REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION NO. 5 OF 2017

(Coram: Maraga CJ& P; Mwilu DCJ& V.P, Ojwang, Wanjala & Njoki, SCJJ)

BETWEEN

BRITISH AMERICAN TOBACCO KENYA, PLC

(Formerly

BRITISH AMERICAN TOBACCO KENYA LIMITED) ..... APPELLANT

AND

CABINET SECRETARY FOR THE

MINISTRY OF HEALTH ..... 1ST RESPONDENT

TOBACCO CONTROL BOARD ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

KENYA TOBACCO CONTROL ALLIANCE ..... 1ST INTERESTED PARTY

CONSUMER INFORMATION NETWORK ..... 2ND INTERESTED PARTY

AND

MASTERMIND TOBACCO KENYA LIMITED.....THE AFFECTED PARTY

JUDGMENT

I. INTRODUCTION

[1] The Appellant moved the Court via a Petition dated 31st March 2017, being an appeal against the Judgment of the Court of Appeal (*Okwengu, Azangalala and Sichale, JJA*) in *Civil Appeal No. 112 of 2016*, which decision upheld the Judgment of the High Court, in *High Court Petition No. 143 of 2015*, ***British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 4 others*** that judgment held that there was adequate consultation or public

participation in the formulation of Tobacco Control Regulations 2014 and that, except for Regulations 1, 13(b) and 45, the provisions are neither unconstitutional nor unlawful nor do they violate any right of the Appellant, the affected party or the Tobacco industry players.

[2] The Appellant sought the following reliefs (produced verbatim), that:

i. *The appeal to be allowed.*
ii. *The Judgment of the Court of Appeal in Civil Appeal 112 of 2016 be set aside and judgement be entered as prayed in the petition in the High Court on 15th April, 2015.*
iii. *The costs in this Appeal, Civil Appeal 112 of 2016 British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 4 others, and High court Petition Number 143 of 2015 British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 4 others, be awarded to the Appellant.*
iv. *Any further or alternative relief this Honourable Court may deem fit to grant.*

II. BACKGROUND

[3] In a Notice in the Kenya Gazette dated 5th December 2014, the 1st Respondent published the *Tobacco Control Regulations 2014* (herein after referred to the Regulations) by way of Legal Notice No. 169 (Legal Supplement No. 161). The Regulations were made pursuant to Section 53 of the Tobacco Control Act, 2007 (herein after referred to the Act) and sought to regulate various aspects of the Tobacco sector in Kenya. Section 53 of the Act gives powers for making Regulations prescribing or prohibiting anything required by the Act to be prohibited, or for the better carrying out of the objects of the Act.

(a) High Court

[4] The Appellant was aggrieved by the Regulations and filed at the High Court, Petition No. 143 of 2015 ***British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 4 others*** on 15th April 2015. The Petition challenged the lawfulness of the Regulations and Section 7 (2) of the Act on grounds that *inter alia,* they were made in contravention of the provisions of the Statutory Instruments Act (SIA) and violated certain provisions of the Constitution. The Petition sought the following orders:

1. *A declaration that Tobacco Control Regulations, 2014 being Legal Notice Number 169 of 2014 published in the Kenya Gazette Supplement 161, Legislative Supplement Number 156 of 2014 are void in their entirety having failed to comply with the applicable provisions of the Statutory Instruments Act 2013 and Article 10 of the Constitution.*
2. *An order for judicial review by way of certiorari to remove into the High Court and quash the Tobacco Control Regulations 2014 in their entirety.*
3. *In the alternative to (2) above, an order for judicial review by way of certiorari to remove into the High Court and quash Regulations 3 to 39 (both inclusive) and Regulation 45 of the Tobacco Regulations 2014.*
4. *In the alternative to (1) and (2) above:*
    a. *A declaration that Regulation 1 of the Tobacco Control Regulations 2014 is not applicable to Part II of the Regulations.*
    b. *A declaration that Part VI (Regulations 37 and 38) of the Tobacco Control Regulations 2014 is void.*
    c. *A declaration that Part V (Regulations 20 to 36) of the Tobacco Control Regulations 2014 is void*
    d. *A declaration that Part II (Regulations 3 to 7) of the Tobacco Control Regulations 2014 is void.*
    e. *A declaration that Regulation 15(b) of the Tobacco Control Regulations 2014 is void.*

f. *A declaration that Regulation 45 of the Tobacco Control Regulations 2014 is void.*

g. *A declaration be made that Section 7(2) (f) of the Tobacco Control Act 2007 is void.*

5. *Any further order or relief that this Court deems fit to make to meet the interests of justice.*

6. *The costs of this Petition be awarded to the Petitioner.*

[5] The crux of the Appellant's case was that the Cabinet Secretary (CS) for Health and the Tobacco Control Board (herein after referred to the Board) did not engage with the Tobacco industry stakeholders in the process of developing the Regulations; and that where there was such engagement, it was limited and entirely unsatisfactory. The Appellant invoked Section 5(1) of the SIA in submitting that where a proposed Regulation is likely to have a substantial direct or indirect impact upon business or restrict competition, the regulatory authority is required to consult with persons likely to be affected. It also argued that the Regulations impose significant costs on the Tobacco industry generally and the community at large, yet there was no evidence of a Regulatory Impact Statement (RIS) obtained by the Board as provided by Section 6 of the SIA.

[6] The Appellant also challenged the Regulations' introduction of the *Solatium Compensatory Contribution (the Solatium)* alleging that it was never heard on the basis for imposing the said contribution. It urged that the imposition was unconstitutional and unlawful as it was not based on any lawful obligation to pay compensation. The amount was deemed discriminatory, as other industries have not been subjected to such measures; and that the wording of Regulation 38, that the *solatium* shall be 2% of the value of Tobacco products manufactured and/or imported, was vague and uncertain as it was not clear which information will be used to ascertain the value of manufactured or imported Tobacco.

[7] Also challenged was the Regulations' limitation of contact between public officers and Tobacco industry players. It is urged that this limitation undermines the Appellant's right to fair administrative action and offends the principles of good governance, including public participation, inclusiveness and non-discrimination. As a result, it brings into question the constitutionality of Regulation 3, as regards packaging and labelling of Tobacco products. The Regulations were impugned for being unreasonable, disproportionate, irrational and onerous because there is an East African Standard, EAS 110: 2005, which provides the specifications for cigarettes and is administered by the Kenya Bureau of Standards, which the Appellant submits to as its cigarettes are submitted annually for testing and certification by that body.

[8] It was contended that the information required to be disclosed under Regulation 42 comprises manufacturer's trade secrets or sensitive information, which is 'protected and that the information if released, may also mislead the public as it may deem one product less risky than another, yet cigarettes with ingredients, are no more or less harmful than those with ingredients. It impugned Regulations 13 on market share. It contended that Regulation 15 was unconstitutional as it prohibited smoking in streets, walkways and verandas adjacent to public places. It urged that Regulation 15(b) had extended the restriction to areas not contemplated under Section 33(7) of the Act.

[9] Regulation 45 which prescribes a penalty of a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years for breach of any provision of the Regulations was challenged for being unconstitutional. It was argued that it is *ultra vires* Section 24(5) of the SIA which only allows a penalty for breach of any provision of Regulations to be a penalty not exceeding twenty thousand shillings or imprisonment not exceeding six months or both. Lastly, the Appellant contended that neither the CS Health nor the Board had any powers to make legislation to domesticate or implement Article 5.3 of the World Health

Organization (WHO) Framework Convention on Tobacco Control (FCTC) and the Guidelines thereto.

[10] The Respondents' case on the other hand, was that as a signatory to the FCTC, Kenya is obligated to fulfil its commitment by enacting and implementing legislation and Regulations compliant with the Convention. It was urged that under Section 9 (g) & (h) of the SIA, a RIS need not be prepared for publication if the proposed Regulation is a matter arising under legislation that is substantially uniform or complementary with legislation of the national government or of any county, similarly, a matter advance notice of which would enable someone to gain unfair advantage.

[11] The Respondents stated that the Regulations were for the benefit of the community and shall not impose significant costs on the community or part of the community. It was urged that there was public participation meetings held in over eight counties which views were considered and that the Regulations were made in compliance with the provisions of the SIA. Therefore, the Regulations were not unconstitutional. Further it was urged that the Regulations on limitation on contact between public officers and members of Tobacco industry are in conformity with Chapter 6 of the Constitution. The imposition of 2% solatium compensatory contribution was stated to be in conformity with the Constitution, Section 7(2)(f) of the Act and Article 6 of the WHO Framework Convention. It was argued that the solatium is meant to cater for any health perils caused by Tobacco.

[12] In its judgment the High Court, *Mumbi J*, delimited three issues for determination as follows:

(a) *Whether the process leading to the enactment of the Tobacco Regulations, 2014 was lawful?*

(b) *Whether specific Regulations are unconstitutional for being arbitrary or unreasonable?*

(c) *Whether a violation of the Petitioner's constitutional rights has been made out?*

[13] Finally, the High Court made the following disposition:

> ***"176. The Tobacco Control Act has very clear objectives of safeguarding individuals and the public from the dangers posed by consumption of Tobacco, which as the Act states in its objectives clause, has been implicated in causing debilitation, disease, and death. The Regulations impugned in this petition are intended to safeguard the public, those who smoke and those who do not, and to provide certain information with regard to the contents of Tobacco products. Having considered the various arguments of the parties, I have come to the following findings:***
>
> 1. ***That there was sufficient public participation and consultation in the formulation of the Regulations and the process was therefore in accordance with constitutional requirements on public participation;***
> 2. ***No violation of the petitioner's rights by the Regulations has been demonstrated;***
> 3. ***Regulation 13(b) of the Tobacco Control Regulations, 2014 is null and void to the extent that it requires Tobacco manufacturers and importers to disclose information pertaining to their market share in the Tobacco industry in Kenya;***
> 4. ***Regulation 45 of the Tobacco Control Regulations, 2014 is ultra vires Section 24(5) of the Statutory Instruments Act and is therefore null and void;***

5. ***Regulation 1 is in conflict with Section 24 of the Act with respect to the period within which the Regulations should come into force. Consequently, it is my direction that the Regulations shall come into force within six (6) months from the date hereof.***
6. ***With respect to costs, I direct that each party shall bear its own costs of the petition.***

[14] The Appellant was dissatisfied with the High Court decision, and lodged an appeal in the Court of Appeal.

