Andrew Amadi (Suing As The Official Representative Of Kenya Renewable Energy Association) v Kenya Revenue Authority; Greentech Solutions Limited & 19 others (Interested Parties) (Constitutional Petition E127 of 2022) [2022] KEHC 13256 (KLR) (Judicial Review) (30 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13256 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

CONSTITUTIONAL PETITION E127 OF 2022

HI ONG'UDI, J

SEPTEMBER 30, 2022

BETWEEN

ANDREW AMADI (SUING AS THE OFFICIAL REPRESENTATIVE OF KENYA RENEWABLE ENERGY ASSOCIATION) ..... PETITIONER

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

AND

GREENTECH SOLUTIONS LIMITED ..... INTERESTED PARTY

ORB ENERGY PRIVATE LIMITED ..... INTERESTED PARTY

SONNEN ENERGIE TECHNIK ..... INTERESTED PARTY

LJOS COMPANY (EOS SOLAR ..... INTERESTED PARTY

HELIOS AGROSOL LTD ..... INTERESTED PARTY

DAVIS & SHIRTLIFF ..... INTERESTED PARTY

GLOSEC SYSTEMS LIMITED ..... INTERESTED PARTY

ENERGOOD EAST AFRICA LIMITED ..... INTERESTED PARTY

SOLAR POEWER AND INFRASTRUCTURE LIMITED . INTERESTED PARTY

POWER POINT SYSTEMS EAST AFRICA LIMITED ..... INTERESTED PARTY

SCANDNAVIAN SOLAR SYSTEMS LIMITED ..... INTERESTED PARTY

CHAMELEON SOLUTIONS LIMITED ..... INTERESTED PARTY

CENTRE FOR ALTERNATIVE TECHNOLOGIES LTD .... INTERESTED PARTY

CLIMACENTO GREEN TECH LTD ..... INTERESTED PARTY

COMMERCIAL RENEWABLE ENERGY TECHNOLOGIES LTD .. INTERESTED PARTY

STEEL STONE KENYA LIMITED ..... INTERESTED PARTY

TECHNICAH ENGINEERING SERVICES LIMITED ..... INTERESTED PARTY

TILE& CARPET LIMITED ..... INTERESTED PARTY

SOLLATEK ELECTRONICS (KENYA) LIMITED ..... INTERESTED PARTY

YAOSHUN IMPORT & EXPORT LIMITED ..... INTERESTED PARTY

RULING

1. Before court for determination is the petitioner's application dated March 29, 2022 and the respondent's preliminary objection dated May 4, 2022. The application is brought pursuant to Article 19(3) (a) and (b), 23(3) (c) of *the Constitution* of Kenya, Rules 3(1), 4(2) (iii), 19 and 23 of the *Constitution of Kenya, (Protection of Rights and Fundamental Freedoms) Practice & procedure rules*, 2013 (Mutunga Rules) and all other enabling provisions of the law. It seeks for orders that:

    1. Spent

    2. Spent.

    3. The court be pleased to issue conservatory orders against the respondent staying and or suspending the implementation of its ruling dated November 22, 2021 reference No. KRA/CBC/BIA/THQ/GEN/099/11/2021 and specifically restraining the respondent from reclassifying solar water heaters imported under HSC 8419:19 to HSC 8516:10 by collecting and/ or demanding payment of VAT and Import duty on importation of solar water heaters by themselves, their agents, their servants, employees or representatives pending the hearing and determination of this petition.

    4. The costs of this application be provided for.

2. The application is premised on the petitioner's supporting affidavit sworn on March 29, 2022. A summary of the same is as follows;

    a. The petitioner is a nonprofit association registered under the *Societies Act* dedicated to facilitating the growth and development of renewable energy business in Kenya. The 1st to 20th interested parties are some of the members of the petitioner who have been adversely affected by the decisions of the respondent.

    b. The interested parties have been importing the solar water heaters under Hs Code 8419.19.00 for the last 10 years which are ordinarily equipped with a backup heating element for heating water in the rare events when the solar water energy is inadequate.

    c. All declarations were verified by the respondent's agents including Kenya Bureau of standards. He deponed that the solar water heaters had not been reclassified for years. In 2020 the respondent had issued notices for

reclassification for the solar water systems from HS code 8419.19.00 to 8516.10.00. Later the respondent demanded back duty & VAT for all posts done during the previous years. This decision has been challenged before the Tax Appeals Tribunal by the interested parties.

d. He averred that after a meeting between the petitioner and respondent, the former sought for a ruling on the issue of reclassification. Following an opinion sought and obtained from the World Customs Organization (W.C.O) the respondent did a ruling dated 22nd November 2021 the subject of this suit. The deponent criticized the opinion by W.C.O as the correct procedure was not followed. Secondly under Article 16 of the HS Convention it is only the HS Committee which has powers to reclassify products.

e. He depones that before the ruling the respondent never issued notices calling for stakeholders to air their views on this issue. That the same offended Articles 47, 201 & 232 of *the Constitution* & Section 5 of the *Fair Administration of Action Act*. Further that pursuant to section 65 of the *Tax Procedures Act*, the respondent's actions of enforcing the ruling and demanding more taxes is both illegal & unconstitutional.

f. He depones further that importation of goods is guided by the standard classification of goods. The tariffs on importation and those used in the countries of origin must match, the invoice used by the exporter. Failure to comply with this makes it difficult for importation of the solar water heaters. This has caused the interested parties to have challenges importing the said items. He avers that the post clearance audit department of the respondent overstepped its mandate by seeking to reclassify the solar water heaters. Its actions are therefore in contravention of the petitioner's and interested parties rights.

g. The actions of the respondent infringe on the interested parties right to property as the monies paid to the respondent under protest could have been reinvested in the businesses of the interested parties. Further, the initial purpose of classifying solar water heaters under HS 8419:19 and the decision to zero rate solar water heaters in Kenya was aimed at averting the negative environmental effects occasioned by the use of fossils fuels.

h. The current challenges experienced in the renewable energy sector will lead to significant loss of investment in this sector which risks eroding all the gains made towards reducing the effects of the continued use of fossil fuels. These will also lead to loss of employment as the interested parties are likely to abandon the renewable energy sector resulting in massive job loss. Unless this court intervenes, they will be greatly prejudiced.

