Kenya Medical Association v Kenya Revenue Authority & 2 others (Petition E163 of 2024) [2024] KEHC 11301 (KLR) (Constitutional and Human Rights) (27 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11301 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E163 OF 2024

LN MUGAMBI, J

SEPTEMBER 27, 2024

BETWEEN

KENYA MEDICAL ASSOCIATION ..... PETITIONER

AND

KENYA REVENUE AUTHORITY ..... 1ST RESPONDENT

CABINET SECRETARY FOR NATIONAL TREASURY AND ECONOMIC PLANNING ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING

Introduction

1. By way of a Notice of Motion Application dated 22nd March 2024, the Petitioner seeks orders that:

    i. Spent;

    ii. Pending inter-partes hearing of this Application, this Court be pleased to issue a conservatory order restraining and/or prohibiting the 1st Respondent from proceeding with the implementation and/or enforcement of the Tax Procedures (Electronic Tax Invoice) Regulations, 2023.

    iii. Pending the hearing and determination of the Petition, this Court be pleased to issue a conservatory order restraining and/or prohibiting the 1st Respondent from proceeding with the implementation and/or enforcement of the Tax Procedures (Electronic Tax Invoice) Regulations, 2023.

iv. This Court be pleased to issue such further or other orders that it may deem just and fair in the circumstances of this case.

v. The costs of this Application be provided for.

2. The Notice of Motion is based on the grounds set out in the Application and supported by the affidavit of the Petitioner's Executive Officer's, Brenda Obondo, sworn on even date and a further affidavit dated 22nd May 2024.

Petitioners' Case

3. The Petitioner avers that in 2005, the 1st Respondent introduced the Electronic Tax Register (ETR) for purposes of collection of Value Added Tax (VAT). Later on, the Value Added Tax (Electronic Tax Invoice) Regulations, 2020 were published on 25th September 2020 vide *Legal Notice No.189 of 2020*. This Regulation introduced a web-based system called Electronic Tax Invoice Management System (eTIMS) which requires all suppliers of goods and services to integrate their invoicing system with the 1st Respondent's eTIMS to aid in sharing of all tax related information. It is asserted however that this Regulation was introduced without a supporting legislation.

4. She depones however that the Finance Act, 2023 proposed amendments to the *Tax Procedures Act* by inserting Section 23A on electronic tax invoices system. This essentially gave the 1st Respondent legislative mandate to implement eTIMS. In effect, the 1st Respondent vide a public notice dated 7th November 2023, informed the public that all taxpayers including those not registered for VAT would be required to register on eTIMS to ensure that all their invoices are compliant with this system. The period for compliance was up to 31st March 2024.

5. The Petitioner states that on 29th December 2023 vide *Legal Notice No. 223 of 2023*, the 2nd Respondent went on to publish the Value Added Tax (Electronic Tax Invoice) Revocation Regulations 2023 which revoked the 2020 Regulations. On the same day, the 2nd Respondent published the *Tax Procedures Act* (Electronic Tax Invoice) Regulations, 2023 vide *Legal Notice No 225 of 2023*. This Regulations re-introduced the electronic tax invoicing and receipting system.

6. The Petitioner takes issue with the *Tax Procedures Act* (Electronic Tax Invoice) Regulations, 2023 as posing serious challenges to a huge section of suppliers of goods and services, particularly those who supply health and health -related services. In particular, Regulation 12 makes it an offence punishable by imprisonment for a supplier of goods and/or services to supply goods or services without issuing an invoice through the eTIMS thus making it practically impossible to render any service, including medical services without issuing an eTIMS invoice.

7. Equally, Regulation 7 prescribes the information which must be included in the eTIMS invoice, which includes the Personal Identification Number (PIN), the nature of the goods or services supplied and the quantity of goods or services supplied. It is argued that not all persons seeking medical services have a PIN hence this Regulation is in breach of a person's constitutional right to receive medical services.

8. It is further contended that the impugned Regulations cannot be implemented, in the context of medical practice, without violating several provisions of *the Constitution*, which relate to the right to privacy, the right to health, the right to emergency treatment, the right to human dignity, consumer rights, the right to access justice, and the right to fair administrative action.

9. Consequently, the Petitioner argues that the impugned Regulations which were set to commence on 1st April 2024, will lead to a public health crisis. As a consequence, consultative meetings were held by the Kenya Medical Association (KMA), Kenya Dental Association (KDA) executives, officials from

Kenya Association of Private Hospitals (KAPH), Medical Advisory Committee (MAC) of the Nairobi Hospital and Doctors of the Nairobi Hospital with the 1st Respondent to voice these concerns.

