



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 532 OF 2017**

**IN THE MATTER OF ARTICLES 22 (1) & (2) (C), 50 (1) AND 258 (1) & (2) OF THE  
CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL  
VALUES AND PRINCIPLES OF GOVERNANCE ENshrined IN ARTICLES 1 (1), 2 & (3), 10  
(2), 69, 70, 73 (10 (B)), 129 (1) & (2), 153 (4), 232 (10 (D), (E) & (F) AND 259 (10 & (3) OF THE  
CONSTITUTION**

**IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 24, 27, 40, 43, 46 AND 47 OF THE CONSTITUTION**

**IN THE MATTER OF ALLEGED ABUSE OF SECTION 234 OF THE CUSTOMS AND EXCISE  
ACT**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 3, 4 AND 5 OF THE FAIR  
ADMINISTRATIVE ACTION ACT; AND SECTION 4, 5, 6, 7 AND 8 OF THE STATUTORY  
INSTRUMENTS ACT**

**IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF LEGAL NOTICE NO.110 OF  
18 JUNE 2013 AND GAZETTE NOTICE NO. 12856 OF 5 SEPTEMBER 2013 IMPOSING THE  
EXCISABLE GOODS MANAGEMENT SYSTEM BY KENYA REVENUE AUTHORITY**

**IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF TAXES  
IMPOSED BY THE EXECUTIVE WITHOUT THE INVOLVEMENT OF PARLIAMENT AND  
WITHOUT THE PARTICIPATION OF THE PUBLIC**

**IN THE MATTER OF THE ABUSE OF DELEGATED LEGISLATION BY THE EXECUTIVE  
AND THE REGULATORY BURDEN IMPOSED ON THE PEOPLE OF KENYA**

**IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION, *DELEGATUS  
DELEGARE NON POTEST* AND *VOID AB INITIO***

**BETWEEN**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**VERSUS**

**THE COMMISSIONER GENERAL,**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup>RESPONDENT**

**THE CABINET SECRETARY,**

**NATIONAL TREASURY.....2<sup>ND</sup>RESPONDENT**

**SICPA SECURITIES SOL. SA.....3<sup>RD</sup>RESPONDENT**

## **RULING**

### **Introduction**

1. Before embarking on the ruling on the first Respondents' application dated 7<sup>th</sup> November 2017, (hereinafter referred to as the application), I find it appropriate to briefly give the background of this case as far as it is relevant to this determination.

2. The Petition herein was filed on 19<sup>th</sup> October 2017 accompanied by a Notice of Motion seeking a conservatory order to suspend the Public Notice published by the first Respondent in the national press and other media titled "Excise Stamps on Bottled Water, Juices, Soda other Non-Alcoholic Beverages and Cosmetics" stating that "with effect from 1<sup>st</sup> November 2017,"all the affected goods manufactured or imported into Kenya shall be affixed with excise stamps in accordance with the Regulations and an order prohibiting implementation of the said the said public notice pending hearing and determination of the petition.

3. On 23<sup>rd</sup> October 2017, I certified both the application and the Petition as urgent and directed service to be effected upon the Respondents and scheduled the matter for directions on 30<sup>th</sup> October 2017. On the said date, Mr. Lemiso for the first Respondent asked for **21** days to file a Response to the Petition. The Petitioner did not oppose the request but asked for a conservatory order to preserve the subject matter of the suit. Mr. Lemiso was not agreeable to the order being granted.