The respondents' case

3. The respondent filed a replying affidavit by Dennis Kabiru sworn on May 6, 2022. Reiterating the contents of the application, as to how the dispute arose, he deposed that the respondent reviewed all objections of the interested parties and upheld its previous tax demands. Those dissatisfied including the interested parties appealed to the Tax Appeals Tribunal and appeals are pending at the Tax Appeals Tribunal with the similar dispute of classification of dual systems solar water heaters.

4. He deposed that the petitioner requested the respondent for a review of the Tariff classification of dual system solar water heaters and a ruling dated November 22, 2021 was issued. He averred that the dispute before this court is purely a tax dispute that has no constitutional question to be answered by this court. That the petitioner ought to have filed for review under sections 229, 230 and 230 of the EACCMA. Hence, the petition offends the doctrine of exhaustion.

5. He deposed that the ruling dated November 22, 2021 issued to the petitioner, and all tax demands and review decisions issued to the interested parties and/ all taxpayers were issued by the respondent in accordance with the law, which laws were duly quoted and explained, through the reasons given. He deposed that in filing this petition, the petitioner contravened Article 47 of *the Constitution* and section 9(2) of the FAAA for failing to exhaust the dispute resolution mechanism provided under sections 229, 230 and 231 of the *EACCMA*.

6. He averred that the tariff classification of all imported items is governed by the provisions of the EAC HS Code, which is a Common External Tariff expressly provided for under section 4 of the*EACCMA* and not the process averred to by the petitioner. Further, the law under section 62(3) and 65(5) is to the effect that rulings are not binding on tax payers and is to provide an avenue for a taxpayer to apply for a review of the said ruling and appeal to the Tax Appeals Tribunal if dissatisfied with the contents of the ruling.

7. He further averred that on one hand, the petitioner disputes the Tariff code but on the other hand, seeks this Court to interpret and classify the dual system solar water heaters using the very same tariff code.

8. He deposed that the post clearance Audit is a mechanism provided for under the law to ensure that tax payers are facilitated to expedite and clear their goods during importation. The respondent has a mechanism to ensure that all tax payers correctly declared and paid the correct amount of taxes. He averred that none of the actions by the respondent created any legitimate expectation on the petitioner and interested party to incorrectly classify the dual solar water heaters. Further that there was no infringement of the petitioner's right to property, and the Tariff Ruling did not raise a constitutional question.

9. He reiterated that no legitimate expectation could be created contra statute. Also, that the petitioner confirms that indeed the issues raised by the ruling can be addressed by a proper legal body, the Tax Appeals Tribunal; they are in the nature of a tax dispute best ventilated before the Tax appeal Tribunal. He called on the petitioner and interested parties to comply with the doctrine of exhaustion, through the appeal mechanism at the Tax Appeal Tribunal which the interested parties have utilized.

The preliminary objection

10. The respondent filed a preliminary objection dated May 4, 2022 raising the following grounds:

    (i) That the petitioner lacks locus to bring this application and petition against the respondent as the same offends the mandatory provisions of section 229(1) & (4) as read with section 230 of the *EACCMA* 2004.

    (ii) That the petition and application as filed by the petitioner offends the provisions of the doctrine of exhaustion of remedies.

    (iii) That any issues relating to the interested parties can only be dealt in accordance with section 229(1) & (4) as read together with section 230 of *EACCMA* 2004.

(iv) That the application and petition do not meet the threshold for a constitutional petition as it raises no constitutional question to be answered.

(v) That the applicant's application is sub judice and amounts to forum shopping since the issues raised herein are also the same issues pending for determination before the Nairobi Tax Appeals Tribunal in Appeals by the interested parties.

(vi) The application is filed contrary to the provisions of section 9(2) of the *FAAA*.

(vii) The application filed contravenes the express provisions of section 52(1) of the *Tax Procedure Act*.

(viii) The application has been filed contrary to the provisions of sections 12 and 13 of the *Tax Appeals Tribunal Act*.

(ix) That the application is therefore an abuse of the court process and a waste of judicial resources.

The response to the preliminary objection

11. The petitioner filed a replying affidavit sworn on May 19, 2022. He deposed that by making and enforcing the ruling dated November 22, 2021 the respondent has infringed on the cited petitioner's and interested parties' constitutional rights hence the applicant has a standing by invoking Article 258 (1) of *the Constitution*. The reason being that the respondent is enforcing the ruling dated November 22, 2021 contrary to section 65 (5) of the *Tax Procedures Act* and is now demanding custom duty in monetary form thereby infringing on the petitioner and the interested parties right to property.