10. The Petitioner depones that the consultative meetings bore no fruits as the 1st Respondent has adamantly refused to appreciate and give any regard to their concerns. Aggrieved, the Petitioner filed the instant suit against the 1st Respondent so as to stop the implementation of the impugned Regulations against medical practitioners and institutions. The Petitioner further contends 1st Respondent's actions violate Articles 27(1), 28, 43(1) (a), 43(2), 31(c) and (d), 46(1) (c), 47, and 48 of *the Constitution*.

1st Respondent's case

11. Opposing the Petitioner's Application, the 1st Respondent filed its Replying affidavit through Josephine Mugure sworn on 12th April 2024. Highlighting the 1st Respondent's statutory mandate, she asserts that implementation of the impugned Regulations should be allowed to proceed.

12. The deponent discloses that the issue of implementation of Section 23A of the Tax Procedure Act, which effected the impugned Regulations, was determined in Constitutional Petition No.181 of 2023 and is currently under appeal in Civil Appeal No. E049 of 2024: Clement Onyango & others v KRA & others. Considering this, she avers that the outcome of the said appeal will directly affect the instant proceedings.

13. It is further contended that the application is based on repealed Regulations, being *Tax Procedures Act* (Electronic Tax Invoice) Regulations, 2023 yet the *Tax Procedures Act* (Electronic Tax Invoice) Regulations, 2024 are in force. Therefore, the challenge is barred in law.

14. The deponent states that the eTIMS system was enacted pursuant to Section 23(A) of the *Tax Procedures Act* as amended by Section 52 of the Finance Act, 2023. The objective of the system is to enhance visibility of transactions undertaken by businesses for purposes of facilitating accurate tax declarations. It is emphasized that the system only captures tax related data in the invoice.

15. With regard to the medical services, it is averred that the medical sector has been issuing invoices for their services and in this case the eTIMS only requires them to issue a tax invoice as has been the case since 2016 when the electronic tax register was introduced.

16. She further posits in relation to the information required under Regulation 7 that, the PIN is only required where the buyer intends to use the invoice to claim input tax or expenses for tax purposes. Moreover, she informs that the description of the services offered should only be worded in general terms without the specifics as alluded to.

17. The 1st Respondent additionally challenges the conservatory orders sought. In its view, the issues relied upon for grant of the Orders can only be fully determined at the hearing of the Petition. Correspondingly, it is argued that grant of the Order would amount to violation of the doctrine of separation of powers.

18. It is acknowledged that the Petitioner wrote to the 1st Respondent on 29th December 2023 and 25th January 2023 raising the aforesaid concerns. She depones that the 1st Respondent in its response dated 15th February 2024 addressed all the concerns raised in detail and even suggested solutions to the issues that were pointed out.

19. The 1st Respondent affirmed that other medical practitioners and hospitals are on board already with the eTIMS and are currently utilizing it. It contended thus that stopping implementation of the impugned Regulations that enjoy presumption of constitutionality, will adversely affect many

taxpayers who are already using the system. Considering this, it is stated that grant of the conservatory orders would be against public interest.

20. The Court was thus urged by the 1st Respondent to decline an invitation to grant of final orders at an interim stage. Equally, that the Application lacks merit as it does not meet the threshold for grant of conservatory orders.

2nd and 3rd Respondents' Case

21. In rejoinder to the application the 2nd and 3rd Respondents' filed grounds of opposition dated 11th April 2024 on the basis that:

    i. The application violates the doctrine of presumption of constitutionality of statutes and the subsidiary legislation made thereunder, constitutional avoidance and separation of powers.

    ii. The public interest lies in upholding the presumption that all laws enacted by and under the authority of Parliament are constitutional and this Court ought to decline to suspend giving effect to provisions of legislation properly enacted by and under the authority of Parliament at an interlocutory stage.

    iii. The Application is prejudicial to the ongoing conversations on the subject matter of the Petition and Application, as admitted by the Applicant, hence amounting to bad faith on the part of the Applicant.

    iv. To the extent that the Application and the Petition has not been brought as public interest litigation under Article 22(2) (c) of *the Constitution*, the orders sought in both the Petition and the Application would strictly only be in favour of the Applicant. Granting the relief sought at an interlocutory stage would amount to granting an exemption to the Applicant contrary to the legislative scheme for such an avenue as provided under Regulation 11 of the Tax Procedures (Electronic Tax Invoice) Regulations, 2023.

    v. The electronic tax invoices system, the subject matter of the impugned regulation is in accord with the value-based system in governance as is stipulated under Articles 10 and 201 of *the Constitution*. In particular, the eTIMS seeks to enhance accountability, transparency, inclusivity and efficiency in VAT collection.