4. Upon considering the motion and the averment and considering that the impugned notice was scheduled to take effect from 1<sup>st</sup> November 2017, I was satisfied that the applicant satisfied the tests for granting conservatory orders. I was persuaded that if the conservatory orders were not granted as sought, this suit risked being rendered a mere academic exercise. Consequently, I ordered as follows:-

a. ***That*** the first Respondents to file their Response within 21 days.

b. ***That*** the Petitioner to serve the second and third Respondent afresh.

c. ***That*** pending the inter-partes hearing and determination of the application and/or Petition, conservatory order be and are hereby issued suspending the Public Notice which the first Respondent published in the National Press and other media titled, :Excise Stamps on Bottled Water, Juices, Soda, other Non-Alcoholic Beverages and Cosmetics" announcing that "with effect from 1<sup>st</sup> November 2017 all the affected goods manufactured or imported into Kenya shall be affixed with excise stamps in accordance with the regulations.'

d. ***That*** the Petitioner to file submissions on the Petition within seven days from the date of service by the Respondent.

e. ***That*** Respondent to file their submissions within seven days from the date of service of Petitioners submissions.

f. That highlighting be on 31<sup>st</sup> January 2018.

5. The time frames for filing pleading were informed by the appreciation of the urgency of this case and the need to determine it within the shortest time possible. Further, the date for highlighting submissions was fixed with the concurrence of the parties and the court diary, which as that point had gone beyond February 2018, but the court agreed to 31<sup>st</sup> January 2018 to accommodate the parties.

6. Article 23 (3) of the Constitution affords a party to proceedings brought pursuant to Article 22, asserting violation or threat of violation of any Constitutional right or fundamental freedom, the avenue of moving the court for any relief, including temporary reliefs among them conservatory orders.

7. The phrase “ a court may grant appropriate relief...” has been the subject of discussion by our courts in numerous decisions. In *Nancy Makokha Baraza vs Judicial Service Commission & 9 Others*<sup>[1]</sup> the court expressed itself, with regard to the phrase, as follow:-

*“ The ...Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises.”*

8. The court in the said case gave the phrase a robust and appropriate interpretation. The court stated that there may be need for a court to go outside the expressly prescribed reliefs, depending on the circumstances of each case. The court should always be in a position to fashion such relief as will be necessary to protect and enforce the Constitution, even if it is a remedy or relief which is not itemized under Article 23 (3), so long as such relief is within the confines of the Constitution.<sup>[2]</sup>

9. First, an applicant seeking conservatory orders is required to demonstrate a *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. As was stated in the case of *Centre for Rights Education and Awareness and 7 Others –v- The Attorney General*:- <sup>[3]</sup>

*“... 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.”*

10. Secondly, once the applicant has established to the court’s satisfaction a *prima facie* case with a likelihood of success, the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights.<sup>[4]</sup>

11. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice. In these respects the case of *Martin Nyaga Wambora –vs- Speaker of the County Assembly of Embu & 3 Others*<sup>[5]</sup> is relevant, especially paragraphs [59] [60] and [61] thereof.

12. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of *Gatirau Peter Munya –vs- Dickson Mwenda Githinji & 2 Others*<sup>[6]</sup> is that the court must consider conservatory orders also in the face of the public interest dogma. So stated the Supreme Court:-

*“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 on the “prospects of irreparable harm occurring during the pendency of a case; or “high probability of success” in the applicants 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”.*

13. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court considers the applicants credentials, the *prima facie* correctness of the availed information, whether the grievances are genuine, legitimate and deserving and whether the grievances and allegations are grave and serious or merely vague and reckless.<sup>[7]</sup>

14. Conservatory orders are intended to help create and or maintain a given state of affairs. It may take the form of a stay order or an injunctive order. It may be negative or positive in form. This is a tool to help secure and protect the rights and freedoms under the Constitution.

### **The application**

15. The application seeks orders that:- **(a)** the conservatory order(s) be set aside for *"in effect crippling the collection of Excise Duty on bottled water, soda and other non-alcoholic beverages and cosmetics,"* **(b)** an order for security for costs and losses against the Petitioner pending the hearing and determination of the Petition, **(c)** an order for a early hearing date for the Petition.