12. He reiterated that the respondent failed to comply with the various constitutional provisions and maintained that Constitutional and Human rights issues are purely a preserve of this court and the petitioner and the entire petition is properly before this court. He therefore deposed that the petition and application meet the constitutional threshold set out in *Anarita Karimi Njeru vs Attorney General* (NO. 1) 1979 1KLR 154 and relied on *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 others* [2015] eKLR that the petition raises triable constitutional issues and the same must be considered on merit.

13. He averred that the jurisdiction of the tribunal is limited under section 12 of the *TAT Act*. Further that the applicable statutory provision relevant is section 52(1) of the *Tax Procedure Act* and which clearly suggests that a tax payer can on appeal to the tribunal against an appealable decision as opposed to the current ruling which is a decision issued in the cause of the making of a tax decision. Pursuant to section 3A of the *Tax Procedures Act* there is no appealable decision in the current matter as the ruling dated November 22, 2021 is not an objection decision but rather a decision made in the course of the making of a tax decision. Hence the application does not offend section 12 and 13 of the *Tax Appeals Tribunal Act* as well as section 52(1) of the *Tax Procedure Act* there being no appealable decision.

14. He refuted that section 229(1) and section 230 of *EACCMA* 2004 are applicable in this matter, and the petitioner cannot also be accused of contravening section 229(1) as the same applies in case of an appealable decision of the commissioner. He averred that a tax decision doesn't include a public ruling issued by the commissioner and the Tax Appeals Tribunal does not have jurisdiction in relation to this ruling. Further a tax decision is not an appealable decision and the only appealable decision is an objection decision under the *Tax Procedures Act*.

15. He deposed that the equivalent of an objection decision is a review decision under the *EACCMA* 2004 which is the appealable decision under section 230 of *EACCMA* 2004. The petitioner cannot therefore

be accused of jumping the gun while the Tribunal is devoid of jurisdiction to hear and determine this matter.

16. Relying on *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, he averred that pursuant to section 65(5) of the *Tax Procedures Act* the ruling was not binding on the tax payer and the said Act does not provide a procedure for appealing against such a ruling. Hence cannot be blamed for having failed to exhaust the internal remedies while the Act in question doesn't provide such a procedure. He deponed that the petitioner need not exhaust such a mechanism as the respondent or the Tax Appeals Tribunal lacks jurisdiction to hear cases of constitutional infringement as held in *John Juma & 2 others v Patrick Lihanda & Another; Zedekiah Orera & 4 others (Interested Parties)* [2018] eKLR.

17. Basing his argument on *Judges & Magistrates Vetting Board & 2 others vs Center for Human Rights & Democracy & 11 others*, he averred that the judiciary is the custodian of the rule of law and retains the jurisdiction in all cases where infringement of constitutional rights and freedoms is alleged. He averred that the petition is not *sub judice* as he only challenges the decision of the respondent to implement the ruling dated November 22, 2021 reclassifying the solar water heaters from HS Code 8419:19 to HS Code 8516:10 and to levy import duty at a rate of 25% plus VAT on current importation of solar water heaters. That the cases pending before the Tax Appeals Tribunal challenge the decision of the respondent of demanding back custom duty plus VAT for the last five years.

18. He deponed that the petition and application do not offend the provisions of section 9 (2) of the *FAAA* as section 65 of the *Tax Procedures Act* and the entire Act do not contain a procedure for challenging a private ruling issued by the respondent. Hence the petitioner has the right to challenge the implementation of the ruling before this court as envisaged in *Republic v Kenya Revenue Authority, Commissioner Ex Parte Keycorp Real Advisory Limited* [2019] eKLR.

The petitioner's submissions to the application

19. The petitioner and interested parties filed submissions through Thiongo & partners advocates dated May 27, 2022 raising the issue as to whether the petitioner has met the threshold for issuance of conservatory orders. Counsel relied on Civil Application No. 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR on the nature of conservatory orders and *Tom Odhiambo Ojienda v Kenya Revenue Authority & another* [2018] eKLR on the principles to be considered by a court when deciding whether to grant conservatory orders.

20. On whether the applicant has demonstrated an arguable *prima facie* case with a likelihood of success counsel reiterated the contents of the petitioner's supporting affidavit. He argued that the respondent neglected or declined to publish notices inviting the views of stakeholders for consideration thus rendering the ruling unconstitutional, for lack of public participation. The respondent was accused of failing to comply with Articles 10, 201 & 232 of *the Constitution*. He relied on several decided cases namely *Mrao v First American Bank of Kenya limited & 2 others* [2003] eKLR 125; *Independent Electoral and Boundaries Commission v National Super Alliance (NASA) Kenya & 6 others* Civil Appeal No. 224 of 2017 [2017] eKLR; and *Samura Engineering Limited & others v Kenya Revenue Authority* HC Petition No. 54 of 2011 [2012] eKLR among others.

21. Counsel submitted that the ruling of November 22, 2021 offends the petitioner's and the interested parties' rights to legitimate expectation on the ground that the interested parties have been importing these products under HS Code 8419.19.00 for a period exceeding 10 years. All the declarations were being verified by agents of the respondent who did not dispute the declared tariff or raise any assessment. Hence a legitimate expectation had been created that the solar water heaters would be

classified under the said code in future. It is therefore estopped from turning back and indicating that the product was classifiable under a different HS 8516:10. They relied on *Krish Commodities Limited v Kenya Revenue Authority* [2018] eKLR.