    vi. The information sought under Regulation 7 of the impugned Regulations are lawfully sought in public interest and necessary to facilitate due performance of a task carried out by the 1st Respondent in the public interest and further necessary in the exercise of official authority vested in the 1stRespondent as a data controller.

    vii. The grant of the orders sought, at interlocutory stage, will result into administrative and governance confusion and chaos in the administration of VAT contrary to the value and principle proposition under Article 10 of *the Constitution*.

    viii. The Applicants will not suffer any prejudice as the Petition will not be rendered nugatory if the application for conservatory orders is declined and the Court proceeds to hear the substantive Petition on its merits.

    ix. The Application does not meet the threshold of granting the orderssought and therefore the same should be dismissed with costs to the Respondents.

Parties Submissions

The Petitioner's Submissions

22. In the submissions dated 28th March 2024, Rachier and Amollo Advocates LLP identified the issues for discussion as: whether the Petitioner has established a prima facie case, whether denial of the conservatory order would render the Petition nugatory and whether failure to grant the conservatory order will militate against public interest.

23. Counsel relying on Rule 23 of *the Constitution* of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 submits that a conservatory order is a judicial remedy granted by the Court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard as held in Invesco Assurance Co. Ltd v MW (Minor suing thro' next friend and mother (HW) [2016] eKLR.

24. Parallel dependence was also placed in Muslim for Human Rights (Milimani) & 2 others v Attorney General & 2 others [2011] eKLR and Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014]eKLR.

25. Relying in Mrao v First American Bank of Kenya Limited & 2 others [2003] KLR 125, Counsel submitted that the Petitioner had established it has a genuine and arguable case thus satisfying the prima facie threshold. Like dependence was placed in RE Bivac International SA (Bureau Veritas) [2005]2 EA 43. In this regard, Counsel argued that the Petitioner's case revolves around the unconstitutionality of the impugned Regulations as detailed in the Petitioner's affidavits. Moreover, it was submitted that the impugned Regulations infringe upon fundamental rights as envisaged in *the Constitution*.

26. Moving on Counsel submitted that failure to grant the sought orders would render the Petition nugatory owing to the imminent threat to the Petitioner's rights. Counsel asserted that allowing the 1st Respondent to proceed with the implementation of the impugned Regulations would in effect violate the constitutional rights outlined in the Petition. In Counsel's view, medical practitioners and institutions will suffer great prejudice if the 1st Respondent is not restrained from implementing the impugned Regulations.

27. Reliance was placed in *Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others, Civil Application No.211 of 2016* where it was held that:

> " whether an appeal would be rendered nugatory depended on whether what was sought to be stayed, if allowed to happen ,was reversible, or if it was not reversible whether damages would reasonably compensate the aggrieved party."

28. Equally, Counsel submitted that in considering such a matter the Court is bound to consider where the public interest lies as held in Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others [2017] eKLR. According to Counsel the Application filed on behalf of medical practitioners, medical institutions and the public, calls for a preservation of the substratum of the Petition due to the detrimental impact the impugned Regulations will have on the health sector. Counsel at this juncture reiterated the various violations and effects that would be rendered in effect, as outlined in the Petitioner's affidavit. Consequently, Counsel argued that the public interest in this matter is made manifest by the represented constitutional values as against the impugned Regulations.

29. Reliance was placed in Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR where it was held that:

> " It's trite law that an unconstitutional law is not law and actions or decisions taken pursuant to an unconstitutional law would out rightly be illegal. It follows that once a law has been declared unconstitutional it has no business remaining in the law books."

30. Urging the Court to allow the Application, Counsel submitted that granting the sought orders was necessary to protect constitutional rights and protecting public interest.

1st Respondent's Submissions

31. On 11th April 2023, Counsel George Ochieng filed submissions in support of the 1st Respondent's case. Further submissions dated 16th April 2024 were also filed subsequently.

32. On whether the Petitioner has met the threshold for grant of the sought orders, Counsel also relied on Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and Gatirau Peter Munya (supra).

33. Similar reliance was also placed in Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General, Nairobi High Court Petition *No. 16 of 2011*; [2011] eKLR, Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR and Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR.

34. Guided by these principles, Counsel argued that the Petitioner had failed to establish a prima facie case. This is based on the fact that the impugned Regulations establishing provision, Section 23A of the Tax Procedure Act is under consideration by the Court of Appeal. Additionally, the Petition is premised on repealed Regulations hence is a non-starter. Likewise, Counsel argued that the Petition is premature as the existing Regulations were gazetted on 28th March 2024.

