REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima J.)

CONSTITUTIONAL PETITION NO. E374 OF 2021

-BETWEEN-

1. ISAIAH LUYARA ODANDO

2. WILSON YATA.....PETITIONERS

VERSUS

1. KENYA REVENUE AUTHORITY

2. ENERGY AND PETROLEUM REGULATORY AUTHORITY

3. THE CABINET SECRETARY, TREASURY

4. THE CABINET SECRETARY, PETROLEUM AND MINING

5. THE CABINET SECRETARY, ENERGY

6. THE SPEAKER OF THE NATIONAL ASSEMBLY

7. THE NATIONAL ASSEMBLY .....RESPONDENTS

-AND-

THE NAIROBI BRANCH

LAW SOCIETY OF KENYA.....INTERESTED PARTY

RULING NO. 1

Introduction:

1. By a Petition and Notice of Motion application both dated 20th September, 2021, the Petitioners herein, *Isaiah Luyara Odando* and *Wilson Yata* approached this Court seeking to forestall the intended upward adjustment of *Excise Duty rates* on petroleum products.

2. The current proceedings were prompted by the public notice issued by the Kenya Revenue Authority, the 1st Respondent herein, on 10th August, 2021 pursuant to Section 10 of the Excise Duty Act, that the rates of excise duty on petroleum products effective 1st October, 2021 will be reviewed upwards subject to the approval of the Cabinet Secretary.

3. On 27th September, 2021 the Court heard the parties after it had issued directions on 20th September, 2021 on filling of brief submissions. Upon hearing the parties, the Court granted prayer 3 of the Notice of Motion dated 20th September, 2021 pending the *inter partes* hearing of the application. The Court also issued further directions on the hearing of the application *inter partes*.

4. Parties duly complied with the directions on the hearing of the application hence this ruling. This ruling is, therefore, in respect of the Notice of Motion dated 20th September, 2021 (hereinafter referred to as '***the application'***).

The Application:

5. The application sought the following orders: -

> *1. Spent*
>
> *2. Spent*
>
> *3. That pending hearing and determination of this application inter-partes, this Court be pleased to issue temporary conservatory orders quashing the decision by the Commissioner General of the Kenya Revenue Authority to adjust excise duty rates for petroleum products effective 1/10/2021 subject to approval by the Cabinet Secretary Treasury and Planning.*
>
> *4. That pending hearing and determination of this Petition, this Court be pleased to issue temporary conservatory orders quashing the decision by the Commissioner General of the Kenya Revenue Authority to adjust excise duty rates for petroleum products effective 1/10/2021 subject to approval by the Cabinet Secretary Treasury and Planning.*
>
> *5. That the Costs of this Application to be in the cause***.**

6. The application was supported by two Affidavits sworn by *Isaiah Luyara Odando*, the first Petitioner/Applicant herein, on 20th September, 2021 and on 15th October, 2021 respectively.

7. The Petitioners averred that the Kenyan population was already bearing the brunt of hiked fuel prices and any further upward adjustment would impact negatively on the transport sector thus further compounding the bad economic situation caused by the COVID-19 pandemic.

8. It was the Applicants case that the social justice envisaged under Article 10(2)(b) of the Constitution demanded that Kenyans are not overburdened by heavy taxes that in turn impact on their socio-economic rights and the right to dignity under Articles 28 and 43 of the Constitution.

9. The Applicants faulted the Senate Committee on Finance and National Planning for rejecting a Report by an audit firm, KPMG, that suggested exclusion of excise duty, fees and other charges in computation of taxable value of fuel products on the basis that the high fuel prices were unsustainable and a threat to economic recovery.

10. It was the Applicants further case that Parliament had ignored the voice and the delegated sovereign power of the people expressed through the National Assembly by high taxation contrary to Article 1(3) of the Constitution.

11. The Applicants contended that the Respondents had failed to be transparent, open and accountable to Kenyans on why Kenyan fuel process retail higher as compared to its landlocked neighbouring countries and has taxes higher that the landed prices of fuel contrary to Article 10(2)(c), 2(2), 46(1)(b) and 201 of the Constitution.

The Applicants' submissions:

12. In further support of their case, the Applicants filed written submissions dated 15th October, 2021.

13. They submitted that the Public Notice dated 10th August, 2021 was shrouded in illegalities for not meeting the requirements expected of a Gazette Notice under Section 10 of the Excise Duty Act, 2015 and was without resolution of the National Assembly as envisaged under the Finance Act, No. 8 of 2020.

14. The Applicants submitted that they had demonstrated how Kenyans' right to affordable basic needs like fuel and fare, healthcare and economic needs had been infringed due to the inappropriate use of funds.