22. Counsel maintained that the respondent is currently demanding taxes on the current importation of solar water heaters and this has had a negative impact on the businesses of the interested parties and continues infringing on Article 40 of *the Constitution*. Further the process of review of the HSC has a far-reaching impact on the livelihoods of the petitioner and the interested parties and it is as such an administrative action that ought to be undertaken with great regard to the right to fair administrative actions as guaranteed by Article 47 of *the Constitution* as well as protected under the *FAAA*.

23. Further that having failed to comply with the procedural requirements the purported reclassification cannot withstand the test of legality and the same are unconstitutional. Thus, the application has met the requirement for prima facie case with a high probability of success.

24. On whether the petitioner and the interested parties will be prejudiced by the denial of conservatory orders, counsel submitted that the respondent is currently implementing its decision and demanding custom duty and VAT on current imports of solar water heaters. That the interested parties are paying heavy taxes by force hence incurring huge cost owing to the delayed clearance of these products. They thus will be prejudiced.

25. Relying on *Stanley Waweru – Chairman & 3 others (suing as Officials of Kitengela Bar Owners Association) v National Assembly & 2 others* [2021] eKLR he submitted that this is a classic example for issuance of interlocutory orders until the issues herein are conclusively determined. It is further submitted that the respondent will not be prejudiced since it can always demand taxes should the ruling be upheld as stated in *Association of Kenya Insurers (AKI) (suing through its Chairman Mr. Mathew Koech) vs Kenya Revenue Authority & 2 others; Insurance Regulatory Authority (IRA) Interested Party* [2020] eKLR.

The respondent's submissions

26. The respondent filed submissions dated June 13, 2022 through Diana A. Almadi advocate raising the following issues:

    a. The law on issuance of conservatory orders

    b. Have the petitioners established a prima facie case?

    c. Will the petitioners suffer prejudice if the orders sought in the petition are not granted?

    d. Where does the public interest lie?

27. Regarding the law on issuance of conservatory orders, counsel relied on Rule 23 of the Mutunga Rules and the cases of: *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*(*supra*); *Center for Rights Education and Awareness (CREAW) & 7 others v Attorney General*, Nairobi High Court Petition No. 16 of 2011; *Platinum Distillers Limited v Kenya Revenue Authority* [2019] eKLR; and *Kenya Association of Manufacturers & 2 others v Cabinet Secretary- Ministry of Environment and Natural Resources & 3 others* [2017]eKLR which set out the law on conservatory orders.

28. On whether the petitioners established a prima facie case, and while relying on *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, counsel submitted that the petitioner has not established a prima facie case. She argued that while the petitioner has stated that the ruling was made

pursuant to section 65 of the *Tax Procedures Act* which provides for private rulings, he claims that the said ruling is unconstitutional for lack of public participation without providing the section that provides for public participation. Further, that there is no constitutional question for determination by this court as the petitioner argued that the ruling is not binding.

29. Relying on sections 229, 230 and 231 of the *EACCMA* counsel argued that the tariff classification dated November 22, 2021 is a decision of the respondent that falls within the ambit of section 229 of the *EACCMA* hence being dissatisfied the first point of reference would have been to apply for a review of the said decision. Referring to section 9(2) of the *FAAA* she argued that the petitioner has contravened the doctrine of exhaustion. She referred to *Speaker of National Assembly vs Karume* [1992] KLR 21; *Republic v Commissioner of Domestic Taxes Ex Parte I & M Bank Limited* [2017] eKLR and *Republic v Commissioner of Domestic Taxes; Panalpina Airflo Limited (Exparte) [2019] eKLR*. Therefore having failed to have the decision reviewed as per the provisions of section 229 of the *EACCMA* there is no prima facie case for determination by this Honourable Court.

30. On whether the petitioners will suffer prejudice if the orders sought are not granted, counsel submitted in the negative for the reasons that, the petitioners ought to have resolved the issue with the tariff classification ruling dated November 22, 2021 in a different forum; having stated that they are not bound by the ruling pursuant to section 65 of the *Tax Procedure Act* there is no need for conservatory orders; no prejudice will be suffered by the petitioner or any of the interested parties since all parties have a redress mechanism under the law; the petitioner has admitted that most of the interested parties are before the Tax Tribunal as a result of tax demands; and there is separate mechanism on the said tariff ruling which does not involve filing of a constitutional petition.

31. With regard to the taxes paid under protest, counsel argued that the taxes were being paid pursuant to section 229 of *EACCMA* and as such, the issue of prejudice does not arise since the redress mechanism under the said section is sufficient. The Government of Kenya will be greatly prejudiced if the said orders which are final in nature are granted. In other words this court is being asked to restrain the respondent from using the current classification of dual system solar water heaters under HS Code 8419.19 prior to the court's determination of the correct classification of the said dual system solar water heaters.

    That for this court to issue conservatory orders it would have arrived at the conclusion that the petitioner's classification is the correct classification; the respondent and the public will be prejudiced.

32. On where the public interest lies, counsel submitted that the issues herein do not raise any issue that is public in nature. The tariff ruling is to the petitioner and not the whole industry. The nature of the private ruling is that it is an opinion by the respondent to a specific taxpayer and no other tax payer can rely on the same. Counsel further contends that the petitioners ought to follow the laid down mechanisms for redress and not rush for constitutional orders that will enable them not meet their tax obligations. Furthermore, section 47 of the *Tax Procedures Act* provides for refund mechanism in instances of overpaid tax. Therefore the petitioner will not suffer any loss. Recovery in the event of the respondent being successful would be an uphill task.

