Waweru & 3 others (Suing as Officials of Kitengela Bar Owners Association) v National Assembly & 2 others (Constitutional Petition E005 of 2021) [2021] KEHC 455 (KLR) (19 April 2021) (Ruling)

Stanley Waweru- Chairman & 3 others (Suing as Officials of Kitengela Bar Owners Association) v National Assembly & 2 others [2021] eKLR

Neutral citation: [2021] KEHC 455 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CONSTITUTIONAL PETITION E005 OF 2021

GV ODUNGA, J

APRIL 19, 2021

IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 165 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 43, 47, 62(1)(F), 62(3), 93, 94 (6), 109, 110, 124, 191, 199(1), 201, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA AS WELL AS THE FOURTH SCHEDULE THERE TO

AND

IN THE MATTER OF SECTIONS 3(1), 3(2), 12D, 15(1), 15(4), THE SECOND SCHEDULE AND PARAGRAPH 2, HEAD B OF THE THIRD SCHEDULE TO THE INCOME TAX ACT, CHAPTER 470 AS AMENDED BY THE FINANCE ACT, 2020 AND THE TAX LAWS (AMENDMENT) (NO.2) ACT, 2020

AND

IN THE MATTER OF SECTIONS 125 (2) AND 207 OF THE PUBLIC FINANCE MANAGEMENT ACT OF 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF ALLEGED ENACTMENT BY THE COUNTY ASSEMBLY OF MACHAKOS OF A LAW THAT IS INCONSISTENT WITH AND/OR IN CONTRAVENTION OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED EXERCISE OF PARLIAMENTARY POWERS AND AUTHORITY IN CONTRAVENTION OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF PERSONS ENGAGED IN THE BUSINESS AND THE CONSUMERS OF THEIR GOODS

AND SERVICES

BETWEEN

STANLEY WAWERU - CHAIRMAN ..... 1ST PETITIONER

SAMWEL GITONGA - VICE CHAIRMAN ..... 2ND PETITIONER

BERNARD ORANGA - ORGANIZING SECRETARY ..... 3RD PETITIONER

PAUL MUKONO KURIA - PATRON ..... 4TH PETITIONER

SUING AS OFFICIALS OF KITENGELA BAR OWNERS ASSOCIATION

AND

THE NATIONAL ASSEMBLY ..... 1ST RESPONDENT

THE COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY .... 2ND RESPONDENT

THE ATTORNEY GENERAL ..... 3RD RESPONDENT

Kenya Revenue Authority restrained from implementing section 12D of the Income Tax Act which introduces a minimum tax at the rate of 1% of the gross turnover pending hearing of a petition challenging its constitutionality.

Reported by Kakai Toili

Constitutional Law *– enforcement of Bill of Rights – authority of courts to uphold and enforce the Bill of Rights - conservatory orders – nature of conservatory orders - factors to consider in granting conservatory orders – where there was a petition challenging the constitutionality of amendments to an Act of Parliament - whether granting conservatory orders suspending implementation of statutory provisions in a petition challenging their constitutionality amounted to a determination that the provisions were unconstitutional – Constitution of Kenya, 2010, articles 1, 2, 22 and 23.*

Jurisdiction *– jurisdiction of the High Court – jurisdiction to issue conservatory orders - whether the High Court could issue conservatory orders where the constitutionality of legislation was challenged – Constitution of Kenya, 2010, article 165(3)(d)(ii).*

Constitutional Law *– fundamental rights and freedoms – right to life - what was the nature of the right to life - Constitution of Kenya, 2010, articles 20(3) and (4), 21 and 43.*

Tax Law *– revenue authorities – duties of revenue authorities - what were the duties of a revenue authority to tax payers?*

Brief facts

In June 2020, the President assented to the Finance Act, 2020 which amended the Income Tax Act (ITA) by introducing a new section 12D providing for the introduction of minimum tax at the rate of 1% of

the gross turnover effective January 1, 2021 (impugned amendment). The petitioners claimed that if the impugned amendment was allowed it would lead to the absolute annihilation of the petitioners' business along with a majority of small and medium enterprises. It was contended that the impugned minimum tax was unconstitutional as it did not fall within the category of taxes imposable by the National Government as envisaged under article 209(1) of the Constitution of Kenya, 2010 (Constitution). According to the petitioners, by its very definition, the minimum tax did not amount to Value Added Tax (VAT), custom duties or excise tax, yet the 1st respondent purported to include it in the category of income tax.

It was pleaded that the introduction of minimum tax required a taxpayer to pay their income tax based on the higher of 30% of net profit or 1% of gross revenue. It was contended that the impugned minimum tax introduced by section 12D was contrary to and inconsistent with the meaning and purpose of income tax as provided under the ITA. It was contended that the minimum tax could not be deemed as an income tax as envisaged and governed under the ITA and as such, the same had no place in the ITA and consequently ought to be adjudged null and void *ab initio*.

The petitioners filed the instant application where they sought that pending the hearing and determination of the petition *inter partes*, a conservatory order be issued restraining the 2nd respondent from the implementation, further implementation, administration, application and/or enforcement of section 12D of the ITA as amended by the Tax Laws (Amendment) (No.2) Act, 2020 by collecting and/or demanding payment of the minimum tax.

Issues

i. What was the nature of conservatory orders?
ii. What were the factors to consider in granting conservatory orders?
iii. Whether granting conservatory orders suspending implementation of statutory provisions in a petition challenging their constitutionality amounted to a determination that the provisions were unconstitutional.
iv. Whether the High Court could issue conservatory orders where the constitutionality of legislation was challenged.
v. What were the duties of a revenue authority to taxpayers?
vi. What was the nature of the right to life?

Relevant provisions of the Law

Income Tax Act (cap 470)

Section 12D - Minimum tax

1. *Notwithstanding any other provision of this Act, a tax to be known as minimum tax shall be payable by a person if—*
    1. *that person's income is not exempt under this Act;*
    2. *that person's income is not chargeable to tax under sections 5, 6A, 12C, the Eighth or the Ninth Schedules; or*
    3. *the installment tax payable by that person under section 12 is higher than the minimum tax.*
2. *The tax payable under this section shall be paid in installments which shall be due on the twentieth day of each period ending on the fourth, sixth, ninth and twelfth month of the year of income.*

Held

1. The power to suspend legislation during peace time ought to be exercised with care, prudence and judicious wisdom where it was shown that the operation of the legislative provision was a danger to life or where there was imminent danger to the Bill of Rights and limb at that very moment and where the national interest demanded and the situation was certain. However, at the stage of the application for conservatory orders the court ought not to make an interim declaration which would effectively undo the legislative will unless there were strong and cogent reasons to do so. In other words, where there were strong and cogent reasons, conservatory orders could be granted.

2. Under article 1 of the Constitution sovereign power belonged to the people and it was to be exercised in accordance with the Constitution. That sovereign power was delegated to Parliament and the legislative assemblies in the county governments; the National Executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There was however a rider that the organs had to perform their functions in accordance with the Constitution. The Constitution having been enacted by way of a referendum, was the direct expression of the people's will and therefore all State organs in exercising their delegated powers had to bow to the will of the people as expressed in the Constitution.
3. Article 2 of the Constitution provided for the binding effect of the Constitution on State organs and proceeded to decree that any law, including customary law, that was inconsistent with the Constitution was void to the extent of the inconsistency, and any act or omission in contravention of the Constitution was invalid. If the court had power to declare an enactment void and invalid, likewise the court had to have jurisdiction in deserving cases to suspend provisions of an enactment if to do otherwise was likely to render whatever decision the court could arrive at a mirage.
4. Where the court was convinced that the orders ought to be granted, there was no reason for the court to shy away from doing so. The tendency to interpret the law in a manner that would divest courts of jurisdiction too readily unless the legal provision in question was straightforward and clear was to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts had to be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand that.
5. Article 23 of the Constitution did not expressly bar the court from granting conservatory orders where a challenge was taken on the constitutionality of legislation. The only rider was that the case had to be one which fell under article 22 of the Constitution. That however did not mean that courts ought to readily suspend legislation simply because a challenge had been made to a statute. Power ought to be exercised very sparingly where the court was satisfied that it ought to be exercised. However, it could be exercised.
6. The presumption of constitutionality of statutes was a rebuttable principle. In interpreting the Constitution, the court would be guided by the general principles that there was a rebuttable presumption that legislation was constitutional hence the onus of rebutting the presumption rested on those who challenged that legislation's status save that, where those who supported a restriction on a fundamental right relied on a claw back or exclusion clause, the onus was on them to justify the restriction.
7. Article 165(3)(d)(ii) of the Constitution donated to the High Court the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of, the Constitution. The Judiciary as a bastion of the rights of the people was the safeguard and watchdog of the rights, which were fundamental to human existence, security and dignity.
8. Whereas the court was mindful of the principle that the Legislature had the power to legislate and courts should give due deference to those words by keeping the balances and proportionality, in the context of fast progressing issues of human rights which had given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches were expanding in natural surroundings, had to have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits.
9. Conservatory orders were not ordinary civil law remedies but were remedies provided for under the Constitution, the supreme law of the land. They were not remedies between one individual as against

another but were meant to keep the subject matter of the dispute *in situ*. Therefore, such remedies were remedies in *rem* as opposed to remedies *in personam*. In other words, they were remedies in respect of a particular state of affairs as opposed to injunctive orders which could only attach to a particular person.

10. Whereas in applications seeking to suspend legislation care had to be taken to ensure that courts did not readily accede to the temptation to render legislation stillborn and that such power ought not to be exercised lightly, to hold that the court could only grant conservatory orders where the court was satisfied that the challenged provisions were unconstitutional would be stretching the standard too far. The law was that in considering an application for conservatory orders, the court was not called and it was indeed forbidden from making any definitive finding either of fact or law as that was the province of the court that would ultimately hear the petition. At that stage the first condition the applicant was required to establish was a *prima facie* case with a likelihood of success.

11. The manner in which the tax was defined, administered and collected was a matter for Parliament to define and it was not for the court to interfere merely because the Legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection.

12. Taxes were imposed on subjects by Parliament. A citizen could not be taxed unless he was designated in clear terms by a taxing Act as a taxpayer and the amount of his liability was clearly defined. The contention that there was lack of clarity in the minimum tax could not be said to be frivolous. Though the 2nd respondent termed it as merely administrative, that was an issue that required interrogation by the court.

13. According to the petitioners, the levying of minimum tax on gross turnover as opposed to gains or profit would give rise to an occurrence where a tax payer, subject to minimum tax (the same being higher than the 30% of his net profit, would pay income tax exceeding the statutory 30% (corporate tax) which would consequently mean that the taxation burden on him/her would be heavier than on other taxpayers. Whether the impugned tax adhered to article 20(a)(i) of the Constitution was arguable

14. If the petitioners' contentions were true, then the impugned provision could well violate article 27 of the Constitution. According to the petitioners, while large corporations with net profits well above the assumed baseline of 3.33% would be least bothered by the introduction of minimum tax, that impugned tax would be the nail on the coffin on small and medium enterprises who would most certainly be forced to pay income tax from capital investment. That tilted the scale in favour of large companies blatantly contravening article 27 that enshrined equality in the application, protection and benefit of the law.

15. At that stage and considering the material placed before the court, the issue of whether the impugned amendment in section 12D of the ITA discriminated against the petitioners and other traders in the consumer products sector by favouring those in the energy and petroleum sector and in the insurance sector was arguable and not merely frivolous. A legal duty was owed by the revenue authority to the general body of the taxpayers;

    1. to treat taxpayers fairly;
    2. to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another did not arise;
    3. to ensure that there were no favourites and no sacrificial victims.

    The duty had to be considered as one of several arising within the complex comprised in the management of tax, every part of which it was their duty, if they could, to collect.

16. Whereas the 2nd respondent contended that the petitioners were not questioning the manner in which the amendment was passed, the petitioners were challenging the procedure leading to its enactment without reference to the Senate. The issues raised by the petitioners were not frivolous. To the contrary, they were weighty constitutional issues which required to be investigated further by the court. The issues raised in the petitions disclosed substantial questions of constitutional law as what was at stake

was the balancing of the need to secure the Government's revenue sources on one hand and the protection of the Bill of Rights on the other both of which the State was enjoined to attain.

17. The guiding principles upon which Kenyan courts made findings on interlocutory applications for conservatory orders within the framework of article 23 of the Constitution were settled. The law was that in considering an application for conservatory orders, the court was not called upon and was indeed not required to make any definitive finding either of fact or law as that was the province of the court that would ultimately hear the petition.

18. The jurisdiction of the court at that point was limited to examining and evaluating the material placed before it, to determine whether the applicant had made out a *prima facie* case to warrant grant of conservatory orders. The court was also required to evaluate the pleadings and determine whether the denial of conservatory orders would prejudice the applicant. However, apart from establishing a *prima facie* case, the applicant had to further demonstrate that unless the conservatory order was granted there was real danger which could be prejudicial to him or her.

19. For a court to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to engender serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience as would be to give succour and sustenance to all who could threaten with sufficient menaces that they could not live with and under the law.