(b) Court of Appeal

[15] In its Memorandum of Appeal, the Appellant raised 17 grounds on which it faulted the High Court judgment.

[16] Parties made their rival submissions before the Court, which to a large extent echoed what they had submitted before the High Court. In its judgment delivered on 17th February 2017 the Court of Appeal delimited the following issues for determination:

(i) *Whether the process leading to the making of the Regulations was vitiated by lack of public participation and consultation as to render the Regulations unconstitutional or unlawful?*

(ii) *Whether the specified provisions of the Tobacco Act and Regulations are unconstitutional, ultra vires or otherwise illegal?*

(iii) *Whether the learned Judge's findings on issue (i) and (ii) were correct?*

(iv) *Whether the learned Judge's view on the health effects of the Tobacco products were relevant to the proceedings?*

(v) *Whether specific Regulations identified by the appellant violated the appellant's rights as alleged?*

(vi) *Arising from (i) to (v), whether the appeal should be allowed or dismissed?*

[17] The Court of Appeal agreed with the High Court on public participation and consultation. The Appellate Court appreciated the case law relied on by the High Court, buttressing that public participation is a mandatory requirement in the process of making legislation including subsidiary legislation. It evaluated the affidavit evidence on record and found no reason to upset the High Court findings. As regards the RIS, the Appellate Court also agreed with the High Court that it was not necessary to prepare the RIS in this matter.

[18] As to whether specific Regulations violated the Appellant's rights, the Court of Appeal held that while the provisions of Part V of the Regulations appear to be discriminatory against the Appellant and others in the Tobacco industry as they seek to limit interactions between players in the Tobacco industry and public officers and/or authorities, a situation not replicated in other commercial industries, not all discrimination amounted to unfair discrimination. Noting the peculiar nature of the Tobacco industry and having taken note of the side effects of the Tobacco products the Court held that *"the inequality of treatment in limiting interaction between the public officers/authorities and members of the Tobacco industry does not amount to discrimination as it is dictated by the circumstances obtaining. Moreover, the limitation does not target only a specific group of players in the Tobacco industry but applies to all players in the Tobacco industry."* It found the limitation of the Appellant's rights justifiable, reasonable and necessary under Article 24 of the Constitution to ensure the enjoyment of rights and fundamental freedoms by all individuals. Article 37 was found not to have been violated. As the Regulations were found to have been made in accordance with the SIA and the Constitution, it was held that the procedure was in line with the Fair Administrative Action Act with regard to public participation, and there was no violation of Article 47 of the Constitution.

[19] On the solatium compensatory contribution, the appellate Court found that it was not a payment that goes towards the national revenue, and could not be considered that is levied by the national government or county government for the purposes of national or county revenue. It does not violate Article 210 of the Constitution and its imposition cannot amount to deprivation of the Appellant's property under Article 40 of the Constitution.

[20] As regards the Regulations on packaging and labelling, the appellate Court agreed with the High Court findings, that the purpose of the Regulations, in prescribing health warnings through packaging and labeling of Tobacco products, was to achieve the object of the Act by providing information and cautioning consumers and non-consumers of the side effects of Tobacco products. They found the Regulations to be in accord with the parent legislation.

[21] On unconstitutionality of specific provisions, Regulation 15(b) which bars smoking in streets, walkways or verandas adjacent to a public place was found not *ultra vires* the Act as it seeks to effect Section 32 of the Act. As regards Part III of the Regulations, on disclosure of information, it was found that the disclosures required under Regulations 13(a), (c), (d) and (e) on Tobacco produced, sales made and revenues earned, quantities exported and affiliated organizations or agents citing on behalf of a manufacturer, are relevant in light of Regulation 37 that requires the payment of the Solatium compensatory contribution at 2% of the value of the Tobacco manufactured or imported by the manufacturer or importer in that financial year. On the disclosure requirements under Regulation 12, the appellate Court observed that there was a need to balance public health needs against intellectual property rights of the appellant and other stakeholders in the Tobacco industry. It found that the limitation was reasonable and justified under Article 24 of the Constitution.

[22] The Court of Appeal dismissed the appeal stating as follows:

"The sum total of the above is that the learned judge did not err or make wrong findings as contended in the grounds of appeal. The meetings, consultations and communication prior to the Regulations satisfied the requirements of the Constitution and Statutory Instruments Act with regard to public participation.

We find that except for Regulations 1, 13(b) and 45 that the learned judge found to be void and or ultra vires the Tobacco Control Act and in regard to which finding there has been no appeal, the Regulations and the Tobacco Act provisions are neither unconstitutional nor unlawful nor do they unlawfully violate any rights of the appellant, the affected party or the Tobacco industry players; that in cases where the Regulations or the Act limits the rights of the industry players the same is reasonable and justified in accordance with Article 24 of the Constitution.

In conclusion, we find no merit in this appeal and do therefore dismiss it in its entirety. We direct that each party shall bear their own costs."

[23] It is this finding of the Court of Appeal that has aggrieved the Appellant and hence the Petition now before this Court.

III. THE PETITION BEFORE COURT

[24] Before the Supreme Court, the Appellant alleges that its claims raise the following points of law, reproduced verbatim:

a. *What do the principles of 'public participation' under Article 10 of the Constitution and 'appropriate consultations' under Section 5 of the Statutory Instrument Act 2013 (SIA) require in respect of the development of the Regulations?*

b. *Was there compliance with the requirement for consultation under the SIA and/or public participation under the Constitution in making the Regulations?*

c. *What amounts to 'a matter arising under legislation that is substantially uniform or complementary with legislation of the national Government or any County' within the exception under Section 9(g) of the SIA so as to exclude the requirement for publication of a Regulatory Impact Statement (RIS) under Section 6 of the SIA?*

d. *What is the effect of non-compliance with the requirements for public participation and consultation; and/or the preparation of a proper RIS on the Regulations?*

e. *What does the term 'solatium compensatory contribution' mean within Section 7(2)(f) of the Act?*

f. *What are the requirements for the determination of the 'solatium compensatory contribution' payable under Section 7(2)(f) of the Act?*

g. *Does Section 7 (2)(f) of the Act provide for the imposition of an annual levy as contemplated by the Regulations?*

h. *Does the solatium compensatory contribution specified in Regulation 37 constitute a 'tax or fee' such that it violates Article 210 of the Constitution?*

i. *Is the wording of Regulation 37 that the solatium compensatory contribution shall be in every financial year the sum of two per cent of "the value" of the Tobacco products manufactured or imported impermissibly vague and uncertain so as to be incapable of compliance?*

j. *Is the Requirement for payment of a solatium compensatory (solatium contribution) of 2% of the value of Tobacco products manufactured or imported as provided for under Section 7(2)(f) of*

the Act as read together with Regulation 37 within the powers and Authorities conferred on the 1st Respondent, constitutional and proportionate?

k. *Is part V of the Regulations which seeks to directly implement the guidelines to Article 5.3 of the FCTC to limit interactions between the Tobacco industry and public officers and public authorities, within the powers and authorities conferred on the 1st Respondent to make Regulations under Section 53 of the Act?*

l. *Is Part V of the Regulations a violation of the Constitution, including Articles 27 and 37 thereof, and otherwise invalid?*

m. *Is Regulation 15(b) which purports to ban smoking in "streets, walkways, verandas adjacent to a public place" within the powers and authorities conferred on the 1st Respondent to make Regulations under Section 53 of the Act?*

n. *How is Article 24 of the Constitution to be applied by the Court?*

o. *Have the Respondents demonstrated that the requirements of Article 24 of the Constitution have been satisfied in respect of any limitation of the fundamental freedoms caused by the Regulations?*

[25] The Petition is anchored on ten (10) grounds summarized as follows, that the Court of Appeal erred:

i. *In holding that there was adequate consultation and/or public participation in the process of making the Regulations.*

ii. *In holding that the Regulations fall under the exception provided in Section 9(g) of the SIA as they are complementary to the Act, and it was therefore not necessary for the 1st Respondent to prepare a RIS.*

iii. *In holding that the Act and the Regulations are anchored on the Constitution and no inconsistencies arise.*

iv. *In upholding Section 7(2)(f) of the Act and Regulations 37,38 and 39, which impose an annual payment (the solatium compensatory contribution) on the Tobacco industry.*

v. *In failing to find that Section 7 (2) (f) of the Act and Regulations 37, 38 and 39 are ultra vires the Act, unconstitutional and unlawful.*

vi. *In presuming that the Regulations are per se lawful and compliant with due process, the Act and the Constitution because of the harmful effects of Tobacco, and in so doing justified clear violations of the Constitution and inconsistencies of the Regulations with the Act.*

vii. *In upholding Part V of the Regulations which severely restrict interactions between public authorities or public officers and the Tobacco industry.*

viii. *In failing to find that Part V of the Regulations is ultra vires the Act, unconstitutional and unlawful.*

ix. *In holding that Regulations 12 to 14 which relate to product disclosure and industry disclosure are justified and reasonable.*

x. *In holding that Regulation 15(b) is not ultra vires the Act but seeks to give effect to Section 32 of the Act.*

IV. PARTIES' SUBMISSIONS

[26] The Appellant filed its written submissions on 17th July 2017 and Submissions in Reply on 11th August 2017, while the Affected Party filed its Submissions on 31st July 2017. The Respondents filed Grounds of Opposition on 7th June 2017 and written submissions on 28th July 2017, while the Interested Parties filed a Reply to the petition and later Submissions on 28th July 2017. This matter was orally canvassed before the Court on 26th April, 2018 where parties were represented by counsel.

a) The Appellant's submissions

[27] The Appellant's case was argued by Counsel, Mr. Kiragu Kimani who submitted that the Appellant is not opposed to regulation of its activities and of the Tobacco industry but supports a regulatory framework that is constitutional, otherwise legal, balanced and evidence based, and which actually helps to achieve the intended public health objectives.