33. Counsel submitted that public interest lies in preserving the government's right to demand and collect taxes until the court declares that the said taxes are not due. In this case the petitioner and interested parties have a redress mechanism and there will be no loss on their end as the any tax demand can be reviewed. They have the right of appeal to the Tax Appeals Tribunal.

The respondent's submissions on the preliminary objection (P.O)

34. The respondent filed submissions dated June 13, 2022 raising the following issues:

    a. Whether the petitioner is properly before this Honourable court

    b. Whether the petitioner has established a constitutional question in its petition

    c. The petition and application on issues touching on the interested parties is sub judice

    d. Whether there is a constitutional question to be answered by the petition

    e. The petition and application are an abuse of the court process.

35. Counsel Almadi submitted that its P.O fits the definition of a P.O in terms of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A. 696. Arguing on the issue of *locus standi*, she submitted that there is a dispute resolution mechanism provided by the law for a tax payer who is unhappy with a tariff classification ruling. Reiterating the contents of their response to the petitioner's application she submitted that the petitioner's first point of reference would have been to review the said ruling. The respondent would have then issued a decision on the review application and the petitioner would then appeal the decision to the Tax Appeals Tribunal pursuant to section 231 of the *EACCMA*. Hence, the petitioner has contravened section 9 (2) of the *FAAA*. It also reiterated the case laws in the submissions to the application on the doctrine of exhaustion.

36. She further submitted that the reliance placed by the petitioner on section 65 of the *Tax Procedures Act* as the provision within which they applied for the ruling of November 22, 2022 is erroneous. By dint of the preamble of the Tax Procedure Act the *EACCMA* is not one of the laws under which the Tax Procedure Act applies in so far as procedure is concerned.

37. On whether there is a constitutional question to be answered by the petition, and relying on *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR on what amounts to a constitutional question, she submitted that the petition has not met the constitutional threshold and as such ought to be dismissed together with the application.

38. Relying on section 22 (1) of *the Constitution* and the cases of *Anarita Karimi Njeru v Republic* (No. 1)- [1979] KLR 154; *Mumo Matemu vs Trusted Society of Human Rights Alliance and others* Nairobi Civil Appeal No. 290 of 2012; and *Justice Amraphael Mbogholi Msagha v the Chief Justice of the Republic of Kenya and 7 others* [2006] eKLR she submitted that even if the court were to look at the petitioner's argument that it applied for a ruling under section 65 of the *Tax Procedure Act*, the petition herein would still not meet the constitutional threshold, as there is no constitutional question to be answered. She further submitted that the interpretation of the said section means that a private ruling while binding on the respondent is not binding on the petitioner.

39. In that case the petitioner is therefore at liberty to ignore the content of the said private ruling until an assessment has been preferred against him. Further pursuant to section 67 (5) of the *Tax Procedures Act* the private ruling is an opinion that is not appealable hence the petitioner should have again ignored it and awaited the assessment from the respondent and thereafter utilize the appeal mechanism provided under the *Tax Procedure Act*.

40. It is her contention that the respondent assessed each of the individual interested parties who applied for review and have since appealed the respondent's review decision at the tax appeals tribunal. Even if

the ruling was to be classified as a private ruling it would still have not met the threshold to be considered under a constitutional petition.

41. Counsel reiterated her submissions on the requirement of public participation while issuing a ruling under section 65 of the *Tax Procedures Act*. She argued that the peititon is not concerned with the constitutionality of the respondent's issuance of the said ruling but rather that the respondent classified the dual system solar water heaters in another tariff code which the petitioner is unhappy with. This is an issue for determination by the Tax Tribunal.

42. On whether the petition and the application on issues touching on the interested parties is *sub judice*, counsel affirmed the said position. She urged that the issues raised therein are subject of various appeals at the Tax Appeal Tribunal. Further any issues relating to interested parties who are yet to file appeals at the Tax Tribunal will still be ventilated at the Tax Tribunal once they decide to appeal. See *Republic v Paul Kihara Kariuki* case (*supra*).

43. She submitted that while the petitioners allege that the issues relating to the interested parties relate to the respondent's demand for VAT and Back duty and as such are different from the issues on Appeal, it is the Tariff classification of the said Dual system solar water heaters that would determine whether the duty and or import duty is payable on the said water heaters.

44. On whether the petition and application are an abuse of the court process, and while relying on *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002[2009] eKLR 229, counsel submitted that the same is an abuse of the court process being that there is a redress mechanism and the issues raised herein are also at the Tax Appeals Tribunal.

The petitioner's submissions to the preliminary objection

45. The petitioner filed submissions dated May 27, 2022 raising the following issues: -

    a. Whether this court has jurisdiction to hear and determine the application

    b. Whether the matter is filed contrary to the doctrine of exhaustion of remedies

    c. Whether the matter is *sub judice* and amounts to forum shopping

46. On the first issue, counsel reiterated that the petition and application meet the constitutional threshold as set out in *Anarita Karimi Njeru vs Attorney General* (No. 1) 1979 1 KLR 154; which indicates the infringed constitutional provisions and the statutory provisions, the manner of infringement and the appropriate remedy. Counsel relied on the case of *Geoffrey Muthinja & Another vs Samuel Muguna Henry* (*supra*). He reiterated that the judiciary is the custodian of the rule of law and retains jurisdiction and that the petition raises issues of infringement of constitutional rights which are a preserve of this court, the jurisdiction of the Tax Appeals Tribunal is limited by virtue of section 12 of the *Tax Appeals Tribunal Act* and section 52(1) of the *Tax Procedure Act* on an appealable decision. Thus the ruling does not contain an appealable decision.

