



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**(Coram: A. C. Mrima, J.)**

**PETITION NO. E277 OF 2021**

**BETWEEN**

**1. JUDITH KARIGU KIRAGU**

**2. DANIEL MASI MOGENI**

**3. NICKSON MWANGI MAINA**

*(Suing on behalf of, as the Chairperson,*

*Secretary and Treasurer respectively of,*

**THE ASSOCIATION OF GAMING OPERATORS OF KENYA).....PETITIONERS**

**VERSUS**

**THE COUNTY GOVERNMENT OF NAIROBI..... RESPONDENT**

**AND**

**1. HON. ATTORNEY GENERAL**

**2. THE BETTING CONTROL AND**

**LICENSING BOARD.....INTERESTED PARTIES**

**RULING NO. 1**

**Introduction:**

1. The *Nairobi City County Betting, Lotteries and Gaming Act, 2021* (hereinafter referred to as '***the impugned Act***') was enacted on 6<sup>th</sup> May, 2021. As a result, the Petition herein was later filed. The Petition challenges the impugned Act as being in contravention of Articles 27, 29(a), 40, 46, 47 and several other provisions of the Constitution.

2. The Petition is opposed.

**The Application:**

3. The Petitioner filed the Petition together with a Notice of Motion dated 16<sup>th</sup> July, 2021. The application seeks the following orders: -

1. That for reasons to be recorded service of this application be dispensed with a first instance in respect of prayer 2.

2. That pending hearing and determination of this application, the Respondent be strictly enjoined and restrained whether by itself or

by its servants, agents or otherwise howsoever form implementing and/or seeking to enforce in any manner howsoever, the provisions of the Nairobi City County Betting, Lotteries and Gaming act, 2021.

3. That Pending hearing and determination of the Petition herein, the Respondent be strictly enjoined and restrained whether by itself or by its servants, agents or otherwise howsoever form implementing and/or seeking to enforce in any manner howsoever, the provisions of the Nairobi City County Betting, Lotteries and Gaming act, 2021.

4. That the costs of and occasioned by this application be provided for.

4. The application is supported by the Affidavit sworn by *Judith Karigu Kiragu* on 16<sup>th</sup> July, 2021 and a List of Authorities.

5. The application is opposed by the Respondent. The Interested Parties did not participate in the hearing of the application.

6. The Respondent filed a Replying Affidavit sworn by one *Geoffrey Mwithimbu*, the Respondent's Acting Director Betting, Lotteries & Gaming Department.

#### **The Parties' Arguments:**

7. Due to the urgency of this matter, the Court directed that the application be heard expeditiously. The parties were allowed to address the Court orally without filing written submissions. This ruling is, therefore, in respect of the Notice of Motion dated 16<sup>th</sup> July, 2021.

8. The Petitioner in seeking that the application be allowed, relied on the grounds appearing on the body of the application, the affidavit in support and the List of Authorities.

9. Counsel for the Petitioner, *Mr. Amoko*, urged this Court to allow that application mainly on three grounds. The first ground is that there was no adequate public participation in coming up with the impugned Act. Counsel submitted that the Respondent only ran a single advertisement in the Daily Star newspaper. It is argued that the national coverage of that newspaper is very minimal and that the public was not, therefore, accorded a reasonable opportunity to participate in the law making process. It is further argued that given the nature of the impugned Act, the Petitioners ought to have, instead, been consulted. To Counsel, the minimal coverage of the newspaper confirms that the people were not made aware of the Bill and it explains why there was no meaningful response save from the Respondent.

10. The second ground in support of the application is that the Respondent cannot levy an entertainment tax. It is contended that the Respondent intends to introduce a tax which is not *per se* a tax capable to be levied by the Respondent. Instead, the tax is an excise duty which can only be charged by the National Government. To that end, the Petitioners contend that there is constitutional overreach on the part of the Respondent. The Petitioners further argued that the intended tax, which is pegged at 15%, was rejected by the National Assembly and that the Respondent seeks to cleverly reintroduce it. According to the Petitioners, the tax aims at taxing premises and not the activities, which is a function of the National Government. The new tax is, hence, prejudicial to the Petitioners who are already struggling under the harsh economic times caused by the prevailing worldwide Covid-19 pandemic. The tax is, hence, unconstitutional.

11. It is also submitted that since the tax is newly introduced by the Respondent, suspending its operationalization will not in any way cripple the operations of the Respondent.

12. The Petitioners argued public interest as the last ground in support of the application. They contended that public entities must operate within defined legal confines and that once it is demonstrated that the entities acted outside the law then an arguable case is established and that calls for appropriate legal sanctions including suspension of the law in appropriate cases like the one at hand.