[28] It was urged that pursuant to Article 94(1) of the Constitution, the power to make law is vested in Parliament, and only the Constitution or Parliament through legislation can donate the power to any other person or body. Where Parliament has donated such power, like it does under Section 53 of the Act, it must be exercised strictly within the limits of the legislation donating that power. It cited the case of ***Resley v The City Council of Nairobi*** [2006] 2 EA 311, where it was held that where Parliament has conferred powers on public authorities and has laid a framework on how the powers are to be exercised, and where that framework is clear, the public authority has an obligation to strictly comply with it, in order for its decision to be considered valid.

[29] In that regard, it was urged that the Regulations herein must be under Section 53 of the Act. It was submitted that for any set of Regulations to be legal, they must not only be consistent with the Constitution but also the parent Act under which they are made, and any other relevant Statute. This is in line with Section 31(b) of the Interpretation and General Provisions Act which stipulates that "*no subsidiary legislation shall be inconsistent with the provisions of an Act.*"

[30] The Appellant urged that FCTC is a framework Convention that limits itself to the formulation of broad principles and objectives and that substantive rules are to be developed in later steps at international and domestic levels; such steps taken to implement the general principles must therefore be consistent with national laws. It submitted that the principles do not by themselves impose any legal obligations. As parliament is the legislating arm, it was urged, the legislation to

implement the FCTC ought to be passed by Parliament and not the 1st Respondent as the case is alleged to have been in the present case.

[31] The Appellant categorized its submissions into two broad limbs, thus:

1) *Whether the process leading to the making of the Regulations was unconstitutional or otherwise unlawful? and*
2) *Whether some specific provisions of the Regulations, and Section 7(2)(f) of the TCA, are unconstitutional or otherwise unlawful?*

Challenge on the Regulations making process

[32] The Appellant submitted that courts have a duty to prevent violation of the Constitution and the law, and may exercise this power to make orders that affect legislative process. It referred to the case of ***Doctors for life International v speaker of the National Assembly and others*** (CCT 12/05), (relied on in ***Robert N. Gakuru & others v Governor Kiambu County & 3 others*** [2014] eKLR) where it was held that:

> ***"...when it is appropriate to do so, courts may-and if need be must-use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty."***

[33] The Appellant invited the Court to examine the process leading to the making of the Regulations, whether it complied with the requirements under the Constitution and the SIA. It urged that the process was unconstitutional and unlawful as there was a failure to conduct appropriate and effective consultations,

and a failure to prepare and publish a genuine RIS. It urged that meaningful public participation is a principle recognized by Articles 10 and 118 of the Constitution as one of the principles of good governance. Section 5(1) of the SIA further requires a Regulation making authority to make appropriate consultations with persons who are likely to be affected by a proposed statutory instrument before making the statutory instrument.

[34] It urged that the mandatory obligation of consultation and public participation is not met by merely taking the perfunctory step of involving the public and any affected persons, therefore the Court of Appeal erred in holding that there was adequate consultation and public participation. Relying on the case of ***Doctors for life***, it was urged that for public participation and effective consultations to be said to have occurred, "*[a]all parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion.*"

[35] Citing the case of ***Samuel Thinguri Waruathe & 2 others v Kiambu County Government & 2 others*** [2015] eKLR, it was urged that public participation and effective consultation are not a mere cosmetic venture. The product of the legislative process ought to be the true reflection of the public participation so that the end product bears the seal of approval by the public. It faulted the Court of Appeal in failing to note that while the Appellant (BAT) volunteered written representations, it did not get any response and there is no evidence that the same was meaningfully considered. That from the minutes of the principal event it was clear that there had been no genuine consultations before making the Regulations and that the Respondents were advised to start the process afresh. It averred that the Court of Appeal erred in failing to find that the Respondents had pre-determined to introduce the Regulations and had a closed

mind when engaging in the process of public participation, hence no genuine consultations. It was urged that the Respondents failed to give any conscientious consideration to the views expressed by the public, especially those of the Tobacco industry.

[36] With this failure of meaningful consultations, it was urged that the Court finds the Regulations unlawful, null and void. Reference was made to the Constitutional Court of Uganda case, ***Constitutional Court Petition No. 08 of 2014 Oloka-Onyango & 9 others v Attorney General*** [2014] UGCC 14 (cited with approval in ***Coalition for Reforms and Democracy (CORD) & another v Republic of Kenya & another*** [2015] eKLR) (***CORD*** case) where it was stated thus: *"we agree with Counsel Opiyo that the enactment of the law is a process and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it... failure to obey the law (Rules) renders the whole process a nullity."*

[37] It was further urged that Section 6 of the SIA imposes an obligation on a Regulation making authority to prepare an RIS if a proposed Regulation is likely to impose significant costs on the community or part of a community. The Appellant faulted the superior Courts for finding that in view of Section 9(g) of the SIA, it was not necessary to publish an RIS, as the Regulations are complimentary to the Act. That this finding negated the objectives of the SIA, especially Section 8. It faulted the Court of Appeal for not noting that the Respondents first agreed that the RIS was prepared but submitted that they did not publish it since it was not required. The Appellant wondered why the same was prepared if it was not required in the first place. It urged that the Court of Appeal misdirected itself as to the scope of Section 9(g) of the SIA and submitted that Section 9(g) is a limited exception to be read narrowly and not to be applied broadly as the Court of Appeal did. The Appellant submitted that the RIS is an essential part of transparent, accountable and empirically-based regulatory system as required under Article

10(2)(c) and 47 of the Constitution. It provides a formal method for ensuring that administrative action is justified and based on a clear understanding of cause and effect.

Challenge on specific provisions of the Regulations and Section 7(2)(f) of the Act

[38] The Appellant also impugned specific provisions of the Regulations for being unconstitutional or otherwise unlawful. Section 7(2)(f) of the Act and Regulations 37, 38 and 39 were said to be unconstitutional for imposing the Solatium Compensatory Contribution (Solatium). Section 7(2)(f) of the Act provides that the Tobacco Control Fund shall consist of among others *"a solatium compensatory contribution payable by any licensed cigarette manufacturers or importers in the country as may be determined by the Board."* Regulation 37 sets the solatium compensatory contribution at 2% of the value of the Tobacco products manufactured or imported by the manufacturer or importer in that financial year.

[39] The Appellant submitted that the Court of Appeal erred in finding that Regulation 37 has a nexus with the Act. In this regard, it relied on the meaning of the term 'solatium' in the *New Shorter Oxford English Dictionary on Historical Principles, vol. 2,* thus: *"a sum of money or other compensation given to a person to make up for loss, inconvenience, injured feelings etc, specifically, in law, such an amount awarded to a litigant over and above the actual loss"* and *"a sum paid to an injured party over and above the actual damage by way of solace to his wounded feelings."* It was submitted that a solatium compensatory contribution is compensation payable for an established injury as opposed to a levy imposed on any activity or a service. An example of tis levy is to be found under Section 105 of the Tourism Act. The Appellant submitted that no connection has been shown between the annual levy and any wrong doing on its part or any Tobacco manufacturer or importer that occasioned an injury. Therefore, there is no reason given why it should be 2% as set.

[40] It was argued that the Court of Appeal's interpretation of the amount amounted to an 'enlargement' of the provisions of Section 7 (2)(f) of the Act rather than its construction. It submitted that the imposition of the solatium compensatory contribution amounted to a deprivation of the Appellant's right to property under Articles 40(1) of the Constitution. It was averred that Article 260 of the Constitution defines property to include, *"any vested or contingent right to, or interest in or arising from money, choses in action or negotiable interests."* Therefore, this solatium deprives the Appellant of property without due process as no finding of wrong on the part of the Appellant has been established.

[41] It was contended that the solatium is a form of dedicated orhypothecated tax. In this regard it was submitted that Section 7(2)(f) of the Act is not sufficient 'legislation' imposing a tax or fee as required under Article 210 of the Constitution. It does not specify the amount of tax or the basis of calculating the tax sought to be imposed. In this regard, the Appellant cited the case of ***Keroche Industries Limited v Kenya Revenue Authority & 5 Others*** [2007] eKLR, where Nyamu, J observed that: *"taxation can only be done on clear words and cannot be on intendment."*

[42] The Appellant submitted that the finding on the contribution of 2% of the Tobacco products manufactured or imported was not supported by any evidence, hence failed the necessary standard under Article 24 of the Constitution. It was argued that Article 24 requires an assessment of whether the limitation is reasonable and justifiable having regard to the matters set out in Article 24(1) and also with respect to Article 24(2). It was argued that with no RIS, the Respondents have not shown that the requirements of Article 24 have been met. Accordingly,, it was urged that the solatium does not satisfy any of the criteria of proportionality. It is arbitrary, capricious and violates due process. It imposes an onerous and unjustified burden on the Appellant, when Tobacco manufacturers and importers are already subject to many other taxes. For that reason, the Appellant argues that

the Court of Appeal erred in not finding that the contribution violates Article 24 of the Constitution.

[43] It was further submitted that the solatium violates Articles 10(1) and 47 of the Constitution. Citing the case of ***Crywan Enterprises Limited v Kenya Revenue Authority,*** [2013] eKLR, it was urged that "where the basis of deprivation is not founded on law, or predetermined objective criteria, or is done without procedural propriety, it is *ipso facto* arbitrary." Therefore, the determination of this contribution is not based on any reason, it is done without procedural propriety and is *ipso facto*, arbitrary and amounts to unlawful exercise of jurisdiction. Also cited in this regard are the cases of ***Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & others*** [2016] eKLR, ***A.G vs Ryan*** (1980) A.C. 718 ***and Law Society of Kenya v Attorney General & another*** [2009] eKLR.

