

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 215 OF 2020**

**BETWEEN**

LAW SOCIETY OF KENYA.....PETITIONER

**VERSUS**

NATIONAL ASSEMBLY.....1<sup>ST</sup> RESPONDENT

ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

COMPETITION AUTHORITY.....3<sup>RD</sup> RESPONDENT

**AND**

THE ASSOCIATION OF PROFESSIONAL SOCIETIES IN EAST

AFRICA.....1<sup>ST</sup> INTERESTED PARTY

INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF

KENYA.....2<sup>ND</sup> INTERESTED PARTY

**JUDGMENT**

1. The petition dated 25<sup>th</sup> June 2020 was filed under Articles 1, 2(1),(2),(3),(4), 3, 10, 22, 23(3), 94(1), (2), (4), 118(1)(b),124(1), 159, 165(3) of the Constitution.
2. Accordingly the petition seeks the following orders: -

- a) *A declaration that Section 29A of the Competition Act No.12 of 2010 is unconstitutional and invalid for unjustifiably being in violation with the petitioner's freedom of association as safeguarded under Article 36 of the Constitution;*
- b) *A declaration that Section 29A of the Competition Act No.12 of 2010 is unconstitutional and invalid for unjustifiably being in violation with consumer rights as safeguarded under Article 46 of the Constitution;*
- c) ii. *A declaration that Section 29A of the Competition Act No.12 of 2010 is unconstitutional and invalid for unjustifiably having been passed in violation of the Rule of law as a national value and principle of public participation under Article 10 of the Constitution;*
- d) *A declaration that Section 29(8) of the Competition Act No.12 of 2010 is unconstitutional and invalid having been passed in violation of the petitioner's right of public participation in a parliamentary process as required under Article 118(b) of the Constitution;*
- e) *A declaration that Section 29(8) of the Competition Act No.12 of 2010 is unconstitutional and invalid having been*

*passed without discernable reasons and objects being provided in contravention to Standing Order 117 and Article 124(1) of the Constitution;*

*f) Further and such other orders that this honourable Court deems fit; and*

*g) The costs of this petition.*

**The Petitioner's case**

3. The petition which is supported by Mercy Wambua's affidavit of even date, is based on the assertion that the 1<sup>st</sup> respondent published the Competition (Amendment) Act, 2019 with amendments to Section 29. That the amendments are unconstitutional.
4. The petitioner deposes that the amendment to the impugned Section requires that professional associations whose rules have the effect of preventing competition in the market, to apply to the 3<sup>rd</sup> respondent for an exemption in the application of those rules. She avers this is unconstitutional in view of Article 36 of the Constitution which safeguards the petitioner's right to freedom of association.

5. It's her disposition that the Law Society of Kenya Act No.21 of 2014 outlines the activities that the petitioner can participate in as an association. Section 4 of the Act requires the petitioner to ensure that all persons who practice law in Kenya meet the standards of learning, professional competence and professional conduct in the legal services provided. She informs further that Section 44 of the Act directs the petitioner to make recommendation to the Chief Justice on all matters relating to the remuneration of advocates. The Act therefore provides the parameters within which the petitioner can carry out its mandate.
6. In light of this, the petitioner deposes that the impugned provision, seeks to restrict the petitioner's right to freely, independently and effectively carry out its mandate as an association in accordance with the Law Society of Kenya Act and the Advocates Act. This in essence violates Article 24 of the Constitution as the justification is not fair, reasonable and justifiable.
7. She deposes that in the enactment of the Competition (Amendment) Act, 2019 the petitioner was not allowed to offer its input despite the momentous implications of the amendments on its mandate. Further that this action violated the democratic

principle of public participation by relevant stakeholders as espoused under Articles 10(2) and 118 of the Constitution. In line with this, it is asserted that the Memorandum of objects and reasons had no relation with Section 29 of the Act hence failing this constitutional requirement.

8. The petitioner avers that Article 124(1) of the Constitution requires under the Standing Orders every Bill be accompanied by a memorandum containing a statement of objects and reasons for the Bill. She deposes that while the Bill was accompanied by this memorandum, the same only spoke to the purposed facilitation of investigations with a view to mitigate abuse of bargaining power not the impugned amendments contained in Section 29A and Section 29(8) of the Act. As such, the amendment according to the petitioner was passed without a justifiable basis and in clear violation of the Constitution.
9. The petitioner therefore claims violation of its constitutional rights under Article 10(2), 24, 36, 46, 118 and 124(1) of the Constitution in enactment of the impugned provisions.

### **The Respondents' case**

#### **1<sup>st</sup> Respondent's case**

10. The 1<sup>st</sup> respondent in opposition to the petition filed its replying affidavit dated 17<sup>th</sup> September 2020 sworn by Michael Sialai, the Clerk of the National Assembly.
11. He avers that the Competition (Amendment) Act, 2019 was sponsored by Hon. Aden Duale and read for the first time on 23<sup>rd</sup> July, 2019 pursuant to Standing Order 127. He informs that following the 1<sup>st</sup> reading, the Bill was referred to the National Assembly Departmental Committee on Finance and National Planning for consideration. The principal object of the Bill was to amend the Competition Act to facilitate investigations. This was with a view of mitigating abuse of bargaining or buyer power which adversely affects the economy and empower the Competition Authority to investigate and take action against such conduct on the basis of its own initiative without having to rely entirely on presented complaints.
12. He deposes that while considering the Bill, the Committee invited comments from the public by placing an advertisement in the print media on Thursday, 26<sup>th</sup> July, 2019 pursuant to Article 118 of the Constitution. It is noted that only three stakeholders namely Competition Authority Kenya, Safaricom PLC; and Bowmans

submitted their views. It is averred that these views formed the basis upon which the Committee made the finding contained in its report dated 13<sup>th</sup> November 2019.

13. He deposes that in considering Section 29 of the Competition Act, the Committee noted that the said section created an obligation for professional associations to apply to the Competition Authority for exemption with respect to rules which contain a restriction which is likely to prevent, distort or lessen competition; however, the section did not provide a consequence for failure to comply. To solve the problem, the Bill introduced a clause providing for a penalty for failure to submit professional rules that fell under Section 29 (1) of the Competition Act and an undertaking to abide by the decision of the Competition Authority on the application. It was envisaged that the inclusion of the penalty for breach would enhance adherence. He adds that the amendment was a clean-up so that the penal provision was in the same section with the prohibition.
14. He deposes that the report was tabled before the 1<sup>st</sup> respondent by the Chairperson of the Committee, Hon. Joseph K. Limo, MP on 13<sup>th</sup> November, 2019. The Bill was read for a second time on

19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> November, 2019 then referred to the Committee of the whole House on 28<sup>th</sup> November, 2019. The report of the Committee of the Whole House was considered by the House and the Competition (Amendment) Bill, 2019 was read for the 3<sup>rd</sup> time on 3<sup>rd</sup> December, 2019 and accordingly passed on the same day. It was soon after assented to by the President on 13<sup>th</sup> December, 2019.

