



**Law Society of Kenya v National Assembly & 2 others (Petition E050 of 2023)
[2023] KEHC 1469 (KLR) (Constitutional and Human Rights) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1469 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E050 OF 2023

HI ONG'UDI, J

FEBRUARY 28, 2023

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

NATIONAL ASSEMBLY 1ST RESPONDENT

**COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. By way of a Notice of Motion dated February 21, 2023 filed pursuant to articles 19, 20, 22, 23 and 159(2) (d) of the [Constitution](#) and Rule 19, 23 and 24 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedom Practice and Procedure Rules, 2013\)](#), the petitioner seeks the following orders:
 - i. Spent.
 - ii. That pending the hearing and determination of this Application *inter partes*, a Conservatory Order be issued restraining the 2nd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of the Regulation 2 of the [Excise Duty \(Excisable Goods Management System\) \(Amendment\) Regulations, 2023](#).
 - iii. That pending the hearing and determination of this Petition *inter partes*, a Conservatory Order be issued restraining the 2nd Respondent whether acting jointly or severally by themselves, their



- servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of regulation 2 of the [Excise Duty \(Excisable Goods Management System\) \(Amendment\) Regulations, 2023](#).
- iv. That pending the hearing and determination of this Application *inter partes*, a Conservatory Order be issued restraining the 2nd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of the regulation 5 of the [Excise Duty \(Excisable Goods Management System\) \(Amendment\) Regulations, 2023](#).
- v. That pending the hearing and determination of this Petition *inter partes*, a Conservatory Order be issued restraining the 2nd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of regulation 5 of the [Excise Duty \(Excisable Goods Management System\) \(Amendment\) Regulations, 2023](#).
- vi. That pending the hearing and determination of this Application *inter partes*, a Conservatory Order be issued restraining the 2nd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of regulation 4 of the [Excise Duty \(Excisable Goods Management System\) \(Amendment\) Regulations, 2023](#).
- vii. That pending the hearing and determination of this Petition *inter partes*, a Conservatory Order be issued restraining the 2nd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of regulation 4 of the [Excise Duty \(Excisable Goods Management System\) \(Amendment\) Regulations, 2023](#).
- viii. That the Costs of this Application be provided for.

The Petitioner's Case

2. The application was supported by the grounds on the face of the application and the sworn affidavit of the petitioner's Chief Executive Officer, Florence Muturi, of even date.
3. The petition is premised on the petitioner's challenge to the constitutionality of the [Excise Duty \(Excisable Goods Management System\) \(Amendment\) Regulations, 2023](#), issued in the 2nd respondent's Ruling dated January 17, 2023, and set to take effect on March 1, 2023.
4. According to the petitioner the impugned [Regulations](#) seek to adjust the price of excise stamps applicable to excisable goods by increasing the cost of these stamps, which is a threat to the survival of manufacturing businesses engaged in the sale and distribution of consumables as well as other innocent third parties. She deponed that Regulation 6 of the [2017 Regulations](#) informs that the purpose of issuing excise stamps is for tax administration as opposed to revenue collection. She averred that the 2nd respondent was arbitrarily imposing the excise stamp fees as a means of revenue collection contrary to the provisions of Article 201 (1) (b) of the [Constitution](#).
5. She further deponed that according to Regulation 6 of the [2017 Regulations](#), there had been no capability enhancements made on the tax stamps to justify the increase in prices, and this fact was



brought to the attention of the 2nd respondent through the Memorandum of British American Tobacco Kenya (BATK) as well as Kenya Association of Manufacturers (KAM).

6. On the impugned Clauses, she deponed that Regulation 2 which purports to amend Regulation 3 of the 2017 Regulations, will impose a requirement of affixing excise stamps on tracked finished goods products such as imported motor vehicles despite the fact that motor vehicles have other means by which they are tracked. Additionally, that Regulation 4 seeks to amend Section 28 (1) of the [Excise Duty \(Excisable Goods Management System\) Regulations, 2017](#) to exclude exports from exempted goods to which the requirement for excise stamps will apply. It's her averment that the increase of the price of the tax stamp will result in increased prices will be borne by Kenyans in contravention of the principles governing taxation.
7. In view of this, she deponed that if the conservatory orders are not granted, majority of manufacturers and distributors of consumable excisable goods and consumers will suffer gravely from the imposition of the illegal and unconstitutional impugned adjusted tax rates. She likewise stated that if the orders were granted the respondents would not suffer any prejudice pending the determination of the petition.

The Respondents' case

The 1st Respondent

8. The 1st respondent opposed the application by filing the following grounds of opposition dated February 23, 2023:
 - i. The petitioner has failed to demonstrate urgency to justify the grant of the orders sought in the application and the petition.
 - ii. The orders sought in the application are similar to those sought in the petition and therefore are final in nature and ought not to be granted at an interlocutory stage.
 - iii. The petitioner's allegations are speculative as the petitioner has failed to demonstrate that the impugned draft regulations have been gazetted and forwarded to Parliament.
 - iv. There is no immediate urgency in the application as the petitioner has only demonstrated that the 2nd respondent has called for public participation on the proposed/ draft regulations.
 - v. The petitioner has failed to demonstrate the manner in which the respondents have violated the principles of taxation as outlined within the [Constitution](#).
 - vi. The allegations of violation of the [Constitution](#) are not specific and fail to meet the requirements of Rule 10 of the [Mutunga Rules](#) and the test in the [Mumo Matemu](#) Case on specificity in drafting of constitutional petitions.
 - vii. The petitioner has failed to demonstrate that the impugned draft regulations were issued ultra vires or contains provisions which are in contravention of the law.
 - viii. The petition is seeking to illegitimately interfere with the exclusive mandate of the respondents with regard to, the passing of regulations with regard to the implementation, administration, application and enforcement of regulations under the [Excise Duty Act](#).
 - ix. The petitioner has failed to provide any evidence of violation of the law save for disagreeing with the policy decisions of the respondents against the allegations in the petition herein in



contravention of the principles of the law of evidence under Section 107 of the Law of [Evidence Act](#), Cap 80 of the Laws of Kenya.

- x. No cogent reasons have been provided by the petitioners to interfere with the exclusive mandate of the respondents with regard to passing of legislation.
- xi. The orders sought by the petitioners seek to violate the principle of separation of powers by having the court directly interfere with the mandate of the respondents.
- xii. That the petitioners have failed to meet the conditions precedent for the grant of conservatory orders in the application. (See: [Peter Gatirau Munya v Dickson Mwenda Kithinji & 2 others](#) (2014) eKLR).
- xiii. The petitioners have failed to demonstrate any imminent danger of violation of their rights requiring the immediate intervention of the court at this stage. (See: [Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 others](#) (2014)eKLR).
- xiv. The honourable court has previously addressed itself to the need to thoroughly interrogate allegations of constitutional violation for determination at the hearing of the main petition.
- xv. The orders sought in the application fly in the face of public interest and this honourable court ought therefore to dismiss the application and petition.
- xvi. The petition is premised on conjecture and an abuse of the court process.
- xvii. It is just that the honourable court decline to grant the orders sought in the application at this interlocutory stage.

The 2nd Respondent's Case

9. The 2nd respondent in response to the application filed the following grounds of opposition dated February 27, 2023:
 - i. The 2nd respondent is authorized under the [Kenya Revenue Authority Act, 1995](#) to administer Revenue Acts of Parliament and Regulations listed under the First Schedule to the [Kenya Revenue Authority Act, 1995](#) which includes the [Excise Duty Act, 2015](#).
 - ii. The Cabinet Secretary in charge of National Secretary and Economic Planning is empowered under Section 45 of the [Excise Duty Act, 2015](#) to make Regulations prescribing any fee or charge to be levied on excisable goods imported into or manufactured in Kenya.
 - iii. The 2nd respondent prepared the draft Excise Duty (Excisable Goods Management System) (Amendment) Regulations, 2023 on behalf of the Cabinet Secretary in charge of National Treasury and Economic Planning.
 - iv. For any Act of Parliament or Regulations to operate as Laws of Kenya, they have to be gazetted in the Kenya Gazette.
 - v. Pursuant to Section 22 of the [Statutory Instruments Act, 2013](#) every statutory instrument must be published in the Kenya Gazette and must be assigned a serial number as of the year in which it was made which must be printed on the face of the statutory instrument.
 - vi. The [Excise Duty \(Excisable Goods Management System\) \(Amendment\) Regulations, 2023](#) are still at the draft stage as they have not yet been gazetted nor been assigned a legal notice number.



- vii. The 2nd respondent was guided by Article 10 and 201 (a) of the *Constitution*, Section 5 of the *Statutory Instruments Act* when issuing the public notice dated January 17, 2023 inviting interested members of the public and stakeholders to submit their inputs and comments for consideration in the finalizing of the regulations.
- viii. The 2nd respondent made it clear that what was being posted on the 2nd respondent's website are draft regulations which do not have any force of law.
- ix. The Court can only grant conservatory orders to preserve a subject which is clear and whose intent and form is known which in this case the Court is being asked to issue conservatory orders restraining the 2nd respondent from implementing draft document without the force of law.
- x. Courts have restrained themselves from interfering with the executive process and only come at the tail end when it is demonstrated that an important element was missed or ignored during the process hence the application calls for interference with the executive process which is a breach of the doctrine of separation of powers. (See: *Free Kenya & 6 others v IEBC & 4 others, Kenya National Commission on Human Rights (Interested Party)* (2022) eKLR).
- xi. The application is juridically incompetent based on the constitutional principle of separation of powers hence bad in law and amounts.

The 3rd Respondent's case

- 10. The 3rd respondent did not file any response to the petitioner's application but relied on the 1st and 2nd respondents' responses.

The Parties submissions

- 11. The parties herein made oral submissions in Court on February 27, 2023. Miss Luther, Counsel for the petitioner submitted that impugned the Regulations go against the purpose and effect of legislation which is contrary to Article 2(1)(a) of the *Constitution*. According to Counsel the impugned Regulations with reference to the excise stamps will overburden the tax payers. She argued that the application was brought so as to arrest violation of the public's rights and that conservatory orders are sought to protect constitutional rights. In support reliance was placed on the case of *Isaiab Luyara Odando & another v Kenya Revenue Authority & 6 others; Nairobi Branch Law Society of Kenya (Interested party)* [2022] eKLR.
- 12. Mr Theuri, Counsel for the petitioner relying on the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR, urged the Court to consider that a gazetteement may come up on March 1, 2023 rendering the petition nugatory if the conservatory orders are not issued.
- 13. Miss Omuom, Counsel for the 1st respondent in opposition submitted that the petitioner's application was premature. She informed that the Public Notice was not a Ruling as asserted but was issued to inform the public to make contributions to the impugned Regulations. She added that the impugned Regulations were yet to be reviewed by the 1st respondent. Counsel argued that the petitioner's averments were speculative.
- 14. In addition, Miss Omuom submitted that the application sought to interfere with the mandate of the 1st respondent. On this issue reliance was placed on the Supreme Court case of *Speaker of Senate and another v Attorney General and 4 others* Reference No 2 of 2013 (2013) eKLR.



15. These submissions were echoed by Mr Ochieng, Counsel for the 2nd respondent. He stressed that the 2nd respondent had not acted unilaterally as alleged by the petitioner but had followed the legal process in issuing the Public Notice. He noted that the impugned date was a suggested date and not an effective date as argued. He added that the Regulations had not been gazetted and even so no such copy had been availed to the Court by the petitioner.
16. Counsel likewise submitted that the petitioner had not satisfied the principles for grant of conservatory orders as set out in the case of *Mrao v First American Bank of Kenya Limited & 2 others* [2003] KLR 125. Similar reliance was placed on the case of *Isaiab Onyango Okello and others v National Assembly and others* (2021) eKLR, and *Energy Dealers Associations v Attorney General* (2021) eKLR where it was noted that before such orders are granted the threat must be real.
17. These submissions were correspondingly echoed by Mr Chabala and Miss Mwangi. Miss Mwangi, Counsel for the 3rd respondent urged the Court to allow the members of the public who include the petitioner to give their comments on the impugned Regulations.

Analysis And Determination

18. From the foregoing account and a perusal of the pleadings, submissions, cited authorities and annexed documents, it is plain that the main issue for determination at this point is:

Whether this Court, should grant the sought conservatory orders.

19. The petitioner's case as appreciated from its application is its challenge of Regulations 2, 4 & 5 under the *Excise Duty (Excisable Goods Management System) (Amendment) Regulations, 2023* which were introduced through the 2nd respondent's Public Notice dated January 17, 2023. It was averred that the impugned Regulations are set to take effect on March 1, 2023. The petitioner on its behalf and the public is apprehensive that these Regulations are unconstitutional and enacted contrary to the principles of taxation under the *Constitution*. In this way the petitioner seeks conservatory orders whose purpose was defined in the case of *Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* (2017) eKLR as follows:

“...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.”

20. The 1st and 2nd respondents opposed the grant of the conservatory orders on the premise that the enactment of the impugned Regulations is still in the draft stage since the same are yet to be gazetted and tabled before Parliament (1st respondent). This in their opinion makes the application premature. They equally argued that the application was offensive to the exclusive mandate of the respondents in passing Regulations hence in violation of the doctrine of separation of powers. By the same token, it was argued that the petitioner had not satisfied the principles set out before one is granted conservatory orders.
21. The Court of Appeal speaking to the essence of the doctrine of separation of powers in the case of *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR stated as follows:

“Separation of powers does not only proscribe organs of government from interfering with the other's function, but also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. It also warned that such powers are, however, not a license to take over



functions vested elsewhere, and recommended that there must be judicial, legislative and executive deference to the repository of the function.”

22. For context, the impugned Regulations are premised on their primary legislation which is the [Excise Duty Act, 2015](#). The birth of Regulations under this Act is set out under Section 45 of the [Act](#) which provides as follows:

45. Regulations

1. The Cabinet Secretary may make Regulations generally for the better carrying out of the provisions of this Act, and, in particular—
 - a. prescribing any fee or charge to be levied on excisable goods imported into, or manufactured in, Kenya; or
 - b. prescribing any matter required to be prescribed for the purposes of this Act.
2. Regulations made under this Act may provide that any person contravening the Regulations commits an offence and shall be liable on conviction to a fine as specified in the Regulation.

23. For the above reason, the 2nd Respondent in its Public Notice dated January 17, 2023 notified the public as follows:

In compliance with the [Statutory Instruments Act](#), the Commissioner General on behalf of the Cabinet Secretary, the National Treasury and Economic Planning, has reviewed the [Excise Duty \(Excisable Goods Management System\) Regulations, 2017](#) and made the [Excise Duty \(Excisable Goods Management System\) \(Amendment\) Regulations, 2023](#).

In compliance with the same Act, and on behalf of the Cabinet Secretary, the National Treasury and Economic Planning, the Commissioner General invites interested members of the public and stakeholders to submit their inputs and comments for consideration in the finalizing of the above regulations. These draft regulations have been posted on the KRA website, www.kra.go.ke. You may download the same for your reference.

24. According to the petitioner the impugned Regulations are set to be effective on 1st March 2023. At this juncture an analysis of the legislative process in the making of a Regulation is imperative to ascertain the right legal position and its implication in the instant matter.

25. Regulations by their nature are distinct from Statutes in that the power to enact the same is vested on a party or body as prescribed by the enabling Act of Parliament. This is made manifest under the [Statutory Instruments Act](#) No 23 of 2013. This Act under Section 2 defines these two aspects as follows:

“regulation-making authority” means any authority authorized by an Act of Parliament to make statutory instruments.

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



26. The Act outlines the process of enactment of a statutory instrument in this case the impugned Regulations as follows:

1) Consultation before making statutory instruments

Section 5:

1. Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—
 - a. have a direct, or a substantial indirect effect on business; or
 - b. restrict competition;

2) Regulatory impact statements

Section 6:

If a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument.

3) Part IV – Parliamentary Scrutiny of Statutory Instruments

Section 11

Laying of statutory instruments before Parliament

1. Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the relevant House of Parliament.
2. Notwithstanding subsection (1) and pursuant to the legislative powers conferred on the National Assembly under Article 109 of the Constitution, all regulation-making authorities shall submit copies of all statutory instruments for tabling before the National Assembly.
3. The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.
4. If a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.

4) Publication of instruments

Section 22

1. Subject to subsection (2), every statutory instrument shall be published in the Kenya Gazette and shall be assigned a serial number as of the year in which it is made which shall be printed on the face of the statutory instrument.



2. If a question arises as to whether statutory instruments under any provision of an enactment are statutory instruments the Attorney-General may, by certificate in writing, decide the matter.

5) Commencement of statutory instrument

Section 23

1. A statutory instrument shall come into operation on the date specified in that behalf in the statutory instrument or, if no date is so specified, then, subject to subsection (2), it shall come into operation on the date of its publication in the Gazette subject to annulment where applicable.
2. If a statutory instrument is made after the passing or making but before the coming into operation of the enabling legislation under which it is made, the statutory instrument, whether or not it is previously published, shall not come into operation before the date on which the enabling legislation comes into operation.

27. I have deliberately set out the process of making a statutory instrument in this case the impugned Regulations so that the procedure can be clear against the facts of this case. From a reading of the material placed before this Court it is clear that the 2nd respondent's public notice dated January 17, 2023 does not qualify as publication within the meaning of Section 22 of the [Statutory Instruments Act](#).
28. Similarly, the Notice made it clear that the impugned Regulations are Draft Regulations hence the same are not yet finalized contrary to the petitioner's allegations. As per the submissions of the 2nd respondent the making of the impugned Regulations is at the Consultative stage. Looking at the legislative process outlined in the [Statutory Instruments Act](#), it is apparent that the procedure which the respondents are mandated by law to carry out is yet to be completed.
29. It is a set principle in law that for any Regulation to have effect, it must go through all the set legislative processes. From what is placed before this Court, the legislative process is incomplete despite the petitioner's contention that the impugned Regulations bear the effective date of March 1, 2023. Notwithstanding the set date, what is clear is that a law can only take effect and come into force once the Regulation is published in accordance with the dictates of the law. Palpably, with an incomplete legislative process it would not be prudent for this Court to exercise its mandate over the matter.
30. In the case of [Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others](#) [2016] eKLR the Court opined as follows:

“27. ... The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.”

31. Being guided by the set legal principles, the material before the Court and the [Wanjiru Gikonyo](#) case (*supra*) I find that the petitioner's application dated February 21, 2023 is premature and the conservatory orders sought will not be granted. However, in the event that the 2nd respondent gives effect to the impugned [Regulations](#) on March 1, 2023, or any other date before the exhaustion of the entire legislating process the petitioner will be at liberty to move the court appropriately.

The Notice of Motion dated February 21, 2023 is hereby dismissed with no order as to costs since it is a high public interest matter.

Orders accordingly.



**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 28TH DAY OF FEBRUARY, 2023 IN
OPEN COURT AT MILIMANI, NAIROBI.**

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

