



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI

CONSTITUTIONAL PETITION NO. 353 OF 2018

KENYA BANKERS ASSOCIATION.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

THE KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT

RULING

1. The Kenya Bankers Association, the Petitioner herein, through its petition dated 15<sup>th</sup> October, 2018 prays for a declaration that the commencement date for Section 32(b) of the Finance Act, 2018 is 29<sup>th</sup> September, 2018. Before the petition could be heard, the 1<sup>st</sup> Respondent, the Attorney General filed the Notice of Motion dated 19<sup>th</sup> November, 2018 seeking orders as follows:-

**“1. This Application be certified as extremely urgent and be heard forthwith.**

**2. This Honourable Court do set aside, vary and/or discharge the earlier orders and directions leading to the scheduling of this Petition for hearing on 20<sup>th</sup> November, 2018.**

**3. This Honourable Court do consolidate the instant Petition with the following cases:-**

**i. Nairobi High Court Petition No. 334 of 2018: Law Society of Kenya –vs- The Hon. Attorney General & 2 Others; which Petition challenges the constitutionality of Sections 13, 32(b)(i), 32(b)(ii), 32(b)(iv), 50, 85 and 86 the Finance Act, 2018. The same has hearing date for 20<sup>th</sup> November, 2018 before the Hon. Justice Chacha Mwita; AND**

**ii. Nairobi High Court Petition No. 366 of 2018: Okiya Okioti Omtatah –vs- The Hon. Attorney General & Another; which Petition challenges the constitutionality of Sections 74, 75, 76, 77, 78, 79, 80, 81, 82 and 83 of the entire Finance Act, 2018. A ruling on an application for Conservatory Orders is slated for 4<sup>th</sup> December, 2018 before the Hon. Lady Justice W. A. Okwany.**

**4. Upon the grant of prayers (2) and (3) above; Pending the hearing and determination of the consolidated Petitions, this Honourable Court be pleased to grant a stay of further proceedings in or arising from Nairobi HC Pet. No. 353/2018 as consolidated with Nairobi HC Petition No. 334 & 366 of 2018.**

**5. In the alternative, Pending the hearing and determination of Nairobi High Court Petition No. 327 of 2018: Okiya Okioti Omtatah – vs- the Hon Attorney General and Ano., this Honourable Court be pleased to grant a stay of further proceedings in or arising from Nairobi HC Petition No. 334/2018, Nairobi HC Petition No. 353 & Nairobi HC Petition No. 366 of 2018.**

**6. This Honourable Court do make such further order(s) and/or direction(s) as it may deem necessary in the circumstances.**

**7. There be no order as to costs of this Application.**

2. The application is supported by the grounds on its face and the affidavit of Maurice Ogosso sworn on the date of the application. The 2<sup>nd</sup> Respondent, Kenya Revenue Authority, expressed its support for the application when the same came up for hearing on 5<sup>th</sup> July, 2019.

3. The Petitioner opposed the 1<sup>st</sup> Respondent's application through Grounds of Opposition dated 23<sup>rd</sup> November, 2018.
4. When the application came up for hearing Ms Almadi for the 2<sup>nd</sup> Respondent who held brief for Mr. Ogosso for the 1<sup>st</sup> Respondent argued the application. She submitted that the application seeks consolidation of this petition [Nairobi High Court C & HR Division Petition No. 353 of 2018, Kenya Bankers Association v The Hon. Attorney General & another] with Nairobi High Court C & HR Division Petition No. 334 of 2018, Law Society of Kenya v Attorney General & 3 others and Nairobi High Court C & HR Division Petition No. 366 of 2018, Okiya Omtatah v the Hon. Attorney General & another.
5. Counsel urged that upon consolidation of the three petitions the Court should go ahead and order stay of the proceedings of the consolidated petitions pending the hearing and determination of Nairobi High Court C & HR Division Petition No. 327 of 2018, Okiya Okiiti Omtatah v The Hon Attorney General & another. For purposes of record, it is noted that Petition No. 327 of 2018 has been stayed by the Court of Appeal on the application of the Attorney General pending appeal in respect of a decision by W. A. Okwany, J declining an application by the Attorney General to certify the petition as befitting the empanelment of a bench of an uneven number of judges to hear the petition.
6. Ms Almadi submitted that Petition No. 327 of 2018 challenges the constitutionality of the entire Finance Act, 2018 whereas the instant petition only raises a single issue being the retrospective application of the provisions of the Finance Act, 2018 amending the 1<sup>st</sup> Schedule of the Excise Duty Act, 2015.
7. Her position is that all the issues raised in the identified petitions will be addressed in Petition No. 327 of 2018. Further, that the issue of the retrospectivity of the Finance Act, 2018 is not unique to the Petitioner as Section 1 of the Act provides for the commencement date for all sections in the Act as 21<sup>st</sup> September, 2018. Counsel also submitted that Petition No. 334 of 2016 and Petition No. 366 of 2018 also raise the same issue of retrospectivity of the provisions of the Finance Act, 2018.
8. It is the 1<sup>st</sup> Respondent's case that the issues raised in all the petitions should be addressed together instead of addressing them separately. Further, that no prejudice will be suffered by the Petitioner herein in view of the fact that conservatory orders are in place in respect of the period beginning 1<sup>st</sup> July, 2018 and ending on 21<sup>st</sup> September, 2018.
9. It is the 1<sup>st</sup> Respondent's position that judicial time will be saved if one court hears and determines the matters. Further, that since all the petitions arise out of the Finance Act, 2018 they will all be settled once the court pronounces itself in Petition No. 327 of 2018.
10. Mr Frazier appearing for the Petitioner vehemently opposed the application of the 1<sup>st</sup> Petitioner. He relied on the grounds of opposition dated 26<sup>th</sup> November, 2018 and the further grounds of opposition dated 2<sup>nd</sup> April, 2019. Counsel pointed out that the sole issue in this petition is the retrospective nature of the increased duty on banking charges. He urged that there is need to urgently determine the matter because if the petition fails the banks will need to recover the necessary charges from their customers and delay may lead to difficulty in making such recoveries.
11. Counsel submitted that his understanding of Petition No. 327 of 2018 is that it challenges the memo issued to the National Assembly by the President requiring the making of certain changes to the Finance Act, 2018. He told the Court that Petition No. 334 of 2018 and Petition No. 336 of 2018 each challenges different sections of the Finance Act, 2018. He asserts that there is nothing to show that retrospectively is central to the other petitions. He concluded that Petition No. 327 of 2018 can fail without impacting the issue of retrospectivity. He therefore urged the Court to reject the 1<sup>st</sup> Respondent's application and fix an early hearing date for the petition.
12. In a brief response, Ms Almadi stressed that the main issue running through all the petitions they seek to consolidate is the Finance Act, 2018. She reiterated that the Court can hear all the issues raised in the petitions at once and deliver a single judgment.
13. On the assertion that Petition No. 327 of 2018 may not determine the issue raised in the instant petition, Counsel submitted that the Court which will hear the consolidated petitions will identify the issues raised in the individual petitions and make a determination on each of those issues.
14. Further, that no prejudice will be occasioned to the Petitioner if the challenge to the retrospectivity of the Finance Act, 2018 fails since the issue of any tax payable for the period 1<sup>st</sup> July, 2018 to 21<sup>st</sup> September, 2018 will be taken care of by the existing tax laws.
15. A challenge to an application for consolidation of cases is a rear occurrence. Consolidation of cases is normally used to speed up the trial process and take care of the need of avoiding several trials involving the same parties and issues. It is a formula that provides for efficiency in the court processes and eliminates the risk of courts issuing conflicting decisions in respect of disputes involving the same parties and issues. Rule 17 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 does indeed provide for consolidation by stating that **"[t]he Court may on its own motion or on application by any party consolidate several petitions on such terms as it may deem fit."**
16. The question therefore is whether it is just and fair to consolidate the petitions as requested by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent's case is indeed strong. The issues in all the cited petitions relate to various provisions of the Finance Act, 2018. It would therefore be proper to have all the petitions heard by one Judge and a single judgment delivered in respect of the petitions. The issues raised in each petition will be flagged out and addressed by the trial Court. This will provide for efficient and effective disposal of the matters. Indeed a single mind would arrive at a coherent decision on each and every provision challenged instead of having the issues addressed separately by different judges.
17. Even with the strong case for consolidation, I find that this is one case where the horse has already bolted. On 18<sup>th</sup> July, 2019, I

delivered judgment in Nairobi High Court C & HR Division Petition No. 426 of 2018 in which the petition therein was challenging Section 65 of the Finance Act, 2018. Incidentally, the 1<sup>st</sup> Respondent herein who was one of the respondents in that petition was supportive of that petition. No issue of consolidation was raised by the 1<sup>st</sup> Respondent in that matter. Allowing the application for consolidation would amount to applying double standards and a court of justice should not do so. For the reason that one of the provisions of the Finance Act, 2018 has already been addressed to conclusion, I will not deny the Petitioner the chance of prosecuting its petition separately from the other petitions touching on the Finance Act, 2018. I therefore decline the 1<sup>st</sup> Respondent's application for consolidation and stay of proceedings. The same is dismissed with no order as to costs. I direct that this petition be listed for hearing on priority basis.

**Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of July, 2019**

**W. Korir,**

**Judge of the High Court**