20. It did not mean that if the court made a finding that the law was constitutional, the petitioner would evade their liability or that if the court found the law was constitutional, the 1st respondent would be at liberty to demand taxes due. The 1st respondent would not be prejudiced as it would be able to collect any taxes due together with interest from the petitioner's members. The 1st respondent would not suffer any prejudice if the orders sought were granted. On the other hand, if the orders were refused; and the petitioner's members continue to make payments and the law was found to be unconstitutional, the petitioners would not be able to recover the money back by virtue of Value Added Tax Act and would be greatly prejudiced.

21. While the 2nd respondent contended that if the petition succeeded, it would be in a position to refund the taxes paid, that position presumed that the petitioners would be in business. Kenya and the whole world were going through serious economic recession mainly attributed to the vagaries of *covid 19* pandemic. The court took judicial notice of the fact that for a number of months the previous year, a lockdown was imposed and restrictions on movements imposed during certain hours; that curfew was in force in Kenya while 4 counties had been classified as disease infected areas and were under lockdown. As a result, businesses had been seriously and adversely affected and with that sources of income had been seriously diminished if not obliterated altogether. That situation remained *in situ* indefinitely.

22. As a result of the effects of the mitigating steps taken by the Government, people lost their jobs while businesses had to close down. Accordingly, it was not far-fetched to say that further implementation of the minimum tax was likely to aggravate the situation, further sending the petitioners and businesses into abyss. That was a situation which ought to be avoided since it would be unhelpful to tell the petitioners once they folded up and or were wound up that they could resurrect and carry on with their businesses. The lesser evil would be for the 2nd respondent to continue operating as it had been operating hopefully in the next few months and also to keep the petitioners afloat.

23. The right to life was meaningless unless people had an opportunity to engage in income generating activities in order to eke a living. It did not help to guarantee a right to life in the Constitution or the law book when there were no corresponding socio-economic rights which were realistically and progressively respected, protected, promoted and fulfilled as required under article 21 of the Constitution. In other words, the implementation of the rights under article 43 of the Constitution were geared towards meaningful realisation of the right to life.

24. In determining whether the operation of a legislative provision posed danger to life and limb, a purposive approach was adopted in order to develop the law where it did not give effect to a right or fundamental freedom and adopt an interpretation that most favoured the enforcement of a right or fundamental freedom and promote the spirit, purport and objects of the Bill of Rights as enjoined under article 20(3) and (4) of the Constitution. Accordingly, an action that threatened the livelihood of a person could well infringe upon the right to life if its effect would be to deprive the person of the means of sustenance.
25. The Impugned amendment introduced minimum tax in Kenya for the first time, hence the respondents could hold off on its implementation for the limited period of determination of the petition. In those circumstances, its suspension would not occasion a *lacuna* in the operations or governance structure which, if left unfilled, even for a short while was likely to cause very grave consequences to the general populace.
26. By granting the orders sought in the instant application, the court would not have issued final orders. The mere fact that the court suspended certain provisions of the challenged enactment, did not amount to a determination that those provisions were unconstitutional. In other words, there was no inconsistency in the court granting conservatory orders suspending certain provisions and after hearing the petition finding that the same provisions were after all not unconstitutional. Similarly, there was no inconsistency in the court invalidating provisions which at the hearing of the application for conservatory orders it did not find necessary to suspend. In other words, at that stage the court was not entitled to determine the petition in its entirety.
27. In an application for conservatory orders, the court had to always be careful not to issue orders whose effect would be to finally determine the pending petition. What the drafters of the Constitution intended was that the court in determining the constitutionality of an enactment ought to adopt the guided missile approach so as to target only the offensive parts of the Act.

Application allowed.

Orders

i. *Conservatory orders granted restraining the 2nd respondent whether acting jointly or severally by itself, its servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of section 12D of the Income Tax Act, Chapter 470 of the Laws of Kenya as amended by the Tax Laws (Amendment) (No.2) Act, 2020 by collecting and/or demanding payment of the minimum tax pending the hearing and determination of the petition.*

Citations

Cases

Kenya

1. *Asin, Brian & 2 others v Wafula W Chebukati & 9 others* Petition 429 of 2017; [2017] KEHC 9388 (KLR) - (Explained)
2. *Assocaition of Kenya Insurers (AKI) (suing through its Chairman Mr Mathew Koech) v Kenya Revenue Authority & 2 others; Insurance Regulatory Authority (IRA) Interested Party* Petition 201 of 2020; [2020] KEHC 4204 (KLR) - (Followed)
3. *Attorney General & another v Coalition for Reform and Democracy & 7 others* Civil Application 2 of 2015; [2015] KECA 994 (KLR) - (Followed)
4. *Bidco Oil Refineries Ltd v Attorney General & 3 others* Petition 177 of 2012; [2013] KEHC 4587 (KLR) - (Explained)
5. *Centre for Human Rights and Democracy & others v Judges and Magistrates Vetting Board & others* [2012] 2 KLR 603 - (Explained)

6. *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] 1 KLR 458 - (Explained)
7. *Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & another (Interested Parties)* Petition 476 of 2015; [2019] KEHC 10892 (KLR) - (Explained)
8. *Council of County Governors v Attorney General & another* Constitutional Petition 56 of 2017; [2017] KEHC 6395 (KLR) - (Explained)
9. *Havi, Nelson Andayi v Law Society of Kenya & 3 others* Petition 607 of 2017; [2018] KEHC 8791 (KLR) - (Explained)
10. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013; [2015] KEHC 6975 (KLR) - (Explained)
11. *Judicial Service Commission v Speaker of the National Assembly & another* Petition 518 of 2013; [2013] KEHC 911 (KLR); [2013] 3 KLR 262 - (Explained)
12. *Kaguru, Susan Wambui & 4 others v Attorney General & another* Petition 545 of 2012; [2012] KEHC 551 (KLR) - (Explained)
13. *Kamau, Jesse & 25 others v Attorney General* Constitutional Application 890 of 2004; [2010] KEHC 3172 (KLR) - (Followed)
14. *Kenya Association of Manufacturers & 2 others v Cabinet Secretary – Ministry of Environment and Natural Resources & 3 others* Petition 32 of 2017; [2017] KEELC 1248 (KLR) - (Explained)
15. *Kenya Bankers Association v Attorney General & another; Central Bank of Kenya (Interested Party)* Petition 427 of 2018; [2019] KEHC 6374 (KLR) - (Explained)
16. *Kenya Bankers Association v Kenya Revenue Authority* Miscellaneous Civil Application 510 of 2017; [2018] KEHC 9028 (KLR) - (Explained)
17. *Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA Workers Union) v Kenya Revenue Authority & 3 others* Petition 544 of 2013; [2014] KEHC 6984 (KLR) - (Explained)
18. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* Miscellaneous Civil Application 743 of 2006; [2007] KEHC 3680 (KLR); [2007] 2 KLR 240 - (Explained)
19. *Kimani, Joseph & 2 others v Attorney General & 2 others* Petition 669 of 2009; [2009] KEHC 11 (KLR) - (Explained)
20. *Law Society of Kenya v Kenya Revenue Authority & another* Petition 39 of 2017; [2017] KEHC 8539 (KLR) - (Explained)
21. *Macharia v Murathe & another* [2008] 2 KLR (EP) 189 (HCK) - (Followed)
22. *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal 39 of 2002; [2003] KECA 175 (KLR) - (Explained)
23. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others (Munya 2)* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Explained)
24. *Mureithi & 2 others (For Mbari Ya Murathimi Clan) v Attorney General & 5 others* [2006] 1 KLR 443. - (Explained)
25. *Muslims for Human Rights (MUHURI) & 2 others v Attorney General & 2 others* [2011] 1 KLR 322 - (Mentioned)
26. *Nabori & 9 others v Attorney General & 3 others* [2007] 2 KLR 331 - (Mentioned)
27. *Obuya, Mark & 5 others (Acting for or on Behalf of Association of Kenya Insurers) v Commissioner of Domestic Taxes & 2 others* Petition 383 of 2013; [2014] KEHC 4336 (KLR) - (Followed)
28. *Onyango, Patrick Ouma & 12 others v Attorney General & 2 others* Miscellaneous Application 677 of 2005 - (Explained)
29. *Patrick Ouma Onyango & 12 others v Attorney General and 2 others* [2005] eKLR - (Explained)

30. *Pevans East Africa Ltd v Betting Control and Licensing Board & 2 others; Safaricom Limited & another (Interested Parties)* Constitutional Petition 252 of 2019; [2019] KEHC 4629 (KLR) - (Explained)
31. *Platinum Distillers Limited v Kenya Revenue Authority* Petition 83 of 2019; [2019] KEHC 9419 (KLR) - (Explained)
32. *Progress Welfare Association of Malindi & 3 others v County Government of Kilifi & 4 others* Constitutional Petition E2 of 2020; [2020] KEHC 1704 (KLR) - (Explained)
33. *Republic v Judicial Commission of Inquiry Into the Goldenberg Affair & another ex parte Saitoti* Miscellaneous Civil Application 102 of 2006; [2006] KEHC 3533 (KLR) - (Mentioned)
34. *Republic v Public Procurement Administrative Review Board & another ex parte Selex Sistemi Integrat* Miscellaneous Civil Application 1260 of 2007; [2008] KEHC 138 (KLR); [2008] KLR 728 - (Followed)
35. *Samura Engineering Limited & 10 others v Kenya Revenue Authority* Petition 54 of 2011; [2012] KEHC 5672 (KLR) - (Explained)
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2. *Vestey v Inland Revenue Commissioners* [1979] 3 All ER 984 - (Explained)

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Canada

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1. *Habre International Co Ltd v Kassam & others* [1999] 1 EA 125 - (Followed)
2. *Kinyanjui v Kinyanjui* [1995-98] 1 EA 146 - (Followed)
3. *Ndyanabo v Attorney General* [2001] 2 EA 485; (2002) AHRLR 243 (TzCA 2002) - (Followed)
4. Trinidad and Tobago
5. *Attorney General v Sumair Bansraj* (1985) 38 WIR 286 - (Explained)
6. *Ferguson and Galbarabsingh v Attorney General* TT 2010 HC 320 - (Explained)

Trinidad and Tobago

1. *Attorney General v Sumair Bansraj* (1985) 38 WIR 286 - (Explained)
2. *Ferguson and Galbarabsingh v Attorney General* TT 2010 HC 320 - (Explained)

Statutes

Kenya

1. Banking Act (cap 488) In general - (Cited)
2. Constitution of Kenya articles 1, 2, 10, 19(1); 20(3)(4); 21(a); 22; 23; 24; 26; 27; 28; 40(2)(a); 43; 46; 48; 94(1); 95; 109; 110(1)(c)(4)(5); 165(3)(d)(ii); 201(a)(i); 209(1); 210- (Interpreted)
3. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rule 23- (Interpreted)
4. Finance Act, 2018 (Act No 10 of 2018) section 63- (Interpreted)

5. Finance Act, 2020 (Act No 8 of 2020) section 2- (Interpreted)
6. Income Tax Act (cap 470) sections 3(2); 5; 6A; 12C; 12D; 15(1); Schedule 8, 9- (Interpreted)
7. Kenya Revenue Authority Act (cap 469) section 5(1)(2)- (Interpreted)
8. Mining Act (cap 306) In general- (Cited)
9. Physical and Land Use Planning Act (cap 303) In general - (Cited)
10. Societies Act (cap 108) In general - (Cited)
11. Tax Laws (Amendment) (No 2) Act, 2020 (Act No 2 of 2020) In general- (Cited)
12. Tax Procedures Act (cap 469B) sections 36, 47 - (Interpreted)
13. Value Added Tax Act (cap 476) In general - (Cited)

Advocates

Mr Okwach for the petitioner
Miss Akama for Mr Mwendwa for the 1st respondent
Miss Almadi with Mr Nyagah and Mr Ochieng for the 2nd respondent
Miss Omuom for the 3rd respondent

RULING

Introduction

1. The petitioners herein are the registered officials of the Isinya East Sub County Bar Owners Association registered under the *Societies Act* cap 108 Laws of Kenya who operate their businesses within Kitengela, Isinya, Athi River and Mavoko within the Counties of Kajiado and Machakos.

2. The 1st respondent is sued as the legislative organ of the National Government created by article 95 of the *Constitution* charged with the enactment of National Legislation in accordance with part 4 of chapter 8 of the Constitution .

3. The 2nd respondent is sued as the agency of the Government of Kenya created under the *Kenya Revenue Authority Act* cap 469 Laws of Kenya responsible for the assessment, collection and accounting of all revenues due to the government, in accordance with the laws of Kenya.

4. The 3rd respondent is sued as the principal government legal advisor.

The Petitioners' Case

5. It was pleaded that on June 30, 2020, the President of the Republic of Kenya assented to the *Finance Act, 2020* which amended to the *ITA* by introducing a new section 12D providing for introduction of Minimum Tax at the rate of 1% of the gross turnover effective 1 January 2021 (Impugned Amendment). Reference was also made to section 7 as read with section 9 of the *Finance Act 2020*

6. It was disclosed that to further exemplify this position, the 2nd respondent, in January of this year, published so called "Guidelines on Minimum Tax". Central to the guidelines was the definition of Gross Turnover.