[44] Invoking International law, the Appellant urged that the solatium compensatory contribution violates the East Africa Community Treaty as it hampers free movement and trade of cigarettes between Kenya and other Treaty Members. It argued that under the Treaty, State Parties are obliged to remove obstacles to the free movement of goods, services and capital. Subsequently, it was urged that as the solatium applies to exports, it will impact on this cross-border trade.

[45] The Appellant questioned why the solatium has been pegged at 2% of the value of Tobacco products manufactured or imported. The Appellant states that such value is vague and impossible to ascertain. Because of this vagueness, the Appellant, is unable to regulate its conduct and is exposed to potential criminal prosecution under Regulation 45 for contravention of the Regulations. Cited in this regard was the case of ***Aids Law Project v The Hon. Attorney General & 3 others,*** [2015] eKLR thus:

"For if the trumpet gives an uncertain sound, who shall prepare himself for the battle? So, if the law gives an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes... Let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known law and certain law. Nor should a man be deprived of his life, who did not first know that he was risking."

[46] It was urged that while the health consequences of Tobacco are relevant, those consequences do not negate the obligation to comply with the law in making Regulations, including undertaking the necessary balancing exercise required under Article 24 of the Constitution.

[47] Part V of the Regulations that limits interaction between public authorities or officers and the Tobacco industry was impugned as being unconstitutional, having been made without authority, and otherwise unlawful. It was urged that the Court of Appeal erred in finding that Part V of Regulations was made within the scope of the powers of the 1st Respondent. The Appellant submitted that Section 53 of the Act does not confer a broad power on the 1st Respondent to make Regulations that modify or extend the Act, but the power is strictly limited to ancillary matters within the existing framework laid down in the Act. It cited ***Utah Construction & Engineering Pty Limited v. Pataky*** (1966) A.C. 629 where the Privy Council adopted with approval the statement in the judgment of the High Court of Australia in ***Shanghan v Scott*** relating to the construction of a provision which provided for the making of Regulations that are necessary or convenient for carrying out or giving effect to the Primary Act, thus:

"The result is to show that such a power does not enable the authority by Regulation to extend the scope or general operation of the enactment but is strictly ancillary. It will authorize the provision of subsidiary means of carrying into effect what is

enacted in the statute itself and will over what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends."

[48] It was submitted that there is no provision in the Act for the Regulation of interactions between public authorities and none of the objects of the Act prescribes the restriction of interactions between public authorities and the Tobacco industry. It was urged that Part V of the Regulations could not have been made pursuant to the powers in Section 53 of the Act. It was submitted that this was an attempt to implement Article 5.3 of the FCTC and the Guidelines, yet there is no power under Section 53 of the TCA to implement the FCTC or the guidelines.

[49] The Court of Appeal was faulted for finding that the inequality of treatment in limiting interaction between the public officers and or authorities and members of the Tobacco industry does not amount to discrimination and is justifiable under Article 24 of the Constitution. It was submitted that the Court of Appeal erred in finding that the Tobacco industry cannot expect equal treatment with other industries in relation to its interactions with public authorities and or officers: no other industry, including those dealing with other harmful products, is subjected to similar limitations in their interactions with the public authorities and or officers, or exclusion from lawful business incentives that may be available to other industries.

[50] It was further urged that Part V of the Regulations does not satisfy any of the criteria of proportionality because any concerns regarding the protection of the public health policies with respect to Tobacco Control can be met by the implementation of appropriate provisions that promote government transparency so that the public knows who is lobbying regulators for what outcomes, and by the

implementation of sensible-conflict-of-interest rules, while not requiring the wholesale exclusion of the Tobacco industry.

[51] The Court of Appeal, it was contended, erred in limiting Intellectual Property Rights (IP) and the right to privacy under Regulations 12, 13 and 14, which is not justifiable under Article 24 of the Constitution. While the Court of Appeal held that Regulation 12 limits the Appellant's IP rights, it was submitted that it erred by holding that the limitation is reasonable and justifiable under Article 24 of the Constitution without providing any analysis of how the criteria laid down in Article 24 are met. It is urged that the disclosures required by Regulations 12, 13 and 14 include trade secrets, manufacturing processes and other IP rights, and that Article 40(2)(a) of the Constitution prohibits Parliament from enacting a law that permits the State to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description. Under Article 40(5), the State is obligated to support, promote and protect the IP rights of the Appellant, and therefore the disclosure required by the Regulation may result in the deprivation of the Appellant's IP rights.

[52] Lastly, it was urged that Regulation 15(b) is *ultra vires* the Act. This Regulation provides that no person shall smoke in streets, walkways or verandas adjacent to a public place. The Appellant submitted that the streets and walkways are not designated public places under the Act and Regulation 15(b) and could not give effect to Section 32 of the Act. Hence, the Court of Appeal erred in failing to find that this Regulation is ultra vires the powers and authority of the 1st Respondent under the Act.

b) Affected Party's Submissions

[53] Counsel Mr. Macharia argued the case of the Affected Party, Mastermind Tobacco Kenya Limited before the Court. It had filed its written submissions on 31st July 2017 in which it agreed with and supported the Appellant's case. It

submitted that it is the only indigenous company in East and Central Africa and that the Regulations would destroy the local Tobacco industry.

[54] It reiterated the submissions of the Appellant concerning lack of due process, particularly that of public participation, in the making of the Regulations contrary to the Constitution and the SIA. It contended that it was not appropriately consulted on the Regulations and the representations it made on its own motion on previous drafts were not responded to and there is no evidence that they were meaningfully and genuinely considered. Further, that there is no evidence of the involvement of experts and or a representation from a cross-section of the public in preparation of the Regulations. It also decried the lack of or failure to publish an RIS by the 1st Respondent as required by the SIA.

[55] The Affected Party also urged that the solatium was illegal and amounted to taxation without representation. It argued that it is *ultra vires* the power and authorities under the Act and it is unclear as to the mechanism used to compute, raise, collect and disburse the fund. Counsel argued that the solatium therefore, amounts to unlawful imposition of tax or fee contrary to Article 210 of the Constitution. In this regard, it reiterated that the solatium is a tax, yet imposition of tax or licensing fee is not provided for by Section 7(2)(f) of the Act. It further urged that the imposition of such a tax was without due process of the law, that is, without determination of a wrong on the part of the Affected Party that caused injury to the State, or damages suffered by the State. It is therefore unlawful and amounts to taking of the Affected Party's property rights under Article 40 of the Constitution. Further, there is no determination of a legitimate purpose of the solatium and as such, the imposition of the solatium violates Articles 10(1) and 47 of the Constitution.

c) Respondents' submissions

[56] The Respondents' case was argued by Counsel Mr. Adan. The Attorney General had filed its submissions on 28th July, 2017. It had also filed Grounds of

Opposition on 7th July 2017. In arguing their case, the Respondents submitted that the Appellant and the Affected Party were merely re-litigating their case and it was not shown how the Court of Appeal misapplied the law.

[57] It was submitted that the process of making the Regulations was strictly in accordance with the SIA as captured in the Replying Affidavit of Mr. James W. Macharia dated 28th July 2015, a fact also found by the Superior Courts. They also urged that the Regulations were exempted from the need for a RIS under Section 9(g) of the SAI.

[58] It was urged that the Regulations are consistent with the Parent Act and that under Section 53 of the Tobacco Control Act, 2007, the Cabinet Secretary for Health, on the recommendations of the Tobacco Control Board, is empowered to make Regulations for the purpose of realizing the objects of the Act. It was submitted that in determining whether the Regulations are inconsistent with the Parent Act, where the dispute relates to the application of an international treaty, Article 2(5) & (6) of the Constitution and Article 31 of the Vienna Convention on the Laws of Treaties, 1969 should be the guide. They urged that in determining the legality of the Regulations, they must be subjected to the four corners of the Parent Act. The decision of the Supreme Court of India in ***Maharashtra State Board of Secondary' & Higher Secondary' Education v Kurmarsheth & Others*** 1985J LRC (Const), which case was cited by the Court of Appeal in ***Nature Foundation Limited v Minister for Information and Communication & another*** [2015] eKLR was submitted to be instructive on this. In that case it was stated:

> ***"The validity of Regulation is to be determined by reference to specific provisions of the Statute conferring the power of delegated legislation and to its objects and purposes. Provided the Regulations have rational nexus with the object and purpose of the Statute, the court should not concern itself with the***

wisdom and effectiveness... The court should not concern itself with the merits or demerits of a policy pursued by means of delegated legislation, but only with the question whether the delegated legislation falls within the scope of power conferred by Statute and is consistent with the Act and the Constitution."

[59] Counsel further cited the case of **U.S vs Butler**, 297 U.S. 1 [1936] where it was held that, *"when an Act of congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former"*... that the *"Court neither approves nor condemns any legislative policy."* Also cited were ***R vs Big M Drug Mart Ltd***, [1985] 1 S.C.R. 295 and ***Ndyanabo v s Attorney General of Tanzania*** [2001] EA 495 in urging that there is a presumption that every Act of Parliament is constitutional, and the burden of proving the contrary lies on the one who alleges otherwise.

[60] They submitted that the Court should strive to interpret the provisions of the Regulations in a manner that will realize the intention of the Legislature: to regulate and control the growth, sale, distribution and consumption of Tobacco and its products. They argued that there is need for a liberal and intentional based approach and that in interpreting a Statute or Regulations, the Court should adopt a purposive approach to achieve the real purpose as was laid down in ***Heydon's Case*** (1584) 300 where it was stated that in the application of this rule, four things are to be discerned: *what was the law before enactment of the Act; what was the mischief or defect for which the old law did not provide; what remedy the Act or Law intended to cure the mischief or defect; and the true reason of the remedy.*

[61] The Respondents urged that the Regulations should be construed in a manner that enhances the purpose or objectives for which the same are enacted for. They argued that the burden of proof lies with the Appellant and the Affected Party to

show that the Regulations are inconsistent with the Parent Act and the Constitution, and that the Regulations violate their rights. It is not enough to say that the Regulations are ambiguous or unconstitutional as the Regulations were arrived at through a consultative process.