15. In submitting that the dispute affected the members of public, they stated that the Parliamentary Finance Committee had appreciated the raft of issues that Kenyans raised regarding high cost of fuel prices and to that end recommended Petroleum Products (Taxes and Levies) (Amendment Bill) 2021.

16. They stated that it had made out a *prima-facie* on the basis that the public notice dated 10th August, 2021 was illegal and that the Petroleum Stabilization Fund had been misappropriated thus subjecting Kenyans to unfordable cost of living.

17. It urged the Court to allow the application.

18. As the Interested Party supported the application, I will, herein below, look at its input.

The Interested Party's case:

19. The Nairobi Branch of the Law Society of Kenya filed written submissions dated 9th February, 2022 in support of the application.

20. It was its case that the application met the public interest threshold for the granting of conservatory orders. It claimed that since the application was seeking to protect the Applicants and the general public, then the public interest element for the consumers of petroleum products or of goods and services affected by pricing on petroleum products was demonstrated and the matter was deserving of conservatory orders.

21. To that end, it made reference to the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR where it was observed:

> [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.

22. It was further submitted that the Respondents, being public bodies, variously violated Articles 10 and 46(3) of the Constitution on National values and the right of consumers respectively by not involving the taxpayers in the exercise of public participation.

23. It was also submitted that public interest demands that conservatory orders be issued as the Petition directly affected and involved the taxpayers of this Nation who are directly affected by the price adjustments.

24. It stated posited that if the conservatory orders are not issued, the matter will be rendered nugatory.

25. On the question on whether the Respondents will suffer any prejudice, the Interested Party submitted that conservatory orders are meant to maintain the prevailing *status quo* so as to ensure that circumstances do not change while a matter is before Court.

26. It was its case that Respondents' rights will not be infringed if the *status quo* is maintained. However, for the Applicants, it was submitted that, they will greatly be prejudiced if the *status quo* is not maintained.

27. The Interested Party urged the Court to allow the application.

1st Respondent's case:

28. The Kenya Revenue Authority (hereinafter referred to as '***the KRA'*** or '***the 1st Respondent'***) opposed the application. It filed a Replying Affidavit sworn by *Maurice Oray*, the Deputy Commissioner Domestic Taxes Department, on 26th October, 2021.

29. It was deposed that under Section 5(2) of Kenya Revenue Authority Act, the 1st Respondent was mandated to collect and receive all revenue and to administer and enforce all written laws for purpose of assessing, collecting and accounting for all revenues including the Excise Duty Act.

30. In reference to Section 10 of the Excise Duty Act as read with Paragraph 2 of the First Schedule to the Act, it was deposed that the Commissioner General of KRA is empowered to adjust specific rates of excise duty annually to take into account the rate of inflation subject to approval by Cabinet Secretary in-charge of the National Treasury and Planning.

31. It was further deposed that every year the cost of goods and services increase due to the dynamics within and outside the country and in line with Section 10 of the Excise Duty Act, the Commissioner General informed manufacturers, importers of excisable goods and members of public that he intended to adjust the rates of excise duty using the average inflation rate of financial year 2020/2021 of 4.97% as determined by Kenya National Bureau of Statistics.

32. He deposed that the Excise Duty which is charged as a percentage of goods automatically increases as the prices of goods increases but maintains the real value of tax. He stated that the same does not apply for specific rates which is charged per unit measure.

33. On the foregoing, he deposed that the adjustment of the specific rates of Excise Duty every year protects the value of duty from erosion by inflation and that petroleum products fall under products which have specific rate of duty imposed.

34. He deposed further that inflation adjustment is based on revenue projections as prepared by The National Treasury Revenue Framework and Budget Policy Statement in order to meet the revenue requirements.

35. It was his case that the adjustment was done after the 1st Respondent engaged Kenya National Bureau of Statistics (KNBS), the institution that determined the monthly and annual inflation rate for the year 2020/2021 as 4.97%.

36. He deposed that the 1st Respondent developed a Legal Notice on the adjustment pursuant to the requirement under section 5 of the Statutory Instruments Act.

37. He stated that it published a Public Notice on 10th August, 2021 inviting the public and the relevant stakeholders for comments on the

intention to review the rates.

38. He deposed that the 1st Respondent received submissions from the various stakeholders namely, *British American Tobacco (BAT), Kenya Association of Manufacturers (KAM), Kenya Wine Agencies Limited (KWAL), Alcohol Beverages Association of Kenya (ABAK) Petroleum Institute of East Africa (PIEA), Total Energies Marketing (TEM), Price Waterhouse Coopers (PWC), and Kenya Breweries Limited/ UDV Distributors* and carried put virtual stakeholder engagements on inflation on 9th September, 2021, 20th September, 2021 and 23rd September, 2021.

39. It was his case that the 1st Respondent complied with the public participation requirement and was in the process of engaging with the 3rd Respondent in the adjustment outcome, a process whose outcome is yet to be determined.