7. The effect of the said amendment, according to the petitioners is that they are threatened with the real and imminent enforcement of what they term as an unconstitutional, unlawful and devastating minimum Tax introduced under section 12D of the *Income Tax Act* cap 470 of the Laws of Kenya (hereinafter referred to as the ITA) recently amended by the *Finance Act 2020*. which if allowed to be imposed will without an iota of doubt lead to the absolute annihilation of the petitioners business along with a majority of Small and medium enterprises struggling to earn an income in the already abysmal economy.

8. It is contended that the impugned Minimum Tax introduced by the 1st respondent in the aforesaid amendment is unconstitutional as it does not fall within the category of taxes imposable by the National Government as envisaged under article 209(1) of the Constitution .

9. According to the petitioners, by its very definition and as is undeniable, the said Minimum tax does not amount to Value-added tax, custom duties nor excise tax, yet the 1st respondent purports to include it in the category of income tax. However, by dint of section 3 (which is the charging provision) as read with section 15(1) of the *ITA*, Income tax is only chargeable on gains or profit and not as gross turnover as implied by Minimum Tax. As such, this novel tax cannot be deemed in any manner of form to amount to income tax. It was therefore contended that the action of the 1st respondent to introduce the said novel tax is not only *ultra vires* but also contra *the Constitution* .

10. It was contended that taxation by a state is necessary for the life of a nation because it sustains the public welfare and public good. Nevertheless, the power to tax is very delicate, vulnerable to abuse by those in authority; therefore, the Constitution imputes safeguards to protect against such abuse.

11. It was pleaded that the introduction of Minimum tax requires a taxpayer to pay their income tax based on the higher of (a) 30% of net profit or (b) 1% of gross revenue. The latter provides that the tax shall be applicable on the gross turnover of the Petitioners and other taxpayers before deduction of production and operational costs, blatantly contradicting section 3 as read with section 15(1) of the *ITA*.

12. From the foregoing, it was contended that the impugned Minimum Tax introduced by section 12D is contrary to and inconsistent with the meaning and purpose of income tax as provided under the *ITA*. On one hand the *ITA* provides that income which is subject to tax under the *ITA* is income in respect of gains or profits having deducted all expenditure wholly and exclusively incurred in the production of that income while on the other hand minimum tax is chargeable on gross turn over including losses with no possibilities of deducting expenses or costs.

13. This blatant inconsistency, according to the petitioners, leaves the petitioners and the taxpayers at large at a position of uncertainty as to what is applicable to them in respect of Income Tax. This inconsistency is not only unlawful but also contravenes the cardinal rule of Legislation, and moreso fiscal policies and legislation that legislation must be clear and certain. The right to certainty is enshrined under article 10 of the Constitution of Kenya 2010 which provides for the sanctity and paramountcy of the Rule of Law in any legislative process.

14. Based on the definition of Income under the *ITA*, it was contended that the Minimum tax cannot be deemed as an Income Tax as envisaged and governed under the *ITA* and as such, the same has no place in the *ITA* and consequently ought to be adjudged null and void *ab initio*.

15. To accentuate this lack of clarity and uncertainty, the *ITA* further provides at Section 12D (2) that minimum tax shall be paid in instalments which shall be due on the 20th day of each period ending on the 4th, 6th, 9th and 12th month of the year of income. However, and in contradiction hereto, the Minimum Tax Guidelines published by the 2nd respondent provide that for persons who more than two-thirds of their income is derived from agricultural, pastoral, or horticultural activities, tax shall be due on the 20th day of each period ending on the 9th and 12th month of the company's financial year which is a provision alien to the *ITA* or the impugned amendment thereto. These ambiguous timelines, coupled with the uncertainty and ambiguity of the section 12D of the *ITA* leaves the Petitioners and the taxpayers at large at a point of confusion and inability to anticipate and or plan for their tax liability and compliance therewith.

16. Additionally, it was contended, the confusion and or uncertainty is exemplified in the Minimum Tax Guidelines published by the 2nd respondent which provide that minimum tax shall not apply to income which is subject to withholding tax, including digital service tax, provided that at the end of the accounting period, the tax payable on taxable income exceeds minimum tax payable. However, there is no provision in the *ITA* exempting this income from minimum tax.

17. Secondly, article 201(a)(i) in setting out the principles of public finance provide for the promotion of an equitable society through the fair and just sharing of the burden of taxation. It is a fact which the petitioners shall demonstrate that the imposition of Minimum tax as against gross turnover violates this cardinal principle of public finance. As the impugned Minimum tax is levied on gross turnover and not gains or profits, all persons, even those in a loss-making position are required to pay minimum tax. This means that a taxpayer who has no profit or is in a loss making position will have to pay the minimum tax out of pocket or their capital. Essentially, what this means is that the impugned tax cares less of the ability of the taxpayer to pay. An elementary principle in taxation is the Principle of economic capacity which states that the percentage of the income of the taxpayers that can be legitimately affected by a tax must not be excessive than the wealth objectively available.

18. This again, is manifestly contrary to the stipulation under section 15(4) and (5) of the *ITA* removing tax-payers in loss making positions from the purview of Income Tax. To wit, section 15(4) acknowledges that a taxpayer can be in a tax loss position and as such allows them to carry forward the losses incurred in a current year for a period of nine (9) years during which the taxpayer can offset the tax losses against future profits made in future years. Furthermore, section 15(5) allows the taxpayer to apply to the Cabinet Secretary responsible for finance for an extension to carry forward losses beyond the nine (9) years where the taxpayer has not extinguished the tax losses within the ten (10) years.

19. Thirdly, it was contended that the action by the 1st respondent to enact the impugned amendment and introduce Minimum tax without the reference of the said amendment to the Senate for discussion and passing thereof violates article 110(1)(c) as read with article 110(4) and (5). Minimum Tax being chargeable on gross turnover, affects the finances of County Government as the gross turnover of an enterprise includes the County taxes and charges levied and chargeable in its County of business. As such, expropriation thereof amount to the deprivation of the said County's revenue.

20. Fourthly, the levying of Minimum tax on gross turnover as opposed to gains or profit will bring rise to an occurrence where a tax payer, subject to minimum tax (the same being higher than the 30% of the his net profit), will pay 'income tax' exceeding the statutory 30% (Corporate Tax) which will consequently mean that the taxation burden on him/her will be heavier than on other taxpayers, contrary to article 201 of the *Constitution of Kenya*.

21. To illustrate the point, the petitioner explored the various scenarios that are likely to face the taxpayers and contended that can be manifestly gleaned from the said scenarios is that compliance with the Minimum tax while adhering to the principles of taxation and the general provisions of the *ITA* is only possible where a Taxpayer has a net interest (after production costs and operational expenses as envisaged under section 15) of 3.33%. Accordingly, the imposition of Minimum Tax is premised on the respondents' false notion that all businesses must always make a Net Profit of at least 3.33% at any given time. Referring to the Hansard Report, it was contended that this misconception was appreciated by the Members of Parliament during the debate on the Bill. It was contended that even where the petitioners' products are lost or damaged, minimum tax will regardless be levied on this loss. It is the petitioners' contention that this very possibility of loss is what section 3 as read with section 15 were enacted to cushion the taxpayer from since such losses would be considered as deductions as contemplated under section 15(1) before arriving at a taxable income.

22. Again, this oppressive imposition is introduced ignorant of the fact that the petitioners' businesses alongside many other SMEs, begin from loss making positions owing to the plethora of licenses and permits required to commence the business together with the costs antecedent procuring the said licenses and these are the very costs and expenses contemplated under section 15 of the *ITA* which are recurrent whether or not the Petitioners make a sale. As such, it is only where the Petitioners are able to recover and exceed the said costs and expenses that they can be deemed to be generating income as envisaged under the *ITA*.

23. While large corporations with net profits well above the assumed baseline of 3.33% will be least bothered by the introduction of Minimum tax, it was contended that this impugned tax will be the nail on the coffin on small and medium enterprises who will most certainly be forced to pay 'income tax' from capital investment. This tilts the scale in favour of large companies blatantly contravening article 27 of the *Constitution* that enshrines equality in the application, protection and benefit of the law.

24. Furthermore, this goes against the very core principle of taxation as enshrined under article 201(b)(1) that taxation should be progressive and not regressive. certainly, minimum tax is regressive taxation, taxing those who earn less more than those who earn more. Undoubtedly, this impugned tax does not promote an equitable society, and is defnitely not fair in sharing the tax burden.

25. Additionally, article 40(2)(a) of the *Constitution of Kenya* states that Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description. Profit is property. Minimum tax illegally and unfairly threatens some enterprises with tax beyond 30% of and even 100% or more. This amounts to depravation of property contrary to article 40 and therefore amounts expropriation without due compensation.

26. Similarly, tax losses enjoyed by enterprises are a form of property for such enterprises as the enterprises are allowed to carry forward and set off against its future profits for a period of nine (9) years. Therefore, requiring the enterprises in a tax loss position to pay minimum tax is an arbitrary deprivation of their right to property.

27. Again, to exemplify the contravention of article 27 of the *Constitution* that provides for the equality in the application and protection of the law, the impugned amendment in section 12D of the *ITA* discriminates against the petitioners and other traders in the consumer products sector by favouring those in the energy and petroleum sector and in the insurance sector. The *Tax Laws (Amendment) (No 2) Act*, 2020 created an exemption for minimum tax for industries whose prices are regulated by the Government. The rationale for this exemption was that since the prices in the energy and petroleum sector are regulated by government, they would be disadvantaged by minimum tax, since they cannot control their profits. This exemption and its rationale create and unfair tax environment to the suffering of the petitioners and traders of consumer as it is based on the fallacious misconception that they (the petitioners) are solely in control of their retail prices and consequently their profits.

28. According to the petitioners, the respondents violated the mandatory provisions of article 2(4) as read with rticle 10 of the *Constitution* by enacting the impugned Amendment that is manifestly riddled with ambiguity, uncertainty, contradictions and lack of clarity as section 12D is inconsistent with section 3 as read with section 15 of the *ITA*.

29. To them, the Impugned amendment under section 12D violates the petitioners' right to property as enshrined under article 40 of the *Constitution of Kenya*. Minimum tax threatens to arbitrarily expropriate the losses and capital of the petitioners and other non-profit making entities despite clear protection and exemption from the same under the *ITA*. Requiring companies in a tax loss position to

pay minimum tax is an arbitrary deprivation of their right to property as imposition of the minimum tax disregards the tax losses that such a company has by requiring the company to pay minimum tax based on its gross turnover.

30. The Impugned amendment violates article 27 of the *Constitution* that provides for the equality in the application and protection of the law. The impugned amendment in section 12D of the *ITA* discriminates against the petitioners and other traders in the consumer products sector by favouring those in the energy and petroleum sector and in the insurance sector vide their exemption from the application of Minimum tax on the fallacious misconception that the petitioners and other consumer goods traders are in full control of their prices and profit margins. As hereinabove demonstrated, this misconception has exposed the petitioners and other consumer goods traders to an unequal and unjust application of the law and an unbalanced shouldering of the Tax burden.

31. Again, as hereinabove demonstrated, the introduction of Minimum tax is founded on the false belief that every business enterprise operating in Kenya generates a profit bottom line of 3.33% at any given point. This misconception in effect means that from the outset, enterprises with a lower profit margin than 3.33% are at risk of being levied a tax higher than the 30% Corporate tax that companies above the expected bottom-line are levied. (based on production costs and operational expenses, some SMEs are at risk of paying 100% income tax or even more).

32. It was contended that Minimum Tax infringes on Consumer Rights as enshrined under article 46(1) of the Constitution , by prejudicing the economic interests of consumers. The Minimum Tax Amendment will expose consumers to unreasonably high prices for basic commodities, since Distributors, Wholesalers and Retailers will be forced to increase their profit markups by up to 7% to cater for 3.67% in operational expenses and 3.33% required Net Profit margin.

33. The petitioners noted that the action by the 1st respondent to enact the impugned amendment and introduce Minimum tax without the reference of the said amendment to the Senate for discussion and passing thereof violates article 110(1)(c) as read with article 110(4) and (5). Minimum Tax being chargeable on gross turnover, affects the finances of County government as the gross turnover of an enterprise includes the County taxes levied and chargeable in its County of business. As such, expropriation thereof amount to the deprivation of the said County's revenue.

34. The impugned tax further infringes article 201(b)(i) of the Constitution by imposing an unfair tax burden on the petitioners. As hereinabove demonstrated, Minimum Tax will expose businesses with high volumes and low profit margins to separate and punitive tax regime beyond the Statutory Scale in the Third Schedule of the *Income Tax Act* as compared to large enterprises who post a profit margin of well over 3.33% who will only pay 30% Corporate Tax on their net profits or gains.

35. Again, the said infringement is espoused in the fact that minimum tax does not grant the taxpayer below the 3.33% profit bottom line an opportunity to deduct production costs and operational expenses before taxation as envisaged under section 15 & the Second Schedule of the *ITA* while a taxpayer above the 3.33% bottom line enjoy this opportunity. Furthermore, the infringement is enunciated in the requirement of loss making entities to pay minimum tax, despite the fact that they are exempted from Corporate tax on account that imposing the same would impose an unfair tax burden on them.

36. Additionally, and most notably, the action by the 1st respondent to enact the impugned amendment blatantly violates article 209 of the Constitution by purporting to impose a tax outside and or foreign to the recognized taxes provided thereunder. Minimum tax cannot be classified as value added tax, custom duties, excise tax nor can it be classified as Income tax as per the *ITA*, income tax is only imposable on profit or gain and not gross turnover.

37. Apart from the Constitutional violations, the petitioners contended that the said Act violated several legal principles. In their view, it to uphold the constitutional tenets of the rule of law, transparency, accountability, public participation and good governance by failing to verify that the applicable mandatory constitutional and statutory provisions were complied with before enacting section 12D of the *Income Tax Act*, chapter 470 of the Laws of Kenya as amended by the *Tax Laws (Amendment) (No 2) Act, 2020*. It also failed to defend the *the Constitution* by enacting section 12D of the *Income Tax Act*, chapter 470 of the Laws of Kenya as amended by the *Tax Laws (Amendment) (No 2) Act, 2020* that is riddled with incurable procedural and substantive defects and which was ex facie illegal. Further, it failed to defend the fundamental rights and freedoms in the Bill of Rights by enacting section 12D of the *Income Tax Act*, chapter 470 of the Laws of Kenya as amended by the *Tax Laws (Amendment) (No 2) Act, 2020* that is geared towards the arbitrary and whimsical deprivation and or denial of fundamental rights and freedoms contained in articles 10, 27, 40, 46 and 201 of the *Constitution* , contrary to article 24 of the *Constitution* .

38. The 1st respondent was accused of failing in their duty to uphold, defend and protect the Constitution , as well as in their duty not to infringe on the fundamental rights and freedoms of the people, by enacting section 12D of the *Income Tax Act*, chapter 470 of the Laws of Kenya as amended by the *Tax Laws (Amendment) (No 2) Act, 2020* that is unconstitutional, illegal, therefore null and void for the following reasons:

    (i) Passing section 12D of the *Income Tax Act*, chapter 470 of the Laws of Kenya as amended by the *Tax Laws (Amendment) (No.2) Act, 2020* which legislation in fact infringes, threatens and or violates the constitutional principles of equity and fairness, equality and non-discrimination, rule of law, equal protection of the law, sanctity of property rights, and good governance, contrary to articles 10, 27, 40, and 201 of the *Constitution* .

    (ii) Fettering the right to access justice which includes justice in the context of taxation contrary to article 48 of the *Constitution* by passing the said tax legislation that:

        (a) Unfairly imposes double tax by imposing tax on application for permit and royalties which is already charged under the *Mining Act, 2016* thereby imposing an unjust tax system;

        (b) Unfairly and unjustly imposing an unreasonable and unsustainable tax burden on industry players engaged in the alcoholic beverage and tobacco industry without due consideration.

    (iii) The passing of the impugned amendment blatantly offends the principle of legitimate expectation of the petitioners and the general public, to wit, that the 1st respondent would uphold the supremacy of the Constitution and the hereinabove integral tenets of legislation, especially fiscal in nature.

39. It was further contended that the impugned Minimum Tax is very likely to occasion the unlawful punishment of double taxation as against the petitionerand other similar taxpayers.

40. From the foregoing, the petitioners contended that it is manifest that the impugned minimum tax is not only unlawful and unconstitutional but also oppressive to the petitionersand the Small and Medium Enterprises engaged in the distribution and sale of consumer goods with low profit margins and will most certainly sound the death knell of most of their enterprises. The imposition of minimum tax on gross turnover in blatant disregard of the costs of production and operational expenditure will definitely translate in the Petitioners and other SMEs paying ‘income’ tax out of capital (out of their pocket).

41. The petitioners' view is that the impugned amendments threaten the sanctity of the right to life (which includes the right to earn a livelihood and sustain one's life) as well as the right to human dignity as enshrined under article 26, 28 and 43 of the *Constitution* . This means that imposition of burdensome and oppressive taxes which are deliberately designed to kill certain types of businesses cannot in any way be constitutional.

42. The Petitioners therefore seek the following reliefs:

(i) A declaration that section 12D of the *Income Tax Act* as introduced by the *Finance Act, 2020* and amended by the *Tax Laws (Amendment) (No 2) Act, 2020* is illegal and unlawful an contrary to the provisions of article 10 of the *Constitution* and as such null and void *ab initio*;

(ii) A declaration that section 12D of the *Income Tax Act* as introduced by the *Finance Act, 2020* and amended by the *Tax Laws (Amendment) (No 2) Act, 2020* is illegal and unlawful an contrary to the provisions of article 27 of the *Constitution* and as such null and void *ab initio*;

(iii) A declaration that section 12D of the *Income Tax Act* as introduced by the *Finance Act, 2020* and amended by the *Tax Laws (Amendment) (No 2) Act, 2020* is illegal and unlawful an contrary to the provisions of article 40(1)(a) and (2)(a) of the *Constitution* and as such null and void *ab initio*;

(iv) A declaration that section 12D of the *Income Tax Act* as introduced by the *Finance Act, 2020* and amended by the *Tax Laws (Amendment) (No 2) Act, 2020* is illegal and unlawful an contrary to the provisions of article 46(1) of the *Constitution* and as such null and void *ab initio*;

(v) A declaration that section 12D of the *Income Tax Act* as introduced by the *Finance Act, 2020* and amended by the *Tax Laws (Amendment) (No 2) Act, 2020* is illegal and unlawful an contrary to the provisions of article 110(1) (c) as read with article 110 (4) and (5) of the *Constitution* and as such null and void *ab initio*;

(vi) A declaration that section 12D of the *Income Tax Act* as introduced by the *Finance Act, 2020* and amended by the *Tax Laws (Amendment) (No 2) Act, 2020* is illegal and unlawful an contrary to the provisions of article 201(b)(i) of the *Constitution* and as such null and void *ab initio*;

(vii) A declaration that section 12D of the *Income Tax Act* as introduced by the *Finance Act, 2020* and amended by the *Tax Laws (Amendment) (No 2) Act, 2020* is illegal and unlawful an contrary to the provisions of article 209 (1) of the *Constitution* and as such null and void *ab initio*;

(viii) A declaration that per the provision of section 3 as read with section 15 of the *Income Tax Act*, Income taxable under this *Act* is net income after deductions of expenditure wholly and exclusively incurred b in the production of that income.

(ix) An order of prohibition be and is hereby issued restraining the 2nd respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of section 12D of the *Income Tax Act*, chapter 470 of the Laws of Kenya as amended by the *Tax Laws (Amendment) (No.2) Act, 2020* by collecting and/or demanding payment of the Minimum Tax;

(x) The costs of this petition be borne by the respondents;

(xi) Any other or further order or relief that this honorable court deems fit to grant.

43. Together with the petition, the petitioners filed a notice of motiondated March 23, 2021in which they seek that pending the hearing and determination of this petition *inter partes*, a conservatory order be and is hereby issued restraining the 2nd respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of section 12D of the *Income Tax Act*, chapter 470 of the Laws of Kenya as amended by the *Tax Laws (Amendment) (No 2) Act, 2020* by collecting and/or demanding payment of the Minimum Tax.

44. The said motion is supported by an affidavit sworn by Stanley Njuguna Waweru, the Chairman of the Isinya East Sub-county Bar Owners Association and the 1st petitioner herein. In the said affidavit, the deponent has reiterated the contents of the petition herein.

45. The petitioners contended that this is careless of the already dire economic situation caused by the Covid 19 pandemic which resulted in the total shutdown of the petitioners businesses for a period exceeding 10 month closure which drove many of the bar-owners to a complete exit from the industries while most of the others are now buried in debt. To them, the passing of the impugned amendment blatantly offends the principle of legitimate expectation of the petitioners and the general public, to wit, that the 1st respondent would uphold the supremacy of the *Constitution* and the hereinabove integral tenets of legislation, especially fiscal in nature. According to the petitioners, the bring the application and petition filed herewith in their own interest, in the interest of other SMEs as well as the Public interest to protest the imposition of the impugned taxation on the ground that it is illegal, excessive, unsustainable, oppressive and unconstitutional therefore null and void. They were of the view that the tax burden imposed on the petitioners is unsustainable, inequitable, and excessive and is outright discriminative against the petitioners and other SMEs compared to large enterprises. Moreover, the same will effectively render the businesses of the petitioners uneconomical and inutile.

46. It was their case that if the conservatory orders sought in the application filed herewith are not granted as a matter of urgency, the petitioners and a majority of enterprises in Kenya will fatally suffer from the imposition of the illegal and unconstitutional minimum tax. Without a shred of doubt, the 2nd respondent, unless the conservatory orders sought herein are granted, will implement the impugned minimum tax. As a matter of fact, as provided under section 12D, the petitioners are required to make the 1st Payment of the impugned minimum tax not later than the 20th of April 2021 and the 2nd respondent has indeed commenced issuance of demand notices to taxpayers in respect of Minimum tax.

47. The petitioners, it was averred, will suffer untold prejudice because its gross turnover will be subjected to an excessive, discriminative and illegal tax. Moreover, the enforcement of the impugned legislations stands to kill their business and the livelihoods of millions of Kenyans operating small to medium enterprises which form the majority of the business community. The death of a business is certainly not a damage that can be remedied by way of damages. As such, it is in the interest of Justice that the honourable court grants interim reliefs at the very least to preserve the businesses and livelihoods of the petitioners and millions of SMEs pending the hearing and determination of this application and petition.

48. In the inverse, where the interim relief is granted, the respondent will not suffer any prejudice whatsoever as where the court finds the impugned minimum tax to be legal and constitutional, the 2nd respondent will be at liberty to collect all tax arrears due from the Petitioners and all other taxpayers together with interest and/or penalties.

49. It would be prudent in the public interest that the conservatory orders sought in the application be granted pending the hearing and determination of both this application and the petition filed herewith.

50. In their submissions in support of the petition, the petitioners relied on *Vestey v Inland Revenue Commissioners* [1979] 3 All ER at 984, *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR and *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] 2 KLR 240

51. The court was therefore implored to appreciate the uncertainty of the applicability of section 12D based on the operative section 3(2) of the *ITA* that is the charging Section which provides a basis upon which an income tax is levied being income on gains and profit. Additionally, the confusion and or uncertainty is exemplified in the Minimum Tax Guidelines published by the 2nd respondent which provide that minimum tax shall not apply to income which is subject to withholding tax, including digital service tax, provided that at the end of the accounting period, the tax payable on taxable income exceeds minimum tax payable. However, there is no provision in the *ITA* exempting this income from minimum tax.

52. Further, the uncertainty has also been witnessed by the manner in which the 2nd respondent has issued exemptions to some entities (for instance the Kenya Airways who were exempted in March 2021) which do not fall under the exemptions in the *Income Tax Act* from paying the Minimum Tax. This signifies that any person can make an application for exemption from payment of the Minimum Tax to the detriment of other tax payers as the parameters of exercising that discretion by the 2nd respondent to issue exemptions are not in the statute and or in public domain. In this regard, the petitioners relied on *Kenya Breweries Association v Attorney General & another; Central Bank of Kenya (Interested Party)* [2019] eKLR.

53. As regards the alleged infringement of the right to property guaranteed in article 40(2)(a) of the *Constitution of Kenya* it was submitted that pro?t is property and that minimum tax illegally and unfairly threatens some enterprises with tax beyond 30% of and even 100% or more. This amounts to depravation of property contrary to Article 40 and therefore amounts expropriation without due compensation. Reliance was placed on *Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & another (Interested Parties)* [2019] eKLR.

54. As regards unfair treatment, the petitioners relied on *Kenya Bankers Association v Kenya Revenue Authority* (2018) eKLR where reference was made to *R v Inland Revenue Commissioners exp National Federation of Self Employed and Small Business Limited* [1981] UKHL 2, *Samura Engineering Limited and & others v Kenya Revenue Authority* HC Petition No 54 of 2011 [2012] eKLR, *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR.

55. On the issue of prejudice, the petitioners relied on the holding in *Association of Kenya Insurers (AKI) (suing through its Chairman Mr Mathew Koech) v Kenya Revenue Authority & 2 others; Insurance Regulatory Authority (IRA) Interested Party* [2020] eKLR.

56. It was submitted on behalf of thepetitioners that the respondents will in deed not suffer any prejudice whatsoever as where the honourable court finds the impugned minimum tax to be legal and constitutional, the 2nd respondent will be at liberty to collect all tax arrears due from the petitioners and all other taxpayers together with interest and/or penalties. The interest and penalties will compensate them for any damage suffered by the deferment.

57. Again, the impugned amendment introduces Minimum Tax in Kenya for the first time, which has very serious Constitutional and economic ramifications to the petitioners and their members and members of the public and therefore, the respondents can hold off on implementation of the novel Minimum

Tax as the court decides on the petition. Further, the suspension of the Impugned Amendment will not occasion a lacuna in the operations or governance structure which, if left unfilled, even for a short while is likely to cause very grave consequences to the general populace. In fact, if the court grants orders suspending the implementation of the Impugned Amendment, the petitioners, their members and members of the public are still obligated to pay Corporation or Instalment tax. The Government is not losing any taxes.

58. The argument that the government will lose projected tax collections owing to the suspension of the implementation pending determination of this act is baseless as this is not only a novel tax being levied for the first time, but also as there exists mechanisms for its collection in arrears as hereinabove submitted. Again, this argument is also limbless as the country has witnessed the wanton and unstructured manner in which the Government is granting exemptions to several taxpayers outside the contemplated parameters. What the petitioners are seeking is not an exemption, but instead a deferment. Therefore, it is misguided to say that the orders sought are final in nature. Reliance was placed on *Attorney General & another v Coalition for Reform and Democracy & 7 others,* Civil Application No Nai 2 of 2015 (Ur 2/2015); [2015] eKLR and *Association of Kenya Insurers (AKI) (suing through its Chairman Mr Mathew Koech) v Kenya Revenue Authority & 2 others; Insurance Regulatory Authority (IRA) Interested Party* (*supra*).

59. According to the petitioners, in as much as the 2nd respondent would like to expand its tax base, it should do so with the effect of its action in mind. Article 201(a)(i) of the *Constitution* in setting out the principles of public finance provide for the promotion of an equitable society through the fair and just sharing of the burden of taxation. From the foregoing, it is undoubtable that there is no prejudice. Loss and or damage that the respondents will suffer where this courts grants the conservatory orders sought.

60. These submissions were highlighted by Mr Okwach, the petitioner's learned counsel.

1st Respondent's Case

61. In opposing the application, the 1st respondent herein, the National Assembly, filed the following grounds of opposition:

1) That the 1st respondent holds a constitutional mandate under article 94(1) 109, 209(2) and 210 of the *Constitution* to take legislative and policy measures to enact legislation as to the manner in which taxes are administered. This position was held by the court in the case of *Bidco Oil Refineries Limited v Attorney General & 3 others* [2013] eKLR where it was stated as follows:-

> " It is within the authority of the legislature to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it is imposed, calculated and enforced. The arguments made by the appellant concern how the customs duty is calculated, that is an issue of the application of the Act, rather than its constitutionality. Since statutory application is really the issue here, the consideration whether article 47(1) has been violated is dispositive. In any case, the collection of taxes through the procedures provided by the law cannot, at least in the circumstances of this case, constitute an arbitrary deprivation of property."

2) That under article 209 of the Constitution , the legislature retains wide authority to define the scope of taxation through a statute. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the petitioner opposes to the administration or imposition of the impugned minimum tax as provided under section 12D of the *Income Tax Act, 2020*. In the case of *Mark Obuya,*

Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others [2014] eKLR: the court upheld this decision by stating as follows: -

> " The decision whether to impose a tax and to who, is within legislative authority hence it has a right to decide what institutions fall within the definition of 'financial institutions' under the Act. That power falls squarely with the legislature. This court cannot therefore intervene and therefore find nothing unconstitutional in regard to that aspect of the petition."

3) That the petitioner has not rebutted the presumption of constitutionality of statutes which states that statutes should be presumed to be constitutional until the contrary is proved as highlighted in the High Court case *Institute of Social Accountability & another v National Assembly & 4 others* High Court Petition No 71 of 2014; [2015] eKLR which provides that:-

> " Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity"

4) That the petitioner has adopted a misleading interpretation of the provisions of article 209 of the *Constitution* whose purpose is to assert that the powers of imposing taxes and charges solely lies with the National Government. The provision in no way limits the scope of taxes that may be legislated on by the Government. The petitioner has neglected the provision of article 209(2) of the *Constitution* which authorizes the imposition of any other taxes or duty through an Act of Parliament, therefore, giving wide discretion to the 1st respondent on the nature of taxes to be administered.

5) That the petitioner has presented a fallacious interpretation of section 3 as read together with section 15(1) of the *income tax Act* which do not negate or contradict in any form with the imposition of a minimum tax or limit the scope of the 1st respondent in introducing the impugned provision through the *Income Tax Act*.

6) That while it is within the mandate of this court to scrutinize the constitutionality or otherwise of any Act passed by Parliament, the court's role is limited to ensuring that the statute does not violate the Constitution and the petitioner ought not to cast doubt as to the merits of the impugned sections of the *Income Tax Act* as that is the purview of the 1st respondent herein being empowered to enact on policy decisions mandated by the executive.

7) That In the case of *Patrick Ouma Onyango & 12 others v Attorney General and 2 others* [2005] eKLR the court held as follows on whether it should interfere with a formulation of policy, political or legislative process:-

> " The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on

formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters".

8) That the allegations of uncertainty and lack of clarity have not been sufficiently proved by the petitioner. The 2nd respondent has established the Guidelines on Minimum Tax which further clarify the provisions on minimum tax introduced in the Act. The petitioners have failed to consider the guidelines as a guide to promoting the understanding of the intention and purpose of the minimum tax.

9) That the petitioner has the obligation to prove how the law is unclear and inconsistent. This is the position held in the case of *Britestone Pte Ltd v Smith & Associates Far East Ltd* (2007) 4 SLR (R) 855, thus;

> " The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

10) That the court be pleased to be guided by the principles of the interpretation of statutes as are set out in the case of *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR as follows:-

> The principles governing the interpretation of statutes are summarized as follows:-
>
> i. Under article 259 of the *Constitution*, the court is enjoined to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under article 159(2)(e) of the *Constitution* to protect and promote the purposes and principles of the Constitution .
>
> ii. There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. (The court should start by assuming that the Act in question is constitutional).
>
> iii. In determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.
>
> iv. The Constitution should be given a purposive, liberal interpretation.
>
> v. That the provisions of the Constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.
>
> vi. The spirit of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.

11) That the petitioner has not satisfied the threshold for proving their claim of unfair and unreasonable discrimination under article 27 of the Constitution whereby in the case of *Pevans*

East Africa v Betting Control and Licensing Board & 2 others; Safaricom Limited & another (Interested Parties) , the court stated as follows with regard to imposition of the principle of differentiation to serve a legitimate purpose.

> " The test for determining whether a claim based on unfair discrimination should succeed was laid down by South Africa Constitutional Court in *Harksen v Lane NO and others*... in which the court said:
>
> They are:-
>
> (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is a violation of the Constitution . Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:-
>
> (i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...
>
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (of the Constitution)."

12) That while article 27(1) provides for equality, the same provisions do not prohibit differentiation or classification based on different requirements. What the Constitution requires is that any classification or differentiation based on prohibited grounds set out in article 27 must bear a rational connection to a legitimate government purpose. This has been achieved by the provision of the impugned sections.

13) Thatthe petitioner has failed to provide evidence to prove the alleged contravention of the right to property protected in article 40 of the *Constitution* and has not shown how the provisions of the Act have imposed unfair discrimination.

14) That taxes are a form of raising revenue sanctioned by the Constitution and the imposition of taxes does not deprive the petitioners of the right to property provided under article 40 of the *Constitution* and as such the petitioner's allegations that they have been deprived of their property by paying taxes has no basis in law. This was the position taken by the court in the case of *Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiha Workers Union) v Kenya Revenue Authority & 3 others* [2014] eKLR wherein the court stated that "The imposition of tax by statute cannot, of itself, amount to arbitrary deprivation of property contrary to article 40 of the Constitution ."

15) That the payment of taxes is an obligation imposed on all businesses and individuals. Therefore, if the court were to uphold the petitioners' arguments, it would open the flood gates since nearly all businesses and individuals would raise similar issues about taxation, fairness issues, double taxation, among others with possible abandonment of the need to pay taxes.

16) That contrary to the petitioners allegations, the impugned provision shall promote fairness in the sharing of the taxation burden as provide in article 201(b)(i) of the *Constitution* by ensuring that the payment of tax is an obligation imposed on all persons through the introduction of a minimum tax. This will ensure the contribution of all businesses in the government development agenda.

17) That the petition is a threat to the doctrine of separation of powers and is an encroachment to the legislative mandate of parliament. An order of the court granting the petitioner's prayer amount to an interference of Parliament's constitutional powers by the Judiciary.

18) That the jurisdiction of this honourable court can only be invoked in the event of an excess of jurisdiction by way of reach of the Constitution and there has been no such violation of the Constitution in the enactment of the impugned provision.

2nd Respondent's Case

62. The application was similarly opposed by the 2nd respondent herein, The Commissioner General, Kenya Revenue Authority.

63. According to the 2nd respondent, Kenya Revenue Authority is established under the *Kenya Revenue Authority Act*, cap 469 Laws of Kenya. Under section 5(1), the Authority is an agency of the Government for the collection and receipt of all revenue. Further, under section 5(2) with respect to the performance of its functions under subsection (1), the Authority is required to administer and enforce all provisions of the written laws set out in Part 1 and 2 of the First Schedule for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

64. In its view, the conservatory orders sought by the petitioner are final in nature and cannot be granted at an interim stage because section 12D of the *Income Tax Act*, chapter 470 of the Laws of Kenya (hereinafter-Minimum Tax Legislation) was introduced vide section 4 of the *Finance Act 2020*, which Act was assented to and published on June 30, 2020. Pursuant to section 2 of the *Finance Act 2020*, the commencement date of the minimum tax Legislation was stipulated to be January 1, 2021.

65. It was disclosed that the Minimum Tax Legislation was amended by the *Tax Laws (Amendment) (No 2) Act, 2020* including introducing persons exempted by the legislation. That *Amendment Act* was

published on December 24, 2020 and pursuant to section 2 of the said Act, the Commencement date of the said amendment was stipulated to be January 1, 2021. Accordingly, the law was enacted Nine (9) months ago on June 30, 2020 and commenced operation three (3) months ago on January 1, 2021.

66. It was the Authority's view that the *Finance Act 2020* was passed through the laid down procedure for enacting legislation and was passed by Parliament on June 30, 2020, and as such, it enjoys the principal (sic) of Constitutionality. Therefore, it contended that this lawful legislation has been in existence and within the public knowledge for the last nine months and that the process of enactment of the Minimum Tax Legislation is not disputed, but rather, the petitioner disputes the Constitutionality of an already enacted legislation.

67. In the Authority's view, the orders sought by the petitioner in the application is in essence urging this honourable court to suspend the implementation of the Minimum Tax Legislation, a law properly and procedurally enacted by National Assembly, prior to hearing the main Petition.

68. In the Authority's view, the orders sought by the applicants are final in nature and shall be akin to determining the petition at this interim stage without hearing the parties on substantive issues. Secondly, for this court to grant prayer 2 and 3 of the application, this honourable court must first determine the following questions which questions can only be determined at the hearing of the Petition:-

    a. The nature of and the Policy informing introduction of Minimum Tax Legislation.

    b. Whether Minimum Tax is an Income under the *Income Tax Act*.

    c. Whether Minimum Tax legislation is constitutional.

    d. Whether the Minimum Tax Legislation infringes on any constitutional rights alleged by the petitioner both in the application and in the petition.

    e. Whether the 2nd respondent has violated any constitutional obligations.

    f. Whether the 2nd respondent's implementation of the Minimum Tax Legislation will violate any Constitutional provisions.

69. According to the authority, for this court to grant the prayers in the application, this honourable courtmust reach the decision that the Minimum Tax legislation is unconstitutional, which decision can only be made upon hearing all parties during hearing of the petition.

70. It was appreciated that the petition raises weighty policy and constitutional issues that this court must consider before making any determination, which determination has far-reaching consequences on the Government of Kenya's economy. However, all enacted legislations including the Minimum Tax legislation enjoy the presumption of constitutionality until declared otherwise by the honourable court after hearing both parties.

71. It was the Authority's view that until this court finds in favour ofthe petition and grants the prayers sought in the petition at paragraph 105 of the petition, this honourable court cannot suspend the implementation and or applicability of the Minimum Tax Legislation which legislation was properly enacted. According to it, this court has set the minimum threshold that must be met before it can grant conservatory order in petitions like the herein. However, the application has not met the threshold for this court to grant conservatory orders for reasons hereunder. Was averred that a *prima facie* case should manifestly expose a violation of a right, which is not the case here. According to the Authority, the Minimum Tax legislation as passed aims at ensuring that all persons equitably contribute to the national kitty for equitable sharing of the tax burden. Since the minimum tax is chargeable at 1%

on gross turnover hence leaving taxpayers with 99% of the turnover outside tax regulation unlike the corporate tax which is 30% after deductions hence it is fairer.

72. In the Authority's view, no prejudice shall be suffered by the petitioner if the conservatory orders sought are not granted reason being:-

    a. The minimum Tax legislation has been in existence for nine (9) months since its enactment on 30th June and the petitioner has only approached this court at the end of March 2021, when their obligation to remit the said tax has crystallised.

    b. The dispute revolves around taxes, which are money claims that are quantifiable and can be refunded should the court hold in favour of the petitioner in its judgement.

    c. *Tax Procedures Act* provides for a refund mechanism under section 36 in cases of overpaid taxes or taxes paid in error which the 2nd respondent is able to employ should this court declared the minimum tax legislation unconstitutional upon hearing both parties.

    d. It would be impossible for the 2nd respondent to recover the taxes due from all kenyans if the implementation of minimum tax legislation is suspended at this interim stage, and upon hearing of the petition, the legislation found to be constitutional.

73. On the other hand, the Authority contended that prejudice lies on Government of Kenya that has relied on budgetary projections from the taxes to be recovered that will suffer as government projects will stall. It was stated that certainty of tax is an important doctrine of taxation and the only thing that the conservatory orders will cause at this point is confusion hence it is important that the law be retained as it is until the outcome of the petition.