13. Counsel for the Petitioners referred to some decisions and urged this Court to allow the application as prayed or alternatively to suspend the sections of the impugned Act as stated in prayer (b) of the Petition.

14. In opposing the application, *Mr. Theuri*, Counsel for the Respondent drew the Court's attention to the fact the Petition seeks diverse prayers as well as the application. As such, it is argued that the Court ought to be careful not to deal with the Petition at this stage. In fact, Counsel submitted that allowing prayer (b) of the Petition at the moment is irregular as it is tantamount to allowing the Petition at an interlocutory stage. The Court was also asked to note that prayer 3 of the application seeks to suspend the entire impugned Act.

15. It was submitted that there is no doubt that the regulation of the gaming industry is a shared function between the National Government and the County Governments. The Respondent, therefore, enacted the impugned Act on the basis of a constitutional edit.

16. Counsel argued that statutes must be interpreted to be in conformity with the Constitution. According to Counsel, the impugned Act was enacted to create harmony in exercise of the Respondent's shared functions and in line with the constitutional dictates.

17. The Respondent further argued that in 2014 it enacted a legislation similar to the impugned Act. That legislation was challenged in Court by among others the Petitioners herein. That was in Nairobi High Court Constitutional Petition No. 295 of 2014 consolidated with Petition No. 315 of 2014 and No. 1 of 2015 *Africa Rafiki Ltd & 2 Others vs. Nairobi City County Government & 2 Others and Transition Authority (Interested Party)*. The Court eventually and clearly delineated the functions between the National Government and the County Governments on the subject. An appropriate Gazette Notice thereafter followed. The Respondent now contends that the impugned Act is in consonance with the Constitution and the said Court judgement.

18. It is the Respondent's further contention that the impugned Act is presumed to be constitutional and that the Petitioner has a burden of

proving otherwise for the orders sought to be issued. The Petitioners having failed to prove that the impugned Act is not within the constitutional confines, it is argued that no *prima-facie* case has been established to rebut the presumption of constitutionality.

19. Counsel also argued that since it is admitted that the Respondent has powers to enact the impugned Act, then until the Petition is heard and the constitutional violations demonstrated, the Court ought to find that, in the meantime, the impugned Act is in line with its intended objective.

20. The Respondent submitted that the Petitioners' intention not to be regulated by the Respondent is conspicuous. It is posited that in the 2014 litigation the Petitioners urged the Court to disregard the Report of the then Transitional Authority which had unbundled the shared functions and now they have mounted the current proceedings. It is the Respondent's position that the Petitioners are, hence, acting with an improper motive and that litigation must come to an end.

21. On the aspect of public participation, the Respondent contended that since it is admitted that there was such an exercise, then the adequacy or otherwise thereof can only be dealt with at the hearing of the Petition.

22. Finally, Counsel submitted that the suspension sought is against the obligation of citizens to comply with the law. In this case, it is argued that the Respondent is not stealing a march and that the impugned Act was enacted on the backing of the Constitution granting powers to the County Governments to impose levies. According to the Respondent, public interest finds favour in obedience of the law.

23. The Respondent prayed that the application be dismissed with costs.

#### **Issues for determination and analysis:**

52. I have carefully considered the application, the response thereto, the parties' submissions and the decisions referred to. I, hereby, discern the following areas of discussions: -

- (i) The nature of conservatory orders;
- (ii) The guiding principles in conservatory applications; and
- (iii) The applicability of the principles to the applications.

24. I will deal with the above sequentially.

#### **The nature of conservatory orders:**

25. In *Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR*, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders as follows: -

*[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the Applicant's case for orders of stay.*

26. The Court in *Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR* defined a conservatory order as follows: -

*5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.*

27. In *Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR* the Court had the following to say about the nature of conservatory orders: -

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

28. Conservatory orders are, therefore, aimed at preserving the substratum of the matter pending the determination of the main issues in dispute.

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

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

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

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

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

#### **The guiding principles in conservatory applications:**

33. The principles for consideration by a Court in exercising its discretion on whether to grant conservatory orders have been developed by Courts over time. They are now well settled.

34. The *locus classicus* is the Supreme Court in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others** case (supra) where at paragraph 86 stated the Court stated as follows: -

*[86] ..... Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.*

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

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

*(ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.*

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

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

36. In **Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR** the Court summarized three main principles for consideration on whether to grant conservatory orders as follows: -

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

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

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

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

#### **The applicability of the principles to the application:**

##### **(i) A prima-facie case:**

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

*.... In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the*

opposite party as to call for an explanation or rebuttal from the later.

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

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

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

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

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

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

43. Returning to the case at hand, the Petitioner's case is hinged on the alleged lack of public participation, that the Respondent cannot levy an entertainment tax and on account of public interest.