47. On the second issue, counsel reiterates that the Act does not provide for a mechanism for appealing a ruling issued under section 65 of the *Tax Procedures Act* hence the position adopted by the respondent is misguided. The *EACCMA* 2004 is a different legal regime and where a tax decision is under the provisions of the Tax Procedure Act, the provisions of EACCMA 2004 are ousted and the same becomes inapplicable. The procedure could only have been contained in the Act.

48. It was submitted that even if the applicant was required to exhaust the procedure under 229(1) & (4) 230 of the *EACCMA* 2004, the same would not be applicable in the current matter. The reason

being, the said provisions apply where the respondent has made an assessment of taxes payable by an individual taxpayer and issued a demand for the same. This is what provides the tax payer with an avenue for applying for review to the commissioner and later appeal against the review decision to the Tax Appeals Tribunal in line with section 230 of the *EACCMA* 2004.

49. Counsel further submitted that a review decision under section 229 *EACCMA* 2004 is equivalent to an objection under section 52 (1) of the Tax Procedure Act hence, the ruling does not qualify as an appealable decision under both the Act and the *EACCMA*. Thus the petitioners cannot therefore be accused of contravening section 229(1) of the *EACCMA* 2004 as the same only applies in case of an appealable decision of the commissioner.

50. Further that there being no internal procedure for challenging the implementation of the ruling under the *Tax Procedure Act* and the provisions of *EACCMA* 2004 being inapplicable, the applicant had the right to move this court for redress of the alleged constitutional infringement.as provided in *Republic v Kenya revenue Authority, Commissioner Ex Parte KeyCorp Real Advisory Limited* [2019] eKLR. It follows that, they have not violated section 9(2) *FAAA*.

51. On the third issue, counsel reiterated that the issue is not sub judice. He relied on the case of *Republic v Paul Kihara* (*supra*), and added that the respondent has failed to discharge the burden of proving that the matter is sub judice as it has been demonstrated that enforcement of the ruling dated November 22, 2022 is in issue in the Tax Appeals Tribunal.

Analysis and determination

52. Having carefully considered the parties' pleadings and submissions, the following issues arise for determination: -

    i. Whether this court has jurisdiction to entertain this petition in view of:The petitioner/ applicant's standing.Issue of the doctrine of exhaustionThe issue of the doctrine of *sub judice*

    ii. Whether the petitioner has met the threshold for grant of conservatory orders

53. Before delving into the issues, I note that the respondent has raised a preliminary objection raising nine points. It is therefore necessary for this court to determine whether the objection by the respondent qualifies to be a preliminary objection. What constitutes a preliminary objection was set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A. 696. This was later emphasized by the supreme Court of Kenya in the case of *Hassan Ali Joho & another v. Suleiman Said Shahbal & 2 others* [2014] eKLR as follows at paragraph 31:

> "To restate the relevant principle form the precedent in setting case, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* [1969] EA 696:
>
> "a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. .... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

54. The Supreme Court further pronounced itself on the purpose of a preliminary objection in the case of *Independent Electoral & Boundaries Commission v Jane Cheprenger & 2 others* [2015] eKLR as follows: -

> "(21) – The occasion to hear this matter accords us opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: Firstly, it serves as a shield for the originator of the objection – against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time. So it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits." (Emphasis added)

55. In my view points Nos 3, 4 and 9 of the P.O would need this court to look into the facts as pleaded by the petitioner/ applicant. They therefore do not qualify as preliminary objection, points.

56. Points no. 2, 6, 7, and 8 of the P.O are all to the effect that the petitioner did not exhaust the available mechanisms. This court will consider them under the doctrine of exhaustion which is a point of law. Point no. 1 on locus standi and no. 5 on sub judice are points of law. Thus, points 1, 2, 5, 6, 7, and 8 qualify as preliminary objections.

Whether the petitioner/ applicant has the locus standi

57. In the P.O, the respondent submitted that the petitioner applicant lacks the locus standi in view of the fact that there is an available redress mechanism provided by the law for a tax payer who is unhappy with a tariff classification ruling. The petitioner on the other hand deposed in his replying affidavit that it is by making and enforcing of the ruling that the respondent infringed on his rights and those of the interested parties that made him invoke Article 258 of *the Constitution*.

58. The term locus standi was defined in the case of *Alfred Njau & 5 others v City Council of Nairobi* [1983] eKLR to mean;

> "The term *locus standi* means a right to appear in Court and, conversely, as is stated in *Jowitt's Dictionary of English Law*, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding..."

59. In the case of *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR the court held as follows regarding locus standi

> "...*Locus-standi* signified a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a Court of law. That was the holding in *BV Narayana Reddy v State of Kamataka Air* [1985] Kan 99, 106 (*The Constitution* of India, ARD 226). I adopt the same as a correct proposition of the law and I so hold."

60. It is evident from the above cited case laws that locus standi means a right to appear in court. I therefore do not agree with the argument by the respondent that the petitioner/ applicant does not have the locus to appear before this court simply because there is an available dispute resolution mechanism besides this court. Having a different forum for settling the dispute does not rob one of the right to institute a suit or rather an interest in the suit.

61. Articles 22 & 258 of *the Constitution* provides for enforcement of the Bill of rights and *the Constitution*. Together with these I also refer to the cases of: -

    i. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

    ii. *Timothy Otuya Afubwa & Another v County Government of Trans Nzoia & 3 others* [2016] eKLR.