15. From the foregoing, he avers that the petitioner's assertions are baseless as the justification given by the 1<sup>st</sup> respondent is one that is reasonable in line with its mandate as empowered by the Constitution under Articles 95 and 109. This is because the amendment seeks to protect against abuse of buyer power and strengthen the 3<sup>rd</sup> respondent which oversees such abuse. Moreover he deposes that the impugned amendment went through the requisite procedures of the legislative process required under the Constitution and therefore, the procedure applied in the passing of the amendment was sound in law.
16. He deposes therefore that since Statutes enjoy presumption of constitutionality, it is incumbent on the petitioner to prove the unconstitutionality of the cited provisions. Furthermore he states



that the role of the court is to review but not to interfere with the operations of the other arms of Government and in view of the doctrine of separation of powers. as was held by the Court of Appeal in **Civil Appeal No. 157 of 2009; John Harun Mwau vs Dr. Andrew Mullei & Others.** He avers that the petition is bad in law and an abuse of the court process and should be dismissed with costs to the 1<sup>st</sup> respondent.

### **2<sup>nd</sup> Respondent's case**

17. The 2<sup>nd</sup> respondent did not file any response to the petition save for its written submissions.

### **3<sup>rd</sup> Respondent's case**

18. The 3<sup>rd</sup> respondent vide a replying affidavit sworn by its director general, Wang'ombe Kariuki on 9<sup>th</sup> October 2020, avers that a competition policy is a set of measures and instruments used by governments to determine overall conditions and levels of competition in the markets. The objective is to protect consumers, promote competition by discouraging anti-competitive behavior and to create freedom of trade, choice and access to markets.
19. He deposed that Section 21 of the Competition Act No. 12 of 2010 prohibits all agreements between undertakings, decisions by

undertakings or concerted practices which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya or a part of Kenya unless they are exempted in accordance with the provisions of Section D of Part III of the Act. He avers that Section 21 of the Act provides that the only avenue through which a restrictive agreement can be permitted under the Act, is through grant of an exemption in accordance with the provisions of Part D of Part III of the Act.

20. He further deposed that Section 29 of the Act provides for a specific exemption with respect to professional rules. In essence therefore, the Act is not interested in all professional rules but only professional rules that have a restriction prohibited by the Act. Further it is noted that the rules can be exempted if the criteria outlined under Section 29 (2) of the Act is met.

21. The deponent stated that an effort to give effect to Section 29 of the Act, the 3<sup>rd</sup> respondent invited various professional associations in Kenya to comply with this provision of the law. This invitation included the petitioner which failed to comply, yet the requirement was done long before the impugned amendment. Section 29 of the Act has been in operation since 1<sup>st</sup> August, 2011.

He avers that the petitioner has never challenged the operationalization of the impugned Section 29 from the time of its enactment.

22. Accordingly, it is averred that Section 29 of the Act contrary to the petitioner's assertion does not contain any provision which limits the right of the petitioner to form an association, or any member to join the association or participate in the activities of the association as provided under Article 36 of the Constitution. Instead the main focus of the provision is professional rules which contain a restriction that prevents, distorts or lessens competition in a market.
23. He averred that the petitioner has failed to demonstrate how the impugned provision has infringed on the 3<sup>rd</sup> respondent's constitutional rights under Articles 10, 24, 36, 46 of the Constitution. Additionally that the petitioner has failed to demonstrate the unconstitutionality of the impugned Section in view of the general presumption that statutes enacted by Parliament are constitutional. Likewise, the petitioner has not demonstrated that its petition has met the constitutional threshold set out in **Anarita Karimi Njeru [1979] eKLR 154.**

24. He finally deponed that the prayers sought in the petition are not available as they have all been overtaken by events reducing this matter into an academic exercise.

### **The Interested Parties case**

#### **1<sup>st</sup> Interested Party's case**

25. The 1<sup>st</sup> interested party filed an affidavit sworn by its chairman, Felix Owaga Okatch on 4<sup>th</sup> December 2020. He avers that the 1<sup>st</sup> Interested Party is a joint forum of professional associations with a membership of 30 professional bodies. He avers that the regulation of a professional body is done to assure standards of competence, performance, ethical behavior, personal accountability are adhered to, and for protection of the consumers. He depones that regulated professions have a regulatory body that is sanctioned by law to regulate the profession. As such regulation of a profession is necessary to ensure quality of services offered to the public.

26. It is deposed furthermore that professional services are characteristically specialized and differentiated. For this reason some professional services are more standardized and routine than others. Owing to this such service is often offered at standard

fees for completed work while other services or tasks are more uncertain and require more judgment. For such, fees may be customized to the task, often by charging in proportion to the time spent.

27. He depones that the 1<sup>st</sup> interested party in light of this has adopted and advocates for a policy of self-regulation of the professions which is a hallmark of such professions internationally. It is noted that this system of regulation is recognized in Kenya. A number of these professional associations are established by statute and are vested with power to regulate their professions such as the petitioner and the 1<sup>st</sup> interested party.
28. He avers that the Legislature has delegated the power to oversee the legitimate practice of these professions to these associations. Likewise, it has donated the power to make subsidiary legislation relating to professional practice to these professional bodies. It is asserted that the Statutory Instruments Act which prescribes the prerequisites for the preparation of any subsidiary legislation does not include the requirements of submission of rules made by professional associations to the 3<sup>rd</sup> respondent for approval.

29. He avers that the 3<sup>rd</sup> respondent did not ask the 1<sup>st</sup> interested party to submit its views regarding enactment of the Competition (Amendment) Bill, 2019. That there is adequate and sufficient in-built regulatory mechanisms within the regulatory frameworks of professional service providers to meet and address matters pertaining competition. Accordingly it is noted that the requirement that professional associations submit their rules for scrutiny and approval by the 3<sup>rd</sup> respondent has created an unnecessary overlap of functions and infringes on the mandate of professional associations.

#### **The 2<sup>nd</sup> Interested Party's case**

30. The 2<sup>nd</sup> interested party filed a replying affidavit by its Chief Executive Officer and Secretary to the Council, Edwin Makori on 2<sup>nd</sup> March 2021. He avers that the 2<sup>nd</sup> interested party is the statutory body of accountants established under Section 8 of the Accountants Act No.15 of 2008. Additionally it is a member of the Pan-African Federation of Accountants (PAFA) and the International Federation of Accountants (IFAC), the global umbrella body for the accountancy profession which requires it

to adhere to the standards and requirements set including the adoption of international standards.

31. He avers that apart from the Accountants Act and the international standards, the Statutory Instruments Act grants the 1<sup>st</sup> interested party the power to make regulations to regulate its members in all aspects. In view of this the 2<sup>nd</sup> interested party supports the petition since the impugned provision seeks to affect how the Institute regulates its members and the manner of rendering their professional services and the quality of services offered contrary to the provisions of the Accountants Act.
32. He deposes that the 3<sup>rd</sup> respondent wrote to the 2<sup>nd</sup> interested party on 8<sup>th</sup> May 2018 purporting to interrogate competition concerns within the Accountancy Profession in Kenya. Upon seeking further information, the 3<sup>rd</sup> respondent informed the 2<sup>nd</sup> interested party that there was a complaint dated 15<sup>th</sup> May 2018 from one of the training providers on its new policy that regulates the Continuous Professional Development.
33. It is his disposition that the 2<sup>nd</sup> interested party has the right to form an association which has the ability to regulate its activities to govern its operation as enabled by law. As such the enactment

of Section 29 of the Competition Act curtails its right to associate without justification. According to the 2<sup>nd</sup> interested party this provision is a deliberate act by the 1<sup>st</sup> respondent to grant powers to the 3<sup>rd</sup> respondent to infringe upon the 2<sup>nd</sup> interested party's autonomy to regulate the accountancy profession.

34. He deponed further that the 1<sup>st</sup> respondent is required to facilitate public participation yet did not involve it or seek its views as a stakeholder bound to be directly affected by the provisions of Section 29 of the Competition Act. In light of these facts it is contended that Section 29 (8) and 29 of the Competition Act are unconstitutional and ought to be declared invalid.

### **Parties' submissions**

#### **The Petitioner's submissions**

35. The petitioner through the firm of Triple OKLaw LLP filed written submissions and a list of authorities dated 27<sup>th</sup> September 2021 citing the issues for determination to be:
- i. *Whether this Honourable Court has the jurisdiction to hear and determine this matter;*
  - ii. *Whether Section 29 (8) of the Competition Act No. 12 of 2010 is unconstitutional and invalid for;*



- a) *Being in violation of the national values and principles of public participation under Article 10 of the Constitution of Kenya, 2010 and the Petitioner's right of public participation in a Parliamentary process as required under Article 118 (b) of the Constitution of Kenya 2010.*
  - b) *Being passed without discernable reasons and objects being provided in contravention to Standing Order 117 and Article 124 (1) of the Constitution of Kenya, 2010.*
- iii. *Whether Section 29 of the Competition Act No. 12 of 2010 is unconstitutional and invalid for:*
- a) *Unjustifiably being in violation with the Petitioner's freedom of association as safeguarded under Article 36 of the Constitution of Kenya 2010.*
  - b) *Unjustifiably being in violation with consumer rights as safeguarded under Article 46 of the Constitution of Kenya 2010.*

36. On the first issue Counsel submits that this Court has jurisdiction to hear this matter owing to Rule 4 (1) and 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. He notes that a constitutional issue is,

one which confronts the various protections laid out in the Constitution as held in the case of RC v KKR [2021] eKLR. In view of this it is submitted that this Court is charged with the mandate to determine the constitutionality of the impugned provisions as seen in the cases of Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR, Re Kadhis' Court: The Very Right Rev Dr. Tesse Kamau & Others vs The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004.

37. Turning to the second issue Counsel on the first sub– issue submits that in determining the constitutionality of a provision the Court must determine whether the legislative process was flawed since a flawed process would render the substance of the impugned legislation or amendment invalid as opined in the case of Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR. It is submitted that one of the processes as set out in Article 10(2) and 118 of the Constitution is public participation. To support the public participation's role the cases of Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR and the Institute of Social Accountability (Supra) were cited.

38. Furthermore, he submits that in addition to Article 118 of the Constitution, Committal of Bills to Committees and public participation is provided for in Standing Order 127 of the National Assembly Standing Orders. This section provides a clear and precise sequence with regards to the procedure of carrying out public participation. Article 124 (1) of the Constitution elucidates the role of the Standing Orders as the guiding rules of procedure for the National Assembly.
39. Counsel in view of this submits that the threshold of what constitutes public participation is not cast in stone and so requires the Courts to interrogate the individual scenarios and evidence brought before them and determine whether indeed the Legislature afforded the public a reasonable opportunity to participate. This was appreciated in the case of **Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others [2013] eKLR**. Additional reliance was placed on the cases of **British America Tobacco Kenya Limited vs. Cabinet Secretary for the Ministry of Health and 2 Others - Petition Number 143 of 2015** and **Law Society of Kenya v Attorney General & another [2016] eKLR**.

40. According to Counsel the 1<sup>st</sup> respondent neither attempted to afford the petitioner and the public a meaningful opportunity to participate nor made any efforts to ensure that the petitioner and the public had the ability to take advantage of the opportunity for public participation.
41. Counsel on the second sub-issue submits that Standing Order 117 of the National Assembly Standing Orders provides that every Bill shall be accompanied by a memorandum containing a statement of objects and reasons for the Bill together with a statement of delegation of legislative powers and limitation of fundamental rights and freedoms. He notes that whereas the Competition (Amendment) Bill was accompanied by a Memorandum of objects and reasons, the memorandum only stated that the Act was being amended for the limited purpose of facilitating investigations with a view of mitigating abuse of bargaining or buyer power which adversely affects the economy, and empower the 3<sup>rd</sup> respondent to investigate and take action against such conduct and not the control of professional bodies.
42. To support this argument Counsel relied on the case of **Law Society of Kenya** (supra) where the Court noted that the scope

of the published Bill as stated in its Memorandum and objects was a different subject, contrary, to Standing Order 133. According to him whereas the Competition (Amendment) Bill was accompanied by a Memorandum of objects and reasons, the memorandum only stated that the Act was being amended for the limited purpose stated above. Counsel as a result submits that the 1<sup>st</sup> respondent did not properly set out the object and purpose of the amendment to Section 29 of the Act.

43. Moving on to the third issue, Counsel on the first sub-issue submits that Section 29(8) which introduces the Amendment to the Competition Act attempts to restrict the petitioner's right to freely and effectively carry out its functions as an association in accordance with the LSK Act and Advocates Act. Relying on the case of **Eunice Nganga & another v Law Society of Kenya & another [2019] eKLR**, he notes that the legal profession is unique compared to other professions and by parity of reasoning applies to other professional bodies. For that reason restraint should be exercised in any attempts to regulate such bodies as done by Section 29 of the Act.

44. Accordingly it is submitted that the purpose of a provision or effect thereof, may lead to unconstitutionality of the statute or provision as held in the case of Robert Alai v The Hon Attorney General & another [2017] eKLR. Further reliance was placed on the case of Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR. It is therefore Counsel's submission that the penal sanction is not proportionate nor justified and offends the sacred provisions of the Constitution.
45. On the second sub-issue, Counsel submits that consumers of legal services are entitled to consumer rights as protected under Article 46 of the Constitution and so similarly entitled to services of reasonable quality as seen in the case of Okenyo Omwansa George & another V Attorney General & 2 others [2012] eKLR.
46. He submits that the petitioner is the legal body mandated with the responsibility of coming up with the necessary regulations that shall ensure professional conduct by its members and therefore protecting the interests of consumers of legal services. In view of this, Section 29(8) attempts to introduce a new layer of regulation of the profession hence unjustifiably burdening the ability of the

petitioner to ensure that consumers benefit from efficient professional services from its members.

47. Counsel finally submits that Section 29 of the Competition Act No. 12 of 2010 is unconstitutional and invalid, as it not only, limits without, any basis the petitioner's rights and negatively impacts on consumer rights as safeguarded under Article 46 of the Constitution.

### **The 1<sup>st</sup> Respondent's submissions**

48. The 1<sup>st</sup> respondent through its Counsel Sophie Otieno filed written submissions dated 2<sup>nd</sup> March 2021. She outlines the issues for determination as follows:
- i. *Whether this Honourable court is vested jurisdiction over the matter specifically:*
    - a) *Whether this Honourable Court is bound by the doctrine of judicial restraint.*
    - b) *Whether Parliamentary Powers and Privileges bar the Jurisdiction of court.*
  - ii. *Whether the impugned amendment is unconstitutional;*
    - a) *Whether there was public participation.*

b) *Whether the amendment infringes on any rights and freedoms guaranteed by the constitution.*

49. Counsel submits that Articles 94, 95 and 109 of the Constitution make it clear that Parliament has the legislative mandate and exercises it through Bills passed by Parliament and assented to by the President. Additionally it is submitted that Article 117 of the Constitution reinforces the legislative power through the award of powers, privileges and immunities.
50. She further submits that the justification for the impugned amendment was to facilitate investigations with a view to mitigating the abuse of bargaining or buying power which adversely affects the economy. The amendment empowers the 3<sup>rd</sup> respondent to investigate and take action against such conduct. In essence the intention behind the amendment was in the greater public interest to bring discipline and regulation to bargaining powers and curb unscrupulous dealings.
51. To support this view Counsel relied on the case of **Hambardda Dawakhana v Union of India Air (1960) AIR 554** where the justification of public interest vis-a-vis constitutionality of a statute was appreciated as the legislature understands and appreciates



the needs of the people such that the laws it enacts are directed to problems which are made manifest by experience. The said laws are considered to be reasonable for the purposes for which they were enacted.

52. On the first issue, Counsel submits that this honourable court ought to restrain itself from interfering with the business of the 1<sup>st</sup> respondent based on the doctrine of separation of powers. That the petitioner has so far not shown that there was a breach of the Constitution or any other law, nor that the relevant committee failed to adhere to the rules of natural justice and procedure. It has also not been shown that the process leading up to the enactment of the Competition (Amendment) Bill, 2019 or the alleged impugned provision is improper and/ or illegal.
53. In support of the issue of judicial restraint Counsel relied on the Supreme Court case of Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR where it was noted that the integrity of court orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express

mandate allocation under the Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. To that end Counsel submits that the jurisdiction of this Court can only be invoked in the event of breach of the Constitution. She submits that there has been no evidence produced by the petitioner of such violation of the Constitution and or the rights and freedoms enshrined therein.

54. On the second issue she submits on the first sub-issue that the public was involved in the process of enactment of the said impugned amendment. This was through call for, and submissions of memoranda from stakeholders as shown in the annexed exhibits in the replying affidavit, and copies of the call for submission of memoranda, (on the Competition (Amendment) Bill; National Assembly Bill No. 49 of 2019) appearing in the Daily Nation Newspaper of 26<sup>th</sup> July, 2019). In the end the amendment took into account these views and submissions.
55. It is argued that the allegation of lack of public participation simply because the petitioner failed to tender its views cannot suffice in the test of public participation. To support this view Counsel relied on the case of Law Society of Kenya vs. The

**Attorney General and 10 Others (Petition No. 3 of 2016)**. Further reliance was placed on the case of **Robert Gakuru & Others Vs The Governor Kiambu County & 3 Others (2013)**.

56. On the second sub –issue, Counsel submits that statutes enjoy presumption of constitutionality as held in the case of **Ndyanabo v Attorney General of Tanzania [2001] EA 495** and the burden of proof lies with the person alleging unconstitutionality and illegality of the law or part of its provisions. Additionally relying on the case of **Olum and another v Attorney General [2002] 2 EA** she notes that only when the purpose or the effect of a statute's implementation infringes a constitutional right or freedom can the impugned statute or section be declared unconstitutional. Its Counsel's, conclusion therefore that only upon discharge of the said burden can the amendment be declared unconstitutional.

#### **The 2<sup>nd</sup> Respondent's submissions**

57. State Counsel Gracie Mutindi on behalf of the 2<sup>nd</sup> respondent filed written submissions and a list of authorities dated 26<sup>th</sup> April 2022.
58. On the alleged unconstitutionality of Section 29 of the Competition Act, 2010 she submits that whereas public

participation is a core element of governance, there is no specific style in which public participation is to be modeled. That the obligation to facilitate public involvement maybe fulfilled in different ways and is open to innovation. It is indisputable that the State has a considerable measure of discretion in developing a programme for public participation that is coherent with the nature of the subject matter. To support this notion Counsel relied on the case of Doctors for Life International v Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11. Additional reliance was placed on the cases of Minister of Health and Another vs New Click (Pty) Limited and Others CCT 59/2004, [2005] ZACC 14, Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others [2013] eKLR, Consumer Federation of Kenya (COFEK) vs Attorney General & Others – Nairobi Petition No. 11 of 2012 (Unreported), Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others [20016] ZAACC22, and Richard Dickson Ogendo & 2 Others v Attorney General & 5 Others [2014] eKLR.

59. Counsel submits that it is clearly demonstrated in the 1<sup>st</sup> respondent's replying affidavit (annextures MS-1 to MS-5) that public participation was undertaken as follows:
- i. *Publication of the Competition (Amendment) Bill, 2019 in the Kenya Gazette on 1st July, 2019.*
  - ii. *Inviting the public through newspaper advertisements on 26th July, 2019 to submit their views on the Competition (Amendment) Bill, 2019;*
  - iii. *Receipt of memoranda/views from the public on the Bill;*
  - iv. *Consideration by the Committee of the views received from the public and stakeholders on the Bill;*
  - v. *Tabling of the Committee report to the National Assembly and adoption of the same with the requisite amendments.*
60. In view of this Counsel submits that the petitioner and the interested parties did not submit their views or comment on the Bill despite having the opportunity to partake in the legislative process as members of the public. As such it is argued that indolence is a clear demonstration that their challenge of the impugned law is simply because the impugned law does not suit their economic interests. This cannot be visited on the 1<sup>st</sup>

respondent who strictly and effectively complied with all the requisite legislative making procedures.

61. Counsel on the issue of absence of discernible reasons and objects of the Bill submits that the allegation that the impugned law is invalid for violating Article 124(1) of the Constitution and Order 117 of the National Assembly Standing Orders is a flawed interpretation of both the Constitution and law. The reason being that Article 109(1) states that Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President. The constitution makes no reference to publication of memorandum of objects and reasons of the Bill to the public, which are provided for under the Standing Orders as a guide into the contents of the Bill for members of Parliament. Secondly, the invitation to the public (MS-2) clearly indicates that comments were to be made on the Bill, and not on the memorandum.
62. Thirdly, it is submitted that the petitioner and the interested parties have not stated any particular provision of the law that mandates the 1st respondent to publish the memorandum of objects and reasons of a Bill to the public for comments so as to hold the 1st

respondent in violation. Fourthly, the prayer by the petitioner and the Interested parties to invalidate the impugned law simply because the memorandum of objects and reasons were not provided to the public is an affront to the sacred doctrine of separation of powers and parliamentary privileges entrenched in Article 117(2) and also fortified in Section 12 of the National Assembly (Privileges and Immunities) Act, 2012 and affirmed by the Supreme Court in the case of **Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR.**

63. Moving on to the third issue, on the alleged violation of freedom of association Counsel submits that the petitioner and the interested parties on this issue have failed to demonstrate how the impugned law and the statutory mandate of the 3<sup>rd</sup> respondent violated their right to association as provided under Article 36 of the Constitution. Moreover it is noted that there's absolutely no causal link between the functions of the 3<sup>rd</sup> respondent and the petitioner and the interested parties' right to association. There's also no evidence tendered to demonstrate how the impugned law has prohibited the petitioner and the interested parties from

enjoying their right of association or from carrying out its functions as an association.

64. On the alleged violation of consumer rights Counsel submits that the object of the Competition Act, 2010 under Section 3 is among others, to promote and protect effective competition in markets and prevent unfair and misleading market conduct throughout Kenya. As such Counsel argues that the petitioner and the interested parties cannot therefore claim self-regulation so as to escape the 3<sup>rd</sup> respondent's regulatory authority over the services their members provide to the public. That in essence, the provisions of Section 4 and 44 of the Law Society of Kenya Act, 2014 and section 13 of the Accountants Act, 2008 do not preclude the petitioner and the Interested parties from the regulation of the 3<sup>rd</sup> respondent in as far as its mandate as the statutory regulator of commercial services to the public and protector of consumer interests is concerned.
65. Furthermore, it is submitted that the rights under Article 36 and 46 are not absolute rights but subject to limitation in accordance with the provisions of Article 24 of the Constitution. In view of this Counsel submits that the petition is not demonstrative of how the



impugned law violates the petitioner's right of association and or consumer rights as alleged.

66. Counsel on the guiding principles of constitutional and statutory Interpretation urged the Court to be guided by the principles laid down in the cases of Katiba Institute & 3 others v Attorney General & 2 others [2018] eKLR, Hamdarddawa Khana vs Union of India Air 1960(554), Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others [2012] eKLR, Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR, Re Hyundai Motor distributors (PTY) and others v Social No and others [2000] ZACC 12 2001(1) SA 545 and Apollo Mboya v Attorney General & 2 others [2018] eKLR.
67. She finally submits that in light of its submissions the petitioner and interested parties case is founded on general assertions and have failed to establish their case.

#### **The 3<sup>rd</sup> Respondent's submissions**

68. The 3<sup>rd</sup> respondent through its Counsel Ameyna Omari filed its written submissions dated 13<sup>th</sup> October 2021 and cited the issues for determination to be as follows:

- i. *Whether the petition meets the threshold of a constitutional petition;*
- ii. *Whether Section 29 of the Competition Act is unconstitutional and invalid;*
- iii. *Whether Section 29 limits the petitioner's freedom of association as provided for under Article 36 of the Constitution and whether such limitation if it exists is within the boundaries set under Article 24 of the Constitution; and*
- iv. *Whether Section 29 offends the provisions of Article 46 of the Constitution.*

69. Counsel on the first issue submits that the petition does not meet the basic threshold for constitutional petitions as set out in the case of **Anarita Karimi Njeru vs. Republic (No.1) (1978) KLR 154** as affirmed by the Court of Appeal in the case of **Mumo Matemo v. Trusted Society for Human Rights Alliance & 5 Others NRB CA Civil Appeal 290 of 2012 (2013) eKLR**. Further that it is trite law that a person claiming violation of constitutional provisions ought to specifically state how the provisions were violated as observed in the cases of **Samuel Ndiba Kihara -vs- Attorney General (2019)**

**eKLR and Judicial Service Commission –vs- Gladys Boss Shollei & Another (2014) eKLR.**

70. Counsel submits that despite the petitioner citing various provisions purported to be violated, there is a disconnect between the said provisions and how they had been violated. Given the foregoing, it is submitted that the petitioner's invocation of Article 24, 36 and 46 of the Constitution is misplaced as none of the Articles correlate with Section 29 of the Competition Act since the section is not premised on the right of association and further does not seek to restrict the right of association.
71. On the second issue Counsel submits that the matter being a constitutional challenge to statutory provisions, this Court must be guided by the Article 259 of the Constitution which was reiterated in **the Matter of the Interim Independent Electoral and Boundaries Commission, Application No. 2 of 2011**. As such it is submitted that this Court in making its determination ought to ascertain the subject matter of the statute, the area it is to operate, as well as determine the purpose and intent of the statute or statutory provision as seen in the case of **Jack Mukhongo Munialo & 12**

**others v Attorney General & 2 others [2017] eKLR**. Additional reliance on statute interpretation was placed on the cases of **Hambardda Dawakhana (supra), Kenya Human Rights Commission v Attorney General & another [2018] eKLR, Olum and another v Attorney General of Uganda [2002] 2 EA 508** and **Jacob Nyandega Osoro v Chief Justice of Kenya & another [2018] eKLR**.

72. While bearing these principles in mind Counsel submits that it is necessary to set out the impugned provision and juxtapose it against the Articles of the Constitution said to be offended and determine whether it is in accord with and conforms to the Articles of the Constitution. He proceeded to submit that the 3<sup>rd</sup> respondent is a statutory corporation established under Section 7 of the Competition Act and mandated to promote and safeguard competition in the national economy and protect consumers from unfair and misleading market conduct.
73. Accordingly the 3<sup>rd</sup> respondent under Part III of the Competition Act and Section 21 of the Act prohibits all agreements between undertakings, decisions by undertakings or concerted practices which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya

or a part of Kenya unless they are exempted in accordance with the provisions of Section D of Part III of the Competition Act. Section 29 of the Competition Act under Section D of Part III of the Competition Act provides for a specific exemption with respect to professional rules. In essence therefore, the Competition Act is not interested in all professional rules but only professional rules that have a restriction prohibited by the Competition Act. Further, the rules can be exempted if the criteria outlined in Section 29 (2) of the Act is met.

74. From the foregoing Counsel submits that Section 29 of the Competition Act is not unconstitutional or invalid because its purpose does not infringe any right guaranteed by the Constitution and further its implementation does not also infringe any constitutional right. On the contrary, the section enhances consumers rights under Article 46 of the Constitution.
75. Turning to the third issue Counsel submits that Part III of the Competition Act does not in any way restrict the freedom of association under Article 36 of the Constitution. This is because Section 29 of the Competition Act is not premised on the right of association as provided under Article 36 of the Constitution and

hence it is misplaced for the petitioner to state that their right under Article 36 has been limited by the 3<sup>rd</sup> respondent. Nevertheless it is argued that the petitioner has not demonstrated how Section 29 of the Competition Act has restricted its right to carry out its functions.

76. To support this issue Counsel cited the case of **Harrikissoon vs Attorney General of Trinidad and Tobago [1980] AC 265** where it was held that the notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by the Constitution is fallacious. The right to apply to the High Court for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.
77. On the last issue Counsel submits that Section 29 of the Competition Act does not interfere with the consumers right to enjoy goods and service of reasonable quality under Article 46 of

the Constitution as alleged. This is because Section 29 of the Competition Act supports consumers rights under Article 46 of the Constitution as the regulation of professional services is geared towards increasing efficiency in the legal services and promoting of innovation as professionals compete to provide a wide range of quality services in an effort to attract consumers. Moreover Counsel submits that the essence of the regulation of professional services is to also avail the consumer with an opportunity to make a choice on the professional services available and the freedom to negotiate for those services.

78. Counsel in view of this concludes by submitting that the petition is geared toward excluding the petitioner from the requirements of fair competition as provided under Article 46 of the Constitution.

#### **The Interested Parties submissions**

##### **The 1<sup>st</sup> Interested Party's submissions**

79. The 1<sup>st</sup> interested party did not file any written submissions in this matter.

##### **The 2<sup>nd</sup> Interested Party's submissions**

80. The firm of Ogembo & Associates Advocates on behalf of the 2<sup>nd</sup> interested party filed written submissions and a list of authorities

dated 24<sup>th</sup> September 2021. Counsel commences the discussion by submitting that the impugned provision is unconstitutional as was enacted without the participation and involvement of the various stakeholders whose powers are limited by the amendment. Furthermore, Counsel submits that Section 29(8) of the Competition Act is unconstitutional for purporting to limit the members of the 2<sup>nd</sup> interested party's consumer right to quality services and freedom of association as enshrined under Articles 36 and 46 of the Constitution.

81. On the issue of public participation he submits that neither the 2<sup>nd</sup> interested party nor any other professional body was given an opportunity to participate in the enactment of the Competition (Amendment) Act, 2019. Counsel argues that public participation ought to be real and not illusory, and not a mere formality to fulfill the constitutional mandates. As such the National Assembly in enacting legislation ought to ensure that the spirit of public participation is attained both quantitatively and qualitatively. According to Counsel, in the present case neither has been shown to have been effected. To support this view he Counsel cited the cases of **Kenya Human Rights Commission v Attorney**



**General & another [2018] eKLR and Law Society of Kenya v Attorney General & 2 others [2019] eKLR.**

82. Turning to the issue of the constitutionality of Section 29 of the Competition Act, Counsel submits that Section 29 of the Competition Act purports to grant the 3<sup>rd</sup> respondent autonomy to regulate professional bodies and dictate what terms are to be incorporated in their rules, regulations and policies under the false pretense of regulating the abuse of bargaining power. It is argued that the net effect of the amendment is that it curtails the enjoyment of constitutional rights under Article 46 and 36.
83. Counsel submits that parliament enacted statutes to create bodies to regulate and manage these professions. In view of this the rights and powers granted by the statute cannot be arbitrarily limited through amendments. In support, reliance was placed on the case of **Eunice Ng'ang'a Vs Law Society of Kenya (2019) eKLR** where it was noted that self-regulation is the best way of ensuring a robust and effective Advocates' body, and this obtains in other countries of the world where the legal professions regulate themselves.

84. On the other hand, he submits that the amendment further limits the 2<sup>nd</sup> interested party's constitutional right to freedom of association as set out under Article 36 by unjustifiably limiting its right to make rules subject to the Accountants Act and by requiring the same to be subjected to review by the 3<sup>rd</sup> respondent. It is argued that this is contrary to Article 24 of the Constitution. Citing the opine in the case of **Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR** Counsel submits that a key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought.
85. In light of this, Counsel submits that Section 29 of the Competition Act is capable of being exploited and misconstrued to surpass the provisions of Section 13 (2) of the Accountants Act and to overshadow the statutory powers of the 2<sup>nd</sup> interested party. As such Counsel urges this Court to find that Section 29 of the Competition Act and the Competition (Amendment) Act is unconstitutional.

### **Analysis and Determination**

86. I have considered the pleadings, responses, submissions, cited cases and the law and in my view the issues for determination are:

*a) Whether this Court has jurisdiction to hear this petition;*

*b) Whether Section 29(8) of the Competition Act No.12 of 2010 was subjected to public participation; and*

*c) Whether Section 29(8) of the Competition Act No.12 of 2010 is constitutional.*

**a) Whether this Court has jurisdiction to hear this Petition**

87. The jurisdiction of this Court was challenged by the 1<sup>st</sup> respondent in view of the doctrine of separation of powers owing to the principle of judicial restraint and Parliamentary Powers and Privileges. According to Counsel this Court can only interfere with the 1<sup>st</sup> respondent's mandate where there is breach of the Constitution. Other than that, it was argued that the Court ought to restrain itself from interfering as guided by the Supreme Court in the Justus Kariuki Mate case (supra).

88. The Supreme Court addressing its mind on the issue of jurisdiction in the case of Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & others (2012) eKLR opined as follows:

*"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."*

89. This Court's jurisdiction to entertain constitutional matters is spelt out under Article 165(3) (d) of the Constitution as follows:

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

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

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

90. It is clear therefore that both this Court and the 1<sup>st</sup> respondent have separate executive mandates as distinct arms of government. The question therefore is whether the questions raised are estopped by the doctrine of separation of powers. To answer this I find guidance in the South Africa's Constitutional Court case of Doctors for Life International(supra) which addressed the issue of separation of powers as follows:

***"The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an***

*abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'.. ..*

*But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'. Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning*

*to the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled'. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution."*

91. It is clearly evident that while the doctrine of separation of powers governs the operations of each arm, the Constitution under Article 165 bestows specific authority on the High Court with regard to the interpretation of the Constitution being its guardian. I am certain therefore that this Court has the jurisdiction to interrogate the constitutionality of the statutes and acts done in view of those legislations. The petitioner in this matter seeks a determination on the constitutionality of the impugned Section 29 of the Competition Act owing to the legislative process that led up to its enactment, a question that directly falls within the jurisdiction of this Court. I am accordingly certain that the nature of the petition invokes the jurisdiction of this court.
92. Be it as it may, it is vital to note that this interrogation does not extend to the manner in which the 1<sup>st</sup> respondent made its

decisions, this would amount to interference with its mandate in effect invoking the doctrine of separation of powers.

**b) Whether Section 29(8) of the Competition Act No.12 of 2010 was subjected to public participation**

93. The petitioner and interested parties have argued that prior to the impugned amendment the 1<sup>st</sup> respondent failed to procure their views as stakeholders as required and mandated by the public participation principle under Article 10(2) and 118 of the Constitution. The 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other hand assert that public participation was conducted as evidenced by the 1<sup>st</sup> respondent's account and evidence in its replying affidavit.
94. One of the hallmarks of the Constitution of Kenya is the involvement of the public in its affairs so much so that it forms one of the national values and principles as envisaged in Article 10 of the Constitution. The government is obligated under Article 118 of the Constitution to facilitate public participation and involvement in the legislative and other businesses of the national assembly and its committees. It is reasonable to conclude that public participation is a key element in the legislative functions of the government at all levels.



95. The parties ably cited numerous authorities on the essence of public participation which this Court stands guided by. In addition the Supreme Court in the case of British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR speaking to the principle of public participation and giving guidance on its determination held as follows:

*[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”.*

96. The Court went on to issue the following guidelines on this principle as follows:

*“[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. An examination of the evidence presented before this Court reveals that the 1<sup>st</sup> respondent invited the public and the relevant stakeholders to submit memoranda and views for the purposes of public participation through an advertisement in the Daily Nation dated 26<sup>th</sup> July 2019 found at Paragraph 17 of the 1<sup>st</sup> respondent's replying affidavit dated 17<sup>th</sup> September 2020. Further it is noted that evidence of the public participation exercise was contained in the report of the National Assembly Departmental Committee on Finance and Planning dated 13<sup>th</sup> November 2019 as noted at paragraph 24 of the 1<sup>st</sup> respondent's replying affidavit.
98. My observation is that the 1<sup>st</sup> respondent's advertisement provided clear information regarding the consideration of the Competition (Amendment) Bill (National Assembly Bill No.49 of 2019). Members of the public were given information on how and where to submit their views contrary to the petitioner and interested parties assertion that they were not invited to issue their views on the Bill. It is unfortunate that bodies like the Petitioner, 1<sup>st</sup> & 2<sup>nd</sup> Interested Parties did not react to the advert and waited to be invited to give their views. It is not clear as to who was to invite them when the advert was very clear on what was to be done.

99. It is my humble finding that the 1<sup>st</sup> respondent did not relinquish its constitutional mandate in the enactment of the Competition (Amendment) Bill, 2019 and its responsibility to submit the Bill to the public for its participation as asserted by the petitioner and interested parties. I find that the National Assembly acted within its constitutional mandate as envisaged in the Constitution and thus cannot be faulted. It is my humble finding accordingly that the public participation principle as envisaged under Article 10(2) and 118 of the Constitution was satisfied in the circumstances of this case.

**c) Whether Section 29A and 29(8) of the Competition Act No.12 of 2010 is constitutional**

100. It is the petitioner's and interested parties central argument that the amendment to Section 29 of the Competition Act as enacted by the Competition (Amendment) Act, 2019 violate their fundamental rights and freedoms as envisaged under Articles Article 10(2), 24, 36, 46, 118 and 124(1) of the Constitution. This is because according to the parties the amendment seeks to restrict professional associations' right to freely, independently

and effectively carry out their mandate in accordance with their enabling statutes.

101. The respondents on the other hand opposed this explanation by the said parties since according to them the impugned provision specifically deals with the parties' professional rules that have a restriction prohibited by the Competition Act.
102. The genesis of the present challenge stems from the Competition (Amendment) Act, 2019. The relevant amendment is captured under Section 6 of the Act as follows:

*The principal Act is amended in section 29 by inserting the following new subsection immediately after subsection (7)—*

*(8) Any professional association —*

- (a) whose rules contain a restriction that has the effect of preventing, distorting or lessening competition in a market in Kenya and which fails to apply for an exemption as required by sub-section (1) and (2); or*
- (b) which having applied for exemption under sub-section (1) fails to comply with the Authority's decision rejecting its application, commits an offence, and any official thereof or any person who*

*issues guidelines or rules in contravention of that provision shall be liable, upon conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings, or both.*

103. This essentially forms the basis of Section 29(8) of the Competition Act No.12 of 2010 which reiterates the contents of Section 6 of the Amendment Act verbatim.
104. I now turn over to the issue of the constitutionality of the impugned Sections. Answering this question requires this court to bear in mind the relevant guiding principles in the interpretation of an Act of Parliament in light of the Constitution. The parties in like manner cited a plethora of cases that have addressed these principles. To begin with, at the forefront, the spirit of the Constitution must preside and permeate the process of judicial interpretation which is this Court's mandate as spelt out under Article 259 of the Constitution.
105. In interpreting a Statute the first principle is the general presumption that Acts of Parliament are enacted in conformity with the Constitution as affirmed by the Court of Appeal of



Tanzania in the Ndyanabo vs. Attorney General case (supra) in the following words:

*"Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative"*

106. Secondly, this Court is required to examine the purpose and effect of the impugned Statute as stated in the case of Geoffrey Andare v Attorney General & 2 others [2016] eKLR. The Court at paragraph 66 held as follows:

*"It has also been held that in determining the constitutionality of a statute, a court must be guided by the object and purpose of the impugned statute, which object and purpose can be discerned from the legislation itself. The Supreme Court of Canada in R vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 enunciated this principle as follows:*

*"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to*

*achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."*

107. Additionally, this Court is beholden to interrogate the intention articulated while drafting the Statute. This was confirmed by the Court of Appeal in the case of County Government of Nyeri & another v Cecilia Wangechi Ndungu(supra) where it stated as follows:

*"The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context..."*

108. Generally the preamble of an Act of Parliament reveals the drafters' chief intent for the Statute as a starting point. In this case the Competition Act provides in its preamble as follows:

*'An Act of Parliament to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct; to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal, and for connected purposes.'*

109. A reading of the preamble divulges that the purpose of the Act is simply to protect consumers from unfair and misleading market conduct. It is not in dispute that this is one of the fundamental rights and freedoms envisaged under Article 46 of the Constitution. As a consequence the Parliament under Article 46(2) is charged with the duty to enact consumer protection legislation. The Competition Act therefore was enacted to ensure this right was upheld to give effect to the contents of the Article.
110. It is clear that this Act provides a broad framework within which consumers can be protected. One of the comprehensive classes of protection under the Act is found under Part III which provides for Restrictive Trade Practices. These practices are defined under Section 21(1) of the Act as follows:

*Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part.*

111. One of the practice which is the subject of this case is found under Section 29 of the Act. This Section provides as follows:

*Exemption in respect of professional rules*

- (1) *A professional association whose rules contain a restriction that has the effect of preventing, distorting or lessening competition in a market shall apply in writing or in the prescribed manner to the Authority for an exemption in terms of subsection (2).*
- (2) *The Authority may exempt all or part of the rules of a professional association from the provisions of Section A of this Part for a specified period if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of preventing or substantially*

*lessening competition in a market is reasonably required to maintain—*

*(a) professional standards; or*

*(b) the ordinary function of the profession.*

*(3) Upon receiving an application in terms of subsection (1), the Authority shall—*

*(a) publish a notice of the application in the Gazette;*

*(b) allow interested parties thirty days from the date of that notice to make representations concerning the application; and*

*(c) consult the Government agency or Ministry responsible for the administration of any law governing the profession concerning the application.*

*(4) After considering the application and any submission or other information received in relation to the application, the Authority shall—*

*(a) either grant an exemption or reject the application by issuing a notice in writing to the applicant;*

*(b) give written reasons for its decision if it rejects the application; and*

- (c) *publish a notice of that decision in the Gazette.*
- (5) *If the Authority considers that any rules, either wholly or any part thereof, should no longer be exempt under this section, the Authority may revoke the exemption in respect of such rules or the relevant part of the rules, at any time after it has—*
- (a) *given notice in the Gazette of the proposed revocation;*
  - (b) *allowed interested parties thirty days from the date of that notice to make representations concerning the exemption; and*
  - (c) *consulted the responsible Minister referred to in subsection (3)(c).*
- (6) *The exemption of a rule or the revocation of an exemption shall take effect from such date as may be specified by the Authority.*
- (7) *For the purposes of this section, "professional association" means the controlling body established or registered under any law in respect of recognized professions, but does not include trade associations and industry lobby institutions or bodies whether incorporated or not.*

(8) Any professional association—

- (a) whose rules contain a restriction that has the effect of preventing, distorting or lessening competition in a market in Kenya and which fails to apply for an exemption as required by sub-section (1) and (2); or
- (b) which having applied for exemption under sub-section (1) fails to comply with the Authority's decision rejecting its application, commits an offence, and any official thereof or any person who issues guidelines or rules in contravention of that provision shall be liable, upon conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings, or both.

112. The apparent interpretation of the above provision is that Parliament purposefully intended that restrictive trade practices be regulated within the context of professional associations such as the petitioner and the interested parties. Furthermore, it is discernable from a reading of the impugned Section that the Act in no way dictates or determines how the said associations are to carry out their mandate or business in light of their enabling

legislations. The Act expressly speaks to restrictive trade practices that it wishes to regulate in the context of consumer protection in view of professional associations.

113. In the circumstances of this case I find the case of **Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi acting for or on behalf of Association of Kenya Insurers & 5 others vs. Commissioner of Domestic Taxes & 2 others [2014] eKLR** pertinent and valuable. The 2 Judge bench pronounced itself as follows:

***“32. The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court license to declare it unconstitutional.”***

114. I associate myself with the cited authority and Article 259 of the Constitution which enjoins this Court to interpret the Constitution in a manner that promotes its purpose and principles that advances the rule of law and human rights and fundamental



freedoms in the Bill of Rights, and permits the development of the law which contributes to good governance.

115. The petitioner and interested parties interpretation of the impugned Section, cannot stand. I have come to that conclusion because nothing in the Section suggests that the 3<sup>rd</sup> respondent usurps their mandate as stipulated in their Statutes hence violating their constitutional rights. If anything the restriction as seen from the Act has been in operation since 2011 save for the penalty clause that is introduced by the amendment.
116. Moreover, the petitioner and interested parties despite putting up a spirited fight in respect of the impugned law failed to demonstrate by submission of facts or evidence how the impugned provision or the 3<sup>rd</sup> respondent violated their rights. Undoubtedly the standard of proof places the onus of proof on the petitioner. The petitioner was required to prove the elements that constitute the alleged violation of the said rights. This included sufficient facts to justify a finding that the said rights were indeed violated.
117. What is apparent from the material placed before this court is that there is nothing to show that the amendment of Section 29 of the

Competition Act curtailed the parties right of association or inhibited the members of the public from accessing quality services from the professional associations. The inevitable conclusion that I come to in light of this analysis is that Section 29(8) of the Competition Act No.12 of 2010 is constitutional.

118. From the analysis and reasons set out above I have come to the conclusion that the petition dated 25<sup>th</sup> June 2020 lacks merit and is hereby dismissed with costs.

**Delivered virtually signed and dated this 21<sup>st</sup> day of July 2022 in open court at Milimani Nairobi.**



**H. I. Ong'udi**

**Judge of the High Court**