44. The Respondent has put up a rebuttal on all the grounds in support of the Petition. I have carefully weighed the Petitioners' case against the rebuttal and I am convinced that the issues as raised in the Petition and as countered by the Respondent constitute a *prima-facie* case.

**(ii) Whether the Petitioners will suffer prejudice and the cases rendered nugatory unless the conservatory orders are granted:**

45. The *Black's Law Dictionary 10<sup>th</sup> Edition Thomson Reuters* at page 1370 defines '**prejudice**' as follows: -

*Damage or detriment to one's legal rights or claims.*

46. Will the Respondents, therefore, suffer any damage or detriment if the conservatory orders are not granted? Generally, any contravention or threat to contravention of the Constitution or any infringement or threatened infringement of human rights and fundamental freedoms in the Bill of Rights is an affront to the people of Kenya. That is the clear purport of the Preamble and Chapter 1 of the Constitution.

47. Courts must, in dealing with Petitions brought under the various provisions of the Constitution, be careful in determining the prejudice at least at the preliminary stages. I say so because, at such stages of the proceedings, the provisions of the Constitution alleged to have been infringed or threatened with infringement are yet to be subjected to legal scrutiny.

48. Therefore, the damage or threat thereof to the rights and fundamental freedoms or to the Constitution must be so real that the Court can unmistakably arrive at such an interim finding. Such a breach or threat should not be illusory or presumptive. It must be eminent.

49. The Petitioners contend that they ought not be coerced to comply with an unconstitutional law and which law has the effect of driving them out of business more so in view of the current global economic stature. The Respondent argues that the impugned law is constitutional and traces its history from the 2014 litigations.

50. I have carefully considered the parties' dispositions on record. The issues raised therein are partly admitted and denied. They are both factual and legal issues. To me, the issues that are denied must undergo judicial scrutiny for settlement. That can only happen at the hearing of the Petition. For instance, whether there was adequate public participation is a factual issue which can only be determined after a hearing. Another issue is whether the impugned Act is in line with the judgment in *Africa Rafiki Ltd & 2 Others vs. Nairobi City County Government & 2 Others and Transition Authority (Interested Party)* case (supra) and the resultant Gazette Notice and whether the impugned law creates different layers of taxation which breeds discourse.

51. As to whether the Petitioners are likely to be driven out of business as a result of the implementation of the impugned Act, again, the

issue is factual and calls for scrutiny and proof. The Petitioners have not, so far, laid any evidence to that effect.

52. Speaking of evidential proof, the Court of Appeal in **Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others** [2016] eKLR stated as follows: -

*35. In the instant case, the trial judge made a finding that there was no threat of violation of the applicant's fundamental rights and freedoms. We remind ourselves that the trial judge made this finding in an interlocutory application. In our view, whether there is a threatened violation is a matter of fact to be ascertained in a full hearing of the Petition.*

53. This Court further notes that the Petitioners have not contended that if they comply with the impugned Act and pay the requisite levies, they will not be able to recover the same in the event the Petition is successful. That, therefore, means that in the end, if the Petitioners are successful, they stand not to suffer any loss or at all as the Respondent will have to make appropriate refunds.

54. Having said so, I now find and hold that the Petitioners have, at the moment, failed to demonstrate the prejudice they are likely to suffer if the application is not allowed.

**(iii) Public interest:**

55. 'Public interest' is defined by the *Black's Law Dictionary 10<sup>th</sup> Edition* at page 1425 as: -

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

56. Generally speaking, laws are passed to govern the people. As such, the laws are always presumed to be constitutional until the contrary is proved. In a matter, therefore, where the constitutionality of a statute is impugned, Courts must weigh, with care, the alleged breach against the doctrine of presumption of constitutionality of statutes. As said, unless proved otherwise, statutes are deemed constitutional and may only be suspended in the clearest of cases and where the statute is a threat to life and limb.

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

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

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

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

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

***It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stay actually show that the operation of the legislative provision are a danger to life and limb at that very moment.***

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

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

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

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

While the Court appreciates the contextual backdrop leading to the enactment of the **SLAA**, it must also be appreciated that it is not in the interest of justice to enact or implement a law that may violate the Constitution and in particular the Bill of Rights. Constitutional supremacy as articulated by **Article 2 of the Constitution** has a higher place than public interest. When weighty challenges against a statute have been raised and placed before the High Court, if, upon exercise of its discretion, the Court is of the view that implementation of various sections of the impugned statute ought to be suspended pending final determination as to their constitutionality, a very strong case has to be made out before this Court can lift the conservatory order. **The State would have to demonstrate, for example, that suspension of the statute or any part thereof has occasioned a lacuna in its operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace.**

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

60. In this case, the Respondents posit that the process of enacting the impugned Act began way back in 2014 and that the process was accordingly guided by the Court. Further, the Respondent aver that it fully complied with all the requirements in the law-making process.

61. The impugned Act was passed in May, 2021. It, hence, means that by the time the Respondent passed its budget for the year 2021/22 sometimes in June 2021, the revenues intended to be raised through the impugned Act were factored in the budget. That being the position, it then means that if the taxes are not collected, then the Respondent is likely to suffer revenue deficits which will adversely affect service delivery. The suspension is, therefore, likely to occasion '*... a lacuna in its [Respondent's] operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace.*'

62. There is also the issue of the delay. As said, the impugned Act was enacted in May 2021. The Petition herein was filed towards the end of July, 2021. By then, the impugned Act was long operational. The Petitioner did not explain the delay.

63. This Court recently dealt with the aspect of delay in filing constitutional petitions in Nairobi High Court Constitutional Petition No. 33 of 2020 **Peter Odoyo & Stanley Kinyanjui (Suing on behalf of the Outdoor Advertising Association of Kenya) v. Kenya National Highways Authority & 2 Others** (unreported) where after extensive consideration of several decisions, the Court at paragraph 159 held as follows: -

***(i) That human rights and fundamental freedoms can never be waived or acquiesced to by a person unless there is such enormous and unexplained delay in enforcement.***

***(ii) Statutory limitations do not apply to Petitions claiming infringement or threat to infringement of human rights and fundamental freedoms. A party, however, must account for the time between the alleged infringement or threat of infringement of the human rights and fundamental freedoms and the filing of the claim.***

64. From the foregoing, whereas petitions on infringement of Bill of Rights are not time-bound, '*a party, however, must account for the time between the alleged infringement or threat of infringement of the human rights and fundamental freedoms and the filing of the claim.*'

65. In this case, the Petitioners did not account for the period of around three months after the enactment of the impugned Act.

66. Article 10(2)(b) of the Constitution lists **equity** as one of the national values and principles of governance. As such, the principles of equity were elevated to constitutional principles. One of the principles of equity is that; *Equity aids the vigilant and not the indolent*'. The principle is also referred to as '*Delay defeats equity*'.

67. In Civil Appeal No. 51 of 2015, **Willy Kimutai Kitilit v Michael Kibet** [2018] eKLR, the Court of Appeal defined the doctrine of equity and emphasized the need for Courts to apply it as constitutional principle under Article 10(2)(b). The learned judges observed as follows;

*[24] ...By Article 10(2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1)(b)). Further, by Article 159(2)(e), the Courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution.*

*[25] The word equity broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from Black's Law Dictionary, Ninth Edition will suffice for our purpose:*

- 1.
2. *The body of principles constituting what is fair and right.*
3. *The recourse to principles of justice to correct or supplement the law as applied to particular circumstances ---*
4. *The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called "Law" in the narrower sense) when the two conflict*

68. In appreciating the elevation equity was given by the Constitution, the Appellate Judges made the following remarks: -

*Thus, since the current Constitution has by virtue of Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.*

69. As the issue of delay is yet to be addressed by the Petitioners, this Court notes that the failure thereof hinges on breach of the Constitution on the part of the Petitioners.

70. Having considered the relevant legal principles, and the exceptional circumstances in this matter, this Court finds that public interest tilts in favour of the Respondent. It is in public interest that the impugned Act or any part thereof is not suspended, at least, at the moment.

**Conclusion and Disposition:**

71. The above analysis yields that the Petitioners have not, in the meantime, successfully laid a basis for the grant of the orders sought in the application.

72. That being the case, the application is unsuccessful. However, given the nature of the Petition herein, there is need for its expeditious disposition.

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

**(a) The Notice of Motion dated 16<sup>th</sup> July, 2021 is hereby dismissed with costs.**

**(b) The Petition shall be heard by way of reliance on the Affidavit evidence and written submissions.**

**(c) The Petitioners shall file and serve any supplementary response, if need be, together with written submissions within 14 days.**

**(d) The Respondent and the Interested Parties shall file and serve their respective written submissions within 14 days of service.**

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

**(f) The Petitioner shall extract and serve a copy of this order upon the Interested Parties within 7 days.**

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF AUGUST, 2021.**

**A. C. MRIMA**

**JUDGE**

**Ruling No. 1 virtually delivered in the presence of:**

**Mr. Amoko**, Counsel for the Petitioners.

**Mr. Theuri**, Counsel for the Respondent.

**No appearance** for the Interested Parties.

**Elizabeth Wambui** – Court Assistant.