74. In its view, Public Interest at this interim stage lies in upholding the will of the people who through Parliament enacted the Minimum Tax Legislation, and not the opinion of a select few prior to hearing the petition. The same interest also lies with ensuring that the burden of tax is equally shared and that is what minimum tax seeks to achieve.

75. The Authority averred that the conservatory orders sought can only be granted in legislations affecting life or limb of a person, which the minimum tax legislation is not one such legislation.

76. In this case, the petitioner will not suffer irreparable loss if they pay the minimum tax as the same is quantifiable and can be refunded should this court hold in favour of the Petitioner.

77. It was therefore sought that since the application has failed to meet the threshold for granting conservatory orders, lacks in merit and ought to be dismissed with costs to the respondents.

78. In its submissions the 2nd respondent reiterated the foregoing and contended that rule 23 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* provides for this court hearing and determining an application for conservatory orders and there is established case law on the granting of conservatory orders. In this regard reference was made to *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, and the case of *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General*, Nairobi High Court Petition No 16 of 2011; [2011] eKLR cited with approval in *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.

79. Based on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR it was submitted that for the petitioners to meet this threshold, the petitioners' case must be so water tight that this court having perused the petitioners pleading is able to out-rightly tell a constitutional

violation, which needs for a rejoinder by the respondent. This is not the case in this petition and or the application. In the 2nd respondent's view, the issues raised by the petitioner are factual and their veracity cannot be gleamed from the filed documents without hearing all the parties. According to it, this court must consider the submissions by the National Assembly and the 2nd respondent on the Policy considerations informing the imposition of Minimum Tax legislation. To it, most of the allegations made by the petitioner are no supported by evidence and remain speculative statements. In its view, the alleged unconstitutionality of the minimum tax legislation is therefore not *prima facie* evident on the pleadings both in the application and in the petition, and the court must call for more evidence from the respondents to satisfy itself and that at this stage, the petitioner's case remains speculative. No determination has been made of what an 'income' is under the *Income Tax Act* and as such, the alleged violations under section 3 and 15 of the Income Tax cannot and have not been established at this point. It was emphasised based on the case of *Council of County Governors v Attorney General & another* [2017] eKLR that enacted laws enjoy the presumption of constitutionality unless proved otherwise by a court of law. In the same vein, this court should begin by presuming that section 12(D) of the *Income Tax Act* is constitutional and should only hold otherwise upon hearing of both parties at the hearing of the petition. To that extent therefore, this court should be hesitant to grant the prayers in the application, which call for the court to suspend implementation of a statute without first finding that the said statute is unconstitutional.

80. It was the 2nd respondent's view that what is instead evident is teething problems on a new tax legislation, which are usually apparent with the introduction of any new tax law or policy. New tax laws are always accompanied by debates and concerns, rightfully so from the taxpayers. This does not automatically equate to the unconstitutionality of the said tax law. It was appreciated that it is evident that the Minimum Tax legislation brings with it anxiety from the taxpayers on its effect on their businesses. However, this is to be anticipated with all new tax legislation, and will not equate to unconstitutionality, unless determined by court. In this regard reliance was placed on the case of *Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others* [2014] eKLR.

81. It was submitted that it is apparent from the Report on the consideration of the *Tax Laws (Amendment) (No 2) Bill* that during public participation, various parties wished that the law would have been authored differently. However, the ultimate power to enact the law rested with the National Assembly who upon hearing parties approved the Bill to be assented into law.

82. In the Authority's submission, since the petitioner has not established a *prima facie* case at the interim stage, this court should not to disturb the implementation of a properly enacted law by issuance of conservatory order, but allow parties to argue the petition and issue a substantive determination.

83. Regarding prejudice, it was submitted that the minimum tax legislation, having been properly enacted is a law that must be implemented across board. At this interim stage, this court has not pronounced itself as to whether the said law is excessive, discriminative or illegal. At this interim stage, the law enjoys the presumption of constitutionality. According to it, taxation cannot prejudice a society that created it. In this instance, since the procedure of enactment of the law is not faulted, then the public at large cannot suffer prejudice if the court does not intervene at this interim stage.

84. To it, should this court find upon hearing the petition that the law is unconstitutional, the petitioner and all taxpayers have a remedy in law since taxes are money claims which are quantifiable and the *Tax Procedures Act* provides for a refund mechanism for overpaid tax under section 47. On the other hand, the 2nd respondent and by extension the public at large will suffer extreme prejudice should this honourable court grant the conservatory orders for the following reasons:-

a. Minimum tax legislation is as a result of budget policy that seeks to ensure all citizens share an equitable tax burden; the taxes collected under this legislation have been projected into the annual budget for economic development.

b. The 2nd respondent will be foregoing taxes that have accrued legally under the law.

c. The 2nd respondent will be barred from undertaking its constitutional and statutory mandate.

d. This tax burden for meeting the deficit that will have been forgone by the suspension of the minimum tax legislation will have to be pushed to other taxpayers, which concept defeats the very concept of non-discrimination advanced by the petitioners.

e. It would be impossible for the 2nd respondent to recover the taxes due from all Kenyans if the implementation of minimum tax legislation is suspended at this interim stage, and upon hearing of the petition, the legislation found to be constitutional.

85. In the 2nd respondent's view, the allegations of prejudice by the petitioner are not those of the Public but a select few who do not want to meet their constitutional tax obligations. The court was therefore urged to weigh the allegations of prejudice advanced by the petitioner, *vis-à-vis* the prejudice to be suffered by the wider citizenry represented by the Legislature, who enacted the legislation. It was noted that the Minimum Tax legislation has been in existence for nine (9) months since its enactment on June, 30th and the petitioner has only approached this court at the end of March 2021, when their obligation to remit the said tax has crystallised. It was asserted that since the first instalments is due to be remitted by the April 20, 2021, any perceived notion of unconstitutionality of the legislation should have been raised much earlier, and any sort of judicial intervention sought earlier for the good of the people. To the 2nd respondent, an argument that a business shall be killed because of implementation of a properly enacted law cannot hold. Indeed, as observed by the petitioner, there exists various other forms of taxes, all of which have been enacted in accordance with the Constitution , and all of them co-existing. This one will not be an exception. Reliance was sought from the case of *Progress Welfare Association of Malindi & 3 others v County Government of Kilifi & 4 others* [2020] eKLR.

86. According to the Authority, the real danger lies with the Government foregoing the taxes at an interim stage due to suspension of implementation of the minimum tax legislation. While not downplaying the petitioners' submission on collapse of businesses, it was submitted that collapse of business can be because of many things. The past one year has been hard on Kenya's economy both on the government and on businesses. Both are suffering. Collapse of the petitioner business cannot be attributed solely to introduction of minimum tax. In its view, the conservatory orders sought will only create chaos and uncertainty. This is great prejudice that the people of Kenya do not deserve to suffer, for the benefit of a select few.

87. On the issue of public interest, reliance was paced on the holding by the Indian Supreme Court case of *Ashok Kumar Pandey v The State of West Bengal* on 18 November, 2003 and *Brian Asin & 2 others v Wafula W Chebukati & 9 others* [2017] eKLR.

88. Accordingly, the court was urged to look through the intentions of the petitioner and determine that the application has not been brought in Public Interest. In its view, the Public Interest in this dispute lies with the people who through their elected leaders have enacted the minimum tax legislation. At this very stage, the law was enacted represents the will of the people, the public interest of the people and public interest therefore frowns upon the said will, being dislodged at an interim stage prior to hearing of this petition by granting the conservatory orders. According to it, the petitioner, Isinya East Bar Owners Association, represents a small section of bar owners within the County Governments

of Machakos and Kajiado, a very small fraction of taxpayers, and is not a true representation of the larger population of taxpayers who are shouldering this burden of taxation. While the 2nd respondent respects the views of the petitioner, their views of a properly enacted law cannot at this Interim stage trump the views of the whole citizenry.

89. It was contended that a cursory look at the application and the petition shows that no violation is apparent. What is apparent is the administrative difficulties to bed expected with the introduction of a new tax law but this does not mean the said law should be suspended at an interim stage. Given that the conservatory orders apply in rem, the 2nd respondent urged this court to be first satisfied that Public interest will be injured if the orders sought are not granted, which is not the case in this dispute. It was argued that the intention of granting conservatory orders is to preserve the subject matter, which in this case is the equitable burden of taxation under the minimum tax legislation and accordingly, the court shall best preserve the shared burden of taxation by allowing everyone to shoulder the responsibility of paying tax until such responsibility is dislodged by this court's judgement. We urge this court to dismiss the application for failure to meet the threshold for conservatory orders and set down the petition for hearing.

90. Accordingly, the court was urged to dismiss the application.

91. The said submissions were highlighted by Miss Almadi who appeared in the matter with Mr Nyagah and Mr Ochieng Learned counsel for the 2nd respondent.

3rd Respondent's Case

92. In opposing the application, the 3rd respondent, the Attorney General, relied on the following grounds and adopted the submissions made on behalf of the 2nd respondent:

    1. That the orders sought in the notice of motionapplication are final in nature and ought not to be granted at an interlocutory stage.

    2. That the petitioner has not fulfilled the requirements set out in various authorities for the grant of orders of a conservatory nature at an interlocutory stage as set out in various authorities and case law.

    3. That it is against public interest that the honorable court grant the orders sought by the petitioner herein.

    4. That the petitioner is seeking to curtail the statutory mandate of the respondents to enforce laws that are for the benefit of the citizenry in order to sustain his alleged cause of action.

    5. That the orders sought by the petitioner herein are in complete violation of articles 94 and 95 among other provisions of the *Constitution of Kenya 2010* which provide for the legislative authority of Parliament.

    6. That the orders sought if granted will have the effect of interfering with the respondents' statutory mandate and limiting the legislative freedom of Parliament which is enshrined within the Constitution .

    7. That the petitioner has not placed any evidence before this honorable court to warrant the interference with the powers of the respondents.

    8. That no strong or cogent reasons have been advanced by the petitioner to justify the delay in filing the matter since June 30, 2020, and as such the petitioner is guilty of laches.

9. That the impugned act of parliament herein namely the *Income Tax Act* is constitutional in nature having been enacted by Parliament in exercise of its powers under article 94 of the *Constitution of Kenya (2010)*

10. That the impugned act of Parliament enjoys a presumption of constitutionality having been enacted pursuant to the sovereign authority donated to Parliament under article 94(1) & (5) of the *Constitution of Kenya (2010)*. Further it is not within the honorable courts' powers to question the legislative wisdom of Parliament.

11. That the orders sought herein are against public policy and public interest as the petitioner ought not to be allowed to stop the respondents' exercise of their legitimate legal mandate in order to sustain his alleged claim.

12. That public interest tilts in favor of therespondents as no cogent reasons have been supplied in order to interfere with the powers of the respondents.

13. That the respondents are bound by the provisions of the law and the petitioner has not produced any cogent evidence before the court to prove that the respondents are acting/ have acted *ultra vires*.

14. That the petition and application herein are premised upon imaginary scenarios rather than actual facts.

15. That the petitioners are in effect seeking to have court stop the respondents from carrying out their lawful mandate under the impugned act which law is presumed to be constitutional until determined otherwise.

16. That the application herein is unmerited, misconceived, misplaced and an abuse of the court process.

17. That the notice of motion application herein should be dismissed with costs to the Respondents'.

Determinations

93. I have considered the application the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited.

94. In Mombasa High Court Petition No 669 of 2009 – *Bishop Joseph Kimani & others v Attorney General & ors,* Ibrahim, J (as he then was) pronounced himself 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 stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment...It is my view the principle of presumption of Constitutionality of Legislation in (*sic*) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even

> regulations should be wholly avoided except where the national interest demand and the situation is certain...I am still of the view that "there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void." It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first."

95. Majanja, J on his part in *Susan Wambui Kaguru & ors v Attorney General & another* [2012] KLR expressed himself *inter alia* as follows:

> "I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of the Constitution . No doubt serious legal arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so."

96. What clearly comes out is that the power to suspend legislation during peace time ought to be exercised with care, prudence and judicious wisdom where it is shown that the operation of the legislative provision are a danger to life and limb at that very moment and where the national interest demand and the situation is certain. On my part I would modify that view by adding to the phrase "a danger to life and limb" the words "or where there is imminent danger to the Bill of Rights" since article 19(1) of the *Constitution* provides that the "Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies" and article 21(a) provides that "it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights." However, at the stage of the application for conservatory order the court ought not to make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so. In other words, where there are strong and cogent reasons conservatory orders may be granted.

97. Under article 1 of the *Constitution* sovereign power belongs to the people and it is to be exercised in accordance with the *Constitution* . That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution . Our *Constitution* having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution . If anyone is in doubt, article 2 of *Constitution* provides for the binding effect of the Constitution on state organs and proceeds to decree that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. In my view, if the court has power to declare an enactment void and invalid, likewise the court must have jurisdiction in deserving cases to suspend provisions of an enactment if to do otherwise is likely to render whatever decision the court may arrive at a mirage.

98. Where in my view, the court is convinced that the orders ought to be granted, i do not see why the court should shy away from doing so. On this note I wish to associate myself with the holding of Mulenga, JSC in *Habre International Co Ltd v Kassam & others* [1999] 1 EA 125 to the effect that:

> " The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this."

99. I similarly agree with this court's decision in *Re Kadhis' Court: Very Right Rev Dr Jesse Kamau & others v Attorney General & another* Nairobi HCMCA No 890 of 2004 where it was held that:

> " The general provisions governing constitutional interpretation are that in interpreting the Constitution , the court would be guided by the general principles that;
>
> (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document;
>
> (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."

100. In my view this holding is even more appropriate in cases where the court is called upon to uphold the provisions of the Constitution .

101. Article 23 of the *Constitution* does not expressly bar the court from granting conservatory orders where a challenge is taken on the constitutionality of legislation. The only rider is that the case must be one which falls under article 22 of the Constitution . This however does not mean that courts ought to readily suspend legislation simply because a challenge has been made to a statute. I agree that power ought to be exercised very sparingly where the court is satisfied that it ought to be exercised. However, it can be exercised.

102. Whereas I agree that there is a presumption of Constitutionality of Statute that is a rebuttable principle. This was clearly appreciated in *Ndyanabo v Attorney General* [2001] 2 EA 485 where it was held *inter alia* that in interpreting the Constitution , the court would be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation's status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction.

103. I wish to associate myself with the holding of Mbogholi Msagha, J in *Macharia v Murathe & another* Nairobi HCEP No 21 of 1998 [2008] 2 KLR (EP) 189 (HCK) where he expressed himself inter alia as follows:

> " The learned counsel cited several authorities from the English jurisdiction to advance his submission that the courts have no jurisdiction to question whatever takes place in Parliament. Britain does not have a written *Constitution* hence the sovereignty of Parliament. But in Kenya we have a *Constitution* whose supremacy as set out therein is unambiguous and unequivocal. In a democratic Country governed by a written Constitution, it is the Constitution which is supreme and sovereign...it is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because ...the Constitution itself makes provision in that behalf, and the amendment of the Constitution can be validly made only by following the procedure prescribed by the... [*Constitution*]. That shows that even when Parliament purports to amend the Constitution , it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers and Judges take oath of allegiance to the Constitution for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe their allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature...in the literal absolute sense."

104. In the same vein, Nyamu, J (as he then was) in *Republic v Public Procurement Administrative Review Board & another ex parte Selex Sistemi Integrat*i Nairobi HCMA No 1260 of 2007 [2008] KLR 728 pronounced himself as follows:

> " The other reason why this court cannot blindly apply the so called ouster clauses is that, unlike the English position where judges must always obey, or bow to what Parliament legislate, is, because Parliament is the supreme organ in that legal system. Even there judges have refused to blindly apply badly drafted laws and have in some cases filled the gaps in order to complete or give effect to the intention of the legislature. In the case of Kenya it is our written Constitution which is supreme and any law that is inconsistent with the Constitution is void to the extent of the inconsistency (see s 3). Our first loyalty as judges in Kenya is therefore to the Constitution and in deserving cases, we are at liberty to strike down laws that violate the Constitution ."

105. That brings me to the present case.

106. Article 165(3)(d)(ii) of the *Constitution* donates to the High Court the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution . The Judiciary as a bastion of the rights of the people is the safeguard and watchdog of the rights, which are fundamental to human existence, security and dignity.

107. Whereas the court is mindful of the principle that the Legislature has the power to legislate and judges shall give due deference to those words by keeping the balances and proportionality, in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution , the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches,

stems, flowers and fruits. See Rawal, J (as she then was) in *Charles Lukeyen Nabori & 9 others v Attorney General & 3 others* Nairobi HCCP No 466 of 2006 [2007] 2 KLR 331.

108. Under what circumstances can the court grant conservatory orders?

109. In *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR this court expressed itself as follows:

> "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."

110. This position was reinforced by the Supreme Court in *Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (*supra*) where the highest court in the land held:

> "'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 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. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

111. Whereas it is true that in applications seeking to suspend legislation care must be taken to ensure that courts do not readily accede to the temptation to render legislation stillborn and that such power ought not to be exercised lightly, to hold that the court can only grant conservatory orders where the court is satisfied that the challenged provisions are unconstitutional would in my view be stretching the standard too far. The law as I understand it is that in considering an application for conservatory orders, the court is not called and it is indeed forbidden from making any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the first condition the applicant is required to establish a *prima facie* case with a likelihood of success.

112. What are the issues which the petitioners intend to canvass at the hearing of the petition? What has provoked this petition is the assent by the President on June 30, 2020 of the *Finance Act,* 2020 which amended the *Income Tax Act*, by inserting a new section 12D which introduced the Minimum Tax at the rate of 1% of the gross turnover effective 1 January 2021 (Impugned Amendment). That new insertion provides that:

12D.

(1) Notwithstanding any other provision of this Act, a tax to be known as minimum tax shall be payable by a person if—

(a) that person's income is not exempt under this Act;

(b) that person's income is not chargeable to tax under sections 5, 6A, 12C, the Eighth or the Ninth Schedules; or

(c) the instalment tax payable by that person under section 12 is higher than the minimum tax.

(2) The tax payable under this section shall be paid in instalments which shall be due on the twentieth day of each period ending on the fourth, sixth, ninth and twelfth month of the year of income.

113. Section 7 as read with section 9 of the *Finance Act 2020* provides the rate chargeable as Minimum tax as follows;

> Section 34 of the *Income Tax Act* is amended in sub section (1) by inserting the following new paragraphs 470 immediately after paragraph (m) —
>
> (n) tax upon the Gross Turnover of a person whose income is chargeable to tax under section 12D shall be charged at the rate specified in the Third Schedule

114. Section 9 of the *Finance Act, 2020* states that:

> The Third Schedule to the *Income Tax Act* is amended in Head B by inserting the following new paragraphs immediately after paragraph 10 — 11. The rate of tax in respect of minimum tax under section 12D shall be one per cent of the Gross Turnover.

115. The 2nd respondent subsequently published "Guidelines on Minimum Tax" and the same defined Gross Turnover in the following terms;

> " Gross turnover' means gross receipts, gross earnings, revenue, takings, yield, proceeds, sales or other income chargeable to tax under section 3(2) excluding a person's income which is chargeable to tax under sections 5, 6A, 12C, the Eighth or the Ninth Schedules and exempt income under any provision of the *Income Tax Act*, cap 470."

116. I associate myself with the opinion of Majanja, J in the case of *Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others* [2014] eKLR, at paragraph 33 that:-

> " The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection."

117. The applicants contend that the impugned Minimum Tax is unconstitutional as it is riddled with ambiguity, uncertainty, contradictions and lack of clarity in light of the provisions of section 3 as read with section 15 of the *ITA*. This, according to them contravenes provisions of article 2(4) as read with article 10 of the *Constitution* .

118. In *Vestey v Inland Revenue Commissioners* [1979] 3 All ER at 984, it was held that;

> " Taxes are imposed on subjects by parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined."

119. Similarly, in *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR the need for certainty and clarity was restated when it was held that;

> " The term rule of law has been used to mean a variety of things. Two common components, however, are:
>
> (1) the predictability of the law, which enables people to rely on it in ordering their affairs, and to plan their conduct with some confidence and security; and
>
> (2) the coherence of the legal system as a whole (that is, that one standard of law will not contradict another).
>
> The common law principle of legality has hardened into a strong clear statement rule that is applied when legislation engages common law rights and freedoms. It has transformed a loose collection of rebuttable interpretive presumptions into a quasi-constitutional common law bill of rights. If Parliament wishes to interfere where rights, liberties and expectations are affected, it must do so with clarity. The clear statement principle is the critical way that the law of statutory interpretation reflects and implements the principle of legality. If Parliament wishes to interfere where rights, liberties and expectations are affected, it must do so with clarity. The clear statement principle is the critical way that the law of statutory interpretation reflects and implements the principle of legality. As Lord Hoffmann famously observed in *ex parte Simms*:
>
> > " [T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."
>
> In *Grayned v City of Rockford*, the United States Supreme Court identified a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vagueness offends several important rules. A vague law impermissibly creates dangers of arbitrary and discriminatory application.
>
> Therefore elementary justice or the need for legal certainty demands that rules by which the citizen is to be bound should be ascertainable by him by reference to identifiable sources that are publicly accessible, clear and not vague. It is important to have clarity and certainty.
>
> A statute is void for vagueness and unenforceable if it is too vague for the average citizen to understand. There are several reasons a statute may be considered vague; in general, a statute might be called void for vagueness reasons when an average citizen cannot generally determine what persons are regulated, what conduct is prohibited, or what punishment may be imposed. A statute is also void for vagueness if a legislature's delegation of authority to administrators is so extensive that it would lead to arbitrary prosecutions.
>
> To summarize the contents of the doctrine void for vagueness, it establishes specific criteria that all laws, or any legislation must meet, to qualify as constitutional. Such criteria includes the following:-
>
> (a) Law must state explicitly what it mandates, and

(b) what is enforceable,

(c) Definitions of potentially vague terms are to be provided.

Vague laws aren't just a threat to individual freedom. They constrict economic growth and discourage legitimate enterprise. As Justice Thurgood Marshall once wrote, vague laws "lead citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked."

120. In the case of *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] 2 KLR 240 it was similarly held that:

> " taxation can only be done on clear words and cannot be on intendment. Linked to this is that a penalty must be imposed in clear words. Finally even where the inclination of the legislature is not clear or where there are two or more possible meanings, the inclination of the court should be against a construction or interpretation which imposes a burden, tax or duty on the subject...Nothing summarises the above position better than Brooms Legal Maxims: 'a remedial statute therefore shall be construed so as to include cases which are within the mischief which the statute was intended to remedy; whilst, on the other hand, where the intention of the Legislature is doubtful, the inclination of the court will always be against that construction which imposes a burden, tax or duty or the subject."

121. The case of *Kenya Breweries Association v Attorney General & another; Central Bank of Kenya (Interested Party)* [2019] eKLR also reinforces this principle. In that case the court in declaring section 63 of the *Finance Act, 2018* unconstitutional for *inter alia* lack of certainty held that:-

> " ...Having found that section 63 of the *Finance Act, 2018* is ambiguous and vague, I find that the enactment is void for vagueness as a citizen would not be able to know in advance what are the legal consequences that flow from the impugned section of the *Finance Act, 2018* I find that the members of the petitioner are unable in, view of the ambiguity and vagueness of section 63 of the *Finance Act, 2018*, to know what is regulated and the manner of that regulation. I further find that section 63 of *Finance Act, 2018* and consequently section 31A of the *Banking Act* lack certainty; it is confusing due to being imprecise and vague..."

122. In my view, the contention that there is lack of clarity in the said Minimum Tax cannot be said to be frivolous. Though the 2nd respondent terms it as merely administrative that is clearly an issue that requires interrogation by this court.

123. According to the petitioners, since the impugned Minimum tax is levied on gross turnover and not gains or profits, all persons, even those in a loss-making position are required to pay minimum tax. This means that a taxpayer who has no profit or is in a loss making position will have to pay the minimum tax out of pocket or their capital. According to the petitioners, this contravenes article 201(a)(i) of the *Constitution* which sets out the principles of public finance which provide for the promotion of an equitable society through the fair and just sharing of the burden of taxation. According to the petitioners, the levying of Minimum tax on gross turnover as opposed to gains or profit will give rise to an occurrence where a tax payer, subject to minimum tax (the same being higher than the 30% of his net profit), will pay 'income tax' exceeding the statutory 30% (Corporate Tax) which will consequently mean that the taxation burden on him/her will be heavier than on other taxpayers. From the discourse herein, it is clear that whether the impugned tax adheres to article 201(a)(i) is arguable

124. Intertwined with the said issue is the question whether the said provision is discriminatory as against the petitioners and those who fall within their business categories. If the said contentions are true, then the said provision may well violate article 27 of the *Constitution* . According to the petitioners, while large corporations with net profits well above the assumed baseline of 3.33% will be least bothered by the introduction of Minimum tax, this impugned tax will be the nail on the coffin on small and medium enterprises who will most certainly be forced to pay 'income tax' from capital investment. This tilts the scale in favour of large companies blatantly contravening article 27 of the *Constitution* that enshrines equality in the application, protection and benefit of the law.

125. It was noted that the impugned amendment insection 12D of the *ITA* discriminates against the petitioners and other traders in the consumer products sector by favouring those in the energy and petroleum sector and in the insurance sector since the *Tax Laws (Amendment) (No 2) Act, 2020* created an exemption for minimum tax for industries whose prices are regulated by the Government based on the fallacious misconception that they (the petitioners) are solely in control of their retail prices and consequently their profits. This exemption and its rationale, according to the petitioners, create and unfair tax environment to the suffering of the Petitioners and traders of consumer goods.

126. At this stage and considering the material placed before me that issue is clearly arguable and not merely frivolous. The basis of my fining so is supported by the decision in *Kenya Bankers Association v Kenya Revenue Authority* [2018] eKLR where reference was made to *R v Inland Revenue Commissioners exp National Federation of Self Employed and Small Business Limited* [1981] UKHL 2 at page 22 where the court was:

> " ...persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within complex comprised in the management of tax, every part of which it is their duty, if they can, to collect."

127. Similarly, in *Samura Engineering Limited & others v Kenya Revenue Authority* HC Petition No 54 of 2011; [2012] eKLR Majanja, J at paragraph 58 emphasised that:

> " ...Kenya Revenue Authority as the State agency charged with the collection of taxes is bound by the provisions of the Bill of Rights to the fullest extent in the manner in which it administers the laws concerning the collection of taxes. The values contained in article 10 must all times permeate its functions and activities which it is mandated to carry out of by statute.""

128. In *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR it was the court's view at paragraph 92 that;

> " ...it is safe to state that the Constitution prohibits unfair discrimination. In my view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization."

129. It is also contended that the amendment ought to have been referred to the Senate since it affects the revenues of the County Governments and failure to do so violates article 110(1)(c) as read with article 110(4) and (5). According to the petitioners, Minimum Tax being chargeable on gross turnover, affects the finances of County government as the gross turnover of an enterprise includes the County taxes and charges levied and chargeable in its County of business. As such, expropriation thereof amount to the deprivation of the said County's revenue. Whereas the 2nd respondent contended that the petitioners are not questioning the manner in which the said amendment was passed, it is clear from this contention that the petitioners are challenging the procedure leading to its enactment without reference to the Senate.

130. I have identified only some of the issues raised by the petitioners. In my view these are not frivolous issues. To the contrary, they are weighty constitutional issues which require to be investigated further by the court. That they need further investigation is clearly appreciated by the 2nd respondent. In this petitions, I am satisfied that the issues raised herein disclose substantial questions of constitutional law as what is at stake is the balancing of the need to secure the government's revenue sources on one hand and the protection of the Bill of Rights on the other both of which the State is enjoined to attain. In the case of *Platinum Distillers Limited v Kenya Revenue Authority* [2019] eKLR, it was held that:-

> "(8) The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of article 23 of the Constitution are settled. The law, as I understand it, is that in considering an application for conservatory orders, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a *prima facie* case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant."

131. I also agree with the position adopted in *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR that:

> "(20) The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of article 23 of the *Constitution* are settled. In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest."

132. However, apart from establishing a *prima facie* case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her. See *Centre for Rights, Education and Awareness (CREAW) & 7 others v The Hon Attorney General*,

Nairobi HC Pet No 16/2011, *Muslims for Human Rights (MUHURI) & 2 others v The Attorney General & Judicial Service Commission,* Mombasa HC Pet No 7 of 2011 and *V/D Berg Roses Kenya Limited & another v Attorney General & 2 others* [2012] eKLR.

133. In the Privy Council case of *Attorney General v Sumair Bansraj* (1985) 38 WIR 286 Braithwaite JA expressed himself follows:

> "Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by section 14(2) and (3) of the *Constitution* and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, ... but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of ... the provisions" of the Constitution ...In the exercise of its discretion given under section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in section 14 (2) "subject to subsection (3) and the enactment of section 14(3) in the 1976 Constitution must have...the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too...The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."

134. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of *Steve Furgoson & another v The AG & another* Claim No CV 2008 – 00639 – Trinidad & Tobago. The Honourable Justice V Kokaram in adopting the reasoning in the case of Bansraj above stated:

> "I have considered the principles of *East Coast Drilling v Petroleum Company of Trinidad and Tobago Limited* (2000) 58 WIR 351 and I adopt the reasoning of Bansraj and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the Constitutionality of the legislation academic."

135. Musinga, J (as he then was) in Petition No 16 of 2011, Nairobi – *Centre for Rights Education and Awareness (CREAW) & 7 others* on his part stated:

> " ...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the petitioner's application and not the petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution ."

136. In The *Centre for Human Rights and Democracy & others v The Judges and Magistrates Vetting Board & others* Eldoret Petition No 11 of 2012, it was held by a majority as follows:

> " In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."

137. From the authorities cited herein and in my own holding hereinabove, the power to suspend legislation during peace time ought to be exercised with care, prudence and judicious wisdom where it is shown that that the operation of the legislative provision are a danger to life and limb or there is imminent danger to the Bill of Rights at that very moment and where the national interest demand.

138. As regards real danger, it is the petitioner's position that if the conservatory orders sought in the application filed herewith are not granted as a matter of urgency, the petitioners and a majority of enterprises in Kenya will fatally suffer from the imposition of the illegal and unconstitutional minimum tax. The petitioners, it was averred, will suffer untold prejudice because their gross turnover will be subjected to an excessive, discriminative and illegal tax. Moreover, the enforcement of the impugned legislations stands to kill their business and the livelihoods of millions of Kenyans operating small to medium enterprises which form the majority of the business community. The death of a business is certainly not a damage that can be remedied by way of damages. As such, it is in the interest of justice that the court grants interim reliefs at the very least to preserve the businesses and livelihoods of the petitioners and millions of smes pending the hearing and determination of this application and petition.

139. In the inverse, where the interim relief is granted, the 2nd respondent will not suffer any prejudice whatsoever as where the court finds the impugned minimum tax to be legal and Constitutional, they will be at liberty to collect all tax arrears due from the petitioners and all other taxpayers together with interest and/or penalties.

140. This court was however, urged not to grant the orders sought on the ground that the real danger lies with the Government foregoing the taxes at an interim stage due to suspension of implementation of the minimum tax legislation. While not downplaying the petitioners' submission on collapse of businesses, it was submitted that collapse of business can be because of many things. The past one year has been hard on Kenya's economy both on the government and on businesses both of which are

suffering. Accordingly, collapse of the Petitioner business cannot be attributed solely to introduction of minimum tax. In its view, the conservatory orders sought will only create chaos and uncertainty. This is great prejudice that the people of Kenya do not deserve to suffer, for the benefit of a select few.

141. On this point I can do no better than cite the decision in *Kinyanjui v Kinyanjui* [1995-98] 1 EA 146 where it was held:

> " For a court of law to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to engender serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience as would be to give succour and sustenance to all who can threaten with sufficient menaces that they cannot live with and under the law."

142. It has been said that the courts must never shy away from doing justice because if they did not do so justice has the capacity to proclaim itself from the mountaintops and to open up the Heavens for it to rain down on us. Courts are the temples of justice and the last frontier of the rule of law. See *Republic v Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr Justice of Appeal Bosire and another ex parte Honourable Professor Saitoti* [2007] 2 EA 392; [2006] 2 KLR 400.

143. Justice, it has been said is not a cloistered virtue and that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and heaven and earth embrace. See *Mureithi & 2 others (For Mbari Ya Murathimi Clan) v Attorney General & 5 others* Nairobi HCMCA No 158 of 2005; [2006] 1 KLR 443.

144. While the 2nd respondent argue that if the orders sought are granted and eventually the petition is dismissed it will find itself in a difficulty in collecting the tax due, this position was sufficiently answered in *Association of Kenya Insurers (AKI) (suing through its Chairman Mr Mathew Koech) v Kenya Revenue Authority & 2 others; Insurance Regulatory Authority (IRA) Interested Party* [2020] eKLR where the court pronounced itself as hereunder;

> " This does not mean that if the court makes a finding that the law is constitutional, the petitioner will evade their liability. That if the court finds the law is constitutional, the 1st respondent will be at liberty to demand taxes due. The 1st respondent will not be prejudiced as it will be able to collect any taxes due together with interest from the petitioner's members. I therefore find the 1st respondent will not suffer any prejudice if the orders sought are granted. On the other hand, if the orders are refused; and the petitioner's members continue to make payments and the law is found to be unconstitutional, the petitioners will not be able to recover the money back by virtue of *VAT Act* and will be greatly prejudiced."

145. While the 2nd respondent contends that if the petition succeeds, it will be in a position to refund the taxes paid, that position presumes that the petitioners will be in business. That this country and the whole world is going through serious economic recession mainly attributed to the vagaries of COVID 19 pandemic cannot be in doubt and this is appreciated even by the 2nd respondent. This court takes judicial notice of the fact that for a number of months last year, a lockdown was imposed and restrictions on movements imposed during certain hours. That curfew is still in force in the country while 4 counties in this country have been classified as Disease Infected Areas and are under lockdown. As a result, businesses have been seriously and adversely affected and with that sources of income have been seriously diminished if not obliterated altogether. This situation remains in situ indefinitely. It

is not in doubt that as a result of the effects of the mitigating steps taken by the Government, people lost their jobs while businesses had to close down. Accordingly, it is not far-fetched to say that further implementation of the Minimum Tax is likely to aggravate the situation, further sending the petitioners and businesses into abyss. That is a situation which ought to be avoided since it would be unhelpful to tell the petitioners once they fold up and or are wound up that they can resurrect and carry on with their businesses. In my view the lesser evil would be for the 2nd respondent to continue operating as it has been operating hopefully in the next few months and also to keep the petitioners afloat.

146. In my view, the right to life is meaningless unless people have an opportunity to engage in income generating activities in order to eke a living. It does not help to guarantee a right to life in the Constitution or the law books when there are no corresponding socio-economic rights which are realistically and progressively respected, protected, promoted and fulfilled as required under article 21 of the *Constitution* . In other words, the implementation of the rights under article 43 are geared towards meaningful realisation of the right to life. It is therefore my view that in determining whether the operation of a legislative provision pose danger to life and limb, the court must adopt a purposive approach in order to develop the law where it does not give effect to a right or fundamental freedom and adopt an interpretation that most favours the enforcement of a right or fundamental freedom and promote the spirit, purport and objects of the Bill of Rights as enjoined under article 20(3) and (4) of the *Constitution* . Accordingly, an action that threatens the livelihood of a person may well infringe upon the right to life if its effect would be to deprive the person of the means of sustenance.

147. It is true that the Impugned Amendment introduces Minimum Tax in Kenya for the first time, hence therespondents can hold off on its implementation for the limited period of determination of the petition. I agree that in those circumstances, its suspension will not occasion a *lacuna* in the operations or governance structure which, if left unfilled, even for a short while is likely to cause very grave consequences to the general populace.

148. I also do not agree with the 2nd respondent that by granting the orders sought in this application, the court would have issued final orders. I must make it clear that the mere fact that the court suspends certain provisions of the challenged enactment, does not amount to a determination that those provisions are unconstitutional. In other words, there is no inconsistency in the court granting conservatory orders suspending certain provisions and after hearing the petition finding that the same provisions are after all not unconstitutional. Similarly, there is no inconsistency in the court invalidating provisions which at the hearing of the application for conservatory orders it did not find necessary to suspend. In other words, at this stage this court is not entitled to determine the petition in its entirety.

149. I associate myself with the opinion expressed in *Attorney General & another v Coalition for Reform and Democracy & 7 others*, Civil Application No Nai 2 of 2015 (Ur 2/2015); [2015] eKLR where the court stated that:-

> "...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..."

150. Similar position was adopted in *Association of Kenya Insurers (AKI) (suing through its Chairman Mr Mathew Koech) v Kenya Revenue Authority & 2 others; Insurance Regulatory Authority (IRA) Interested Party* (*supra*) where the court held that:

> " 43. A *prima facie* case; it has been held is not a case where most succeed at the hearing of the main case. However, it is not a case which is frivolous. It follows the applicants has to show that he/she has a case which discloses arguable issues and in this case, arguable constitutional issues.
>
> 103. In the instant application the 1st respondent has not shown that it will suffer any prejudice if the orders sought are granted. The impugned Amendment introduces VAT in the Insurance Industry for the first time since 1989 and no urgency has been exhibited for the passing the law during the Covid-19 pandemic. It is urged by the petitioner that the 1st respondent can hold off on implementation of the novel VAT in the Insurance Industry pending the court making a determination on the petition. I find that the suspension of the impugned Amendment Bill will not occasion a lacuna in the operation or government structure, which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace.
>
> 104. In the instant application, I find that court cannot be called upon to aid the furtherance of a constitutional breach as the court has a duty to uphold the Constitution , which it must do without fear or favour as the court owes its allegiance to the Constitution . The court in execution of its discretion has to act judiciously and its decision in civil matters should be based on balance of probabilities.
>
> 105. The upshot is that I am satisfied that the petitioner has met the standard of proof as required in a civil matters. In this matter the balance of convenience tilts in favour of granting the conservatory orders."

151. In application for conservatory thecourt must always be careful not to issue orders whose effect would be to finally determine the pending petition. From the authorities cited herein and from discourse herein regarding the interpretation of danger to life, the interpretation is in consonance with the principle that a law is only void if inconsistent with the Constitution to the extent of its inconsistency. In my view, what the drafters of the Constitution intended is that the court in determining the Constitutionality of an enactment ought to adopt what I would call "the guided missile" approach so as to target only the offensive parts of the Act.

152. Having considered the issues placed before me, it is my view and I find that this is an appropriate case for the 2nd respondent to "hold its horses" for the time being as this court navigates through the labyrinth of the respective contentions made by the parties herein.

153. In the result I grant conservatory orders restraining the 2nd respondent whether acting jointly or severally by itself, its servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of section 12D of the *Income Tax Act*, chapter 470 of the Laws of Kenya as amended by the *Tax Laws*

(Amendment) (No 2) Act, 2020 by collecting and/or demanding payment of the Minimum Tax pending the hearing and determination of this petition

154. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS 19TH DAY OF APRIL, 2021

G V ODUNGA

JUDGE

Delivered the presence of:-

Mr Okwach for the Petitioners

Miss Akama for Mr Mwendwa for the 1st Respondent

Miss Almadi with Mr Nyagah and Mr Ochieng for the 2nd Respondent

Miss Omuom for the 3rd Respondent

CA Geoffrey