40. He reiterated that it had complied with the law in reaching its decision and that the Applicants had not challenged the provisions of the law empowering the Commissioner General of KRA to make adjustments.

41. He deposed that the Petitioners had not made out a *prima-facie* case and that the grant of conservatory orders could not be sought on an intended action whose outcome had not been determined with certainty.

42. He stated that approval of the Commissioner's decision was yet to be granted by the 3rd Respondent in accordance with Section 10 of the Excise Duty Act and paragraph 2 of the First Schedule and absent any demonstration that the 1st Respondent acted contrary to any statute, the threshold for grant of conservatory orders was not met.

43. He deposed that the Petitioners had not put any satisfactory argument that the substratum of the Petition will be rendered nugatory if conservatory Orders were granted and in any event, this Court had jurisdiction to reverse the decision of the 3rd Respondent should it approve the adjustment.

44. In the end, the 1st Respondent stated that the 1st Respondent shall suffer harm if the conservatory orders are granted as it affected the Commissioner's execution of its mandate. It also maintained that the application did not disclose any reasonable cause of action for the grant of conservatory orders and as such ought to be dismissed.

The Submissions:

45. In its written submissions dated 8th October, 2021, the 1st Respondent identified the issues for determination as being *whether the Applicant were entitled to grant of conservatory orders* and *whether there had been adequate public participation in the policy decision*.

46. On entitlement to conservatory orders the Respondent submitted that the Applicants had not made out a *prima facie* case. To that end, reliance was placed on Nairobi Petition No 16 of 2011, *Centre for Rights Education and Awareness (CREAW) & 7 Others -vs- Attorney General* (2011) eKLR where it was held that -

> **…** a party seeking conservatory orders must demonstrate that he has prima-facie case with a likelihood of success and that if a court does not grant it its likely to suffer prejudice as a result.

47. Support was also found in *Platinum Distillers -vs- Kenya Revenue Authority* where the Court established the principles for the granting of conservatory orders and observed in part: -

> **…**the court is not called upon to and is indeed not required to make any definitive finding neither of fact on the law as that is the province of the court that will ultimately hear the Petition.

48. On what a *prima-facie* case is, reference was made to the decision in *Kevin K. Mwiti & Others -vs- Kenya School of Law* where it was observed thus: -

> **…** A prima facie case, it has been held is not one which must succeed at the hearing of the main case. However, it is a case which discloses arguable issues and in this case arguable constitutional issues.

49. In submitting that the Applicants ought not be granted conservatory orders, the Supreme Court decision in *Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others* (2014) eKLR, was relied on where it was observed -

> Conservatory Orders …should be granted on the inherent merit of the case bearing in mind the public interest, constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant cause.

50. On the second facet of the need to establish public interest in order to be granted conservatory orders, it was submitted that if the orders were to issue then the Government will not be able to collect revenue and the Applicants will not be able to compensate the 1st Respondent for lost revenues in the event the Petition fails.

51. It was further submitted that granting the conservatory orders would hamper Government operations and cause more suffering to a greater number than if it was allowed to continue collecting taxes.

52. It was urged that there would be no remedy to return the Government back to the position it would have been if Court granted the orders.

53. In addition, it was stated that the revenue projections had already been factored in the budget estimates tabled and approved by the National Assembly as such if the conservatory orders were allowed it will result in a short fall in revenue collection.

54. It was also submitted further that granting the orders sought will result in loan borrowing to plug the deficit which in turn will result in higher inflation rate in the country.

55. In reference to Article 209 of the Constitution that donates power to impose tax and charges to the National Government, it was submitted that the adjustment of the inflation rates is within the law and that the specific law giving the 1st Respondent that power had not been challenged. As such, this Court cannot interfere with this 1st Respondent's legal mandate unless there was clear breach of law.

56. To buttress that no unconstitutional action had been demonstrated, the Court was directed at Article 210 of the Constitution which provides that: - no tax or licencing fee may be imposed waived or varied except as provided by legislation.

57. On the issue whether there was adequate public participation, it was submitted that the 1st Respondent had subjected its decision to more than adequate forum of public participation. Reference was made to the depositions of *Maurice Oray* where he deposed that the 1st Respondent collected the views of various stakeholders and considered them.

58. In the end, it was submitted that the Petitioners were unconstitutional for seeking to prevent the 1st Respondent from exercising its mandate.

59. It was argued that the application had not met the threshold for conservatory orders and ought to be dismissed.

The 2nd Respondent's case:

60. The 2nd Respondent, *Energy and Petroleum Regulatory Authority (*hereinafter referred to as ***'EPRA'*** or ***'the 2nd Respondent')***, opposed the application through the Replying Affidavit of *Eng. Edward Kinyua,* the Director of Petroleum & Gas deposed to on 8th October, 2021.

