with sections 37, 39A, and 40 of the PFMA which prescribes the budget 30
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making process, thereby rendering the ensuing Finance Act, 2023 fundamentally flawed and therefore void ab initio and consequently unconstitutional;

- g. The Learned Judges of the Court of Appeal erred in finding that sections 76 and 78 of the Finance Act, 2023 amending section 7 of the Kenya Roads Act, 1999; are all unconstitutional, null and void; and
- h. The Learned Judges of the Court of Appeal erred in finding that sections 30 to 38, 52 to 63 and 23 to 59 of the Finance Act, 2023 stand vitiated and therefore unconstitutional.

C. THE ARGUMENTS IN SUPPORT OF THE GROUNDS OF THE PETITION

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a. The Court of Appeal departed from the principle of *stare decisis*

36. The Supreme Court in *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party) (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment)* set out the standards of public participation.

37. By reaching a finding that the Finance Act, 2023 was unconstitutional for failure by the National Assembly to provide detailed reasons for accepting and/or rejecting the views submitted during public participation, the Court of Appeal departed from the well-laid precedent in the *British American Tobacco* case.

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38. The Court, in making that finding, added endless tiers of public participation outside the confines of the standards set down in the *British American Tobacco*.

39. The Appeal Judgment also violates the Petitioner's constitutional right to equal protection and equal benefit of the law as guaranteed by Article 27(1) of the Constitution. In particular, the Court of Appeal failed to determine the Appeal before it in consonance with the principles of *stare decisis*.

b. The Court of Appeal violated the Petitioners' right to fair trial

40. The Court of Appeal is established as an appellate Court of law with jurisdiction to hear and determine Appeals.

41. Article 159 (1) and (2) (a) and (e) of the Constitution provides that judicial authority is derived from the people and is vested in, and shall be exercised by, the Courts. The exercise of this authority by a Court is to be guided by the principles that justice shall be done to all, irrespective of status, and that the purpose and principles of the Constitution (enshrined in Article 10 thereof) shall be protected and upheld.

42. In the Appeal Judgment the Court of Appeal breached the appellants' right to a fair hearing as the learned Judge failed to refer to and analyse Supplementary Affidavit sworn by the Clerk of the National Assembly on 17th August, 2023 attaching the report of the Departmental Committee on Finance and National Planning which clearly demonstrated that the Committee gave reasons for acceptance and rejection of views submitted by the Public.

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c. The Court of Appeal failed to appreciate that the strict statutory timelines for enacting the Finance Act

43. In **High Court Petition No. 253 of 2018; Okiya Omtatah Okiiti v the Cabinet Secretary, National Treasury & Planning [2018] eKLR**, the Court issued 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.

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44. Following that judgment, an amendment was effected in 2019 to the Public Finance Management Act under Section 39A to ensure that the Finance Bill was presented to the National Assembly by the 30th April every year, the same time as the submission of the budget estimates to the National Assembly. The amendment set the deadline of 30th June for the Finance Act to be assented to.

45. The upshot of the above is that the Finance Act, unlike other statutes, has a statutory timeline within which it must be presented, considered and passed by the National Assembly.

46. These timelines, which are provided under Section 39A of the Public Finance Management Act, were not under challenge before the Court of Appeal. The Court of Appeal failed to take into account the special nature and place of the Finance Act by declaring it unconstitutional for failing to provide detailed reasons for accepting or rejecting views by the public.

47. Particularly, the Court failed to appreciate that the legislative process involves a wide array of inputs and considerations, and it is not feasible to individually address each submission.

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48. By requiring every amendment to undergo a full formal process as if it were a new Bill, the judgement creates unreasonable procedural bottlenecks especially considering the timelines introduced by the Court in **Okiya Omtatah Okiiti V Cabinet Secretary, National Treasury & 3 Others (2018) eKLR** and Section 39A of the Public Finance Management Act.

d. The Court of Appeal misapprehended the law on public participation

49. Article 118 sets out the obligation of Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. The process of such public participation is elaborated upon in the National Assembly Standing Order 127(3) and includes inviting submission of memoranda; holding public hearings; consulting relevant stakeholders in the sector.

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50. The Supreme Court set out the standard of public participation required from public entities in **British American Tobacco Kenya, PLC v Cabinet Secretary for the Ministry of Health & 2 others [2019] eKLR** at paragraph 96 of the judgment.

51. In **Republic v County Government of Kiambu Ex parte Robert Gakuru & Another [2016] eKLR** the court held that Public participation does not necessarily mean that all the views as presented by stakeholders must prevail; what is required is that the views

presented will be taken into account and adequately consider in good faith. The National Assembly is not obligated to accept all views presented during public participation owing to the diverging views and objectives of the legislation.

52. The National Assembly conducted adequate public participation and acted reasonably in the manner in which it facilitated public participation on the Finance Bill, 2023.

53. There was adequate opportunity for public participation. The Finance Bill, 2023 was published in the Kenya Gazette Supplement No. 56 on 28th April 2023 and tabled in Parliament for the first reading and committal to the relevant committee on 4th May 2023, after which the National Assembly sent out notices through print media calling for memoranda. Members of the public and stakeholders were accorded sufficient opportunity to present their views during public hearings. As evidenced in the report of the Finance and National Planning Departmental Committee on public participation, the information from all the memoranda that were submitted and oral views from the hearings were considered.

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54. As evidenced in the Committee report on public participation the views and proposals presented were considered and incorporated. The committee proposed amendments arising from the public participation exercise as evidenced in the Committee Report.

55. In fact, the Court of Appeal, at paragraph 181 of the judgment, found that the public participation exercise conducted by the National Assembly allowed diverse stakeholders to present their views on the Bill.

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56. The Court of Appeal in finding that amending the Finance Bill, 2023 post-public participation to include 18 totally new provisions which were not subjected to public participation is unconstitutional and the ensuing enactment being a product of a flawed constitutional process is a nullity, failed to appreciate that the impugned amendments were introduced in accordance with the Standing Orders, informed by submissions from public participation and considered by the House.

57. Further to the foregoing, the Court erred in finding that sections 21, 23, 32, 38, 44, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 are totally new provisions which were not in the original Bill. The Court also noted substantive amendments to sections 26, 38, 47 and

72. The Court held amending the Finance Bill, 2023 post-public participation to include 18 totally new provisions which were not subjected to public participation is unconstitutional.
58. By requiring every amendment introduced post public participation to undergo a full formal process as if it were a new Bill, the judgement of the Court of Appeal creates unreasonable procedural bottlenecks especially considering the timelines introduced by the Court in **Okiya Omtatah Okoiti V Cabinet Secretary, National Treasury & 3 Others (2018) eKLR** where Senator Omtatah challenged the budgetary process leading up to the enactment of the Finance Act, 2018 as well as the Appropriation Act, 2018.
59. The Judgment of the Court of Appeal fails to appreciate the practical implications of its decision. Requiring every amendment to undergo public participation and additional readings (first, second and third reading) would bring the legislative process to a halt. 10
60. The judgment of the Court of Appeal failed to appreciate that public participation is intended to inform the legislative process, not to dictate it. The Court of Appeal misconstrued the role of public participation by implying that every public view must be individually addressed and justified. This is not the intent of public participation which is meant to provide a broad spectrum of input to guide legislative decision-making.
61. The Court of Appeal judgment undermines the principle of representative democracy. Elected representatives are entrusted with the mandate to deliberate, amend, and enact legislation on behalf of the public. The judgment effectively questions this mandate by implying that the legislative process should be strictly bound by the original Bill's contents as subjected to public participation, thus violating Article 1 (2) of the Constitution. 20
- e. The Court of Appeal findings encroached on the principles of separation of powers and constitute judicial overreach**
62. This Court, in **Advisory Opinion Reference No. 2 of 2013 In the Matter of the Speaker of the Senate & another [2013] eKLR** held that the Court cannot supervise the workings of Parliament. The Court further held that 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.
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63. The Court of Appeal's judgment fails to appreciate the practicalities and established principles of legislative processes. Additionally, it places unrealistic constraints on public participation, potentially leading to endless consultations and legislative paralysis.

64. The finding encroaches on the constitutional principle of separation of powers by micromanaging the legislative process, a core mandate of the National Assembly. Despite Article 124 of the Constitution providing for the establishment of the Standing Orders of the National Assembly to guide its proceedings, the judgment by the Court of Appeal is tantamount to prescribing the manner in which the House should conduct its proceedings.

65. The Court's judgment misconstrues the role of public participation by implying that every public view must be individually addressed and justified. This is not the intent of public participation; which provides a broad spectrum of input to guide legislative decision-making. Public participation is intended to inform the legislative process, not to dictate it. 10

66. The Court's requirement for the National Assembly to give detailed reasons for each decision is an overreach of judicial authority into legislative functions. Legislative processes already provide for transparency and accountability through public records of debates, committee reports, and public access to legislative sessions. These mechanisms suffice to meet constitutional requirements without excessive procedural burdens.

67. Further, whereas the court's role is to interpret the law and ensure that policies and actions of the executive and legislative branches comply with the Constitution, this role does not extend to substituting judicial decisions for policy judgments made by elected representatives or policy experts unless there is a clear constitutional infringement. 20

f. The Court of Appeal misapprehended the provisions of Article 221 of the Constitution as read with Sections section 39 (1) and (2) of the Public Finance Management Act

68. In reaching a finding that the estimates of revenue were not included in the Appropriation Bill and the Appropriation Act, 2023, the Court of Appeal failed to apprehend the provisions of Article 221 of the Constitution.

69. Article 220 on the “Form, content and timing of budgets” states that the “budgets of the national and county governments shall contain estimates of revenue and expenditure, differentiating between recurrent and development expenditure. Article 221 partly states 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.”

70. However, Article 221(6) omits the reference to “estimates of revenue” and instead correctly references “estimates of national government expenditure” and expenditure for the Judiciary and Parliament. In particular, the Clause states that: “*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.*”

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71. More particularly, the Court of Appeal read and interpreted the provisions of Article 221(1) in isolation of other provisions of the Constitution. While Article 221(1) requires the Cabinet Secretary to submit estimates of revenue and estimates of expenditure to the National Assembly, Article 221(6) of the Constitution specifically **states that the estimates of expenditure are to be included in the Appropriation Bill**, whose main purpose is to authorise payment out of the Consolidated Fund.

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g. The Court of Appeal failed to take into account the public interest and craft an appropriate remedy

72. The Constitution mandates the Court, in proceedings aimed at enforcing the Bill of Rights, to devise suitable remedies. The Court of Appeal neglected to fulfil this obligation by dismissing the Petitioner’s Application.

73. More particularly, the Court of Appeal:

- a. Neglected to issue effective orders, as mandated by Article 23, aimed at preserving the “values of the constitution” and the public interest;

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- b. Failed to adopt an interpretation, as required by Article 20(3)(b), that most strongly supports the enforcement of a right or fundamental freedom;
- c. Minimized its role in conducting a "balanced review," which, based on its own reasoning could have resulted in the Court permitting certain provisions of the Act to be enforced while restraining those that, on prima facie grounds, undermine the Constitution and the public interest.

D. ISSUES FOR DETERMINATION

- 74. Whether every proposed amendment to a Bill must undergo a full formal legislative process, including first reading, second reading and public participation, as if it were a new Bill. 10
- 75. Whether the National Assembly, upon conclusion of the public participation exercise, provided detailed reasons for accepting or rejecting views.
- 76. Whether omission by Parliament to provide detailed reasons for accepting or rejecting views vitiates the process.
- 77. Whether amendments can be effected on a Bill after public participation.
- 78. Whether the estimates of revenue should be appropriated in every vote akin to the estimates of expenditures considering that the principle objective of an appropriation Bill is to allocate and appropriate expenditure in addition to authorizing withdrawals from the consolidated fund. 20
- 79. To what extent can a court of law intervene on policy matters?

E. RELIEFS SOUGHT

- a) This Petition of Appeal be allowed;
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- b) That the Judgment and Decree of the Court of Appeal in *Civil Appeal No. E002 of 2023 as consolidated with Civil Appeal No. E016, E021, E049, E064 and E080 all of 2023* be and is hereby set aside in its entirety;
- c) That *Civil Appeal No. E003 of 2023 The National Assembly & The Speaker of the National Assembly v Okiya Omtatah Okoiti & Others* be and is hereby allowed;
- d) Any further or alternative relief and/or order that this Court may deem fit and just to grant; and
- e) Costs of the Appeal be awarded to the Petitioners.

DATED at NAIROBI this 2nd day of August 2024

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To: The Honourable Judges of the **Supreme Court.**

LODGED in the **Supreme Court** of **KENYA** at **Nairobi** this day of **August, 2024.**

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