[62] They explained that the Regulations are divided into 8 parts, and that each is in conformity with the relevant Sections of the Act. The Respondents then proceeded to link each Part of the Regulations and the particular Sections of the Act it conformed with. They submitted that Part II of the Regulations conforms to Sections 16, 21, 22, 23, 24, 25 & 26 of the Act and that Part III of the Regulations is in conformity with Section 4 of the Act. It was submitted that the disclosures required are meant for counteractive measures to control and mitigate Tobacco related problems. The Respondents argued that the disclosure is reasonable and justifiable in an open and democratic society based on the Bill of Rights, human dignity, equality and freedom. This disclosure is directly supported by guidelines for implementation for Article 10 of the WHO FCTC (disclosure to government authorities), and Article 20.2 of the WHO FCTC (national health surveillance).

[63] Part IV of the Regulations was submitted to be in conformity with Sections 32, 33, 34 & 35 of the Act. Part V conforms to chapter 6 of the Constitution, the Act, the Public Officer Ethics Act, 2003, the Leadership and Integrity Act and Article 5.3 of the WHO FCTC and guidelines. Part VI of the Regulations which provides for the 2% Solatium is in conformity with Section 7(2)(f) of the Act and Article 6 of the WHO FCTC and is meant to cater for the health perils caused by Tobacco use. The Respondents urged that the solatium is not unconstitutional and is just like any other levy such as tourism levy fund under Section 105 of the Tourism Act, Cap. 383. They urge that the Tobacco Control Act was enacted in 2007 through public participation processes and Section 7(2)(f) was operationalized by the Regulations.

[64] It was urged that the Petition does not meet the threshold as per the principles in ***Anarita Karimi Njeru vs the Republic*** (1976-1980) KLR 1272 as the Appellant failed to show even a single right that was violated and the manner in which that right had been violated or even threatened. The Respondents wondered how Regulations which they believe are lifesaving and beneficial to the public violates the rights of any one including the Appellant.

[65] As regards allegation of violation of the right to property, the Respondents cited among others, the case of ***Richard Dickson Ogendo & 2 others v Attorney General & 5 others*** [2014] eKLR, where Majanja J held:

> ***"Article 40 of the Constitution protects the person from arbitrarily deprivation of property. The petitioner has not shown how his right to protection has been arbitrary taken away. In any case, the law does not prevent people from drinking alcohol at places of their choice but driving when drunk."***

In that regard, it was submitted that the Regulations do not prevent people from smoking, they simply regulate how and when it can be done; this does not amount to a constitutional violation. It was urged that the Learned Judges of the Superior Courts did not misapply the law or the facts in arriving at their decisions.

[66] Submitting on public interest protection, it was urged that whereas there are no hierarchy of rights, there has to be a balance between the competing rights of the Appellant, which are not absolute and are driven by profits, and the greater public health interests in a mutually respectable manner. As such, there are instances where some private rights and interests have to give way to greater public rights and interests. The Respondents argued that the Appellant makes no submission on the right to health *vis a vis* it's rights. The right to health is one of the most fundamental human rights which were a primary concern in developing the WHO-FCTC. Article 21(2) of the Constitution, in mandatory terms, demands

the State to provide legislative, policy and other measures to achieve rights guaranteed under Articles 42 and 43 of the Constitution, including the right to a clean and healthy environment, and the right to the highest attainable standard of health. To buttress this argument, the Respondent cited ***East African Cables Limited vs The Public Procurement Complaints, Review & Appeals Board and another*** (2000) eKLR.

[67] They urged that Tobacco Control and Regulation is a global practice and Kenya being a respectable member of the International Community and a Party to WHO FCTC cannot be exceptional. The purpose of the Regulations is to protect the global- citizens those-who-smoke and those-who-do-not, from the harmful effects of Tobacco consumption and use, by informing them the effects of the same. The WHO Framework Convention on Tobacco Control (FTCT), the first-ever public health treaty, provides a framework and set of legally-binding measures to be implemented in countries that have ratified it and is an evidence-based treaty that affirms the right of all people to the highest standard of health. The Respondents submitted that under Article 2 (6) of the Constitution, Kenya is a signatory to the WHO FCTC, is duty bound to fulfil its obligations under the FCTC by enacting and implementing FCTC compliant legislations and Regulations.

d) 1st and 2nd Interested Parties' submissions

[68] Their case was argued by Counsel Mr. Nyamweya. They filed a Reply to the Petition and Submissions on 28th July 2018. They supported the Respondents in opposing the petition of appeal. It was their case that there was adequate public participation in the process of making Regulations. They submitted that there is no specific style in which public participation is to be modeled on. They cited the case of ***Minister of Health v New Clicks South Africa (PTY) Ltd*** (2006) (2) SA in urging that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation.

[69] They urged that the complaint is neither that the Appellant was not consulted nor denied the opportunity to take part in the deliberations about the proposed Regulations. Its complaint is that, it should have been consulted as a specific entity. In this regard, they submit that public participation is for everyone and not an exclusive province of a solitary person or corporation however influential or large. They referred to the case of ***Merafong Demarcation Forum v President of the Republic of South Africa*** [2008] ZACC 10 and submitted that a person consulted or who participated in the forum would air his or her views but the prerogative to adopt them remains with the law-making body. Where the views expressed by members of the public or those interested in the matter are in direct conflict with the policies of the government, such views cannot be said to be binding on the law-making authority.

[70] They agreed with the Respondents that the Regulations are exempted from the need for RIS under Section 9(g) of the SIA as they were complimentary to the Act.

[71] They submitted that the Appellant misconstrued the Superior Courts' judgments on the effect of Tobacco products. They urged that the Courts were emphatic that the negative effects of Tobacco necessitated the promulgation of the Regulations. Hence, the State's discharge of its duty to secure and promote health cannot be said to be a violation of private rights. They referred to the case of ***British American Tobacco & Philip Morris v Secretary of State for Health*** in which the Court held that when it comes to matters of public health, States have power to take pecuniary measures to protect their citizens; this is what the Tobacco Regulations, 2014 seeks to do.

[72] It was their case that the Superior Courts correctly directed themselves on the standard to be applied in considering the conformity of legislation with the Constitution as espoused in the ***CORD v R*** case, and Article 259 of the Constitution which standard is: *promotion of the purposes, values and principles*

of the Constitution; advancement of the rule of law; promotion of human rights and fundamental freedoms in the Bill of Rights; securing good governance; and adopt a liberal purposive approach. Public interest is at the core of the existence of the Regulations and the Appellant's rights are therefore diametrically in competition with those of the public.

[73] It also urged that as *Lenaola, J* (as he then was) stated in ***Nairobi Metropilitan PSV Saccos & Others v County of Nairobi government & others***, it is not for the court to decide what is appropriate or right or wise legislative provision. As was stated in ***Poverty Alleviation Network & Others v President of the Republic of south Africa & others*** [2010] ZACC 5, a court cannot interfere with legislation simply because it may disagree with its purpose or believes that it should be achieved in a different way. Therefore, the Court should not entertain the Appellant's attack on the Regulations on account of bad faith, pre-determined motives and vindictiveness. The Interested Party submitted that the Regulations meet all the tests enunciated in the ***CORD*** case, that is: *they have been prescribed by the Parent Statute and are part of it; they are clear; their objective is pressing and the problem they are aimed at addressing is substantial; they are proportionate to the magnitude of the effect of Tobacco on health.*

[74] As regards the constitutionality of specific provisions of the Regulations, they agreed with the submissions of the Respondents that Regulations limiting interactions between Tobacco industry and public officers are constitutional as they flow from the ethic and integrity requirements in Chapter 6 of the Constitution, the TCA, Public Officers Ethics Act and the Leadership and Integrity Act, Article 5.3 of the WHO Framework Convention and the Guideline thereto. It was urged that the Regulations are aimed at achieving effectiveness of the Tobacco control legislation that is free of conflict of interest amongst the enforcement and administration officers.

[75] They submitted that the power of the 1st Respondent to make these Regulations flows from Section 53 of the Act. The enactment of the Act was in fulfilment of Kenya's obligation under the WHO FCTC which Kenya ratified on 25th June, 2004. The same is also anchored in the Constitution under Article 2(6) of the Constitution. Further, that the Regulations are not discriminatory as they affect all the players in the industry and do not target only the Appellant and the Affected Party.

[76] They agreed with the Court of Appeal findings on the solatium and submitted that it is in accordance with Section 7 of the Act and not *ultra vires*. It does not violate Article 210 of the Constitution as it is not a tax or fee levied by the National or County government for purposes of National or County revenue. It does not amount to deprivation of the Appellant's property. It is a payment that will be paid by all Tobacco manufacturers and importers. It will not solely come from the Appellant, hence not discriminatory.

[77] They also submitted that the Court of Appeal was right in its findings as regards the disclosure Regulations, that the State has a duty to secure and promote the health of its citizens and that the discharge of that duty cannot and can never be said to be in violation of private rights. Private rights include those protected under municipal law and international law can legally be overridden by public interest consideration. Finally, they urged that the petition be dismissed with costs.

c) Appellant's Reply

[78] Upon the Respondents and the Interested Parties filing their Written Submissions on 28th July, 2017, the Appellant filed its Submissions in Reply on 11th August 2017 responding to each and every submission made by the Respondents and reiterate its submissions in support of the Appeal. They reiterated that the process of making the Regulations was flawed and that there is no public interest in violating rights and fundamental freedoms in the Constitution. Therefore, the Respondents cannot justify using that argument. Further, Mr. Kiragu urged that if

the Court finds that it is inclined to uphold the Court of Appeal, it should give directions as to when the directions should take effect. He urged that preferably, the Court should order that the Regulations become operational after 6 months of the judgment.

V. *ISSUES FOR DETERMINATION*

[79] In the Petition, the Appellant framed ten (10) issues for determination, which in its written submissions, it summarized into two broad issues as follows:

(1) *Whether the process leading to the making of the Regulations was unconstitutional or otherwise unlawful? and*

(2) *Whether some specific provisions of the Regulations, and Section 7(2)(f) of the TCA, are unconstitutional or otherwise unlawful?*

[80] On their part, the Respondents, through the Attorney General's Written Submissions filed on 28th July, 2017 framed four issues for determination in the following terms:

(a) *Whether the processes of making the Regulations was in accordance with the Statutory Instruments Act, 2013?*

(b) *Whether the Regulations are inconsistent with the Parent Act, i.e the Tobacco Control Act of 2007?*

(c) *Whether the Appellant's Petition meets the threshold test of constitutional proof as per the Principles in* ***Anarita Karimi Njeru vs The Republic (1976-1980)*** *KLR 1272? and*

(d) *Whether the Hon. Judges misapplied the law and the facts before them in arriving at the judgment of 17th February, 2017?*

[81] While parties may propose issues for determination in a matter before the Court, it is the unfettered prerogative of the Court to delimit the issues for

determination that it will consider a matter before it. Consequently, the Supreme Court is not bound by the issues as framed by the parties.

[82] Before delimiting the issues for determination in this case, however, we would like to underscore the jurisdiction under which this matter is determined. The Appellant's case is anchored on Article 163(4)(a) of the Constitution, that is, it has appealed to this Court as of right that its matter "involves issues of constitutional interpretation and application". We reiterate that under Article 163(4)(a) of the Constitution, not every case or issue determined by the Court of Appeal falls for appeal to this Court. In **Gladys Wanjiru Munyi v Diana Wanjiru Munyi,** [2015] eKLR, this Court reiterated its earlier jurisprudence [Paragraph 12] thus:

> ***"In Peter Ngoge v. Francis Ole Kaparo & 5 Others, Sup. Ct. Petition No. 2 of 2012 [2012] eKLR, we signalled the guiding principle that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, do indeed have the competence to resolve all matters turning on the technical complexities of the law, and that only cardinal issues of law, or of jurisprudential moment, deserve the further input of the Supreme Court."***

[83] It follows that even where it is established that a matter or issue was before the High Court and rose to the Court of Appeal, that matter or issue does not automatically qualify for appeal before the Supreme Court under Article 163(4)(a) of the Constitution. The Court is under an obligation to undertake a forensic audit and sieve out matters so that only issues that rightfully involve the interpretation and or application of the Constitution are presented and determined by the Supreme Court. Consequently, while the Appellant, and to some extent the Respondents, have addressed this Court on a number of issues in this case, the Court warns itself that some of these issues do not fall for determination before

this Court in exercise of its appellate jurisdiction under Article 163(4)(a) of the Constitution. This is the foundation upon which we proceed to frame the issues for determination in this matter.

[84] Consequently, upon a thorough appraisal of the matter before us, and guided by the issues framed for determination before us by both the High Court and the Court of Appeal, the following issues rightfully crystallize for determination:

(i) ***Whether the process leading to the making of the Tobacco Regulations 2014 was unconstitutional for lack of public participation?***

(ii) ***Whether specific provisions of the Regulations are unconstitutional for being discriminatory as against the Appellant?***

(iii) ***Whether specific provisions of the Regulations violate the Appellant's right to privacy and infringe on Intellectual Property rights?***

(iv) ***Whether the imposition of the Solatium compensation contribution amounts to unlawful taxation?***

(v) ***What are appropriate reliefs?***

VI. ANALYSIS AND DETERMINATION

(i) *Whether the process leading to the making of the Tobacco Regulations 2014 was unconstitutional for lack of public participation and consultation ?*

[85] Public participation has been entrenched in our Constitution as a national value and a principle of governance under Article 10 of the Constitution and is binding on all State organs, State officers, public officers and all persons whenever any of them: *(a) applies or interprets the Constitution; (b) enacts, applies or*

interprets any law; or (c) makes or implements public policy decisions. As aptly stated by the Appellate Court, public participation is anchored on the principle of the Sovereignty of the People *"that permeates the Constitution and in accordance with Article 1(4) of the Constitution is exercised at both national and county levels".*

[86] Article 118 of the Constitution provides for public participation in the legislation making process, as follows:

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

Therefore, while the legislative mandate is delegated to Parliament, it must facilitate public participation as the onus of ensuring public participation rests with it.

[87] Since the promulgation of the Constitution 2010, the question of the rationale, scope and application of public participation as a principle of governance has been subject of numerous decisions by the courts. The High Court in this matter appraised itself of the various decisions on the same, which appraisal the Court of Appeal readily endorsed. ***In the Matter of the National Land Commission,*** the Supreme Court placed the principle of public participation at the core of the concept of checks and balances in governance in the execution of their functions by the various arms of government, when we stated:

"[308] The conditioning medium within which these functions have to be conducted, is constituted by the national values and principles outlined in Article 10 of the Constitution: in particular, the rule of law; participation of the people; equity; inclusiveness; human rights; non-discrimination; good governance; integrity; transparency and accountability. It is to be noted that, the very essence of checks-and-balances touches on the principles of **public participation, inclusiveness, integrity, accountability and transparency;** *and the performance of the constitutional and statutory functions is to be in line with values of* **integrity, transparency, good governance and accountability...***"*

[88] The Retired Chief Justice, Dr. Willy Mutunga, in his concurring opinion expounded on the principle and traced the place of the People in the Constitution making ***process thus:***

"[320] In the entire history of constitution-making in Kenya, the participation of the people was a fundamental pillar. That is why it has been argued that the making of Kenya's Constitution of 2010 is a story of ordinary citizens striving to overthrow, and succeeding in overthrowing the existing social order, and then defining a new social, economic, political, and cultural order for themselves. It is, indeed, a story of the rejection of 200 Parliamentary amendments by the Kenyan elite that sought to subvert the sovereign will of the Kenyan population. Public participation is, therefore, a major pillar, and bedrock of our democracy and good governance. It is the basis for changing the content of the State, envisioned by the Constitution, so that the citizens have a major voice and impact on the equitable distribution of political power and resources. With devolution

being implemented under the Constitution, the participation of the people in governance will make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority is derived from the people of Kenya, is the indestructible fidelity to the value and principle of public participation.

[89] The Rtd Chief Justice drew from caselaw on the principles for public participation in various court decisions including ***Speaker of the Senate & another v. Attorney General& 4 others*** Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR; ***Thuku Kirori & 4 Others v. County Government of Murang'a*** Petition No. 1 of 2014; [2014] eKLR; ***Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v. County of Nairobi Government & 3 Others*** Petition No. 418 of 2013; [2013] eKLR; and ***Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others,*** **Petition No. 532 of 2013 consolidated with Petition Nos. 12 of 2014, 35, 36 of 2014, 42 of 2014, & 72 of 2014 and Judicial Review Miscellaneous Application No. 61 of 2014;** [2014] eKLR [***Robert Gakuru*** case](Most of these cases were also referred to by the High Court in this matter). He also referred to the jurisprudence from the South African Constitutional Court decision, ***Doctors for Life International v. Speaker of the National Assembly and Others*** [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) which also considered the role of the public in the law-making process. It in part stated as follows:

> *"The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic*

dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.

116. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy"

[90] Earlier on, the Supreme Court had reiterated the centrality of public participation as regards the issue of digital migration, in the case of ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others,*** [2014] eKLR. We stated *inter alia*:

"Public participation is the cornerstone of sustainable development and it is so provided in the Constitution...

[381]*Public participation *calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 34. In the cases of establishment,

licensing, promotion and protection of media freedom, public participation ensures that private "sweet heart" deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted."

[91] The High Court in this matter, as observed by the Court of Appeal, appropriately referred to several decisions on public participation and consultation. All these cases are illuminating on the place of public participation in governance under the Constitution 2010.

[92] In ***Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others Judicial Review*** No. 378 of 2017; [2017] eKLR among the issues for consideration before the High Court was whether the IEBC was constitutionally obliged to facilitate public participation as part of the tendering process. The High Court allowed the Petition and quashed the award of the tender for lack of public participation. It ordered that the procurement process begin *de novo* in accordance with the Constitution. IEBC appealed to the Court of Appeal. In upholding the appeal, setting aside the High Court decision, the Court of Appeal considered the big issue of *justifiability and enforceability of Article 10 of the Constitution*, which encompasses the principle of public participation. The Appellate Court in **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others,** Civil Appeal No. 224 of 2017; [2017] eKLR held that Article 10(2) and the principles therein are for immediate realization, thus:

> ***"80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that* Article 10 (2) *of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in* Article 10 (2) *are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles.***

We agree with this pronouncement and reiterate that the principle of public participation as anchored in Article 10 of the Constitution is alive and the same is equally justiciable before our courts.

[93] While the Court of Appeal in the above matter was dealing, particularly, with the question of the place of public participation in procurement, its pronouncement is illuminating on the principle of public participation in general. Having appraised several decisions on the issue, the Appellate Court stated thus:

> ***"164. Our analysis of the emerging jurisprudence from the Supreme Court and other superior courts as well as the reading of the express provisions of* Section 3 *of the* Public Procurement and Asset Disposal Act, 2015 *as read with* Articles 10 (2) (b) *and* 227 *of the* Constitution *lead us to find that as a general principle (subject to limited exceptions) public participation is a requirement in all procurement by a public entity. <u>The jurisprudence also reveals that allegation of lack of public participation must be considered in the peculiar circumstances of each case. The mode, degree, scope and extent of public participation is to be determined on a case by case basis.</u>***
>
> ***165. What is critical is a reasonable notice and reasonable opportunity for public participation. In determining what is***

reasonable notice, a realistic time frame for public participation should be given. In addition, the purposes and level of public participation should be indicated. Reasonableness is also to be determined from the nature and importance of legislation or decision to be made, and the intensity of the impact of the legislation or decision on the public. The length of consultation during public participation should be given and the issues for consultation. Mechanisms to enable the widest reach to members of public should be put in place; and if the matter is urgent the urgency should be explained."