61. He deposed that EPRA under the Energy Act, 2019 has the mandate to regulate the petroleum sector and under the Energy (Petroleum Pricing) Regulations 2010 it is a requirement to compute and publish petroleum pump prices by the 14th day of every month to be applicable from the 15th day of that month.

62. He stated that in doing so, EPRA considers the landed cost, storage and distribution costs, allowable wholesale margin for oil marketing Companies and retail margin for retail stations operators and applicable taxes as may be gazetted from time to time.

63. He deposed that since Kenya imports 100% of its refined petroleum products, the landed costs for each product are subject to price fluctuations in the international market. For that reason, EPRA can only incorporate the costs as provided of under the open tender system.

64. He deposed that applicable taxes are formulated by various Government agencies vide Legal Notices and in Kenya Gazette and are collected by the KRA. He deposed that it ensures transparency by consistently publishing and informing the public on the various components of the petroleum price build up through press release.

65. On the foregoing, he deposed that the Applicants' contention that there was no transparency was without merit because there was press release for all the changes in the prices.

66. He deposed that the Applicants failed to substantiate any impropriety on the part of EPRA or that they had misapprehended the process of determination, application and collection of taxes in respect of the impugned levy.

67. It was his case that the Applicants had not demonstrated a case for interference with the mandate of the 2nd Respondent. He urged that the application be dismissed.

The 3rd, 4th and 5th Respondents' cases:

68. The 3rd and 4th Respondents filed Grounds of opposition dated 8th October, 2021 in opposition to the application. The 2nd Respondent was also enjoined in the Grounds of opposition.

69. The Respondents opposed the application by stating that the orders sought by the Petitioners were final in nature and ought not to be granted at an interlocutory stage.

70. The Respondents further asserted that the Petitioners misunderstood and misapprehended the process and procedure through which taxes are reviewed and that the empowering section of the Excise Act enjoys a presumption of constitutionality until the same is sufficiently rebutted and declared unconstitutional.

71. It was their case that Petitioners failed to meet the requirements for the grant of orders sought in the application and that the balance of

probabilities leans in favour of the Respondents for reasons that if the orders sought are granted, the Respondents would have no means for recovery of monies lost.

72. It was further their case that the Petitioners have failed to initiate processes to use any available channels to have their grievances heard.

73. It was their case further that Petitioners were seeking to interfere with the statutory and administrative powers of the Respondents without having advanced any legitimate reasons.

74. They contended that the Applicants failed to demonstrate any instance of the Respondents having acted *ultra-vires* and as such there was no basis for grant of the orders sought.

75. It was further their case that the application was vague, full of glaring conjectures and does not raise issues for constitutional interpretation by Court and as such, is an abuse of the Court process and, therefore, ought to be struck out with costs.

76. The 4th Respondent, the Cabinet Secretary for Petroleum and Mining, further opposed the application through the Replying Affidavit of *Joseph Wafula*, the Ministry's Chief Economist in-charge of Mid and Downstream Petroleum. The affidavit was sworn on 8th October, 2021.

77. He deposed that the 4th Respondent is responsible for policy formulation and regulation but does not participate in enacting, approving or collection of taxes.

78. It was its case that in a bid to stabilize the prices of petroleum products the Respondents in consultation with stakeholders led to the enactment of Legal Notice No. 124 of 2020, Petroleum Development Levy Order, 2020 to stabilize local petroleum pump prices in instances of spikes occasioned by high landed costs above the threshold established by the 2nd Respondent.

79. On the foregoing, he stated that the Applicants' contention that Petroleum Development Levy Order is shrouded with secrecy and without clear Regulations is unfounded. He also stated that the funds collected from the levy are accounted for.

80. It was his case that the application failed to substantiate any impropriety on the part of the 4th Respondent and that the Applicants have misapprehended the process of determination, application and collection of taxes as regards the impugned levy.

81. He urged the Court vacate the conservatory orders granted on grounds of misrepresentation of facts and law and non-disclosure of material facts.

82. He further deposed that the application was supported by newspaper cuttings and as such ought not to form the basis of any decision.

83. He urged the Court to dismiss the application.

The 2nd, 3rd, 4th & 5th Respondents' submissions:

84. The 2nd, 3rd, 4th and 5th Respondents filed joint written submissions dated 25th October, 2021.

85. In submitting that the Petitioner failed to make a case for the grant of conservatory orders, the Respondents argued that the remedy sought by the Petitioners is of judicial review nature and when granting such an order the Court ought to concern itself not with the propriety of the decision but rather with the process. To that end, support was found in the case of *Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited* [2008] eKLR.

86. It was further submitted that the impugned decision was made within the law and the Respondents acted within their mandates and as such, the Court at this stage the Court ought not to concern itself with the merits of the impugned decision when deciding whether or not to grant the orders sought in the application.

87. It was further submitted that since the prayers in the application and the Petition are similar, it follows that the Petitioners have sought final orders in their interlocutory application.

88. On the need not to grant final orders at interim stage, the Courts attention was drawn to case of *Okiya Omtatah Okoiti v Attorney General & 5 others* [2020] eKLR, where the Court reiterated the findings of Ibrahim J. (as he then was) in *Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others* (2011) eKLR where the Learned Judge stated as follows: -

> **….** The Court must be careful for it not to reach conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely visa vis the case of either parties.

89. It was submitted that this Court must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition and, therefore, not give final orders as prayed in the application.

90. The Respondents also reiterated the principles for the grant of Interim conservatory orders and to that end referred Court to Petition Nos. 56, 58 & 59 of 2019 *Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 8 others (Interested*

Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) [2019] eKLR, where the Court reinstated the principles in regard to the grant of interim conservatory orders.

91. In the end, the Respondents submitted that the Petitioners failed to demonstrate that there was a *prima facie* case with likelihood of success, for reasons that the Petitioners had not adduced any evidence to that end.

92. It was reiterated that the grant of the orders sought in the application would unfairly prejudice the Respondents as there would be no way for the collection of monies lost if at the end of the hearing of the Petition the Court finds that the Petition w unmerited.

93. This Court was urged to dismiss the application.

The 6th and 7th Respondents' cases:

94. The 6th and 7th Respondents are the Speaker of the National Assembly and the National Assembly respectively. They opposed the application through Grounds of Opposition dated 26th September, 2021.

95. In reference to the Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR on the requirements for the grant of conservatory orders, the Respondents stated that the Applicants were underserving of the interim orders.

96. It was their case that the rate of taxation is a policy decision solely within the exclusive mandate of the Executive and as such the application is misconceived and without any basis in law as the orders sought violate the constitutional and statutory mandate of the National Assembly.

97. It was their case that public interest militates against the suspension of the impugned taxes at this stage as the taxes to be collected therefrom have already been factored into the budget for the current financial year.

98. On the foregoing basis, it was prayed that the application for conservatory orders be dismissed with costs.

Issues for Determination:

99. From the perusal of the documents filed on record by the respective parties' cases, the issues that arise for discussion are as follows: -

i. The nature of conservatory orders.

ii. The applicable principles for the granting of conservatory orders.

iii. Whether the application is merited.

100. I will consider the issues in *seriatim.*

Analysis and Determination:

i. The nature of conservatory orders:

101. In Petition E408 of 2020 ***Okiya Omtatah Okoiti v Judicial Service Commission; Philomena Mbete Mwilu & another (Interested Parties)*** [2021] eKLR, this Court made a detailed summary of the nature of conservatory orders in reference to various decisions of the superior Courts. This Court stated ass follows: -

> *16. In* ***Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others*** *(2014) eKLR, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders 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 Applicant's case for orders of stay.*
>
> *17. The Court in Nairobi Civil Appeal 151 of 2011* ***Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW)*** *[2016] eKLR defined a conservatory order as follows: -*
>
> > *5. 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. It is an order of status quo for the preservation of the subject matter.*
>
> 18. *In* ***Judicial Service Commission vs. Speaker of the National Assembly & Another*** *[2013] eKLR the Court had the following to say about the nature of conservatory orders:*

Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

18. Given the nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.

19. The foregoing was fittingly captured by ***Ibrahim, J*** *(as he then was) in Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR. The Learned Judge, correctly so, stated as follows: -*

The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

20. The decisions in ***Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General*** *(2011) eKLR,* ***Platinum Distillers Limited vs. Kenya Revenue Authority*** *(2019) eKLR and* ***Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others*** *(2017) eKLR also variously vouch the cautionary approach.*

21. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, I will, therefore, restrain myself from dealing with such issues.

ii. The applicable principles for granting of conservatory orders:

102. The principles applicable for the granting of conservatory orders have also been the subject of discussion by various Courts. In ***Okiya Omtatah Okoiti v Judicial Service Commission; Philomena Mbete Mwilu*** case (supra) this collated the principles as established by various decisions in the following fashion -

23. The locus classicus is the Supreme Court in Civil Application No. 5 of 2014 ***Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others*** *(2014) eKLR where at paragraph 86 stated the Court stated as follows: -*

[86] …… 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 courses.

24. In Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR after going through several decisions, the Court rightly so, summarized three main principles for consideration on whether to grant conservatory orders as follows: -

(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

(c) The public interest must be considered before grant of a conservatory order.

25. There is also the need to ascertain whether the conservatory order sought will delay the early determination of the dispute. (See Nairobi High Court Constitutional Petition No. E243 of 2020 Kenya Tea Development Agency Holdings Limited & 55 Others vs. The Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 Others and Kenya Small Tea Holders Growers Association (Kestega) (Interested Party) (unreported).

103. In ***Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others*** [2015] eKLR**,** the Court summarized the principles for grant of conservatory orders as: -

(i) The need for the applicant to demonstrate an arguable prima facie *case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.*

(ii) 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.

(iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

(i) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

104. Having set out the guiding principles, I will now deal with the last issue.

iii. Whether the application is merited:

A *prima-facie* case:

105. A *prima facie* case was defined in ***Mrao vs. First American Bank of Kenya Limited & 2 Others*** (2003) KLR 125 to mean: -

…. In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.

106. The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 ***Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another*** (2015) eKLR while dealing with what a *prima facie* case is, made reference to Lord Diplock in *American Cyanamid vs. Ethicon Limited (1975) AC 396,* when the Judge stated thus: -

If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.

107. What constitutes a *prima-facie* case was further dealt with by the Court of Appeal in ***Mirugi Kariuki -vs- Attorney General*** Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show……. that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. ***Without a rebuttal to these allegations****, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought.* (emphasis added).

108. In ***Re Bivac International SA (Bureau Veritas)*** (2005) 2 EA 43, the Court while expounding on what a *prima-facie* case or arguable case is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

109. In sum, therefore, in determining whether a matter discloses a *prima-facie* case, a Court must look at the case as a whole. It must weigh, *albeit* preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by Articles 22 (1) and 258(1) of the Constitution which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when the Constitution has been contravened, or is threatened with contravention.

110. Returning to the case at hand, the Petitioners' contention rested on the impact and processes of the upward adjustment of the excise duty on petroleum products. The resultant effect would be the skyrocketing of the fuel prices which will in turn translate to rise in costs of goods and services in almost every sector, if not all sectors, in Kenya.

111. It was argued that the upscaling of the costs of goods and services will no doubt result to high costs of living across the country. The Petitioners further took issue with the failure by the Respondents to cushion the escalating fuel prices and yet there is in place the Petroleum Subsidy Fund which in essence is to guard against such upscaling.

112. The Petitioners called upon this Court to note that Kenyans are already struggling under the heavy burden of high cost of living and that the introduction of further taxes on fuel will have serious negative impact on the quality of life generally. They decry mismanagement, lack of transparency and accountability of the Petroleum Subsidy Fund such that the Fund is no longer serving the intended purpose.

113. The processes towards the introduction of the impugned taxes were also questioned. Such include whether there was adequate public participation and the legal validity of the Public Notices and Gazette Notices.

114. The Petitioners, hence, call for the Court's intervention.

115. In the main, the Petitioners vehemently argued that the introduction of the impugned levy will variously infringe Articles 1(3), 2(2),

10(2), 43(1), 46(1)(b) and 201(a) of the Constitution.

116. The Respondents' common position is that the Petitioners failed to establish a *prima-facie* case. As captured above, the Respondents gave several reasons as to why there was no breach of the Constitution and the law.

117. This Court has carefully weighed the rival positions. Whereas the Respondents do not deny the impact of the impugned taxes on the lives of Kenyans, they posited that the taxes were within the constitutional and legal confines. With such a position, several issues arise for determination including whether the various provisions of the Constitution and the law as cited by the Petitioners were indeed infringed or not including whether the impugned taxes pass the test in Article 201 of the Constitution, whether the Petroleum Subsidy Fund serves its intended purpose, a consideration of the principle of social justice in Article 10 of the Constitution in the context of this matter, among many other pertinent constitutional issues.

118. The issues raised in the Petition cannot, therefore, be wished away. They are serious constitutional issues worth consideration. It is on that background that this Court finds that the Petition raises a *prima-facie* case in the circumstances of this case.

Irreparable Damage:

119. This second requirement for the granting of conservatory orders dictates that an Applicant must demonstrate that if the application is not allowed, the substratum of the Petition will be lost and as such the main claim will be rendered nugatory. In other words, the Applicant will suffer prejudice.

120. Put differently, an Applicant must show, *albeit* on the face of it, that if not granted conservatory orders, the objective of the Petition to forestall the continued or threatened violation of the rights and fundamental freedoms or the Constitution will irredeemably be lost and there would be no need to further pursue to main Petition.

121. The Applicants and the Interested Party submitted that since conservatory orders are meant to preserve the *status quo*, it was necessary to allow the application. It was contended that if no orders are granted, then the ordinary citizens will be unable to be compensated in the event the Petition is successful.

122. The Respondents argued that the granting of the conservatory orders will impact on the State's ability to finance its operations since the adjustment had already been factored in the Budget Policy Document and as such, the country stands to suffer prejudice if the adjustment is stopped.

123. I have carefully considered this aspect of the dispute. One of the parties, concededly, stand to suffer prejudice either way this Court decides on this issue.

124. Whereas the country majorly depends on taxes to finance its budgetary projections and operations, the Constitution and the law sets out the manner and limits within which such taxes must be raised and applied. The Constitution and the law does not accord the State a *carte blanche* to levy taxes as it pleases. The State and all State actors must, like caged animals, play, but within the Constitution and the law.

125. Given the impact of the matter on the lives of Kenyans and the State's ability to levy and collect taxes, there is every justification for an expeditious determination of this matter.

126. As the Petitioners have established a *prima facie* case, it will be unfair to the citizens of this country for this Court to allow the introduction and levying of the impugned taxes since the citizens will not be able to recover such payments in the event the Petition is successful. Conversely, in the event the Petition is unsuccessful, the State still has the machinery to raise more taxes.

127. Further, it is not lost to this Court that Kenyans are currently struggling under the negative impacts of the Covid-19 pandemic, hence, it can only be prudent that the Petition be first heard to determine whether the intended taxes are within the permissible constitutional and legal limits. This Court is also alive to the fact that the State has the ability to re-adjust its budgetary allocations and projections further to seeking foreign aid and borrowings.

128. By putting the twin considerations on a weighing scale, this Court finds that, in the unique circumstances of this case, there will be greater prejudice in subjecting the citizens to the impugned taxes before the Petition is heard and determined.

129. The foregoing finding is buttressed by the reasoning of the Court of Appeal in ***Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others*** [2016] eKLR where even after dismissing an application for conservatory orders, the Court went ahead to assert the constitutional rights of the Applicant and the need for the Court to protect those rights. The Court eventually granted orders which maintained the *status quo*. The Court expressed itself as follows: -

> *59. As indicated above, it has come to the attention of the Court that notwithstanding the pendency of the applicant's petition alleging abuse of legal process by the 1st and 2nd respondents, the 1st and 2nd respondents have preferred charges against the applicant and bonded him to appear before the Magistrate Court to answer the charges which are the subject matter of the petition.*
>
> *60. If that is allowed to happen, the constitutional right of the applicant to the protection of the law and his right to institute legal proceedings to enforce his rights will be breached and the Court will have failed to protect and promote the purpose and principles of the Constitution including the rule of law. Moreover, the prosecution will undermine the authority of the High Court to administer justice in an orderly and effective manner, bring the administration of justice into disrepute and render the petition futile. The courts should not be seen to be impotent.*

61. We would for those reasons invoke the constitutional principles and the inherent jurisdiction of the Court and in spite of the dismissal of the application, grant a conservatory order suspending the charges and the arraignment of the applicant until 27th May, 2016 when Petition No. 310 of 2014 is scheduled to be heard. Thereafter, the applicant is at liberty to move to the High Court and the High Court has liberty to make any further orders.

130. Likewise, in this case, there is the need to maintain the *status quo* as the Court determines whether the Constitution and the law were infringed as alleged.

131. The Court, therefore, returns the verdict that the members of public stand to suffer irreparable loss if no interim relief is granted.

Public Interest:

132. '***Public interest'*** is defined by the *Black's Law Dictionary 10th Edition* at page 1425 as: -

The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.

133. Generally speaking, Constitutions and laws are passed for the orderly governance of the people. As such, the laws are always presumed to be constitutional until the contrary is proved. In a matter, therefore, where the Constitution is alleged to be violated or is threatened with violation, the Court must thread carefully since the allegation is yet to be subjected to legal scrutiny.

134. Further, where the constitutionality of a statute is impugned, Courts must weigh, with care, the alleged breaches against the doctrine of presumption of constitutionality of statutes. It is the case that unless proved otherwise, statutes are deemed constitutional and may only be suspended in the clearest of cases and where the statute is a threat to life and limb.

135. In ***Kizito Mark Ngaywa v. Minister of State for Internal Security and Provincial Administration & Another*** [2011] eKLR, the High Court (*Mohamed, J* (as he then was) had the following to say on the issue: -

I have considered the application for adjournment and that for temporary suspension of the regulations and the submissions by Counsel. When considering the matter, I recalled my decision in PETITION NO. 669 OF 2009, MOMBASA BISHOP JOSEPH KIMANI & OTHERS –V- ATTORNEY GENERAL, COMMITTEE OF EXPERTS AND ANOTHER which I delivered on 6-10-2010. In the said case I was guided by the decisions of the Constitutional Court in Tanzania in NDYANABO –V- ATTORNEY GENERAL (2001) 2 EA 485 in which the said court presided over by the Hon. Chief Justice Samatta stated as follows: -

Thirdly; until the contrary is proved, a legislation is presumed to be Constitutional. It is a sound privilege of Constitutional construction that if possible, a legislation should receive such a construction as will make it operative and not inoperative.

Fourthly, since, as stated, a short while ago, there is a presumption of Constitutionality of legislation, the onus is upon those who challenge the Constitutionality of the legislation, they have to rebut the presumption. Fifthly where those supporting a restriction on a fundamental right rely on a claw back or exclusion clause in doing so, the onus is on them, they have to justify the restriction."

I am still persuaded by the above-mentioned principles of Constitutional interpretation. In the BISHOP JOSEPH KIMANI case, the court observed as follows: -

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 stay actually show that the operation of the legislative provision are a danger to life and limb at that very moment.

It is my view that the principle of presumption of Constitutionality of Legislation in 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.

136. The applicability of the doctrine of constitutionality of a statute was further dealt with by the Court of Appeal alongside the aspect of public interest. That was in ***Attorney General & another v Coalition for Reform and Democracy & 7 others*** [2015] eKLR.

137. In the matter, the High Court had suspended some provisions of the Security Laws (Amendment) Act. The State appealed the decision. In dismissing the appeal, the Court of Appeal had the following to say:

*We agree with Prof. Muigai that in an application of this nature, which is not seeking entirely private law remedies, the Court must also consider where the public interest lies. In **PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES** case, (supra), it was held that when the State is the appealing party in an appeal where the constitutionality of a statute is the subject matter for determination, the State interest and harm merges with that of the public. There is also the doctrine of presumption of constitutionality which must be borne in mind. The impugned Act is intended to serve the public.*

*While the Court appreciates the contextual backdrop leading to the enactment of the **SLAA**, it must also be appreciated that it is not*

*in the interest of justice to enact or implement a law that may violate the Constitution and in particular the Bill of Rights. Constitutional supremacy as articulated by **Article 2** of the **Constitution** has a higher place than public interest. When weighty challenges against a statute have been raised and placed before the High Court, if, upon exercise of its discretion, the Court is of the view that implementation of various sections of the impugned statute ought to be suspended pending final determination as to their constitutionality, a very strong case has to be made out before this Court can lift the conservatory order.* ***The State would have to demonstrate, for example, that suspension of the statute or any part thereof has occasioned a lacuna in its operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace.***

*We do not think that the applicant has made out such a case. The Court was not told that the grant of the conservatory orders has brought about a vacuum in our laws which makes it impossible or difficult to investigate and prosecute terror suspects or such other persons who may be targeted by the **SLAA**. Apart from the eight (8) sections of the **SLAA** whose operationalization has been temporary suspended, all other laws of Kenya are still in full operation. We entertain no doubt that as we await either the hearing of the appeal before this Court, or, the finalization of the petitions before the High Court, the country's security agents and law enforcement organs can still make full use of the existing laws to keep the country and its people safe.*

138. In this case, it is in public interest that the Constitution and the law are respected and followed. Therefore, an allegation that the Constitution is violated or is threatened with violation ought not to be lightly taken. However, Courts must always exercise restraint so as not to deal with the main issues at interlocutory stages.

139. In this case, public interest miliates against the Respondents. There is every good reason that this Court, in the first instance, determines if the impugned taxes are within the constitutional and legal provisions.

Disposition:

140. The above analysis yields that the Petitioners have laid a basis for the grant of the orders sought in the application.

141. As stated elsewhere above, given the nature of the Petition herein, there is need for its expeditious disposition.

142. I cannot end this discussion without pointing out that the reasons given by Hon. Makau, J on 27th September, 2021 when issuing the interim reliefs add to this Court's finding that indeed the prevailing *status quo* in this matter ought to be maintained.

143. In the end, the following orders hereby issue: -

(a) The Petition shall be heard by way of reliance on the pleadings, affidavit evidence and written submissions.

(b) Any Respondent and/or the Interested Party desirous of filing any Response or Further Response, as the case may be, shall do so within the next 7 days.

(c) The Petitioners shall thereafter file and serve any supplementary responses, if need be, together with written submissions within 10 days of (b) above.

(d) The Respondents and the Interested Party shall file and serve their respective written submissions within 10 days of (c) above.

(e) Highlighting of submissions on a date suitable to the Court and the parties.

(f) Time is of essence. Any defaulting party shall suffer the consequences.

(g) Pending the hearing and determination of the Petition, there shall be a stay of the decision by the Kenya Revenue Authority to adjust excise duty rates for petroleum products effective 1st October, 2021 (now past) or on any other date.

(h) Pending the hearing and determination of the Petition, the Cabinet Secretary Treasury and National Planning be and is hereby restrained form in any manner whatsoever considering and/or approving the decision by the Kenya Revenue Authority to adjust excise duty rates for petroleum products effective 1st October, 2021 (now past) or on any other date.

(i) Leave to appeal granted.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2022.

A. C. MRIMA

JUDGE