16. The core grounds in support of the application are:-

*(a) the effect of the order is to suspend the provisions of Legal Notice No. 53 of 2017 which provides for collection of Excise Duty on bottled water, soda and other non-alcoholic beverages and cosmetics;*

*(b) that the order was granted on the basis of misapprehension of material facts by the Petitioner that Legal Notice No. 110 of 18<sup>th</sup> June 2013 is void and misapprehension that collection of excise duty on the products had been stopped by the Public Accounts Committee both of which are incorrect;*

*(c) the Petitioner did not demonstrate any specific loss to warrant the orders;*

*(d) that order amounts to usurping the constitutional and legal duty of the government to collect taxes'*

*(e) there will be monumental and irreparable loss to the government if the orders are not granted.*

### **Petitioners' Opposition to the application**

17. The Petitioners grounds of opposition are:- **(a)** *the application is brought in bad faith, is incompetent and an abuse of court process,* **(b)** *that the prayer for security offends the doctrine of public interest litigation,* **(c)** *that the first Respondent sought an adjournment and asked for 21 days to file his Response and is yet to respond to the Petition,* **(e)** *that the date of 31<sup>st</sup> January was granted by consent, that the conservatory orders were granted to preserve the subject matter of this suit.* The other grounds raised will be relevant at the hearing of the Petition not this application.

### **Issues for determination**

18. From the opposing facts presented by the parties, I find that the following issues distil themselves for determination, namely; **(a)** *whether the applicant has demonstrated sufficient grounds to warrant the court to set aside the conservatory orders;* **(b)** *whether an order for security pending hearing of the Petition can be granted;* **(c)** *whether there are grounds to bring the hearing date forward.*

### **Analysis of the facts, submissions, the law and authorities**

19. Mr. Ontueka, counsel for the Applicant submitted that:- **(i)** the Petitioner misrepresented some facts to the court at the time of obtaining the orders; **(ii)** the impugned legal notice is not void; **(iii)** the law was followed as required; **(iv)** and that the first Respondent is bound to suffer great loss owing to the orders.

20. Counsel for the Hon. Attorney General has not filed a Response to the Petition nor did he file a Response to the application, but he supported the application orally in court.

21. **Mr. Katiku**, counsel for the third Respondent is yet to file a Response to the Petition. He orally supported the application stating that:- **(a)** the court was misled while granting the orders; **(b)** the system is based on subsidiary legislation of 2017 which was not brought to the courts attention, **(c)** the applicant relied on the wrong provisions of the law, **(d)** it is not true the implementation had been stopped by Parliament, **(e)** that the orders have far reaching implication on taxes, **(f)** the matter is of public interest, **(g)** that the process had been rolled out to the manufactures, **(h)** that the public were involved in the process, **(i)** that the third Respondent was not heard at the time the orders were granted.

22. The Petitioner urged the court to maintain the conservatory orders till the petition is heard and determined on grounds that the balance of convenience is in favour of maintaining the orders, that it is important that the matter be determined on merits and further, setting aside the orders will have a pre-emptive effect on the Petition. On the proposal to bring the case forward, the Petitioner argued that the date was taken in court at the request of the applicants counsel who asked for **21** days to file a Response and to date, he is yet to be filed. The Petitioner opposed the prayer for security on costs on grounds that it is not appropriate in public interest litigation.

## Determination

23. Courts have power to vary or review interlocutory orders. The principle that a court may vary its interlocutory orders, rests on the notion that a court is not *functus officio* while there remains any judicial function which may be performed in relation to the proceeding.<sup>[8]</sup>

24. However, this power is exercised with great caution,<sup>[9]</sup> and ordinarily will only be exercised to correct an error or oversight or to effect a review of the proposed order so that the orders may be able to deal more appropriately with the issues as litigated by the parties.<sup>[10]</sup>

25. The High Court has inherent jurisdiction to vacate or vary its own orders in cases where there would otherwise be an irremediable injustice, but this power will only be exercised in exceptional circumstances, where justice requires the Court to act, or where a mistake has occurred which, if unrepaired, would cause a serious injustice.<sup>[11]</sup> Examples though not exhaustive include:-

*(a) Varying an order to give effect to the meaning the court intended the order to have or to resolve an ambiguity.*<sup>32</sup>

*(b) Reviewing an order made ex parte, the basis of which has been said to be natural justice. Under this category can also be included denial of procedural fairness through no fault of a party. The court may set aside an order at any time if the order was made in the absence of a party if service was not proper or for sufficient reason.*

*(c) The occurrence of circumstances after the order which warrant varying the order.*

*(d) Entertaining an application for extension of time for appealing against the order after the time for compliance with that order has expired.*

26. For an application of this nature to succeed, the court is required to **first** consider and satisfy itself that **the applicant has a strong case likely to succeed on the merits.**<sup>[12]</sup> **Secondly, the court must be satisfied that the applicant will be irreparably injured, if stay is refused.**<sup>[13]</sup> **Thirdly, the court must consider whether the issuance of a stay order will substantially injure the other parties interested in proceedings.**<sup>[14]</sup> **Lastly, the court is bound to consider where the public interest lies.**

[15]

27. The court may set aside an order at any time if the order was obtained by fraud or misrepresentation because such an order is “*tainted and vitiated throughout*” and “*if the fraud is clearly proved, the party defrauded is entitled to have the order set aside.*”<sup>[16]</sup> The jurisdiction to impeach orders for misrepresentation has its origins in equity.

28. The matters which must be established to impugn an order on the basis of misrepresentation can be summarised as follows:-<sup>[17]</sup>

***First,** the particulars of the misrepresentation claimed must be exactly given and the allegations established by the strict proof.*

***Secondly,** it must be shown that fresh facts have been found which, by themselves or in combination with previously known facts, would provide a reason for setting aside the order.*

***Thirdly,** mere suspicion of misrepresentation raised by fresh facts later discovered will not be sufficient to secure relief... The claimant must establish that the new facts are so evidenced and so material that it is reasonably probable that the action will succeed.*

***Fourthly,** mere allegation of misrepresentation will not normally be sufficient to attract such drastic and exceptional relief as the setting aside of an order..*

***Fifthly,** it must be shown by admissible evidence that the successful party was responsible for the misrepresentation which taints the order under challenge.*

***Sixthly,** the burden of establishing the components necessary to warrant the drastic step of setting aside an order or judgment allegedly affected by misrepresentation or other relevant taint, lies on the party impugning the order. It is for that party to establish the misrepresentation and must do so clearly.*

29. It must be reasonably clear that if the alleged misrepresentation had not been there, at the time the order was made, an opposite result would have been produced or, it must be so highly likely as to make it unreasonable to suppose the contrary.

30. The applicants counsel submitted that the impugned legal notice is valid and stated that the Petitioner misrepresented to the court that it is invalid. It was also submitted that that the Petitioner cited the wrong Legal Notice, hence misled the court to grant the orders. I have already stated above the tests for granting conservatory orders. I am not satisfied that the said tests have been proved in this application.

31. A party who alleges misrepresentation must prove it. Put simply, misrepresentation is giving a false or misleading statement usually with an intent to deceive or be unfair.<sup>[18]</sup> This intent to deceive or to be unfair has not been proved.

32. Having alleged misrepresentation, the applicant was enjoined to give clear evidence of the alleged misrepresentation. Put differently, the applicant has not satisfied the tests enumerated above to establish misrepresentation.

33. It would suffice for me to state that the Petitioner raised a pertinent issue, namely, that the first Respondent failed to comply with the provisions of the Statutory Instruments Act<sup>[19]</sup> an Act of Parliament to provide for the making, scrutiny, publication and operation of statutory instruments and for matters connected therewith.

34. I am aware I cannot at this stage delve into the merits of the respective party's case for obvious reasons, that is, such matters will be determined at the hearing of the Petition.

35. However, conscious not to delve into the merits of the Petition, it will suffice for purposes of this ruling for me to mention that Compliance with the Statutory Instruments Act[20] or absence of it was a core issue in granting or refusing the conservatory order. This is because a party is required to demonstrate that he has a *prima facie* case with a likelihood of success to qualify for a conservatory order.

36. First, if the Petitioner cited the wrong Legal Notice as stated, then, in my view that is a defect that can be cured by way of amendment and cannot be a ground for recalling the conservatory order unless it is shown that the Petitioner cited it intentionally to mislead the court.

37. Secondly and more important, if the correct legal notice is the one cited by the applicant, then considering the centrality of compliance with the provisions of Statutory Instruments Act[21] the applicant ought at least to spare some effort to demonstrate that indeed the provisions of the act were complied with. That would have reinforced their argument that there was no basis for granting the order now under attack. There was simply no attempt to establish this important issue.

38. Thirdly, the objects of the Statutory Instruments Act[22] as stipulated in Section 4 of the act is to provide a comprehensive regime for making, scrutiny, publication and operation of statutory instruments by requiring regulation-making authorities to undertake appropriate consultation before making statutory instruments; requiring high standards in the drafting of statutory instruments to promote their legal effectiveness, clarity and intelligibility to anticipated users; improving public access to statutory instruments; establishing improved mechanisms for parliamentary scrutiny of statutory instruments; and establishing mechanisms to ensure that statutory instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed.

39. Fourthly, also relevant is Section 5 of the act which provides for consultation before making statutory instruments where the proposed statutory instrument is likely to have a direct, or substantial indirect effect on business or restrict compensation. Subsection 2 of the section 5 provides the test for determining whether any consultation that was undertaken is appropriate including the extent to which the consultation drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

40. No attempt was made to show that the above statutory tests were satisfied, yet the applicant questions the basis upon which the order was granted.

41. A list of meeting for beer manufacturers has been annexed adding to the confusion. Beer is not among the items the subject of this Petition. The only relevant document is a non-alcoholic beverage sector workshop group discussion notes. There are no details to connect the notes with the tests stipulated in the provisions, that is, the test for determining whether any consultation that was undertaken is appropriate including the extent to which the consultation drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content. This being a statutory requirement, it must be satisfied hence the need why the conservatory orders must remain in place until a full hearing for the Respondents to demonstrate to the court that indeed the law was fully complied with.

42. Fifth, Part IV– of the act deals with Parliamentary Scrutiny of Statutory Instruments, and this is one of the legal challenges cited by the Petitioner. Whereas the applicant says the wrong legal notice was relied by the Petitioner, I think it was incumbent upon the applicant to submit material to prove that what they describe at the correct legal notice met this requisite statutory requirement which includes Parliamentary scrutiny. No material was submitted before me to rebut the applicant position that this requirement was complied with to warrant the court to disturb the orders.

43. The position is worsened by the fact that the applicant has as at today opted not to file a Response to the Petition, at least to give the court the opportunity to evaluate the merits of its case. I embarked on writing this ruling only yesterday after I was satisfied that the 21 days had lapsed and the applicant had

not filed their Response.

44. In fact, none of the Respondents has filed a Response to the Petition. The only material before the court is what was filed by the Petitioner. Cases are determined on the basis of evidence presented by the parties or lack of it. If the issues raised in the Petition are misleading, it was in my view necessary for the Respondents to file a Response detailing their averments. I need not repeat the tests for establishing misrepresentation discussed earlier.

45. As stated above, the court is required to satisfy itself that a applicant seeking to set aside conservatory orders has a strong case likely to succeed on the merits.[23] Unfortunately this test was not satisfied nor was such an argument advanced at all. Absence of a Response to the Petition makes it hard for the court to fully appreciate the nature of the defence the applicant will advance at the hearing of the Petition.

46. To set aside or disturb conservatory orders, the court must be satisfied that the applicant will be irreparably injured, absent of a stay.[24] The injury complained of is loss of taxes. This has to be balanced with the legal requirement that all taxes must be grounded on the law. I need not repeat that the applicant avoided demonstrating that the statutory and legal requirements stated above were fully complied with.

47. Also, the court is required to consider whether the issuance of a stay order will substantially injure the other parties interested in proceedings.[25] I am persuaded that should the stay be lifted the subject matter will be jeopardized in that the applicant has insisted on willingness to bring into effect the impugned legal notice. This will render the proceedings an academic exercise.

48. Further, the court is bound to consider where the public interest lies.[26] Nothing can be of greater public interest than the court playing its constitutional mandate of ensuring that all laws and actions of public bodies including imposing taxes conform with the law.

49. In my view, the legality or otherwise of the legal notice or any law or legal regime upon which the taxation is premised is a core issue for determination at the hearing of the Petition. Whether or not the Petitioner misconstrued the legal effect of the legal notice as alleged or the law cannot qualify to be described as misrepresentation. If the Petitioner cited the wrong Legal Notice as alleged, to me that is not fatal to the case because it is a defect that can be cured by way of amendment.

50. The applicant had a duty to lay before the court material to demonstrate to the court that the legal notice which they state is the correct one fully complied with the earlier discussed statutory provisions.

51. It is instructive to note that the applicant asked for 21 days to file a Response to the Petition. To date the applicant has not filed the same. The only material before this court is the Petitioner's averments. The purpose of conservatory orders is to preserve the subject matter so that in the event of the Petition succeeding, the same is not rendered nugatory.

52. Before the court is a Petition challenging the constitutionality and or legality of the imposition of excise duty on certain products. It raises a Constitutional question. The determination of this case requires a close examination of the relevant legal regimes and the implementation and determination of the constitutionality of the entire process. This can only be determined after a full hearing.

53. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It is not enough to plead that a court order is causing hardship. It must be demonstrated that there are justifiable grounds to warrant the court to disturb its orders.

54. In my view, the arguments raised by the applicant ought to be raised at the hearing of the Petition but not as a basis for setting aside or varying the court orders.

55. The third Respondent's counsel submitted that the orders in question were granted in their absence. There is no application by the third Respondent seeking to set aside the orders on grounds that they were

granted *ex parte*. No affidavits either to support the averments. The third Respondent opted to ride on the first applicants application. It was incumbent for the third Respondent to file an application, persuade the court that the orders were granted *ex parte*, sufficiently explain why it did not appear, and demonstrate the tests for setting aside *ex parte* orders. Above all, persuade the court that the outcome would have been different had the third Respondent been present.

### **On the issue of security for costs**

56. The applicant prays for an order for security for costs and losses against the Petitioner pending hearing and determination of the Petition.

57. The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party.

58. The power to make an order for deposit for security for costs is a discretionary one. As authorities show, the court has unfettered though judicial discretion to order or refuse security. Much will depend upon the circumstances of each case.[\[27\]](#)

59. What is significant is that this is a constitutional Petition seeking to enforce constitutional Rights and brought in public interest. It is common knowledge that courts have been reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights. Worse still, an order for security of costs before trial will in my view create a barrier to public interest litigation. Such an order, in my view cannot pass the constitutional muster viewed from the lens of our constitution which allows any person to approach the court either on his behalf or on behalf of another person citing violation or threat of a constitutional right.

60. Discussing costs as a barrier to Public Interest Litigation, I am reminded of the phrase "*Justice is open to all, like the Ritz Hotel*"[\[28\]](#) attributed to a 19<sup>th</sup> Century jurist. Costs have been identified as the single biggest barrier to public interest litigation in many countries.[\[29\]](#) Not only does the applicant incur their own legal fees; they run the risk of incurring the other side's.

61. For all potential litigants, the risk of exposure to an adverse costs order is a critical consideration in deciding whether to proceed with litigation. Should the fear of costs prevent an issue of public importance and interest from being heard? **Lord Diplock's** dictum comes to mind:-

*"... it would, in my view, be a grave lacuna in our system of public law if a pressure group... or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the lawful conduct stopped..."*[\[30\]](#)

62. There is little point opening the doors of the Courts if litigants cannot afford to come in, in the fear, if unsuccessful, they will be compelled to pay the costs of the other side, with devastating consequences to the individual or environmental group bringing the action, which will inhibit the taking of cases to court.[\[31\]](#)

63. The rationale for refusing to award costs against litigants in constitutional litigation was appreciated by the South African constitutional court which observed that "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights."[\[32\]](#) The court was quick to add that this is not an inflexible rule[\[33\]](#) and that in accordance with its wide remedial powers, the Court has repeatedly deviated from the conventional principle that costs follow the result.[\[34\]](#)

64. The rationale for the deviation was articulated by the South African constitutional Court in *Affordable Medicines Trust vs Minister of Health* where **Ngcobo J** remarked:-

“There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case.”<sup>[35]</sup>

65. **Sachs J**, set out **three reasons** for the departure from the traditional principle:-

*“In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse.*

*Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy.*

*Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.”*<sup>[36]</sup>

66. Discussing the same point, the supreme court of Kenya in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others*<sup>[37]</sup> observed that:-

*“in the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.....”*

67. The reason for the above reasoning is that in public litigation, a litigant is usually advancing public interest as opposed to personal gain.

68. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.<sup>[38]</sup> The “nature of the issues” rather than the “characterization of the parties” is the starting point.<sup>[39]</sup> Costs should not be determined on whether the parties are financially well-endowed or indigent.<sup>[40]</sup>

69. One exceptions which can justify a departure from the general rule, is where the litigation is frivolous or vexatious.<sup>[41]</sup> That has not been demonstrated in this case nor was it alleged.

70. This Petition is brought in public interest. According to Black's Law Dictionary<sup>[42]</sup> "Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

71. While dealing with the question of “*bona fides*” of a petitioner, especially in the case of a person approaching the Court in the name of Public Interest Litigation, the Indian Supreme Court in the case of *Ashok Kumar Pandey vs. State of West Bengal*<sup>[43]</sup> held as hereunder: -

*“Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest*

*an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.”*

72. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice.<sup>[44]</sup> Public interest litigation is a highly effective weapon in the armoury of law for reaching social justice to the common man. It is a unique phenomenon in the Constitutional Jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns.

73. There was no suggestion that this Petition is frivolous or vexatious. I find no reason to depart from the generally accepted jurisprudence discussed above and award an order for security for costs the Petitioner in this constitutional petition.

74. As for prayer four seeking to bring the hearing date for the Petition forward, the difficult I have is that the applicant has to date not filed a Response to the Petition despite the clear directions of this court. The twenty one days granted by the court to the applicant to file their Response has since lapsed. In fact, none of the Respondents has filed a Response to the Petition.

75. Rule 3 (6) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013<sup>[45]</sup> provides that "a party to proceedings commenced under these rules, or an advocate for such party is under a duty to assist the Court to further the overriding objective of these rules and in that regard-(b) comply with the directions and orders of the Court.

76. Courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of the court is run effectively and efficiently. Invariably this leads to the orderly management of courts' rolls, which in turn brings about the expeditious disposal of cases in the most cost-effective manner. Parties are also obliged to comply with courts directives including filing their documents to facilitate expeditious disposal of cases.

77. The Petition is still uncontested. Unless and until the Respondents comply with the courts directions and file their Response to the Petition, I find no reason bring the hearing date forward.

78. In view of my analysis herein above, I find that the applicant has not demonstrated grounds to warrant the Court to set aside or vary the conservatory orders. The upshot is that the application dated 7<sup>th</sup> November 2017 is hereby dismissed with no orders as to costs.

Orders accordingly.

**Dated at Nairobi this 22<sup>nd</sup> day of November 2017**

**John M. Mativo**

**Judge**

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[1]{2012}eKLR

[2] See also *Fose vs Minister of Safety and Security* (CCT 14/ 96) [1997] ZACC 6.

[3] *Musinga J* (as he then was) HCCP No. 16 of 2011

[4] See *Patrick Musimba –v- The National Land Commission & 4 Others* HCCP 613 of 2014 (No. 1) [2015] eKLR and also *Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme* [2011] eKLR.

[5] CP No. 7 of 2014

[6] {2014} eKLR

[7] See *Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others* HCCP No. 11 of 2012 as well as *Suleiman –v- Amboseli Resort Ltd* [2004] 2 KLR 589.

[8] *FAI General Insurance Co Limited v Southern Cross Exploration NL* (1988) 165 CLR 268 per Gaudron J at p289. For an example of the Court recalling an order before it is perfected see in *re Harrison’s Share* [1955] 1 Ch 260 CA.

[9]*Wentworth v Woollahra Municipal Council*(1982) 149 CLR 672 at p 684.

[10] P. W. Young, *Reopening after reasons for decision*, 73 ALJR 624. As to the position in England see: *Stewart v Engel* [2000] 1 WLR 2268, CA; *Charlesworth v Relay Roads* [2000] 1 WLR 230 at p238 per Neuberger J. As to correcting *ex tempore* reasons: P.W. Young, *Revision of ex tempore judgments*, 74 ALJR 746.

[11] *DJL v The Central Authority* (2000) 201 CLR 226 per Kirby J (dissenting) at para 107.

[12] **See the American case of *Nken v. Holder*, 556 U.S. 418 {2009}**

[13] *Ibid*

[14] *Ibid*

[15] *Ibid*

[16]The leading Australian authority on setting aside an order or judgment obtained by fraud/misrepresentation is *Cabassi vs Vila*(1940) 64 CLR 130 at p147; *Di Carlo v. Dubois* [2007] QCA 316 at [33].

[17] See Kirby P (with whom Hope JA and Samuels JA agreed) in *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at pp538 - 539; see also *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234 at p241; *Magarditch v. Australia and New Zealand Banking Group Ltd* (1999) 17 ACLC 1275 and *Pembroke School Incorporated v. Human Rights and Equal Opportunity Commission* [2002] FCA 1020 and *Di Carlo v Dubois* [2007] QCA 316 at [30].

[18] <https://www.meriam-webster.com>

[19]Act No. 23 of 2013

[20] *Ibid*

[21] *Ibid*

[22] Ibid

[23] See the American case of *Nken v. Holder*, 556 U.S. 418 {2009}

[24] Ibid

[25] Ibid

[26] Ibid

[27] *Marco Tool & Explosives Ltd vs Mamuyee Brothers Ltd* (1988) KLR 730, the Court of Appeal at page 733

[28] Sir James Matthew, 19th Century jurist

[29] 2 Mel Cousins BL (2005) Public Interest Law and Litigation in Ireland, Dublin: FLAC, October 2005 and see Stein R. & Beageant J., “R (Corner House Research) v the Secretary of State for Trade and Industry” (2005) 17(3) Journal of Environmental Law 413

[30] R (ex parte National Federation of Self-Employed and Small Businesses Ltd) v Inland Revenue Commission [1981] UKHL 2.

[31] Toohey J.’s address to the International Conference on Environmental Law, 1989 quoted in *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150 [19].

[32] *Hotz and Others vs University of Cape Town* [2017] ZACC 10, citing *Biowatch Trust v Registrar, Genetic Resources* [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (*Biowatch*).

[33] Ibid

[34] See, for example, *AB vs Minister of Social Development* [2016] ZACC 43; 2017 (3) BCLR 267 (CC) at para

329; *Minister of Home Affairs vs Rahim* [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC) at para 35;

*Sali vs National Commissioner of the South African Police Service* [2014] ZACC 19; 2014 (9) BCLR 997 (CC); (2014) 35 ILJ 2727 (CC) at para 97.

[35] {2005} ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138

[36] *Biowatch Trust v Registrar, Genetic Resources* [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (*Biowatch*)

[37] Supra note 4

[38] Supra note 32

[39] Ibid

[40] Ibid

[41] Supra Note 32

[42] Sixth Edition

[43] AIR 2004 SC 280

[44] Public Interest Litigation: Use and Abuse, <http://lawquestinternational.com/public-interest-litigation-use-and-abuse-0>

[45] Legal Notice Number 117 of 28<sup>th</sup> June 2013