35. Reiterating the 1st Respondent's averments in its response, Counsel submitted that the Petition was brought based on misinformation. This is despite all the Petitioner's concerns being addressed by the 1st Respondent. For this reason, the 1st Respondent accused the Petitioner of acting in bad faith. Similarly, that the Petition is based on misquoted provisions of the impugned Regulations and reliance placed on non-existent provisions in the Regulations. Furthermore, it was stressed that other medical practitioners and institutions had adopted the eTIMS already save for Nairobi Hospital.

36. In the light of this, Counsel argued that the Petitioner would not suffer any prejudice if the orders sought are not granted. Counsel also took issue with the nature of the sought orders. In that, the same calls for suspension yet the impugned Regulations yet the enabling Statute have not been declared unconstitutional. Reliance was placed in Council of County Governors v Attorney General & another [2017] eKLR where it was held that:

> " There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. (The court should start by assuming that the Act in question is constitutional)."

37. Correspondingly, it was contended that the Petitioner has not demonstrated the breach that would be occasioned if the impugned Regulations are not implemented. Moreover, it was pointed out that the questions raised in the Application are also raised in the Petition.

38. Counsel additionally argued that the 1st Respondent will suffer prejudice as it will lose critical tax data if the conservatory orders are issued. In the same vein, Counsel asserted that public interest lies in not granting the sought orders.

2nd and 3rd Respondents' Submissions

39. Principal State Counsel, Kaumba S.O. filed submissions dated 11th April 2024 in support of these Respondents case. Similarly relying in Gatirau Peter Munya (supra) Counsel submitted that the Petitioner had not demonstrated a prima facie case. Reliance was placed in Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR where it was held that:

> "26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis..."

40. Counsel in this regard reasoned that the Petition was lodged in the midst of an ongoing conversation hence a show of bad faith. Similarly, that the information sought under Regulation 7 of the impugned Regulations is sought in public interest and necessary to aid the 1st Respondent carry out its function. On the other hand, the number of Kenyans without the PIN although relied upon was not established contrary to Sections 2, 107, 109 and 110 of the *Evidence Act*.

41. Correspondingly Counsel posited that public interest tilts in favour of not granting the conservatory orders as all laws enjoy presumption of constitutionality. As such the Court ought to decline suspending the Regulations at the interlocutory stage unless it can be demonstrated that the same will not hamper the State in delivery of its mandate. Reliance was placed in Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another [2015] eKLR where it was held that:

> "It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment...It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain."

42. Comparable reliance was also placed in Susan Wambui Kaguru & 4 others v Attorney General & another [2012] eKLR, Adrian Kamotho Njenga v Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission [2021] & 2 others; Independent Electoral and Boundaries Commission [2021] eKLR, Olive Mwihaki Mugenda & Another v Okiya Omtata Okoiti & 4 Others [2016] eKLR and Attorney General & another v Coalition for Reform and Democracy & 7 others [2015] eKLR.

43. Counsel also contended that the Petitioner had not demonstrated how the eTIMS had affected the rights of its members. It was noted further that since the Petition was not brought as public interest litigation under Article 22(2) (c) of *the Constitution*, the orders sought would essentially only be in the Petitioner's favour. In the same way, granting the conservatory order at the interlocutory stage would amount to granting an exemption to the Petitioner contrary tothe legislative scheme for such an avenue as provided under Regulation 11 of the Tax Procedures (Electronic Tax Invoice) Regulations, 2023.

44. Furthermore, it was submitted that the Petitioner had not demonstrated how it would suffer prejudice or irreparable harm if the conservatory orders are not granted. To that end, Counsel submitted that the Petitioner had not met the threshold for grant of the sought orders.

Analysis and Determination

45. In my view the only issue is raised by the parties for determination and that is:

Whether or not the sought Conservatory Orders should be granted.

46. The law on issuance of conservatory orders in constitutional petitions finds its bearing under Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which reads as follows:

Conservatory or interim orders.

1. Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.

2. Service of the application in sub rule (1) may be dispensed with, with leave of the Court.

3. The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.

47. The applicable principles for grant of conservatory Orders are now well settled. In Mwaniki Gachuba & 10 others vs County Government of Embu & 2 others [2021]eKLR observed as follows:

> " 20. The applicable principles for the grant of a conservatory order were detailed by Onguto J. in Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR. In summary, the principles are that the applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order."

48. Furthermore, in Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others [2017]eKLR the Court stated:

> " A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will

be violated and that such violation or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition."

49. The Supreme Court while addressing its mind on the issue in the case of Gatirau Peter Munya (supra) gave guidance as follows:

> " (86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

50. While drawing from the numerous authorities the Court in Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR summarized the threshold for the grant of the conservatory orders as follows:

> " 24. From various authorities of the Courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following:-
>
> a. First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
>
> b. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
>
> c. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
>
> d. The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order."

51. As guided by the numerous authorities the key issue that the Application seeks is to have the status quo maintained pending the hearing of the Petition. It is not my duty to determine the merits of the Petition at this stage as all what I need to do is to make a finding on whether the set principles for grant of conservatory Orders have been satisfied.

52. A perusal of the application and the responses thereto as well as the parties' submissions shows that the dispute stems from the enactment of the *Tax Procedures Act* (Electronic Tax Invoice) Regulations, 2023 where the Petitioner argues a substantial number of those regulations are in violation of rights and fundamental freedoms in reference to the health sector.

53. On the contrary, the Respondents contend that the Application is moot as some of the impugned Regulations have been repealed and are no longer in existence. Further, that the Petitioner has not satisfied the conditions precedent for grant of conservatory orders. Stressing the issue of public interest, the Respondents argued that the impugned Regulations have not been declared unconstitutional and that granting conservatory orders in favour of the Petitioner will adversely affect the 1st Respondent's mandate.

54. In my view, the substratum of the Petition is founded on the constitutionality of the impugned Regulations and their effect on the rights and fundamental freedom of the Petitioners as players in the health sector. Indisputably, these are pertinent issues that are not merely arguable or just debatable.

55. The next question that needs determination is whether there is a real danger that the Petitioner will suffer prejudice if the conservatory orders are not issued thus rendering the Petition nugatory in the end. The Petitioner in this regard only requires to demonstrate that, unless the court grants the conservatory order, there is real danger that it will suffer prejudice as a result of the threat or violation to the constitutional rights.

56. The meaning of real danger was dealt with in the case of Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR where the Court expressed as follows:

> " To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."

57. In this matter the threat alluded to is violation of the cited constitutional rights in relation to the health sector. To support its case, the Petitioner argued that the impugned Regulations are unconstitutional. Further that requiring of the PIN would affect provision of medical services to the numerous Kenyans who do not have the PIN. Equally the information sought to be issued in the invoice will interfere with the right to privacy.

58. I am of the view that these issues are arguable but they do not present a real threat or danger requiring immediate action. I say so because the Petitioner relies on the unconstitutionality of the impugned Regulations yet they have not been declared unconstitutional yet. They enjoy the presumption of constitutionality as rightly pointed out by the Respondents. Their constitutionality or otherwise can only be determined after the trial of the Petition.

59. Further, the contention that persons without the PIN will not be able to access medical treatment is not based on any adduced evidence but hypothesis.Consequently, the Petitioner has not demonstrated the existence of real or actual danger.

60. Finally, the principle of public interest enunciated by the Supreme Court in the Gatirau as part of the factors to consider in granting of conservatory orders comes into play. The purpose is to facilitate orderly functioning within public agencies, as well as to uphold the adjudicatory authority of the Court

in public interest. To this end, Francis Bennion highlights a critical consideration courts should be alive to in Statutory Interpretation, 3rd Edition at Page 606:

> " It is the basic principle of legal policy that law should serve the public interest. The court... should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".

61. The Court has a duty to consider the importance of proportionality in granting its orders. The impugned Regulations established the eTIMS that apply to all suppliers of goods and services who are expected to integrate their invoicing system with the 1st Respondent's for a seamless sharing of VAT information. The impugned eTIMS does not affect only the medical sector but other fields as well. The Petitioner asserts that the medical sector as a whole is affected. However, the 1st Respondent depones that it is only the Nairobi Hospital that is opposed to using the system.

62. This Court has a duty to strike a fair balance between the interests of the Petitioner and the 1st Respondent. The Petitioner seeks to stop the entire implementation process of the impugned Regulations while the 1st Respondent insists such a step would have dire consequences in its operations.

63. In the case of Martin Nyaga Wambora (supra) the Court observed thus:

> " (63) Where a conservatory order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for the orderly functioning in the public interest."

64. The Court went on to state as follows:

> " (65) The Court will only issue conservatory orders in exceptional circumstances and will be minded of the mandate of other constitutional organs in exercise of their constitutional mandates."

65. By parity of reasoning, it is my considered view that the public interest tilts in favour of the 1st Respondent in the circumstances of this case.

66. For these reasons, it is my finding that the Petitioner has not satisfied the threshold for grant of conservatory orders. The application is dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2024.

.....

L. N. MUGAMBI

JUDGE