THE SUPREME COURT OF KENYA

SC PETITION NO. E006 OF 2025

ELIUD KARANJA MATINDI VS NATIONAL ASSEMBLY & 4 OTHERS

DATE OF JUDGMENT: 17TH JULY 2026

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Order: Appeal Dismissed

Background

The Governments of Kenya and Japan entered into a series of financing agreements between 2007 and 2020 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 by the Cabinet Secretary for the National Treasury and Planning. 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 the Statutory Instruments 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

The appellant filed *Constitutional Petition No. E280 of 2021* challenging the Legal Notice on multiple grounds. He argued 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. He further contended that the National Assembly and the Committee on Delegated Legislation had acted contrary to the Constitution and the Statutory Instruments Act by approving the exemption through a Legal Notice rather than legislation, and by exempting the Notice from public participation. He also questioned the transparency of the underlying financing agreements.

The High Court in its determination 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.

Aggrieved by the High Court's decision, the respondents filed two separate appeals which were consolidated with *Civil Appeal No. E326 of 2023* being designated as the lead file.

On appeal, the Court of Appeal reversed the High Court's findings. It held 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. As such, it did not fall within the definition of a statutory instrument under Section 2 of the Statutory Instruments Act. The Court of Appeal further found that the procedural requirements under Sections 5 and 5A of the Statutory Instruments Act, which require 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. It was determined that the alleged unconstitutionality of Section 13(2) of the Act was neither pleaded nor among the prayers sought in the petition. The Court of Appeal 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.

Finally, it held that section 13(2) of the Income Tax Act validly conferred on 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.

Undeterred, the appellant filed the instant appeal, challenging the Court of Appeal's decision on four (4) grounds. The Court delineated the following three (3) issues for its determination:

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?*

Upon consideration, the Supreme Court determined the appeal as follows:

1. **Issue 1**: 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. The Legal Notice also did not create any rule, order, or regulation. Consequently, we find that the impugned Legal Notice was administrative in nature and did not acquire a legislative character sufficient to require the procedure pleaded by the appellant. 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. Having considered the process against the law set out, we have no reason whatsoever to disagree with the Court of Appeal's decision 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.

2. **Issue 2:** 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.

3. **Issue 3:** The court affirms the decision of the Court of Appeal and declines 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. The Court directs each party to bear their own costs.

Consequently, the final orders were as follows:

(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.

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