62. The present suit was brought pursuant to Article 258(1) of *the Constitution* which allows every person to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention. The Petitioner is also championing for his rights and those of the interested parties which is allowed under Article 22(1) of *the Constitution*. There is no ulterior motive that has been shown in the institution of this suit. In my view, he has the *locus standi*.

Whether the petition and application offend the doctrine of exhaustion

63. The respondent argued that the petitioner has failed to take the dispute to the available forum. That he ought to have first reviewed the said ruling which would then be appealed against at the Tax Appeal Tribunal pursuant to section 231 of the *EACCMA* 2004 if they were dissatisfied. According to the respondent this was a contravention of section 9(2) of the *FAAA*. It also submitted that the reliance placed by the petitioner on section 65 of the *Tax Procedure Act* as the provision within which they applied for the ruling of November 22, 2022 is erroneous as the *EACCMA* is not one of the laws under which the *Tax Procedure Act* applies in so far as procedure is concerned.

64. The petitioner argued that it is this court that has the jurisdiction to hear matters concerning infringement of constitutional rights. That the Tax Appeal Tribunal's jurisdiction is limited by virtue of section 12 of the *Tax Appeals Tribunal Act* and section 52(1) of the *Tax Procedure Act* on an appealable decision. The impugned ruling did not contain an appealable decision. He also argued that the Act does not provide for a mechanism for appealing the ruling hence the position by the respondent is misguided. In a nutshell the petitioner argued that they could only have gone to the Tax Tribunal if the respondent had made an assessment and a demand made for the same. That the ruling which is equivalent to section 52(1) of the *Tax Procedure Act* does not qualify to be an appealable decision. Hence, they had the right to move to this court.

65. Section 9 of the *FAAA* provides for the process of Judicial Review. On the other hand the doctrine of exhaustion in Kenya is provided for under Article 159(2)(c) of *the Constitution*. It recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

> 159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-
>
> (a)...
>
> (b)...
>
> (c)
>
> alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

66. This issue was substantively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others ; Muslims for Human Rights & 2 others (Interested Parties)*[2020] eKLR. The above decision was appealed against by the Respondents. The Court of Appeal upheld the decision and dismissed the appeal *vide* Mombasa Civil Appeal No. 166 of 2018 *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR and held as follows: -

> "The jurisdiction of the High Court is derived from Article 165 (3) and (6) of *the Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of *the Constitution* encompassing determination of any matter relating to the Constitutional relationship between the different levels of government..... First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of *the Constitution* became automatic. And in our view, it could not be ousted or substituted."

67. The petitioner has argued that the *EACCMA* 2004 is not applicable herein and that the *Tax Procedure Act* is the one that applies. The respondent has on the other hand argued to the contrary. For this court to determine which Act applies in the circumstances herein, it is important to consider the nature of the ruling dated 22nd November 202. This will give guidance as to which Act is applicable.

68. I have perused the ruling by the respondent dated November 22, 2021 and I have noted the following: that the ruling is as a result of a request by the petitioner/ applicant to the respondent seeking for review of tariff classification of dual system water heaters. I have also noted that after forwarding the matter to the W.C.O, the respondent rendered its ruling determining the dual solar water heaters as classifiable in EAC/CET 2017 HS Code 8516.10.00.

69. The petitioner/ applicant is aggrieved that the decision which it terms an opinion has been enforced by the respondent contrary to the provisions of the *Tax Procedures Act*. According to the petitioner that decision is not appealable and non- binding and there is no mechanism or procedure provided in the two statutes for appealing against such a decision.

70. Section 229 of the *EACCMA* 2004 referred to by the respondent provides as follows

> 229.
>
> (1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.

(2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.

71. In my view the said section does not apply to the impugned ruling, as it was an opinion and not a decision, to be appealed against. I have considered several provisions of the law among them sections 2(2), 3, 51(1) & (2), and 52, of the *Tax Procedure Act* and sections 12 & 13 of the *Tax Appeals Tribunal Act*. My finding from this is that it is only a decision by the commissioner that is appealable to the Tax Appeals Tribunal. What is the subject of the impugned ruling is an opinion and not a decision.

72. Section 65 on binding private rulings provides

> (1)A taxpayer may apply to the Commissioner for a private ruling which shall set out the Commissioner's interpretation of a tax law in relation to a transaction entered into, or proposed to be entered into, by the taxpayer.
>
> (4)If the taxpayer has made a complete and accurate disclosure of the transaction in relation to an application for a private ruling and the transaction has proceeded in all material respects as described in the application, the private ruling shall be binding on the Commissioner
>
> (5) A private ruling shall not be binding on a taxpayer.

Section 67(5) provides

> (5) A private ruling shall set out the Commissioner's opinion on the question raised in the ruling and is not a decision of the Commissioner for the purposes of this Act or the *Tax Appeals Tribunal Act*, 2013 (No. 40 of 2013).

73. Based on the above cited provisions of the *Tax Procedure Act* and the *Tax Appeals Tribunal Act*, it is clear that the ruling dated November 22, 2021 by the respondent was a private ruling pursuant to the provisions of section 65(5) of the *Tax Procedure Act* and it is not binding on the petitioners. Further pursuant to section 67(5) of the *Tax procedure Act* it is an opinion of the commissioner and as such not appealable. It is also important to note that this Act does not provide for a procedure for appealing against the private ruling or the opinion of the respondent as the case may be, neither does the *EACCMA* Act.

74. The petitioner has also submitted that the matter before this court only challenges the decision of the respondent to implement the ruling and to levy import duty at a rate of 25% plus VAT on current importation of solar water heaters. What is before the Tribunal is the decision of the respondent in demanding back custom duty plus VAT for the last five years. I find that there is no dispute resolution mechanism available for appealing against the non- binding ruling provided for under any of the two statutes. The petition is also faulting the respondent for enforcing a decision that is non- binding. This in my view would have been a classic case of exemption on the doctrine of exhaustion. The issues raised cannot be addressed by the Tribunal as this is not a decision but an opinion over which the Tribunal has no jurisdiction.

Whether the petition offends the doctrine of sub judice

75. Basically the respondent argues that the various issues raised herein are the subject of the various appeals before the Tax Tribunal. The petitioners are challenging the ruling by the commissioner. That is the basis and origin of the taxes being challenged at the Tribunal. A decision has to be made on the same.

76. Section 6 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya provides for when a matter can be declared as offending the doctrine of *sub judice*. The rationale for the doctrine of *sub judice* was discussed in *David Ndii & others v Attorney General & others* [2021] eKLR.

77. The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR had this to say in regard to *sub judice*:-

> "(67) The term 'sub-judice' is defined in *Black's Law Dictionary* 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

78. This court has also pronounced itself recently with regards to *sub judice* in *Auto Terminal Japan Limited v Directorate of Criminal Investigations & another* [2021] eKLR that:-

> "Basically, for the doctrine of *sub judice* to stand in the instant suit, the four principles examined above must be present. That is, there must exist two or more suits filed consecutively, the matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits must be the same and they must be litigating under the same title and the suits must be pending in the same or any other court having jurisdiction in Kenya."

79. In my view, the issues before the Appeals Tribunal are not similar to the issues before this court. As discussed, the ruling by the respondent is not a decision that is appealable before the Tax Appeals Tribunal; there is also no mechanism or forum for addressing the issue. Further, the petitioner and interested parties are aggrieved because the respondent is enforcing a non- binding private ruling. The issue before the Tax appeals Tribunal is on the back duty taxes and tariff classification. This matter does not therefore amount to *sub judice*.

80. An argument was raised by the respondent that if the ruling is indeed non- binding, the petitioner should have ignored it. Further that this court then has no constitutional question to consider. I do not agree with this argument for the simple reason that why would the respondent enforce a non- binding ruling in that regard? Can this court then just assume and determine the issue on the premise that it is non- binding yet a party has gone ahead to enforce a non- binding decision which may be against its mandate?

Whether the petitioner has met the threshold for grant of conservatory orders

81. The petitioner submitted that he has met the threshold for grant of conservatory orders while the respondent submitted the contrary arguing that this is not the right forum and that the existing mechanism has not been exhausted. The issue of exhaustion has already been dealt with above.

82. Regarding the issue of conservatory orders, the Supreme Court discussed their nature in Civil Application No. 5 of 2014 *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 Applicant's case for orders of stay.

See also *Judicial Service Commission v Speaker of the National Assembly & Another* [2013] eKLR.

83. Based on the above case law, the rationale for granting conservatory orders is to preserve the substratum of the matter pending the determination of the main issues in dispute.

84. The courts have however been cautioned when granting conservatory orders to avoid dealing with finality, in the interim, with issues which are the preserve of the main petition. In the case of *Muslim for Human Rights (Milimani) & 2 Others v Attorney General & 2 Others* [2011] eKLR, Ibrahim J (as he then was stated thus;

> " 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."

85. The principles regarding the grant of conservatory orders were stated in *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* [2015] eKLR, the court enumerated the summary of the principles as follows: -

> (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.

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

Also see *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (*supra*).

86. In *Free Kenya Initiative & 6 others v Independent Electoral & Boundaries Commission & 4 others; Kenya National Commission on Human Rights (Interested party)* [2022] eKLR Mrima J, stated:

> " The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters which a Court ought to look into. Such may include the effect of the orders on the determination of the case, whether there is eminent danger to infringement of the human rights and fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality of statutes, whether the Applicant is guilty of laches, the doctrine of proportionality, among many others."

87. The first principle is whether the petitioner has demonstrated a prima facie arguable case. The case of *Mrao v First American Bank of Kenya Limited & 2 others* [2003]KLR 125 defined a prima facie case 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."

88. In the Free Kenya Initiative & 6 others (supra) the court stated,

> " 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"

89. I have considered the issues raised by all the parties herein. The main issue falling for determination herein is the enforcement and implementation of a "non-binding" private ruling as set out in sections 65-67 of the *Tax Procedures Act*. The court will need to determine the real effect of the private rulings and their place since the law says they are not binding on the tax payer and moreso under section 67(5) of the Act the ruling is not a decision of the commissioner so what is it in essence? This court must render a determination on these issues.

90. Based on the above findings and in consideration of what a prima facie case is as stated in *Mrao v First American Bank of Kenya Limited & 2 others* (*supra*) and Free Kenya Limited & 6 others (supra) I am satisfied that the petitioner has established an arguable *prima facie* case. It follows that the petitioner who is the subject of the impugned ruling of November 22, 2021 will be prejudiced if the conservatory order is not granted. The preliminary objection dated May 4, 2022 lacks merit and is dismissed. The application dated March 29, 2022 is allowed and prayer No.3 is allowed and will be in force for not more than four (4) months. Costs shall be in the cause.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER 2022 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT