REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E006 OF 2025

-BETWEEN-

ELUID KARANJA MATINDI.. APPELLANT

-AND-

NATIONAL ASSEMBLY .... 1ST RESPONDENT

THE SPEAKER, NATIONAL ASSEMBLY...................2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF

NATIONAL TREASURY & PLANNING.....................3RD RESPONDENT

COMMISSIONER GENERAL

KENYA REVENUE AUTHORITY.............................4TH RESPONDENT

THE HON. ATTORNEY GENERAL..........................5TH RESPONDENT

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*(Being an appeal from the Judgment and Decree of the Court of Appeal at Nairobi **(Musinga (P), Lesiit & Achode, JJ.A**.) dated 30th December 2024 in Civil Appeal No. E326 of 2023, as consolidated with Civil Appeal No. E330 of 2023)*

Representation:

Mr. Eliud Karanja Matindi, the Appellant

(*Acting in person*)

Mr. Andrew Emacar for the 1st Respondent

(*Andrew Emacar, Advocate*)

Mr Samuel Odiwuor Kaumba for the 3rd and 5th Respondents

(*Attorney General Chambers*)
Ms. Fridah Mwongera for the 4th Respondent
(*Fridah Mwongera, Advocate*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The appeal before this Court is dated 13th February, 2025 and filed on 24th February 2025 pursuant to Article 163(4)(a) of the Constitution. It challenges the constitutional validity of Legal Notice No. 15 of 2021, which sought to exempt Japanese companies, consultants, and employees from paying income tax in circumstances detailed out below.

B. FACTUAL BACKGROUND

[2] On various dates between 20th November 2007 and 18th September 2020, the Governments of Kenya and Japan entered into financing agreements that exempted Japanese companies, consultants, and employees engaged in projects under those agreements from the provisions of the Income Tax Act. The exemptions were operationalized through Legal Notice No. 15 of 2021 dated 25th February 2021 and published on 26th February 2021 ***(the Legal Notice)*** by the Cabinet Secretary for the National Treasury and Planning ***(CS Treasury)***, pursuant to the powers conferred by section 13 of the Income Tax Act. Section 13(2) of the Act empowers the CS Treasury, by notice published in the Gazette, to exempt from tax any income or class of income that accrued in or was derived from Kenya, to the extent specified in such notice.

The Legal Notice specifically provided as follows:

> *"In exercise of the powers conferred by section 13(2) of the Income Tax Act, the Cabinet Secretary for National Treasury and Planning directs that the income which accrued in or was derived from Kenya by Japanese companies, Japanese consultants, and Japanese employees involved in the project under the Financing Agreements specified in*

the second column of the Schedule that were signed on the corresponding dates specified in the second column of the Schedule shall be exempt from income tax to the extent specified in the Financing Agreements."

[3] The Schedule accompanying the Legal Notice listed sixteen (16) Financing Agreements executed between the years 2007 and 2020. They include: *Improvement of the Power Distribution System in and around Nakuru City, and around Mombasa City; Infrastructure Development in Mombasa Special Economic Zone near Dongo Kundu Area; Enhancing Trade Facilitation and Border Control Capacity in East Africa; Resource Development Scholarship; Health Sector Policy Loan for Attainment of the Universal Health Coverage (Phase 2); Olkaria I Unit 4 Geothermal Power Project; Mwea Irrigation Development Project; Mwea Irrigation Development Project; Olkaria — Lessos — Kisumu Transmission Lines Project; Mombasa Port Area Road Development Project (Phase 1); Mombasa Port Area Road Development Project (Phase 2); Mombasa Port Development Project (Phase 1); Mombasa Port Development Project (Phase 2); Olkaria V Geothermal Power Development Project; Olkaria I Unit 1,2 and 3 Geothermal Power Plant Rehabilitation Project; Mombasa Gate Bridge Construction Project (1); and Mombasa Special Economic Zone Development Project (1).*

[4] In compliance with section 13(3) of the Income Tax Act (which requires that any notice granting tax exemption be laid before the National Assembly without unreasonable delay) and with section 11 of the Statutory Instruments Act (which mandates transmission of a statutory instrument to the responsible Clerk for tabling before the relevant House of Parliament within seven (7) days of publication), the CS Treasury transmitted the Legal Notice to the Clerk of the National Assembly for consideration.

[5] The Legal Notice was subsequently considered by the Committee on Delegated Legislation of the National Assembly and in its report dated 12th May 2021, the Committee found, *inter alia*, that the Legal Notice had been laid before Parliament in compliance with section 11 of the Statutory Instruments Act and without unreasonable delay as contemplated under section 13(3) of the Income Tax Act; that the Legal Notice constituted an understanding between the Governments of Kenya and Japan, thereby rendering the requirements of public participation inapplicable; and that the Legal Notice was properly issued by the CS Treasury in exercise of the powers conferred by section 13(2) of the Income Tax Act. The Committee's report was thereafter tabled before the House and adopted during the sitting held on 19th May 2021.

C. LITIGATION HISTORY

i) Proceedings Before the High Court

[6] Following the adoption of the Legal Notice, the appellant, who has described himself as a public-spirited individual, filed ***Constitutional Petition No. E280 of 2021*** in public interest, challenging the Legal Notice on multiple grounds. He contended that the grant of the tax exemption was required to comply with Article 210(1) of the Constitution, which stipulates that no tax or licensing fee may be imposed, waived, or varied except as provided by legislation. It was also his position that the National Assembly contravened the Constitution, the Statutory Instruments Act, and the Income Tax Act by granting and approving the tax exemption through the impugned Legal Notice, which was not a legislation.

[7] The appellant further asserted that the Committee on Delegated Legislation acted in breach of the Statutory Instruments Act by determining that the Legal Notice did not constitute a statutory instrument within the meaning of section 2 of that Act and was therefore not subject to the requirements of public participation as provided under sections 5 and 5A thereof. He maintained that the tax exemption was unconstitutional and unlawful, and that the negotiation of the underlying loan agreements between the Governments of Kenya and Japan, which formed the basis of the exemptions, lacked transparency.

[8] Additionally, the appellant challenged two separate instruments published in Legal Notice No. 27 of 2021. One appeared in Gazette Supplement No. 21 (Legislative Supplement No. 13) dated 5th March 2021 concerning the Public

Finance Management (National Drought Emergency Fund) Regulations, 2021. The other was published as Supplement No. 37 (Legislative Supplement No. 13) dated 17th March 2021, relating to the exemption of specified taxes on certain airlines. The appellant argued that by issuing two legal notices addressing distinct subject matters under the same numbering, the CS Treasury contravened Articles 10(2) and 118(1) of the Constitution, as well as section 6 of the Revision of Laws Act and section 22(1) of the Statutory Instruments Act.

[9] Accordingly, the appellant sought declarations that:

a) *The CS Treasury or any other state or public officer who signed the financing agreement in the full knowledge that, notwithstanding the provisions of Articles 10,118,201 and 210(1) of the Constitution, the income was accrued in or derived from Kenya by Japanese companies involved in the project under those financing agreements would have to be exempt from the provisions of the Income Tax Act violated the provisions of the Constitution;*
b) *The Committee on Delegated Legislation and subsequently, the National Assembly itself, had no powers to declare that Legal Notice No. 15 of 2021 was not a Legal Notice for the purposes of the requirements set out in the Statutory Instruments Act;*
c) *The Committee on Delegated Legislation by mingling and mangling the contents of three different reports, breached the provisions of the Constitution, including those on good governance, integrity, transparency, accountability, openness, and access to information;*
d) *The CS Treasury breached the constitutional provisions relating to access to information held by the State;*
e) *The National Assembly, by adopting the Committee's mingled and mangled report, violated the provisions of the Constitution, including those on good governance, integrity, transparency, accountability, openness, and access to information;*
f) *Assigning the same number to two Legal Notices published in the same year yet dealing with two different matters, violated the constitutional*

national values and principles of governance, including the rule of law, good governance, integrity, transparency and accountability. The decision further breached the right to access to information, the Revision of the Laws Act and the Statutory Instruments Act;

g) That Legal Notice No. 15 of 2021 is unconstitutional and therefore invalid, null, void, and of no legal effect;

h) The two Legal Notices No. 27 of 2021 are unlawful and unconstitutional and therefore, invalid, null, and void;

i) The respondents should jointly and severally pay the appellant's costs of the suit.

[10] As a result, he sought *inter alia* the following orders:

i) An Order quashing Legal Notice No. 15 of 2021.

ii) An Order quashing the two duplicate Legal Notices No. 27 of 2021.

iii) An Order prohibiting all of the respondents from giving effect to the provisions of the impugned Legal Notice No. 15 of 2021.

iv) An Order compelling the Commissioner General, Kenya Revenue Authority, to immediately commence the collecting of all the income tax due from the income which accrued on or was derived from Kenya by the Japanese companies involved in the projects specified in the impugned Legal Notice.

v) An Order compelling any and all State and public officers who signed the Financing Agreements on behalf of the Government of Kenya to make up from their own personal and private resources any shortfall in the income tax due and collected by KRA in compliance with the court's orders.

vi) An Order compelling the Cabinet Secretary, Treasury, to publish all the information regarding the Financing Agreements that are the subject of Legal Notice No. 15 of 2021.

[11] The respondents opposed the petition, maintaining that the tax exemptions were lawful and arose from binding bilateral agreements linked to foreign-funded projects. They argued that the CS Treasury acted within the powers conferred by section 13(2) of the Income Tax Act and that the Legal Notice had been properly laid before the National Assembly. The respondents also contended that public participation was not necessary in this context, as the exemptions stemmed from intergovernmental agreements and the Legal Notice was not deemed to be a statutory instrument. Moreover, that the income tax exemption was a pre-condition expected and required by the Japanese Government for the Financing Agreements, which requirement was to apply to all countries and not just Kenya. They further maintained that Kenya was obligated to honor the terms of the agreements in order to secure foreign financing and maintain international relations.

[12] In the determination of the dispute, the High Court *(Magare, J.)* framed 4 issues for determination: *whether the CS Treasury had the power and authority to issue the Legal Notice; whether the Legal Notice is a statutory instrument within the meaning of the Statutory Instruments Act; whether the Legal Notice is legislation contemplated under Article 210 of the Constitution; and whether (i) public participation was necessary in respect of the Legal Notice and/or (ii) whether public participation could be waived as was done in this case and (iii) whether Legal Notices No. 27 of 2021 can be impeached.*

[13] First, the court addressed the question whether the CS Treasury had the authority to issue the impugned Legal Notice. The court held that, while section 13(2) of the Income Tax Act appeared to grant such power, it had to be read alongside Article 210 of the Constitution for a proper finding on the issue and under the Constitution, any waiver of tax must be done through legislation passed by Parliament. Consequently, the court held that the CS Treasury lacked the constitutional authority to grant blanket tax exemptions through a Gazette Notice, thus rendering the Legal Notice ultra vires and in violation of Articles 27 and 210 of the Constitution. The court also observed that the exemption were selectively applied to Japanese companies, consultants, and employees without providing reasons or indicating the amount of tax waived, contrary to Article 210 aforesaid. Moreover, the court held that, basing tax exemptions on nationality undermined tax neutrality and amounted to unjustifiable discrimination. It went further to characterize the arrangement as creating “economic apartheid,” since Kenyan workers performing similar roles were taxed while their Japanese counterparts were exempt from taxation, thereby violating the right to equality under Article 27 aforesaid.

[14] Secondly, the court considered whether the Legal Notice qualified as a statutory instrument. It held that, having been issued pursuant to statutory authority, the Legal Notice was indeed a statutory instrument and thus subject to the requirements of the Statutory Instruments Act, including procedural safeguards such as scrutiny and compliance with constitutional standards.

[15] Thirdly, the court examined whether the Legal Notice constituted *legislation* within the meaning of Article 210 of the Constitution. It found that Article 210 requires tax measures, including waivers, to be enacted through legislation. A Gazette Notice issued by the Executive did not meet this threshold, the court determined. Consequently, the court concluded that the Legal Notice did not amount to valid legislation capable of lawfully granting tax exemptions.

[16] The court further considered the constitutional requirement of public participation and whether it could be waived in the present circumstances. It held that public participation is a fundamental constitutional principle under Articles 10 and 210 thereof and applies to all forms of legislation, including statutory instruments. The argument that public participation could be dispensed with because the measure arose from bilateral agreements was therefore rejected. The court therefore concluded that failure to subject the Legal Notice to public participation rendered it unconstitutional.

[17] Finally, the court addressed the challenge to the twin Legal Notices No. 27 of 2021. It held that the duplication or numbering errors were minor clerical issues falling within the doctrine of *de minimis non curat lex* (the law does not concern itself with trifles) and did not affect the substance or legality of the notices. Accordingly, the court found that no justiciable issue arose to warrant their invalidation.

[18] In conclusion, the court *inter alia*, quashed the impugned Legal Notice declaring it unconstitutional and contrary to Articles 27 and 210 of the Constitution; declared section 13(2) of the Income Tax Act unconstitutional to the extent of its inconsistency with Article 210; declared that exemption or waiver of tax income can only be granted by the National Assembly through legislation after the same: has been passed as a money bill under Article 114(3) of the Constitution; and after public participation has been conducted in strict compliance with Article 210 of the Constitution. The court also declared that any tax waiver involving country by country agreements must comply with the Constitution and must be based on reciprocity, non-discrimination, equality and tax neutrality.

ii) Proceedings Before the Court of Appeal

[19] Aggrieved by the High Court's decision, two separate appeals were filed: the 1st and 2nd respondents (the National Assembly and its Speaker) filed ***Civil Appeal No. E326 of 2023*** while the 3rd and 5th respondents (CS Treasury and Hon. Attorney General) filed ***Civil Appeal No. E330 of 2023.*** The two appeals were consolidated, and ***Civil Appeal No. E326 of 2023*** was designated as the lead file. The common grounds were that the learned Judge of the High Court erred in law and fact by:

i. *declaring the impugned Legal Notice unconstitutional;*
ii. *declaring that the Legal Notice was a statutory instrument under the Statutory Instruments Act;*
iii. *declaring the Legal Notice as a money Bill under Article 114 of the Constitution;*
iv. *quashing the Legal Notice on the grounds that it was not subjected to public participation;*
v. *determining issues not raised in the Petition, specifically the constitutionality or otherwise of section 13(2) of the Act and the question of equal pay for equal work done in relation to Japanese and Kenyan workers;*
vi. *holding that the CS Treasury is not allowed to waive taxes; and*

vii. *holding that it is only Parliament that has the mandate to impose and un-impose tax.*

[20] Accordingly, the respondents sought the following Orders:

i) *That the appeals be allowed;*
ii) *That the Judgment and decree of the High Court be set aside and substituted by an Order dismissing the Petition filed in the High Court; and*
iii) *Costs be awarded to the respondents.*

[21] In resolving the appeal, the Court of Appeal distilled the dispute into three central issues. The first issue was *whether the High Court erred in quashing and declaring the Legal Notice unconstitutional on the grounds that it violated Articles 27 and 210 of the Constitution for want of public participation*. In addressing this issue, the court began by interrogating whether the Legal Notice constituted a statutory instrument within the meaning of section 2 of the Statutory Instruments Act, and whether it was therefore subject to the requirements of public participation under Articles 10, 118, and 210 of the Constitution as well as section 5 of the Income Tax Act.

[22] In interpreting Article 210(1) of the Constitution, which provides that no tax or licensing fee may be imposed, waived, or varied except as provided by legislation, the court read it together with Article 94(5), which permits Parliament to delegate its legislative authority to another person or body where such delegation is expressly authorized by the Constitution or statute. The court noted that Parliament, in exercise of this authority, enacted the Income Tax Act, which under Section 13(2), empowers the CS Treasury to grant tax exemptions through a Gazette Notice. In the court's view, this delegation was constitutionally valid, and the Cabinet Secretary therefore acted within a proper legal foundation. On that basis, the Court of Appeal held that the Legal Notice did not constitute a statutory instrument within the meaning of the Statutory Instruments Act. It also reasoned that the Notice was issued to give effect to bilateral Financing Agreements between the Governments of Kenya and Japan and was therefore executive in character and as such, it did not fall within the definition of a statutory instrument under Section 2 of the Statutory Instruments Act.

[23] The court, on this issue, found that the procedural requirements under sections 5 and 5A of the Statutory Instruments Act, requiring public participation, were not applicable. Instead, the only applicable requirement was under section 13(3) of the Income Tax Act, which required the Legal Notice to be tabled before Parliament, a requirement that had been duly satisfied. The Court of Appeal therefore concluded that the High Court erred in holding that the absence of public participation rendered the Legal Notice unconstitutional.

[24] Secondly, the court addressed *whether the High Court erred in declaring Section 13(2) of the Income Tax Act unconstitutional to the extent that it authorized an income tax waiver through a notice in the gazette instead of legislation*. On this question, the court observed that the alleged unconstitutionality of section 13(2) of the Act was neither pleaded, nor was it one of the prayers sought in the petition. The appellate court therefore found that the High Court erred in law in making such a determination when it had not been so moved by any of the parties.

[25] Finally, the court considered *whether the High Court erred in declaring that the exemption of income tax can only be granted by the National Assembly through legislation after the same has been passed as a money Bill as provided under Article 114(3) of the Constitution.* It held that section 13(2) of the Income Tax Act validly conferred upon the Cabinet Secretary the power to exempt income or classes of income from taxation by way of a Gazette Notice. The Court of Appeal rejected the High Court's finding that such powers were unconstitutional, affirming that delegated authority of this nature is permissible within the statutory and constitutional framework. It further noted that the Legal Notice had been duly tabled before the National Assembly, which retained the power to annul it, thereby preserving legislative oversight.

[26] In light of these findings, the Court of Appeal allowed the appeals, set aside the judgment of the High Court, and upheld the validity of the Legal Notice and section 13(2) of the Income Tax Act. Parties were also directed to bear their own costs.

iii) Proceedings Before the Supreme Court

[27] Aggrieved, the appellant has now filed this second appeal challenging the decision of the Court of Appeal on four grounds, that the Court of Appeal erred in holding:

a) *That the Legal Notice was not a statutory instrument and hence did not require to be subjected to public participation before its enactment yet it had failed to comply with Articles 10(2)(a), 118(1)(b), 201(a) and 210(1) of the Constitution;*
b) *That tax waivers were of an executive character and therefore did not fall within the definition of a statutory instrument under Section 2 of the Statutory Instruments Act;*
c) *That the Legal Notice complied with the requirements of Article 210(2) in providing a public record of the waivers and reasons thereof; and*
d) *That the Legal Notice did not unlawfully discriminate, including on the basis of race, ethnicity, citizenship and nationality against persons other than Japanese companies, Japanese consultants and Japanese employees involved in the delivery of the projects covered in the financing agreements therein.*

[28] The appellant now seeks the following reliefs:

i) *That the appeal be allowed;*
ii) *The decision of the Court of Appeal in so far as it concerns the impugned Legal Notice be set aside and be substituted with an order restoring part of the Judgment of the High Court declaring the Legal Notice unconstitutional, null and void ab initio;*
iii) *Any other orders that meet the ends of the Constitution and justice; and*
iv) *An order directing parties to bear their own costs.*

[29] In response to the appeal, the 1st and 2nd respondents have filed a Replying Affidavit sworn on 6th March 2025, and the 4th respondent has filed a Replying Affidavit sworn on 17th November 2025. The 5th respondent has filed Grounds of Objection dated 17th March 2025 on behalf of the 3rd and 5th respondents to the effect that the appeal is premised on a misinterpretation and misapplication of the tenor and scope of Articles 10(2)(a), 118(1)(b), 201(a), 210(1) & (2) and 260 of the Constitution in relation to the impugned Legal Notice; and that the appellant has preferred the appeal without due regard to the meaning and purpose of statutory instruments as described and regulated under the Statutory Instruments Act.

[30] Additionally, the 5th respondent filed a Notice of Grounds for Affirming the Decision dated 17th March 2025, reiterating similar arguments as those in its grounds of opposition, urging that the decision of the Court of Appeal be upheld on additional grounds, namely: that the appeal is founded on a misinterpretation of the aforementioned constitutional provisions; and a misunderstanding of the legal framework governing statutory instruments.

D. PARTIES' SUBMISSIONS

i) The appellant's submissions

[31] In his submissions dated 10th April 2025, on the issue of jurisdiction, though not contested by the respondents, the appellant submits that the appeal involves the interpretation and application of Articles 10(2)(a), 94(1,)(4) & (5), 118(1)(b), 201(a), 210(1) & (2) and 260 of the Constitution which articles formed the substance and basis of determination of the dispute in the High Court and at the Court of Appeal.

[32] On the substance of the appeal, the appellant maintains that the Legal Notice was unconstitutional, null and void, and incapable of constituting a lawful basis for the waiver of income tax as purported. He also contends that all tax waivers must comply with Article 210(1) of the Constitution, which, at a minimum, requires that such waivers be grounded in legislation. In this regard, he relies on Article 260 of the Constitution, which defines legislation to include a law made under authority conferred by an Act of Parliament. The appellant submits that, if the Legal Notice was not a statutory instrument, as argued by the respondents and upheld by the Court of Appeal, then it does not qualify as legislation within the meaning of Article 210. Consequently, it could not lawfully underpin the tax waiver granted under the financial agreements. In the absence of legislation therefore, and as constitutionally required under Article 210(1), the purported income tax waiver is invalid, and the tax remains recoverable in accordance with the law.

[33] The appellant further acknowledges that, the power to grant tax waivers under Article 210(1) is conferred by sections 13(2) and (3) of the Income Tax Act. However, he maintains that this power must be exercised strictly in accordance with the Constitution, including compliance with Articles 10(2)(a), 94(5), 118(1)(b), and 201(a), which collectively require public participation in the application and interpretation of the law, the implementation of public policy decisions, particularly in financial matters, and parliamentary oversight over delegated authority. He furthermore submits that the Statutory Instruments Act provides the procedural framework regulating the exercise of delegated legislative authority under an Act of Parliament, in line with Articles 94(5) and 260 of the Constitution. This framework, he argues, applies to tax waivers under Article 210(1), as read together with section 13(2) and (3) of the Income Tax Act. Accordingly, he contends that the only manner in which the Legal Notice could have complied with the constitutional and statutory requirements was through enactment as subsidiary legislation, including adherence to sections 5 and 5A of the Statutory Instruments Act. Such a process would necessarily entail public participation, in conformity with Articles 10(2)(a), 94(5), 118(1)(b), and 201(a) of the Constitution.

[34] The appellant also faults the Court of Appeal's characterization of the Legal Notice as executive, rather than legislative, in nature. In this regard, he places reliance on the persuasive High Court decision in ***Republic Vs Attorney General; Law Society of Kenya (Interested Party); Moriasi (Ex parte)*** Judicial Review Miscellaneous Application 364 of 2018 [2019] KEHC 7013 (KLR). In that case, the court was dealing with the issue of whether a circular issued by the Attorney General was a statutory instrument. The court made a distinction between provisions that enable smooth administration of a body, which are executive in nature and would not necessarily require to be enacted as statutory instruments, and those of a legislative character, which would require compliance with the process of enacting subsidiary legislation. The appellant asserts that a contextual reading of that decision reveals a distinction between section 18 of the Office of the Attorney General Act, which is executive in nature, and section 32 of the same Act, which empowers the Attorney General to make provisions having the force of law, as contemplated under Articles 94(5) and 260 of the Constitution. He submits that, had the Court of Appeal adopted a similar approach, it would have concluded that section 13(2) and (3) of the Income Tax Act is analogous to section 32 of the Office of the Attorney General Act and is therefore not executive in nature.

[35] Additionally, the appellant posits that the impugned tax waiver amounted to direct discrimination that was unreasonable and unjustifiable in an open and democratic society founded on human dignity, equality, and freedom, as held by the High Court. Finally, he contends that the extent of the waiver, being the precise amount of tax waived as required under Article 210(2)(a) of the Constitution, was not disclosed in the Legal Notice. Instead, the amounts were allegedly contained in unpublished financing agreements. This omission, he argues, contravenes the principle of the rule of law and undermines constitutional requirements of transparency and accountability. Based on the foregoing, the appellant prays that this Court allow the appeal.

ii) The 1st and 2nd respondents' submissions

[36] In their submissions dated 16th April 2025, the 1st and 2nd respondents contend that the central issue for determination is *whether the Legal Notice ought to have been subjected to public participation*. They answer this in the negative, submitting that the impugned Legal Notice emanated from a bilateral agreement between the Government of Kenya and the Government of Japan. In their view, the tax exemption was not a unilateral Kenyan measure but a standard requirement imposed by the Government of Japan in respect of all its financing agreements with foreign governments. They further submit that the Legal Notice was clothed with executive character from the aspect of the negotiations of the agreements. Regarding the manner in which it was worded, they posit that such wording left no doubt that it did not fall within the definition of a statutory instrument under section 2 of the Statutory Instruments Act since the definition does not include a document created in the *'exercise of statutory functions authorized by law'* such as the impugned Legal Notice which was made by the CS Treasury pursuant to section 13(2)(a) of the Income Tax Act.

[37] They also submit that the Legal Notice was not legislative in nature and its purpose was to provide information to the public on the collection of income tax or exemption thereof for Japanese companies, consultants and employees involved in projects under the Financing Agreements specified in the Legal Notice. They submit that this position is supported by the case of ***Republic Vs Attorney General; Law Society of Kenya (Interested Party); Moriasi (Ex parte)*** *(supra),* where the court observed that not all guidelines, orders and directions are legislative in character and/or are statutory instruments; there may be guidelines and directions that are purely executive in character. On this basis, they maintain that the Legal Notice was not a statutory instrument and the provisions of sections 5 and 5A of the Statutory Instruments Act requiring public participation did not apply to it. For these reasons, they urge that the appeal lacks merit and ought to be dismissed with costs.

iii) The 4th respondent's (KRA) submissions

[38] The 4th respondent, in its submissions dated 13th February 2026, contends that pursuant to Part I of the First Schedule to the Kenya Revenue Authority Act, it is mandated to administer and enforce the provisions of the Income Tax Act. It submits that section 13(2) of the Income Tax Act vests the CS Treasury with the authority to exempt income or a class of income from tax. In support of this position, it relies on ***Law Society of Kenya Vs Attorney General & 2 Others*** High Court Petition No. 39 of 2013 [2013] eKLR, where the High Court affirmed that delegated legislation is permissible where Parliament has conferred such authority and retained oversight. Similarly, it relies on ***Institute of Social Accountability & another Vs National Assembly & 3 others; Commission for the Implementation of the Constitution (Interested Party)*** High Court Petition No. 71 of 2013 [2015] KEHC 6975 (KLR), where the court held that Parliament may delegate legislative power, provided it retains supervisory control over the delegated matter.

[39] It is also the 4th respondent's position that, in the present instance, Parliament expressly conferred authority under section 13(2) of the Income Tax Act to the CS Treasury. The impugned Legal Notice was subsequently tabled before the National Assembly, considered, and approved. Accordingly, it is the 4th respondent's assertion that the CS Treasury acted *intra vires* the parent statute and in conformity with Article 94(5) of the Constitution. The 4th respondent further submits that the Legal Notice constituted an understanding between two governments and does not fall within the definition of a statutory instrument under section 2 of the Statutory Instruments Act. Consequently, it was not subject to the requirements of public participation under sections 5 and 5A of said the Act. In this regard, reliance is placed on ***British American Tobacco Kenya PLC Vs Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)*** SC Petition No. 5 of 2017 [2019] KESC 15 (KLR), where this Court held that the nature and extent of public participation required in any circumstance depends on the character of the legal instrument in question. It submits, in addition that the Legal Notice, which implemented bilateral Financing Agreements, was duly tabled before the National Assembly and subjected to scrutiny within the Statutory Instruments Act framework.

[40] In conclusion, the 4th respondent maintains that, under section 5 of the Kenya Revenue Authority Act, its mandate is limited to the administration and enforcement of tax laws. Once the Legal Notice was lawfully issued and approved, it was under a statutory duty to implement it, so it submits. Accordingly, it contends that no cause of action lies against it for the implementation of a valid legal instrument.

The 3rd and 5th respondents' submissions

[41] The 3rd and 5th respondents submit that the central issue for determination is whether the impugned Legal Notice ought to have been subjected to public participation. In that context, they invite the Court to consider the context and purpose of section 13(2) of the Income Tax Act, which they contend is aligned with Article 210(1) of the Constitution. Taking into account the circumstances leading to the issuance of the Legal Notice, they argue that financial agreements are, by their nature, technical, administrative, and executive matters, often intertwined with foreign relations and undertaken pursuant to the constitutional mandate of the Executive.

[42] While acknowledging that public participation is a national value and principle of governance under Article 10(1) of the Constitution, the 3rd and 5th respondents submit that it is now settled that administrative actions which are executive or operational in character are not invariably subject to public participation. They contend that the only instance in which such actions would attract the requirement of public participation is as contemplated under section 5 of the Fair Administrative Action Act, where the administrative action is likely to materially and adversely affect the legal rights or interests of a large part of the public. In support of this position, they rely on the persuasive authority of ***Ramogi & 3 others Vs Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)*** High Court Constitutional Petition No. 159 of 2018 & 201 of 2019 (Consolidated) [2020] KEHC 10266 (KLR), where the High Court articulated the parameters for public participation in relation to executive decisions. They further note that this reasoning was adopted in ***Law Society of Kenya Vs Office of the Attorney General & another; Kenya Meat Commission (Interested Parties) & another*** [2021] KEHC 9067 (KLR).

[43] Moreover they rely on the decisions of this Court in ***The Matter of the Principle of Gender Representation in the National Assembly and the Senate*** Advisory Opinion Reference No. 2 of 2012 [2012] KESC 5 (KLR) and ***Cabinet Secretary for the National Treasury and Planning & 4 others Vs Okoiti & 52 others; Bhatia (Amicus Curiae)*** [2024] KESC 63 (KLR) to highlight the need to avoid interpreting broad constitutional values and principles such as those articulated in Article 10(2) of the Constitution as though they were prescribed as normative values and that values and principles are inherently open textured meaning they provide direction without prescribing exact steps to be taken by duty bearers. Accordingly, they argue that, in so far as the Legal Notice neither imposed regulatory obligations nor adversely affected the public, it cannot be properly classified as a statutory instrument subject to the requirements of public participation. Its tabling before Parliament, they contend, was not pursuant to the Statutory Instruments Act but in compliance with Section 13(3) of the Income Tax Act. They therefore support the finding of the Court of Appeal that the Legal Notice bore an executive character and fell outside the ambit of a statutory instrument. For these reasons, they urge the Court to dismiss the appeal.

E. ANALYSIS AND DETERMINATION

[44] This Court has established that, before determining a dispute before it, it must satisfy itself that it has the requisite jurisdiction. In ***Samuel Kamau Macharia & another Vs Kenya Commercial Bank Limited & 2 others*** SC Application No. 2 of 2011 [2012] eKLR, we held that jurisdiction is conferred either by the Constitution or by national legislation. Concerning its appellate jurisdiction under Article 163(4)(a), this Court in ***Lawrence Nduttu & 6000 Other Vs Kenya Breweries Ltd & another*** SC Petition No. 3 of 2012 [2012] eKLR established that:

> ***"...The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the***

Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation…."

[45] The dispute herein involves the interpretation and application of Articles 10, 94, 95, 118, and 210 of the Constitution. These articles were central to the case in both the High Court and the Court of Appeal. Consequently, we find that we have jurisdiction to hear and determine the appeal.

[46] Turning to the substance of the appeal, the material facts are broadly set out in paragraphs 2 to 5 of this Judgment and are largely uncontested. By Legal Notice No. 15 of 2021, issued pursuant to section 13(2) of the Income Tax Act, the Cabinet Secretary for the National Treasury and Planning exempted from income tax the income earned in Kenya by Japanese companies, consultants and employees involved in sixteen projects financed under specified bilateral financing agreements between Kenya and Japan. The exemption was limited to the extent provided under the respective Financing Agreements. Following its publication, the Legal Notice was considered by the National Assembly's Committee on Delegated Legislation, which approved it in a report dated 12th May 2021. The report was subsequently tabled before the National Assembly and adopted on 19th May 2021.

[47] The appellant submits that the Legal Notice was unconstitutional and incapable of constituting a lawful basis for the waiver of income tax. Such waivers, he argues, should be grounded in legislation as constitutionally required under Article 210(1). In the absence of legislation, the purported income tax waiver is invalid, and the tax remains recoverable. The appellant has also maintained that the only manner in which the Legal Notice could have complied with the constitutional and statutory requirements was through enactment as subsidiary legislation, including adherence to sections 5 and 5A of the Statutory Instruments Act. Such a process would necessarily entail public participation, he argues. He also posits that the impugned tax waiver amounted to direct discrimination.

[48] On the other hand, the respondents maintain that the Legal Notice was clothed with executive character in respect of the negotiations of the agreements, and even in the manner in which it was worded, and therefore did not fall within the definition of a statutory instrument under section 2 of the Act. The Legal Notice was not a statutory instrument, and the provisions of sections 5 and 5A of the Statutory Instruments Act requiring public participation did not apply to it, they assert.

[49] Noting all that we have stated above, we find that the issues for determination in this appeal are as follows:

i. *Whether the Legal Notice constituted a statutory instrument within the meaning of Article 210 of the Constitution and the Statutory Instruments Act, and if so, whether it was therefore subject to the requirements of public participation.*
ii. *Whether the imposition of the tax waiver was discriminatory in nature.*
iii. *What relief(s) should issue?*

i. Whether the Legal Notice constituted a statutory instrument within the meaning of Article 210 of the Constitution and the Statutory Instruments Act, and if so, whether it was therefore subject to the requirements of public participation.

[50] Article 1 of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. Article 1 (3) provides that sovereign power is delegated to state organs, including Parliament. Chapter 8 of the Constitution establishes the Legislature as the sole law-making body. Article 94 (5) precludes all other persons or bodies from making provisions having the force of law in Kenya, except under authority conferred by the Constitution or by legislation passed by the Legislature. Article 94 (5) and (6) of the Constitution specifically provides that:

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

(6) An Act of Parliament, or legislation of a county, that confers on any state organ, state officer or person the authority to make provision having the force of law in Kenya as contemplated in clause (5) shall expressly specify the purpose and objects for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority. (Emphasis ours)

[51] Article 210 of the Constitution then firmly establishes the principle of fiscal legality in taxation, providing that *"No tax or licensing fee may be imposed, waived, or varied except as provided by legislation".* Article 210 (2) further provides that whenever a waiver is permitted by law, a public record of each waiver must be systematically reported to the Auditor-General.

[52] Article 211 of the Constitution provides for borrowing by the national government by stating as follows:

211. (1) Parliament may, by legislation—

(a) prescribe the terms on which the national government may borrow; and

(b) impose reporting requirements

(2) Within seven days after either House of Parliament so requests by resolution, the Cabinet Secretary responsible for finance shall present to the relevant committee, information concerning any particular loan or guarantee, including all information necessary to show—

(a) the extent of the total indebtedness by way of principal and accumulated interest;

(b) the use made or to be made of the proceeds of the loan;

(c) the provision made for servicing or repayment of the loan; and

(d) the progress made in the repayment of the loan

[53] On tax exemptions, such exemptions can arise only from primary legislation enacted by Parliament as shown above. Under Article 94(5) and (6) of the Constitution, Parliament can, however, constitutionally delegate the administrative implementation of these exemptions to an executive authority under a legislation providing for such an exemption.

[54] Section 13(2) of the Income Tax Act, Cap 470 is the primary provision through which Parliament delegates the power to grant specific income tax waivers. It provides as follows:

> *(2) The Cabinet Secretary may, by notice in the Gazette, provide–*
>
> *(a) that any income or class of income which accrued in or was derived from Kenya shall be exempt from tax to the extent specified in such notice;*
>
> *(b) that any exemption under subsection (1) of this section shall cease to have effect either generally or to the extent specified in the notice.*
>
> *(3) <u>A notice under subsection (2) of this section shall be laid before the National Assembly without unreasonable delay, and if a resolution is passed by the Assembly within twenty days on which it next sits after the notice is so laid that the notice be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the issuing of a new notice</u>.* <u>(Emphasis ours)</u>

[55] The Statutory Instruments Act, CAP 2A, provides for the definition of statutory instruments and the procedure to be undertaken in the presentation of a statutory instrument. Section 2 of the Act specifically provides as follows:

> *"statutory instrument" means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.*

[56] The Black's Law Dictionary, Ninth Edition at pg. 1164 defines *notice* as the legal notification required by law or agreement, or imparted by operation of law as a result of some fact. A *legal notice* is also defined in the same terms as a constructive notice or due notice, with due notice being defined as sufficient and proper notice that is intended to and likely to reach a particular person or the public-notice that is legally adequate given the particular circumstance.

[57] From the above definition and to differentiate it from the broad meaning of a *statutory instrument*, a statutory instrument becomes effective once it is published as a legal notice in the Gazette. A legal notice on its part operationalizes broad statutory mandates. A legal notice can therefore be defined as a legislative document made under authority delegated by an Act of Parliament and published in the Kenya Gazette or a Gazette Supplement, through which legally binding rules, orders, exemptions, regulations, or other statutory measures are formally promulgated.

[58] Section 5 of the Statutory Instruments Act provides for public participation in instances where a statutory instrument is likely to have a direct or substantial indirect effect on business or restrict competition. Section 5 specifically provides as follows:

> *(1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—*
>
> > *(a) have a direct, or a substantial indirect effect on business; or*
> >
> > *(b) restrict competition;*
>
> *the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.*
>
> *(2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—*
>
> > *(a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and*
> >
> > *(b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.*

(3) Without limiting, by implication, the form that consultation referred to in subsection (1) might take, the consultation shall—

(a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or

(b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument. (Emphasis ours)

[59] The above process and scenario is similar to that of an administrative action set out in section 5 of The Fair Administrative Action Act, which provides that administrative actions or decisions that are executive in character should be subjected to public participation where any proposed administrative action is likely to materially and adversely affect the legal rights and interests of a group of people or the general public.

[60] Tied to public participation is the preparation of explanatory memorandum under section 5A and regulatory impact assessments under sections 7 to 9 of the Statutory Instruments Act. Section 9 of the Act specifically sets out instances where regulatory impact statements may be unnecessary, stating that a regulatory impact statement need not be prepared for a proposed statutory instrument if the proposed legislation only provides for, or to the extent it only provides for—

(a) <u>a matter that is not of a legislative character, including, for example, a matter of a machinery, administrative, drafting or formal nature;</u>

(b) a matter that does not operate to the disadvantage of any person (other than a government entity) by—

(i) decreasing the person's rights;

(ii) imposing liabilities on the person;

(c) an amendment of statutory instrument to take account of the prevailing Kenyan legislative drafting practice;

(d) the commencement of an Act or subordinate legislation or a provision of an Act or statutory instrument;

(e) an amendment of statutory instrument that does not fundamentally affect the legislation's application or operation;

(f) a matter of a savings or transitional character;

(g) a matter arising under legislation that is substantially uniform or complementary with legislation of the National Government or any County;

(h) a matter advance notice of which would enable someone to gain unfair advantage;

(i) an amendment of a fee, charge or tax consistent with announced government policy. (Emphasis ours)

[61] As set out in section 9 above therefore, a statutory instrument may acquire a legislative or administrative character. We must, however, hasten to note that the provisions of section 9 of the Statutory Instruments Act have not been impugned, and the absence of regulatory impact statements was not the subject of determination in the High Court or the Court of Appeal. By citing the provisions above, we are only making the point that there is, in law, a clear distinction between statutory instruments that are of a legislative and administrative character. Indeed, in ***British American Tobacco Kenya PLC Vs Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)*** SC Petition 5 of 2017 [2019] KESC 15 (KLR), this Court determined that a reading of whether an instrument was required, exempted and/or published involves the evaluation and interrogation of factual evidence, and a reading and interpretation of the Statutory Instruments Act. We stated as follows in that regard:

> ***"…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. <u>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.</u> 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…." (Emphasis ours)

[62] The distinction between what is of a legislative character and what is of an administrative character has also been set out in numerous decisions. In the persuasive authority of ***Republic Vs Attorney General; Law Society of Kenya (Interested Party); Ex parte: Francis Andrew Moriasi*** **(*supra*)** the High Court stated as follows in regard to a circular issued by the Attorney General:

<u>"From the definition given above of statutory instruments, and the powers granted to the Respondent, it is therefore the case that not all the guidelines, orders, or directions given by the Respondent are legislative in character and therefore statutory instruments</u>. There may be guidelines and directions that are purely executive in character, in the sense that their objectives are solely administrative in guiding implementation of standards in laws and policies." (Emphasis ours)

[63] In another persuasive authority, ***Omtatah Okoiti Vs Head of Public Service & 2 others,*** Constitutional Petition No. E031 of 2021 [2024] KEHC 198 (KLR), the petition challenged a Government circular issued by the Head of Public Service. The circular directed the centralization of government motor vehicle leasing through the National Treasury. The petitioner, citing violations of the Constitution and statutory provisions, argued that the circular usurped procurement roles of accounting officers, lacked public participation, and contravened the Statutory Instruments Act. The respondents defended the circular as an administrative directive within existing laws, aimed at achieving efficiency and cost-effectiveness in the Executive. The Court determined that the circular was not a statutory instrument and in doing so, the learned judge stated as follows:

> ***"... Central leasing is already incorporated in the Procurement and Asset Disposal Act, 2015 and is described as consortium buying, a scheme where procurement entities can come together and procure jointly to benefit from economies of scale. All that which the circular did was to give guidance concerning that particular procurement item, but the rules did not change. It was not against the existing legal provisions nor was it usurpation of the roles of respective accounting officers. It did not contravene the existing statutory provisions. In my view, the circular was executive in nature and meant to guide the application of the prevailing policy. It could thus not be considered a statutory instrument within the meaning of section 2 of the Statutory Instruments Act...the circular in question was an amplification of what was already in law and policy (consortium procurement). The circular was not a statutory instrument within the scope of section 2 of the Statutory Instruments Act in the circumstances. It did not require public participation...."*** (Emphasis ours)

[64] In ***Law Society of Kenya Vs Attorney General & 3 others,*** Environment and Planning Petition No. 2 of 2023 [2023] KEELC 20682 (KLR), the Environment and Land Court (*O.A. Angote, J*) determined that a cabinet dispatch amounts to communication of a policy position by the government pursuant to a cabinet meeting and that a cabinet decision is not a statutory instrument. At paragraphs 199 and 200 of its decision the learned judge rendered himself as follows:

> ***"....199. The cabinet, established under article 52 of the Constitution of Kenya, makes up the executive arm of the government responsible for among others formulating government policies. A cabinet despatch amounts to communication of a policy position by the government pursuant to a cabinet meeting. Nowhere is such a despatch indicated to be founded on any provision of any Act or made in the exercise of any legislative powers.***
>
> ***200. The court therefore finds that the impugned cabinet decision is not a statutory instrument. The petitioner's assertion that the despatch is void for not complying with the Statutory Instruments Act, 2013 is therefore without merit...."***

[65] In ***Ethics and Anti-Corruption Commission & Another vs. Tom Ojienda, SC T/a Prof. Tom Ojienda & Associates Advocates & 2 Others*** SC Petition 30 & 31 of [2019] (Consolidated)) [2022] KESC 59 (KLR), this Court delimited 'administrative action' and held as follows at paragraph 57:

> ***"By stipulating that the legislation so contemplated has to among other things, promote efficient administration, the Constitution leaves no doubt that an "administrative action" is not just any action or omission, or any exercise of power or authority, but one that relates to the management of affairs of an institution, organization, or agency...."***

[66] In ***the Cabinet Secretary for the National Treasury and Planning Vs Okiya Ontatah Okoiti & 52 Others*** SC Petition No. E031 of 2024, as Consolidated with Petition Nos. E032 & E033 of 2024, [2024] KESC 63 (KLR) this Court similarly held that Parliament exercises administrative powers in some of its functions, including investigations, recommendations, and findings by its respective committees or approval of appointments to public office. However, the process of enacting a legislation is not administrative in character. The Court, at paragraph 140 of the decision, therefore determined that an administrative action is the application or implementation of law to specific factual circumstances, usually after legislation has been enacted. We stated thus in that regard:

> ***"…[140] In essence, administrative action is the application or implementation of law to specific factual circumstances, usually after legislation has been enacted. Administrative powers, in this sense, are generally lower-level powers exercised after the legislative process. Put differently, the exercise of administrative powers is the implementation of law, not its creation…."***

[67] From the above expositions of the law, we can surmise that a statutory instrument will have a legislative character if it varies or repeals general laws or rules of wide application affecting the public at large, and an executive or administrative character if it guides the implementation of standards in law and policy.

[68] In this instance, Legal Notice No. 15 of 2021 sought to inform the public of the implementation of Financial Agreements between the Government of Kenya and the Government of Japan. The Cabinet Secretary was also acting within his delegated authority under section 13 of the Income Tax Act when he issued the aforesaid notice. Had such authority not been provided in law, then the position would certainly have been different, noting the express provisions of Article 94(5) where other persons or bodies may be conferred certain functions having the force of law by the Constitution or by legislation. The Legal Notice did not also create any rule, order or regulation in the manner specified above. Consequently, we find that the impugned Legal Notice was administrative in nature and did not acquire a legislative character to demand the procedure that the appellant has pleaded. We also agree with the Court of Appeal's determination that the Legal Notice was not a statutory instrument within the meaning of section 2 of the Statutory Instruments Act and was not the subject of public participation as contemplated under section 5 of the said Act.

[69] The next issue is whether due process was adhered to. Section 13(3) of the Income Tax Act provides that a notice under section 13 (2) shall be laid before the National Assembly without unreasonable delay. The conditions to be met under the Statutory Instruments Act include preparing an explanatory memorandum and submitting the statutory instrument to the Clerk within seven (7) sitting days of publication (section 11), adhering to the principles of good governance and the rule of law (section 13), exempting certain classes of statutory instruments from scrutiny (section 14), and conferring with the regulation-making authority before tabling a report to Parliament for their information and modification, if necessary (section 16). Section 13 of the Act, as read with the National Assembly's Standing Order No. 210, mandates the Committee on Delegated Legislation to consider, in respect to any statutory instrument, whether it is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other written laws.

[70] In that context, we note that the impugned Legal Notice was presented to the Committee on Delegated Legislation, accompanied by an explanatory memorandum in accordance with section 11 of the Act. The Committee held a virtual meeting on 15th April 2021 with the then Cabinet Secretary for National Treasury and Planning, in line with section 16 of the Statutory Instruments Act. The Committee raised concerns that the exemption appeared discriminatory and would benefit Japanese nationals more than Kenyan citizens, as local companies are not generally exempted from taxes, yet Japanese nationals would enjoy expatriate benefits under the Notice. Kenyan companies doing business in Japan would also not enjoy similar exemptions. The Committee also raised concerns about the legal status of the Financial Agreements under which the tax exemptions would be granted.

[71] The Cabinet Secretary informed the Committee that the overall benefits to be derived from the effective and efficient implementation of the projects outweighed the tax foregone; income from the jobs created by the projects and the income derived from expenditure on the said projects would generate revenue that was far above the tax foregone as a result of the exemption. The Cabinet Secretary further stated that four (4) of the sixteen (16) projects listed in the Legal Notice were grants, while the remaining twelve (12) were loan agreements. After making these considerations, the Committee accepted that the Legal Notice was properly issued by the CS Treasury in exercise of the powers conferred under section 13(2) of the Income Tax Act. The Committee's report was later tabled before the House and adopted during the sitting held on 19th May 2021.

[72] Having considered the above process against the law set out, we have no reason whatsoever to disagree with the decision by the Court of Appeal on this issue and find that the necessary steps set out in section 13 of the Income Tax Act, as read with the Statutory Instruments Act, were adhered to by the National Assembly when it approved the tax exemptions.

> ***ii. Whether the imposition of the tax waiver was discriminatory in nature.***

[73] A distinction must be drawn between the Legal Notice and the ratification of bilateral agreements. The agreements herein were entered into before the current Constitution and covered the period from 2007 to 2020. The former Constitution was silent on the process of treaty ratification but conferred executive powers on the President to do so. The Executive was also then vested with the authority to negotiate and execute treaties on behalf of the country and also exercised residual powers of ratification. There was no law that required parliamentary approval as a prerequisite for treaty ratification, and constitutional checks and balances operated through Parliament's role in passing legislation to give effect to treaties. Parliament's role, therefore, was to domesticate treaties by passing implementation legislation following ratification by the Executive. (See Kenya National Commission on Human Rights Occasional Report ***Making the Bill of Rights Operational, Policy, Legal and Administrative Priorities and Considerations***, October 2011).

[74] Article 2(6) of the Constitution, however, now provides that any treaty or convention ratified by Kenya becomes part of Kenyan law. This clause guarantees that international agreements, once ratified, would have immediate effect within domestic law. Bilateral agreements between governments are ratified under the

Treaty-Making and Ratification Act, Cap. 4D, which implements the provisions of Article 2(6). The Public Finance Management Act governs the financial, borrowing, and conditional-grant implications of such agreements. In ***Mitubell Welfare Society Vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** SC Petition No. 3 of 2018, [2021] eKLR this Court reflected on the effect of Article 2 (5) and (6) and opined as follows at paragraphs 127 to 132:

> ***"…On the domestic scene, since a state's responsibility to give effect to international obligations does not fall upon any particular institution of its government, international law does not require that domestic Courts apply and give effect to international obligations. However, states do from time to time, undertake to carry out their obligations by particular means, such as taking legislative and other measures to give full effect to their treaty obligations under international law. For example, the International Covenant on Civil and Political Rights requires states to enact laws to protect and ensure respect for rights thereunder; the Genocide Convention commits states to make genocide a crime; the U.N Convention against Corruption requires states to undertake a range of legislative and other measures in its domestic sphere so as to effectively combat corruption. Otherwise, States usually differ as to whether their Courts are required or permitted, by their domestic law, to give effect to the state's international obligations………Where for example, a Court of law is faced with a dispute, the elements of which, require the application of a rule of international law, due to the fact that, there is no domestic law on the same, or there is a lacuna in the law, which may be filled by reference to international law, the Court must apply the latter, because, it forms part of the law of Kenya. In other words, Article 2(5) and (6) of the Constitution, recognizes***

international law (both customary and treaty law) as a source of law in Kenya. By the same token, a Court of law is at liberty, to refer to a norm of international law, as an aid in interpreting or clarifying a Constitutional provision…"

[75] The process outlined in Article 2(5) and (6) of the Constitution is also set out in Sections 7 to 12 of the Treaty-Making and Ratification Act. Cabinet and Parliament are required to approve treaties prior to ratification. The relevant Cabinet Secretary presents the treaty to the Cabinet, along with a memorandum detailing its objectives, benefits, and the financial, legal, and policy implications, as well as its compatibility with the Constitution and other laws. If the Cabinet approves it, Parliament considers it and either approves or rejects the treaty. Both the National Assembly and the Senate may be involved, depending on the subject matter, with due regard to Parts 1 and 2 of Chapter Eight of the Constitution. The Registrar of Treaties keeps a record of all treaties. Section 15 of the Act also mandates the Cabinet Secretary to lay before the National Assembly, at least once every financial year, a report containing a record of all treaties Kenya has ratified and which may in any way bind Kenya to specific actions. It also mandates the Cabinet Secretary to publish in at least two newspapers of nationwide circulation, notify the public of every treaty, which may in any way bind, or to which Kenya is a party.

[76] The 1st Schedule to the Income Tax Act provides for income accrued in, derived from, or received in Kenya that is exempt from tax. Paragraph 27 specifically provides:

> *27. The emoluments payable out of foreign sources in respect of duties performed in Kenya in connection with a technical assistance or other agreement for development services or purpose to which the Government is a party to a non-resident person or to a person who is resident solely for the purposes of performing those duties, in any case where the agreement provides for the exemption of those emoluments.*

[77] In the present case, the burden was on the appellant to prove, on the balance of probabilities, that the financing agreements entered into were discriminatory; to assail them, the agreements ought to have been challenged rather than the Legal Notice, which contained no specific terms. The extent of the tax waivers would have been aptly canvassed in a challenge to the terms of the bilateral agreements. The terms of the agreements would have assisted the courts in determining whether the terms were discriminatory. From the prayers sought by the appellant in the High Court, it is clear that he was unaware of the terms of the government-to-government agreement. Indeed, in one of the prayers, he sought information concerning the agreements; copies of the agreements; confirmation of the income tax waived; and an analysis of the overall benefits to be published.

[78] Further, at the time the Legal Notice was adopted by Parliament (as revealed by deliberations by members of Parliament in the Hansard), significant progress had already been made on some of the projects. Members of Parliament also observed that it was a standard policy for all agreements entered into by the Japanese government to grant such exemptions; it was also argued that Japanese companies pay taxes in their country of origin. The 4th respondent, being the implementing body for the agreements, has also stated that the overall benefits of the agreements outweighed the tax reliefs granted.

[79] We therefore find that the main issue in the petition before the High Court was the validity of the Legal Notice; its discriminatory nature was not specifically pleaded. Emoluments payable from foreign sources in respect of duties performed in Kenya under a technical assistance or other development services agreement are a tax that can be exempted; the appellant, on this issue, did not prove his case on the balance of probabilities.

iii. What relief is to issue?

[80] Having found as we have done above, it follows that we must affirm the decision of the Court of Appeal and decline the invitation to reinstate the judgment of the High Court. The upshot of our determination is also that we find no merit in the appeal before us, and the same is ultimately dismissed.

[81] Regarding costs, guided by our decision in ***Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others,*** SC Petition 4 of 2012 [2014] KESC 31 (KLR), and further considering that the matter is hinged on public interest issues, we find it appropriate that each party shall bear their own costs.

[82] CONSEQUENTLY, and for the reasons aforestated, we make the following orders:

(i) The Petition of Appeal dated 13th February 2025 and filed on 24th February 2025 lacks merit and is hereby dismissed.

(ii) Each party shall bear its costs of the appeal.

(iii) We direct that the sum deposited as security for costs upon lodging of this appeal be refunded to the depositor.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **17th** day of **July, 2026**

....

P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT

OF THE SUPREME COURT

....

S. WANJALA

JUSTICE OF THE SUPREME COURT

....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original.

REGISTRAR,
SUPREME COURT OF KENYA

THE SUPREME COURT OF KENYA
JUDICIARY
REPUBLIC OF KENYA