[94] Finally, the Court of Appeal found that subject to a few stated exceptions, public participation was a mandatory requirement in all procurement done by a public entity. As regards lack of a framework on how to achieve public participation the Court observed:

"...

[189]. We have considered this submission in light of the provisions of Article 10 (2) *of the Constitution and other relevant Articles where public participation is constitutionally required. In our considered view, the absence of a legal framework for public participation is not an excuse for a procuring entity or a State organ to fail to undertake public participation if required by the Constitution or law. A State organ or procuring entity is expected to give effect to constitutional principles relating to public participation in a manner that satisfies the values and principles of the Constitution.*

[95] Indeed the High Court, Odunga J, in ***Robert N. Gakuru & Others v Governor Kiambu County & 3 others*** [2014] eKLR, in which case the

Learned Judged extensively borrowed from the South African jurisprudence in ***Doctors for Life International vs. Speaker of the National Assembly and Others***, illuminated the law of public participation. He emphasized on the seriousness with which public participation should be undertaken:

> ***"75. In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action."***

[96] From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the

governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the Supreme Court Act, we would like to delimit the following framework for public participation:

Guiding Principles for public participation

(i) **As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.**

(ii) **The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.**

(iii) **The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.**

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

(v) **Public participation is not an abstract notion; it must be purposive and meaningful.**

(vi) **Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.**

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

(viii) **Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the**

peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

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

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

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

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

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

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

[97] With the above legal framework on public participation, we now proceed to consider whether the Tobacco Regulations 2014 are unconstitutional for limited or lack of public participation in the process leading to their enactment. In making this determination, we reiterate that we are limited to issues of constitutional interpretation and/or application only.

[98] Upon evaluation of the Court of Appeal judgment, we find that the Appellate Court rightly appreciated the constitutional principle of public participation. The Court of Appeal endorsed the High Court's analysis on several decisions on the issue, which we have also endorsed in this Judgment. We find that the Court of Appeal did not err in its findings on the meaning, scope and application of the principle of public participation. Having noted the law, the Court of Appeal considered the High Court's application of the affidavit evidence on record to the stated law and concluded that: "*given the facts that were before the learned judge, we have no reason to fault the learned judge for finding that the stakeholder meetings, discussions and communications constituted adequate public*

participation and consultation." We find and hold that there is nothing of constitutional interpretation and/or application in this finding, and/or conclusion by the Court of Appeal on how the High Court evaluated the Affidavit evidence before it. Consequently, that issue rests as before this Court.

[99] The second ground upon which the Regulations making process was impugned was due to lack of a Regulatory Impact Statement (RIS). While parties submitted at length on the issue before this Court, we find that issue is not for consideration by this Court under Article 163(4)(a) of the Constitution. As submitted by both parties the requirement for an RIS is provided for by the Statutory Instrument Act. It is statutory anchored. Hence, the question(s) as to whether the same was required, exempted and/or published involves evaluation and interrogation of factual evidence; and a reading and interpretation of the Statutory Instruments Act. All these are issues that fall well within the jurisdiction of the High Court and the Court of Appeal. However, they fall outside the jurisdiction of this Court as there is nothing of constitutional interpretation and or application to invoke this Court's jurisdiction under Article 163(4)(a) of the Constitution. It is not being argued that the SIA itself is unconstitutional for requiring and/or waiving the requirement of an RIS. Therefore, the Court of Appeal's finding on this issue rests before this Court.

(ii) Whether specific provisions of the Regulations are unconstitutional for being discriminatory as against the Appellant?

[100] In this regard, what was impugned was Part V of the Regulations (20-36) which limits interactions between the Tobacco industry and public officers and or authorities. The Appellant argued that this limitation infringes on Article 27 of the Constitution that guarantees the right to equality and freedom from discrimination. In its judgment, the Court of Appeal agreed that a look at this Part V of the Regulations indeed showed that they were discriminatory. However, the

Appellate Court were of the opinion that not all discrimination was unfair. It was persuaded by the case of ***President of the Republic of South Africa & Anor vs. John Philip Hugo*** 1997(4) SAICC para 41, wherein it was stated:

> ***"We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."***

[101] Also cited was the case of ***Federation of Women Lawyers Fida Kenya & 5 Others vs. Attorney General & Anor*** [2011] eKLR where it was held that:

> ***"In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or***

criteria which may afford a reasonable basis for classification in all cases".

[102] We are in agreement that not *all* forms of discrimination are unfair. Each case where discrimination is alleged has to be evaluated on its own peculiar facts. It is worth noting that the rights under Article 27 of the Constitution, equality and freedom from discrimination are not *non-derogable* rights under Article 25 of the Constitution. They are subject to the limitation clause under Article 24 of the Constitution. To this end, we agree with the Appellant that in limiting their rights under Article 27, the same can only be done if the principles in Article 24 have been met. The Article provides:

> ***"24(1) A right or fundamental freedom in the Bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-***
>
> ***(a) the nature of the right or fundamental freedom;***
> ***(b) the importance of the purpose of the limitation;***
> ***(c) the nature and extent of the limitation;***
> ***(d) 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***
> ***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."***

[103] Comparatively, the Constitutional Court of South Africa in ***S v Manamela and Another (Director-General of Justice Intervening)*** (CCT25/99)

[2000] ZACC 5 had a chance to interpret Section 36 of the South African Constitution, which is *pari materia* to Article 24 of the Kenyan Constitution. That Court stated:

> ***"It should be noted that the five factors expressly itemised in Section 36 are not presented as an exhaustive list. They are included in the Section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.***
>
> ***Although Section 36(1) differs in various respects from Section 33 of the interim Constitution, its application continues to involve the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in***

the context of its legislative and social setting. Accordingly, the factors mentioned in Section 36(1) are not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination whether or not the limitation of a right is justifiable."

[104] We have evaluated the findings of the Superior Courts on this issue. The High Court found that the limitation was justified and that it was within the mandate of the CS Health to make the Regulations. It stated:

> ***"145. The intention behind this limitation is, in my view, to ensure effective enforcement and implementation of the Tobacco control laws. It accords with the provisions of Article 24 of the Constitution as it allows differentiation in interactions with public officers between the Tobacco industry and other industries which is permissible under the Constitution."***

[105] In reaching her decision, the Learned Judge was persuaded by the decision of ***State of Kesata and Another vs N.M. Thomas and Others,*** 1976 AIR 490, 1976 SCR (17906):

> ***"The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not natural or logical corollary of the rule if equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity conditions. Equality***

does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."

[106] The Learned Judge was also persuaded with the dictum in ***S vs Makwanyane and Another, CCT 3/94 (1995) 2A CC3*** as regards limitation of rights thus:

"[104] The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provision of Section 33(1). The fact that difference rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equally"; means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation

has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

[107] On appeal, the Court of Appeal upheld the High Court stating:

"66. The inequality of treatment in limiting interaction between the public officers/authorities and members of the Tobacco industry does not amount to discrimination as it is dictated by the circumstances obtaining. Moreover, the limitation does not target only a specific group of players in the Tobacco industry but applies to all players in the Tobacco industry. We are satisfied that in ensuring the delicate balance of rights, the limitation of the appellant's rights is justifiable, reasonable and necessary under Article 24 of the Constitution to ensure the enjoyment of rights and fundamental freedoms by all individuals."

[108] We are persuaded that it is not enough for the Appellant to generally state that the requirements in Article 24 have not been met in limiting the rights under Article 27. Those factors are not exhaustive but are mutually inclusive. They have to be evaluated from within the society within which the Regulations are meant to operate. We disagree with the Appellant that the Superior Courts were wrong in taking into consideration 'extraneous factors' such as the effects and ills of the Tobacco use on the health of the users in justifying the discrimination, that is, the limitation of the contact between Tobacco manufacturers and public officers. We find that there is no way the Regulations can be legitimately made without the CS for Health factoring in the consequences and/or impact of Tobacco use. Such an approach will be akin to the proverbial ostrich burying its head in the sand. In any event, the effects of Tobacco are now subject of much national and international documentation and discussions.

[109] Ultimately, we find that the Superior Courts correctly rendered themselves on the limitation of the Appellant's right of association as regulated by Part V of the Regulations. The Appellant's appeal on this issue before this Court therefore fails.

(iii) ***Whether specific provisions of the Regulations violate the Appellant's right to privacy and infringe on Intellectual Property rights?***

[110] It was the Appellant's case that Part III of the Regulations (12-14), on disclosure of information infringed on its right to privacy and Intellectual Property. It maintained that the disclosures required include, trade secrets, manufacturing processes and other intellectual property rights. The High Court in its judgment weighed the Appellant's intellectual property rights vis-à-vis the public rights and held:

> ***"In any event, it is my view that such requirements and disclosure outweigh the intellectual property rights pertaining to Tobacco products, though it must be emphasized that the infringement thereof has not emerged from the petitioner's case. At any rate, I am guided in my consideration of this issue by the sentiments of the Canadian court in the case of Canada (Attorney General) vs JTI-MacDonald Corp 2007 SCC 30 (CanLII) in which it was observed as follows:***
>
> > ***"[T]obacco is now irrefutably accepted as highly addictive and as imposing huge personal and social costs. We now know that half of smokers will die of Tobacco-related diseases and that the costs to the public health system are enormous. We also know that Tobacco is one of the hardest addictions to conquer and***

that many addicts try to quit time and time again, only to relapse."

Confronted with such a product and a need to balance the public health interests and the rights of the public against the commercial interests of the petitioner and others in the Tobacco industry, the choice is fairly obvious."

Therefore, the High Court found that the Part of the Regulations requiring disclosure was justifiable, save for the part requiring the supply of information relating to their market share, which was found to be unreasonable.

[111] On appeal, the Court of Appeal agreed with the High Court finding:

"87. We have considered the findings of the learned judge and the contending arguments in regard to Regulations 12 and 14. Our reading of Regulation 12 reveals that they relate to product disclosures. The product disclosures relate to ingredients that are used in the products and such disclosure may to some extent expose or compromise the interests of the appellant and other players in the Tobacco industry by infringing on their intellectual property rights. The issue is whether the disclosure requirement under Regulation 12-14 are justified and reasonable.

88. The appellants have not denied that Tobacco products have negative side health effects not only to the consumers but even other innocent persons who become passive smokers by inhaling second-hand smoke. Therefore, there are public health needs that have to be balanced against the intellectual property rights of the appellant and other Tobacco industry players, in

order to determine whether limitation of the appellant's intellectual property rights is justified. This requires demonstration that the societal need for the limitation of the intellectual property rights outweighs the individual right to enjoy the rights to intellectual property.

...

90. We take the view that although Regulations 12 limits the intellectual property rights of the Tobacco industry players, that limitation is reasonable and justifiable under Article 24 of the Constitution as they are meant for counteractive measures to control and mitigate Tobacco related health problems. The disclosure requirements are therefore, neither unconstitutional nor ultra vires nor unlawful."

[112] The Superior Courts considered the balance between the Appellant's intellectual property rights and the need to protect the public health from the effects of Tobacco use. At play was the balance that has to be drawn in considering competing rights. The concept of competing rights calls for utilization of the doctrine of proportionality so as to resolve the tension between such rights where it arises.

[113] This concept of competing rights and how to harmonize that tension was well articulated by the High Court, *Mativo J*, in ***Kenya National Commission on Human Rights & another v Attorney General & 3 others*** [2017] eKLR; thus (which we reproduce at length):

"...

In considering decisions limiting fundamental rights, courts look at whether the government's decision is 'reasonably appropriate and adapted to serve a legitimate end.' In this context, the phrase 'reasonably appropriate and adapted' does not mean 'essential' or 'unavoidable', but has been said to be closer to the notion of proportionality.

When employing the language of proportionality the High Court would ask whether the end could be pursued by less drastic means, and it has been particularly sensitive to laws that impose adverse consequences unrelated to their object, such as the infringement of basic common law rights. I have no doubt that repatriation of refugees is a drastic measure that must be done within the confines of the law and any measure that infringes on refugees constitutional rights must be held to be invalid on account of contravention of such rights..

I may perhaps add that 'Proportionality' is... a fluid test which requires those analyzing and applying law and policy to have regard to the surrounding circumstances, including recent developments in the law, current political and policy challenges and contemporary public interest considerations.

The test for determining whether a restriction is appropriate should be one of proportionality as used in international, regional and comparative human rights jurisprudence. A proportionality test is appropriate as it preserves rights, provides a framework for balancing competing rights and enables other important public concerns, such as national security and public order, to be duly taken into account.

What is reasonably justifiable in a democratic society is an illusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right.

[114] Comparatively, the Constitutional Court of South Africa in the case of ***Johncom Media Investments Limited v M and Others*** (CCT 08/08) [2009] ZACC 5, had the following to say as regards dealing with competing rights:

"[25] To effect a proper balance, the right infringed must be identified, and its nature as well as its importance in a particular context must be considered. The purpose of the limitation must be pin-pointed, together with its extent, so as to determine the relation between the limitation and the purpose it is designed to achieve. We must also consider whether the purpose could be achieved by less restrictive means."

[115] Persuaded by the foregoing case law, we find that the Court of Appeal correctly applied the test of proportionality in resolving the friction between the competing rights of the Appellant's right to its intellectual property vis-à-vis the need to ensure a safe and clean environment, free from the hazards of Tobacco use, for the public. Consequently, we find no reason to upset the Court of Appeal findings on the issue.

(iv) Whether the imposition of the Solatium Compensation Contribution amounts to unlawful taxation?

[116] Several aspersions were cast as regards the Solatium compensation contribution. It was the Appellant's case that the same is a tax and as such having

not been passed by Parliament, the arm of government charged with legislating for taxation under Article 210 of the Constitution, it is therefore unconstitutional. Further that its imposition amounts to deprivation of property of the Appellant and that it was neither adequate and/or proportionate.

[117] First, we would like to state that to the extent that the Solatium compensation contribution is provided by subsidiary legislation, it does not raise a constitutional question within the realm of Article 163(4)(a) of the Constitution. As correctly pointed out by the Court of Appeal, the Parent Act, provides for the Tobacco Control Fund to which the Solatium compensation contribution is paid. That Statute has not been impugned as being unconstitutional. For this Court to interrogate whether the Solatium is adequate and proportionate, it must first determine whether it is indeed a tax. Taxation is a subject matter provided for by the Constitution. However, if it is found that the Solatium is just a fee or a levy, then it is provided for within a legislative framework and therefore not a matter of constitutional issue.

[118] The High Court did consider the narrow issue of the constitutionality of Section 7(2)(f) and Regulation 37 which created the Solatium Compensatory Contribution and set the amount to be paid thereof. The High Court found that the legislative intent of the Tobacco Control Fund, to assist in dealing with the adverse effects of Tobacco consumption, was indeed met by the establishment of the Solatium. It considered that just as the Tourism Levy, the Solatium was provided for in legislation. It therefore found that it was unable to find a violation of the Petitioner's right to property or of the provisions of Article 210 of the Constitution.

[119] On appeal, the Court of Appeal affirmed the High Court agreeing *inter alia* that the Solatium was not a tax. It stated in this regard as follows:

> "***70. Section 7 of the Tobacco Act and*** *Part VI* ***of the Regulations that provide for solatium compensatory contribution were challenged as being unconstitutional and an attempt to***

irregularly apply the World Health Organization Framework Convention on Tobacco Control (FCTC). We note that according to the UN Treaty Collection Depository accessed at treaties.un.org, Kenya signed and ratified this convention on 25th June, 2004. The ratification of the treaty imposed an obligation on Kenya as a State to implement measures to protect its present and future generations from the devastating social and environmental consequences of Tobacco consumption and exposure to Tobacco smoke. It follows that the enactment of the Tobacco Act a few years later, in 2007 can only be viewed as an attempt to fulfil this obligation. In addition, the promulgation of the Constitution of Kenya in 2010 brought into effect Article 2(6) of the Constitution which provides that: "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Thus, the enactment of the Tobacco Act and the Tobacco Regulations are anchored on the Constitution of Kenya and no inconsistency arises.

71. Section 7 of the Tobacco Act provides for the establishment of a Tobacco Control Fund (Fund), that is under Section 7(2)(f) composed of inter alia "a solatium compensatory contribution payable by any licensed cigarette manufacturers or importers." The question is whether the solatium compensatory contribution is a tax. In Black's Law Dictionary 9th Edition tax is defined as:

"A charge, usually monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue. Most broadly, the term embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people, and includes duties, imposts, and

excises. Although a tax is often thought of as being pecuniary in nature, it is not necessarily payable in money." (Emphasis added)

72. The solatium compensatory contribution is not a payment that goes towards the national revenue. Under Section 7(4) of the Tobacco Act, the purposes for which the fund is to be used is specific as follows:

"(a) Research, documentation and dissemination of information on Tobacco and Tobacco products.

b. Promoting national cessation and rehabilitation programs.

c. Any other matter incidental to the matter stated in paragraphs

(a) and (b)."

[120] The fundamental finding of the Court of Appeal is that the solatium is not a tax. We find no reason to hold otherwise. The Court of Appeal was emphatic that the contribution is not a payment that goes towards the national revenue. We add that neither is it a payment that goes to county revenue. It is not a payment that is made to the consolidated fund so as to be part of the annual government budgeting and appropriation. The solatium is provided under statutes anchored with a clear framework on its purpose. The mere fact that a piece of legislation provides for the levying of a particular amount does not transform that payment into a tax.

[121] Consequently, having found that the Solatium is not a tax, and this appeal raises no constitutional issue as to how it was enacted, we find that the other considerations raised by the Appellant as regards this fund do not fall for determination by this Court, in exercise of its jurisdiction under Article 163(4)(a) of the Constitution.

(v) *Appropriate reliefs*

[122] In considering the appropriate relief in this matter, it was the Appellant's prayer that the appeal be allowed. In the alternative, Counsel Mr. Kiragu Kimani in his Reply, urged this Court, if it makes a finding that the Regulations are legal and legitimate, that this Court considers ordering that they be effected six months after the date of this Court's judgment. However, having found that the Court of Appeal Judgment is sound, we see no reason why this Court should delve into determination of how the Superior Courts' judgments should be executed and or implemented. Consequently, we make no pronouncement on this issue.

[123] Lastly, on the issue of Costs, the Court of Appeal had exercised its discretion and ordered that each party bears its own costs, we leave that order undisturbed. We equally exercise our discretion on awarding costs and order that each party bears its own costs before this Court.

[124] Consequently, this Court finds that the Petition of Appeal dated 31st March 2017 has no merit and the same is dismissed in its entirety.

ORDERS

1. ***That the Petition of Appeal No 5 of 2017 is hereby dismissed.***
2. ***That the Judgment of the Court of Appeal of Kenya at Nairobi* in *Civil Appeal No. 112 of 2016, is hereby upheld.***
3. ***Each party to the Appeal shall bear their own costs.***

[125] Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 26th day of November 2019.

.....

D.K. MARAGA
CHIEF JUSTICE/PRESIDENT
THE SUPREME COURT

.....

P.M MWILU
DEPUTY CHIEF JUSTICE / VICE
VICE PRESIDENT OF THE SUPREME
COURT

.....

J.B. OJWANG
JUSTICE OF THE SUPREME COURT

.....

S.C WANJALA
JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a
true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA