



**Angwenyi t/a Herzog Enterprises & another v Kenya Revenue Authority
& another (Petition E137 of 2023) [2023] KEHC 20181 (KLR)
(Constitutional and Human Rights) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20181 (KLR)

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

PETITION E137 OF 2023

M THANDE, J

JUNE 30, 2023

BETWEEN

**DUKE NYACHIRO ANGWENYI T/A HERZOG ENTERPRISES 1ST
PETITIONER**

PATRICIA KATHONI NJERU T/A STARVELS LIQUORS 2ND PETITIONER

AND

KENYA REVENUE AUTHORITY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. By a notice of motion dated April 27, 2023, the petitioners seek the orders that:
 1. Spent.
 2. Pending the inter-partes hearing and determination of this application, this honourable court be pleased to issue a conservatory order to stay in its entirety, the 1st respondent's procurement commenced by the Expression of Interest (EOI) supply, delivery, installation, commissioning and maintenance of an Integrated Excisable Goods Management System (EGMS) reference number KRA/HQS/EO1-073/2022-2023.
 3. Pending the hearing and determination of the petition filed herein this honourable court be pleased to issue a conservatory order to stay in its entirety the 1st respondent's procurement commenced by the Expression of Interest (EOI) supply, delivery, installation, commissioning and maintenance of an



Integrated Excisable Goods Management System (EGMS) reference number
KRA/HQS/EO1-073/2022-2023.

4. This honourable court be pleased to issue any other order or direction(s) it may deem fit in the circumstances.
 5. The costs of this application be provided for.
2. The grounds upon which the application is premised are that pursuant to the *Excise Duty Act* and the regulations made thereunder, the 1st respondent did procure an Integrated Excisable Goods Management System (EGMS) which is currently deployed throughout Kenya. The respondents have made representations in the recent past that ownership of the current EGMS shall vest in the 1st respondent and the benefits of such ownership shall be cascaded to Kenya taxpayers thereby making the cost of collection and administration of excise stamps and duty predictable and much more affordable to citizens. In light of this, the decision by the 1st respondent to acquire a new EGMS is therefore irrational and contrary to the principles of public finance and procurement of public goods and services in a manner that is transparent and cost effective. This will also escalate the tax burden borne by the petitioners and millions of citizens like them.
 3. The petitioners are both engaged in the business of sale of alcoholic beverages, which are excisable goods. All manufacturers and dealers in excisable goods are required by law to affix excise stamps on their products. These stamps are produced by the EGMS and purchased from the 1st respondent. The petitioners contend that the EGMS that the 1st respondent seeks to procure is a replication of the current EGMS obtained in 2015 and is paid for. The petitioners claim that the 1st respondent represented to parliament that the ownership of the EGMS together with its proprietary rights and privileges would be ultimately vest in the 1st respondent. Tax payers would then reap the benefits by way of lower and steady cost of excise stamps and by extension lower and steady prices of affected commodities for the benefit of consumers. The decision by the 1st respondent to procure a new system is thus irresponsible and exposes the petitioners and other tax payers to payment of higher excise tax thereby raising the costs of doing business. This will by extension threaten the livelihood of the petitioners numerous other citizens by exponentially increasing the costs of excise duty and cost of goods and services.
 4. The petitioners contend that the decision by the 1st respondent is an abuse of power, *ultra vires*, Wednesbury unreasonable and unconstitutional and violates the right of citizens under article 46 of *Constitution*. It is therefore imperative that the unconstitutional procurement commenced by the 1st respondent be halted forthwith, in the public interest. The court's intervention will prevent wanton and manifest disregard of the principles of prudent use of public finances and the transparent and cost effective procurement of public goods and services. They urged that it is in the interest of justice that the prayer sought in the application be considered and granted forthwith.
 5. The application is opposed by the 1st respondent vide a replying affidavit sworn on May 19, 2023 by Benson Kiruja, its Ag. Deputy Commissioner. It was deposed that the conservatory orders sought by the petitioners are final in nature and should not be granted at the interlocutory stage as they are exact replicas of the prayers sought in the petition. As such, granting the same at this interlocutory stage is akin to driving the 1st respondent from the seat of justice. He deposed that the petitioners has not established a *prima facie* case warranting the grant of the conservatory orders sought. Further that the public shall suffer prejudice if the conservatory orders are granted. The reasons are that excise duty is a consumption tax that is borne by the final consumer. As such, any stay of the process commenced by the 1st respondent will present a challenge to the government in so far as collection of excise duty taxes is;



that the 1st respondent will not be able to collect revenue owing to the fact that the contract with SICPA Security Solutions SA lapses in July 2023; that granting the orders sought would cripple the operations of the 1st respondent and will result not only in the loss of tax revenue and in the stalling of some projects whose implementation is dependent on the collection of taxes; that granting the conservatory orders will lead to irreparable damages as traders across the country will fail to pay excise duty and it would be practically impossible to collect the taxes after the excisable goods have been consumed by the final consumers.

6. It was further deposed that the petitioners stand to suffer no prejudice as in the unlikely event that the court allows the petition, it has powers to annul the entire process. further that the instant petition is premature as the 1st respondent is yet to make a decision on whether to continue using the current EGMS provided by SICPA Security Solutions SA. It was also stated that the petitioners are misleading this court by claiming that public funds will be lost if the 1st respondent abandons the current EGMS and procures a new one. The 1st respondent's position is that no public funds will be lost as even in the event the new system is procured, the components of the current system specified in the addendum shall still be handed over to the 1st respondent and be used by other government agencies. Further that even if the 1st respondent was to continue using the current system, it would still have to procure services as not all components of the system shall be handed over to the 1st respondent.
7. The 1st respondent asserted that it is only carrying out its constitutional mandate by calling for submissions from the market on whether there are systems that can eliminate or solve the challenges experienced following the reliance on the current system. That in any event, SICPA Security Solutions SA has submitted its proposal on how it can improve its system to mitigate the challenges encountered. it is the 1st respondent's case that at the opportune time, it shall prove to the court that the petitioners are beneficiaries of the deficiencies in the current system and are only apprehensive that elimination of the deficiencies will end their evasion of taxes scheme.
8. By way of rejoinder, the petitioners swore identical further affidavits on May 24, 2023. They reiterated the earlier averments and asserted that the replying affidavit of Benson Kiruja completely vindicates the application and petition and confirms several pertinent issues that the petitioners had raised; that being an entity funded by tax payers, the 1st respondent must remain accountable, fair, transparent and open in the conduct of its affairs with citizens with whom it serves; that the orders sought are intended to preserve public funds that are likely to be utilized in a process in which the 1st respondent has clearly violated the law and wishes to engage in unnecessary spending by procuring a system that has already been procured and deployed throughout Kenya; that the petitioners simply seek that the 1st respondent be restrained from unilaterally undertaking a procurement without any justification and in complete disregard of the users of the already procured and implemented system; that the procurement of the existing EGMS has been the subject of lengthy litigation and public discourse throughout which the 1st respondent has stated time without number that the procurement represented value for money and had realized exponential gains in the collection of excise duty since its deployment; that the 1st respondent confirmed to the National Assembly through the Public Investment Committee on Commercial Affairs and Energy that the current EGMS for which taxpayers have paid over time, will eventually belong to it; that the 1st respondent made serious claims against the system including terrorism and cybercrime without any substantiation or provision of any evidence whatsoever. The averments by Benson Kiruja thus contradict the submissions of the 1st respondent before the said Committee of the National Assembly; that it is important that this Court appreciates that the EGMS is a system used not by the 1st respondent but by business owners who have over the years invested in the acquisition of the same including setting up lines, software and other related equipment based on the current EGMS; that the petitioner is a user of the said system and the duty of purchasing the



system, its components and consumables is the responsibility of its users such as the petitioner; that this is captured both in the contract furnished by the 1st respondent and also at paragraph 5 of the EGMS regulations.

9. It was further deposed that the current EGMS has been paid for by its users at a cost of more than Kshs 15 billion according to the 1st respondent's own admission in various public documents; that the 1st respondent only consolidated the collections from manufacturers and importers for onward payment to a contractor that as per the contract exhibited, the 1st respondent is expected to take over all the aspects of the EGMS at no extra cost and the current service provider is required to ensure the continuity of the system through the provision of stamps, equipment and spares; that if a new EGMS is to be deployed, the same businessmen will have to invest once more in new lines, software and related equipment based on the new EGMS yet their ownership of the present system as per the contracts will vest in the 1st respondent, a fact it acknowledges.
10. The petitioners further contend that they and other users of the EGMS, who will be affected by the intended/ongoing procurement, were not consulted on the decision to procure a new EGMS, contrary to the dictates of the Constitution which underscores the imperative of public participation in the decisions that affect members of the public.
11. Additionally, they deposed that indeed the contract for the current EGMS and the envisaged maintenance contracts provide for enhancements and updates aimed at addressing any current or emerging loopholes or challenges relating to the goods managed under the system. Schedule 9 of the contract dated October 30, 2015 provides a detailed procedure on how the 1st respondent can request for such changes and paragraph 1.3 of the addendum dated May 4, 2021 assures the 1st respondent of non-ending enhancements to the system upon request. It is thus unfathomable for the 1st respondent to seek the system enhancement through a procurement process and yet it could obtain the same through contractual obligations.
12. It is the petitioners' case in light of the foregoing that the 1st respondent having failed to answer these pertinent questions at this stage of the proceedings cannot be heard to suggest that the subject process should proceed unchecked as this will only add the morass of contradictions evident from its actions; that in the absence of a reasonable answer to the legitimate questions raised so far, it is clear that the petition raises a *prima facie* case beyond speculative with a likelihood of success and in the absence of the conservatory orders sought before this court the petition shall be rendered nugatory; that to deny the conservatory orders sought before this court at this stage will set a bad precedent in the conduct of public procurement implying that the dictates of Constitution can be flouted; that the grant of the conservatory orders sought will enhance the constitutional values and objects on public participation, fiscal discipline and transparent and cost-effective public procurement; that the completion of the procurement process is imminent and that there is an inherent public interest pausing the subject procurement and interrogating the same.
13. Parties filed their written submissions which I have duly considered. The only issue for consideration is whether the petitioners have met the threshold for grant of conservatory orders.
14. Article 23 of the Constitution has conferred upon this court the authority to uphold and enforce the bill of rights and provide remedies as follows:
 1. The High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights.



2. ...
3. In any proceedings brought under article 22, a court may grant appropriate relief, including--
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the bill of rights and is not justified under article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.
15. A conservatory order, is one of the appropriate reliefs available to a party who alleges and proves denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights.
16. Rule 23 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* makes provision for conservatory orders. Rule 23(1) provides as follows:

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.
17. The threshold for the grant of conservatory orders was established by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR 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.
 - (87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the court that:
 - (i) the appeal or intended appeal is arguable and not frivolous; and that
 - (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.



- (88) These principles continue to hold sway not only at the lower courts, but in this court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:
- (iii) that it is in the public interest that the order of stay be granted.
- (89) This third condition is dictated by the expanded scope of the bill of rights, and the public-spiritedness that run through the Constitution.
18. The Supreme Court set out the test for the grant of conservatory orders in 3 limbs. A party seeking conservatory orders must demonstrate to the court that first, the petition is arguable and not frivolous. Second that unless the orders sought are granted the suit, were it to succeed, would be rendered nugatory. And third, that it is in the public interest that the orders sought are granted.
19. The petitioners have argued that they have demonstrated a *prima facie* case with probability of success thereby warranting the grant of the orders sought. They contend that their petition is arguable and not frivolous in that they have shown that notwithstanding the expiration of the contract with SICPA, the existing EGMS is efficient and has enabled the 1st respondent seal revenue leaks. The 1st respondent submitted as much to the Public Investment Committee of the National Assembly in May 2023. Further the system will vest in the 1st respondent thereby ensuring continuity in collection of excise duty as the components that will not be handed over will be provided through a maintenance contract. As such, there is no need to procure a new system which will cost in excess of Kshs 10 billion which will be a waste of public funds.
20. In their application, the petitioners claim that they stand to be subjected to higher taxes if the procurement of the new system is not halted by this court. For the petitioners to succeed at this stage, there must be a demonstration of imminent danger that they will suffer prejudice should the orders ought not be granted. This was the holding in Centre for Rights Education and Awareness (Creaw) & 7 others v Attorney General [2011] eKLR where Musinga, J. (as he then was stated:
- At this stage, a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
21. The process in respect of which the petitioners seek the intervention of this court is procurement of a new EGMS. They go on to submit in detail the terms of the existing contract of the existing system in a bid to demonstrate that a new system is not required. With respect this court can only interrogate the issues raised during the hearing of the petition. To delve into the matter at this stage, the court will run the risk of preempting the petition.
22. No decision has been made by the 1st respondent. The petitioners have not placed any material before me to show that there is an imminent increase in excise tax on the products they trade in, resulting in the increase in the cost of doing business should the 1st respondent proceed with the procurement of the new system. There is also no evidence of imminent loss of public funds as alleged. The petitioners have not demonstrated any prejudice that they would suffer should this court not grant the orders sought. My view is that the issues raised herein are premature.
23. From the material placed before me, I find that there is no demonstration of an immediate threat of violation of the petitioners' rights as alleged. Accordingly, I am not satisfied on this ground that the



petitioners have demonstrated a *prima facie* case that calls for the issuance of the conservatory orders sought herein.

24. On whether the petition will be rendered nugatory, the petitioners submitted that there is need to preserve the substratum of the petition which is to save public funds and loading an unnecessary tax burden on Kenyans and also cause confusion of collection of excise duty. They contend that the current system cost tax payers in excess of Kshs 10 billion and that the new system will cost a colossal sum which will not be recoverable if the orders sought are not granted. Further, that manufacturers and traders of excisable goods will be required to commit funds to install new systems and equipment, with no means of recovering the same from the 1st respondent.
25. On its part, the 1st respondent submitted that the EOI process will not be completed within the next 6 months, by which time judgment in the petition will have been delivered. Stopping the process will in the other hand render the 1st respondent incapable of performing its duties as it will have no time to commence and conclude the process after lapse of the current contract. The 1st respondent asserted that no damage will be suffered by the petitioners and the public at large and no public funds will be lost even if the process is concluded. Further that if the petition were to succeed, the court has powers to nullify the entire process and no damage will have been occasioned to the petitioners. The 1st respondent urged that rather than grant the orders sought, the court should expedite the hearing of the petition.
26. The petitioners in their quest for conservatory orders are required to prove that the substratum of the petition will be rendered nugatory if orders are not granted. The term nugatory was defined in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR by the Court of Appeal as follows:

The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
27. In order to succeed, the petitioners are required to demonstrate that if the orders sought are not granted, the petition will become worthless, futile, invalid and trifling.
28. In the case of *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR, the Court of Appeal considered an application for conservatory orders pending appeal and stated:

Having carefully considered the rival contentions we are not persuaded, in the circumstances of this case, that the holding of the forthcoming elections will negate the applicant’s intended appeal, if it ultimately succeeds. Those elections are not immutable; this court can nullify them if it finds that they were conducted on the basis of an illegal and unconstitutional framework that among other things discriminated against or disenfranchised the applicant and other members of LSK. The applicant will then have an opportunity to contest if it is determined with finality that indeed he is eligible to run for the office of president of LSK. The determination of this court after hearing the intended appeal will have two possible consequences. If the appeal is dismissed and we have in the meantime stopped the elections, it will mean losses that are not petty cash for a professional society that is financed primarily by members’ subscriptions. It will also throw into confusion the prescribed statutory calendar and disrupt or undermine the discharge of critical statutory and national functions vested in LSK such as regulation of the legal profession, resolution of complaints against practitioners, and assisting in the administration of justice and the practice of law in the country. If on the other hand the appeal succeeds, the applicant will



have an opportunity to contest in the ensuing bye-election. The primary prejudice that he will suffer is a delay in the realization of his ambition to lead the LSK, which we think can be mitigated or reduced substantially by fast-tracking the hearing and determination of his appeal. In our view that scenario is not synonymous with rendering the appeal nugatory. If he really wished, the applicant could be adequately compensated for any delay that is entailed, by award of damages.

29. Borrowing from the words of the Court of Appeal, the procurement process of the EGMS by the 1st respondent is not immutable. This court can nullify the same were it to find that it was conducted on the basis of an illegal and unconstitutional framework. The petitioners have claimed that public funds shall have been irrecoverably expended towards a futile cause, to wit, procurement of a system that is unnecessary and that may not be used. They further state that if the court eventually finds the petition to be merited, reversal of the procurement will be a tall order. Accordingly, I find that the ground that the petition will be rendered nugatory if the conservatory orders are not granted is without merit and therefore fails.
30. I have considered the rival arguments and am of the view that the petitioners have not put forward a satisfactory argument that the petition will be rendered nugatory if the orders sought are not granted. In any event, even if the procurement proceeds to its logical conclusion and the court eventually finds in favour of the petitioners, this court retains the jurisdiction to quash and nullify the entire process.
31. On whether the grant of the orders sought will be in the public interest, the petitioners submitted that they seek to prevent Kenyan tax payers from being burdened with the responsibility of paying for a new EGMS that they do not need. This they say, is because there is an existing working system whose ownership is vested in the 1st respondent upon the expiry of the contract with SCIS. In light of this, the petitioners submit that prejudice will be occasioned to the public if the impugned procurement is allowed to proceed as the public funds spent will not be recovered. The court must therefore intervene to safeguard the interest of the public from unnecessary tax burden that would arise if the procurement is allowed to go on. The petitioners urged the court to grant the orders sought to prevent a miscarriage of justice to Kenyan tax payers.
32. For the 1st respondent, it was submitted that it has an obligation to collect Excise Duty and requires a system that meets the needs of the time. The current system having been procured in 2013 has some defects owing to advancement in technology across the world. As such the 1st respondent should not be faulted for being diligent and offering an EOI in a bid to cover the challenges of the existing system. It was further submitted that the EOI has the blessings of the tax payers' representatives, namely the National Assembly. Further that since 2013, Parliament, the Executive and Judiciary arms of government have upgraded their systems to keep up with technological advancements. The 1st respondent thus contended that the petitioners seek in their application, that the 1st respondent does not move with the rest of the world and retains the 2013 technology.
33. In the *Gatirau Peter Munya case* (supra) the Supreme Court stated that conservatory orders 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 should therefore be granted on the inherent merit of a case. In doing so, the court must take into account the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes. In light of the foregoing, where a conservatory order is sought against a public body such as the 1st respondent herein, which has a specific mandate to carry out certain functions, the court must exercise due caution. Restraint is called for in the public interest, where the orders sought will result in the interruption of the lawful functions of a public body.



- 34. The petitioners contend that their rights and those of other tax payers are threatened with violation by way of increased taxation by the 1st respondent should the new EGMS be acquired. The court notes that an EOI has been published, kicking off the procurement process for the new EGMS. No decision has however been made. There is no evidence that upon acquisition of the new system, excise duty will be increased, and none has been provided by the petitioners. As such, the claim by the petitioners is both premature and speculative. Further, it is noted that the procurement of the new EGMS falls within the lawful mandate of the 1st respondent. My view is that it is in the public interest that the respondent is allowed to carry out its mandate without interruption by the court. I therefore find and hold that the procurement process should not be halted on the basis of speculation as this would be interfering with the lawful functions of the 1st respondent.
- 35. The upshot of the foregoing is that I am not satisfied that this application herein merits the orders of conservancy sought at this stage. Accordingly, the application dated April 27, 2023 is hereby dismissed. Costs in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JUNE 2023

M. THANDE

JUDGE

In the presence of: -

- **for the Petitioners**
- **for the 1st Respondent**
- **for the 2nd Respondent**
- **Court Assistant**

