



**Benjamin v Attorney General & 4 others; National Council of Churches
of Kenya & 3 others (Interested Parties) (Petition E001 of 2024)
[2025] KEHC 11106 (KLR) (Constitutional and Human Rights) (22 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E001 OF 2024

EC MWITA, J

JULY 22, 2025

BETWEEN

DR MAGARE GIKENYI J. BENJAMIN PETITIONER

AND

HON ATTORNEY GENERAL 1ST RESPONDENT

**CABINET SECRETARY NATIONAL TREASURY & ECONOMIC
PLANNING 2ND RESPONDENT**

KENYA REVENUE AUTHORITY 3RD RESPONDENT

NATIONAL ASSEMBLY 4TH RESPONDENT

THE SENATE 5TH RESPONDENT

AND

NATIONAL COUNCIL OF CHURCHES OF KENYA INTERESTED PARTY

KENYA CONFERENCE OF CATHOLIC BISHOPS INTERESTED PARTY

EVANGELICAL ALLIANCE OF KENYA INTERESTED PARTY

SUPREME COUNCIL OF KENYAN MUSLIMS INTERESTED PARTY

JUDGMENT

Petition

1. Dr. Magare Gikenyi J. Benjamin (the petitioner) filed this petition to challenge the constitutionality of sections 3(2) and 13 of the [Income Tax Act](#) Cap 470 Laws of Kenya (the Act) as read with the



First Schedule to the Act. The petitioner contended that section 3(2) purports to name groups of persons and entities that should pay income tax while exempting other groups which amounts to discrimination and thus, unconstitutional.

2. The petitioner asserted that section 13 as read with the First Schedule to the Act purports to permit exemptions on payment of income tax to certain persons/groups of persons, including churches; mosques and on-governmental organizations which offends the constitutional principle of sharing tax burdens fairly and equally.
3. It is the petitioner's position that the impugned sections are violate articles 10, 21, 25, 27, 30, 40, 41, 43, 47, 60, 73, 75, 201 (b) (i) and 209 of the Constitution and are therefore unconstitutional. For those reasons, the petitioner sought the following relief:
 - a. A declaration that section 3(2) of the Income Tax Act (ITA) Cap 470 of the laws of Kenya to the extent that it segregates /provides certain persons/entities of people to pay income tax while leaving out other groups of persons /entities is discriminatory and contrary to *inter alia* articles 27, 28 and 201 of the Constitution and relevant statutes hence is unconstitutional, null and void ab initio.
 - b. A declaration that section 13 as read with the first schedule of Income Tax Act (ITA) cap 470 of the laws of Kenya as far as it purports to provide persons/groups of persons who are to be exempted from paying income tax is irrational and contrary to constitutional dictates of fair sharing of taxation burden among all persons/ entities in Kenya hence contrary to article 201 as read with article 209 of the Constitution 2010.
 - c. A declaration that the arbitrary/imbalance tax burdens as provided in impugned sections of the Income Tax Act, *inter alia* section 3(2), 13 as read with the First Schedule and all other sections of Income Tax Act cap 470 of the laws of Kenya has an effect of discriminating, violating rights and fundamental freedoms of citizens in various ways and in contrary to various articles of the Constitution *inter alia* article 10, 12, 21, 25, 27, 28, 30, 40, 41, 43, 47, 60, 73, 75, 201, 209 and 232 of the Constitution hence unconstitutional null and void.
 - d. A declaration that any Act and/or sections of the Act in Kenya that purports to exempt a section/part /group of persons/ entities from paying any tax while others are paying is discriminatory, hence unconstitutional, null and void.
 - e. An order of judicial review by way of prohibition, prohibiting the respondents either by themselves, their agents and/ or any other persons whatsoever from acting and/or giving effect to the impugned sections 3(2) and 13 as read with the First Schedule and all other sections of the Income Tax Act (ITA) Cap 470 of the laws of Kenya which purports to exempt any person(s)/entity(ies) from paying income tax.
 - f. An order of judicial review by way of mandamus, compelling the respondents and/or any other person to follow constitutional dictates/principles at all times when performing their duty.
 - g. That any other order or/and modification of petitioner's prayer(s) which this honourable court may deem fit so as to achieve objects of justice for majority of Kenyans as a whole.
 - h. Costs of this petition to be borne by respondents.

1st and 2nd respondents' response

4. The Attorney General and the Cabinet Secretary, National Treasury and Economic planning, (the 1st and 2nd respondents) opposed the petition through a replying affidavit sworn by the 2nd respondent



(Prof. Ndung'u.) The 1st and 2nd respondents contended that the constitutionality of section 13(2) was determined by this court (Kizito, J) in *Eliud Matindi v Cabinet Secretary, National Treasury & Planning & 4 others* [2023] KEHC 114 (KLR). They further contended that the petition is sub judice because the that decision is on appeal which is pending determination before the Court of Appeal in Civil Appeal No. E330 of 2023 - *National Assembly & others v Eliud Karanja Matindi & 4 others*.

5. The 1st and 2nd respondents asserted that while article 209 of the Constitution empowers the government to levy taxes and charges, article 210 permits the government to waive, vary and/or impose taxes through legislation. It is on this premise that the impugned sections exist. According to the 1st and 2nd respondents, exemption of certain income from tax is a worldwide practice for various reasons. Some exemptions are dictated by international agreements and legislations that Kenya is a signatory to such as the *Immunities and Privileges Act* and *United Nations Model Double Taxation Convention Between Developed and Developing Countries*, so that some incomes falling under such situations are to be exempted from tax on reciprocal basis.
6. It was the 1st and 2nd respondent position that the decision in *Commissioner of Domestic Taxes v Thika Road Baptist Church Ministries* [2022] KEHC 644 (KLR) determined that income received by churches in form of tithes, offerings and freewill donations do not constitute taxable income. In that respect, the 1st and 2nd respondents argued that sections 3(2) and 13(2) are not unconstitutional on grounds of discriminating certain persons from tax liabilities because the *Constitution* anticipates positive discrimination. The sections also enjoy presumption of constitutionality.
7. According to the 1st and 2nd respondents, taxation is a policy matter within the purview of the executive to be legislated by Parliament. The court should refrain from interfering with such mandate unless it is demonstrated that there is violation of the *Constitution* and the law.

3rd respondent's response

8. Kenya Revenue Authority, (the 3rd respondent) opposed the petition through a replying affidavit sworn by Josephine Mugure. The 3rd respondent contended that article 210(1) of the *Constitution* provides the basis for exemption of income tax. The 3rd respondent maintained that tax exemptions for the entities listed in the First Schedule of the *Act* are not meant to benefit the entities but to allow such entities offer services to the public free of charge or at an affordable rate to relieve public distress and poverty, among others.
9. The 3rd respondent stated that contrary to the petitioner's assertions, the exemption is limited to tithes, offerings and donations which do not constitute income for purposes of taxation. Those institutions are however not exempt from tax obligations that fall within the taxable income stipulated under section 3(2) of the *Act*.
10. The 3rd respondent further stated that exemptions under paragraph 10 of the First Schedule are subject to certain requirements which must be demonstrated to the Commissioner's satisfaction. This criterion seeks to prevent individuals and corporations seeking to use loopholes to enrich themselves thus, the petitioner's concerns have no basis.
11. The 3rd respondent maintained that tax exemptions under section 13 are aligned with the constitutional principles of taxation and good governance as well as Kenya's Vision 2030 and Sustainable Development Goals.
12. The 3rd respondent agreed with the 1st and 2nd respondents that tax exemption is a worldwide practice and that some of the exemptions are dictated by the international agreements and legislations such as



the *Privileges and Immunities Act* and the *United Nations and Double Taxation* Agreements which Kenya is a signatory.

4th respondent's response

13. The National Assembly, (the 4th respondent) also opposed the petition through a replying affidavit sworn by Samuel Njoroge CBS, Clerk to the National Assembly. The 4th respondent cited rule 10 (2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (Mutunga Rules) and the decisions in *Anarita Karimi Njeru v Republic* [1979] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR to contend that the petition lacks specificity and does not identify specific areas of contention with regard to the waiver of taxes which is underpinned by Article 210 of the *Constitution*.
14. The 4th respondent asserted that Article 210 of the *Constitution* allows for waiver of taxes through legislation and therefore section 13(1) was enacted in line with parliamentary mandate in articles 94 and 95 of the *Constitution* to give effect to article 210 with regard to waiver of taxes. The 4th respondent maintained that tax exemptions are justified because they are integral to the government's fiscal policies and lessen taxpayers' burdens. They also serve as development tools by incentivizing non-governmental organizations and other development partners to actively contribute to specific social policy goals.
15. It is the 4th respondent's position that by virtue of article 210 (1) of the *Constitution*, contributions, donations, and other funds received by religious and other non-governmental organizations for furthering their social, religious and educational purposes do not fall within the definition of income in section 3(2) of the *Act*. Any tax imposed on them would be a burden to the organizations' donors and beneficiaries.
16. The 4th respondent maintained that tax exemptions on religious institutions are not automatic because section 13(1) as read with part I of the First Schedule (at paragraph 10) provides for criteria to be satisfied for purposes of exemption. Further, exemptions enable religious institutions and NGOs operate independently and facilitates their operational efficiency.
17. The 4th respondent stated that contrary to the petitioner's assertions, tax exemptions are not granted to religious institutions and NGOs exclusively, but are also extended to people living with disabilities, corporate entities as well as Kenyans earning below certain amounts, among others factors. The 4th respondent maintained that allowing tax exemptions resonates with article 27 of the *Constitution*; exemptions are discretionary and apply only to specific tax items and do not extend to income or profit not expended towards religious and educational purposes.
18. The 5th respondent and 1st, 2nd and 3rd interested parties did not take part in these proceedings.

4th interested party's response

19. The Supreme Council of Kenyan Muslims, (the 4th interested party) opposed the petition through a replying affidavit sworn by Hassan K. Ole Naado. The 4th interested party contended that the petition is frivolous; has no merit and contains generalized allegations against entities who are neither respondents nor interested parties in this petition.
20. The 4th interested party asserted that the petitioner misapprehended its role and failed to establish a nexus between the alleged economic issues raised in the petition and its non-payment of taxes as a religious association. Tax exemption has historical underpinnings and is accepted and practiced universally. It is the 4th interested party's position that Muslim faithful are encouraged to give in charity at all times according to their means through Sadaqah and Zakat. Sadaqah is voluntary and may be



given at any time and without limit to the amount given, while Zakat is mandatory and is normally given at the end of the year upon calculating the faithful's wealth after expenses.

21. The 4th interested party posited that Zakat is meant to cushion the needy and vulnerable members of society and to achieve redistribution of wealth among people hence there is no profit derived from it. According to the 4th interested party, Zakat is part of Islamic religious expression which cannot be placed under the government taxation processes. Allowing the petition will violate article 32(4) of the [Constitution](#).
22. The 4th interested party maintained that Zakat and Sadaqah are the main resources used to run operations of mosques and Islamic institutions and not government taxes or contributions as implied by the petitioner. Mosques and Islamic institutions are not profit-making entities to be taxed.
23. The 4th interested party maintained that most of the mosques and Islamic institutions in the country are not in a financial position to support their operations. They rely on Sadaqah and Zakat from well-wishers to support mosques. It would be oppressive and unfair to impose tax on them. It is the 4th interested party's case that its members paying Sadaqah and Zakat also pay taxes due to the government from their individual sources of income and businesses. Allowing the petition will constitute unlawful multi taxation.
24. The 4th interested party took issue with the petition because it has only targeted four interested parties and did not joined other entities exempted from paying tax which amounts to discrimination in violation of article 27(4) of the [Constitution](#). The 4th interested party contended that the legislative process enacting the impugned sections has not been attacked.
25. The petition was disposed of through written submissions with brief oral highlights.

Petitioner's submissions

26. The petitioner submitted that the respondents' action was outside the law contrary to the common law principle established in [Entick v Carrington](#) [1965] EWHC KB J98 and [Hardware & Ironmongery \(K\) Ltd v Attorney General](#) [1972] 1 EA 275(CAM). The petitioner relied on article 23 of the [Constitution](#) and the decision in [Salaries and Remuneration Commission & Another v Parliamentary Service Commission & 15 others; Parliament & 4 others \(Interested parties\)](#) [2020] eKLR to urge the court to grant an appropriate relief.
27. The petitioner argued that section 13 of the [Act](#) is unconstitutional because it offends the provisions of articles 24, 27 and 201 (b) (i) of the [Constitution](#). The petitioner further argued that the import of article 210(1) of the [Constitution](#) is to waive and not to exempt tax. That is why there is a need to keep public record of the waived tax in addition to reporting the same to the Auditor General under article 210(2) of the [Constitution](#).
28. The petitioner submitted that the issues raised on the rationale why there is need for tax exemption contradicts the [Constitution](#). The petitioner relied on article 259 of the [Constitution](#) and the decision in [Council of County Governors v Attorney General & another](#) [2017] eKLR.
29. The petitioner posited that tax exemption for some group of people while leaving others is a form of discrimination and aids unfair tax burden among Kenyans thus, cannot be justified. Reliance was placed on article 27 of the [Constitution](#) and the decisions in [Masai Mara \(SOPA\) Limited v Narok County Government](#) [2016] eKLR; [Andrews v Law Society of British Columbia](#) [1989] 1 SCR 143; [Peter K. Waweru v Republic](#) [2006] eKLR and [Harksen v Lane NO and others](#) 1998 (1) SA 300.



30. The petitioner reiterated that the tax exemption offends his legitimate expectation and that of law-abiding citizens. The petitioner relied on the decisions in [Oindi Zaippeline & 39 others v Katarina University & another](#) [2015] eKLR; [Republic v City County & another Ex parte Wainaina Kigathi Mungai](#) [2014] eKLR; [Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others](#) [2014] eKLR, among others. He urged the court to allow the petition.

1st and 2nd respondents' submissions

31. Mr. Kaumba, learned counsel for the 1st and 2nd respondents argued that the petition is sub judice because the issue is pending before the Court of Appeal. Counsel relied on section 6 of the [Civil Procedure Act](#) and the decisions in [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) [2020] KESC 54 (KLR). Learned counsel again cited article 201(b)(i) as read with articles 94, 209 and 210 of the [Constitution](#) to contend that the impugned sections 3(2) and 13 as read with the First Schedule to the [Act](#) are constitutional.
32. Mr. Kaumba submitted that under article 24 of the [Constitution](#) a limitation of a fundamental right and freedom is allowed subject to the conditions stated in that article. According to counsel the exemption contemplated under the impugned sections does not create discrimination but rather differentiation which is allowed. Learned counsel relied on the definition of discrimination in [Black's Law Dictionary](#), 9th Edition and the decisions in [John Harun Mwau v Independent Electoral and Boundaries Commission & another](#) [2013] eKLR; [Nelson Andayi Havi v Law Society of Kenya & 3 others](#) [2018] eKLR and [State of Kerala & Anor v N.M. Thomas & Others](#) 1976 AIR 490; 1976 SCR (1) 906.
33. Learned counsel submitted that the exemptions are granted pursuant to section 13 and paragraph 10 of the First Schedule to the [Act](#), a legally enacted statute which is presumed to be constitutional and the contrary has not been demonstrated. The exemption does not violate the constitutional principle of equitable sharing of tax burden.
34. Mr. Kaumba argued that the petitioner's interpretation of the impugned provisions vis-à-vis articles 201, 209 and 210 of the [Constitution](#) is selective interpretation that cannot stand in the face of the principles of constitutional interpretation in article 259 of the [Constitution](#). Counsel urged the court to dismiss the petition.

3rd respondent's submissions

35. Mr. Muhoro, learned counsel for the 3rd respondent submitted that the basis for tax exemption is article 210 (1) of the [Constitution](#). In that respect, income tax exemptions are made in line with section 13 of the [Act](#). The First Schedule to the [Act](#) provides a comprehensive list of income under paragraphs 1 to 67 to be exempt which is not exclusive to the class of persons and others listed by the petitioner.
36. Learned counsel maintained that the entities listed in Part I of the First Schedule to the [Act](#) are exempted from paying income tax because they offer services that are for the benefit of the public and aid the government in meeting the basic needs of the citizens. Counsel argued that some exemptions listed by the petitioner are listed under paragraphs 10 of the First Schedule to the [Income Tax Act](#) which are subject to certain criteria before they can be granted. They should conform with section 13(2) of the [Act](#) thus; there is no blanket exemption.
37. Mr. Muhoro submitted that tax exemptions under section 13 are aligned with the [Constitution](#); the principles of taxation and good governance. The exemptions are for institutions that are established



solely for relieving public poverty or distress or for advancement of religion and thus, aligned with Kenya's Vision 2030 and sustainable development goals.

38. Learned counsel submitted that section 3 of the *Income Tax Act* ensures that tax burden is equitably distributed among all tax payers and prevents any person from unfairly avoiding taxes and gaining an undue advantage over the others. Counsel relied on the decisions in *Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others* [2017] eKLR and *Pharmaceutical Manufacturing (K) Co. Ltd & 3 others Commissioner General of Kenya Revenue Authority & 2 others* [2017] eKLR to submit that the petitioner's claim on legitimate expectation has no basis.
39. Mr. Muhoro submitted that the petition does not meet the constitutional threshold established in *Anarita Karimi Njeru v Republic* (*supra*) and *Timothy Njoya v Attorney General & another* [2014] eKLR. Counsel urged the court to dismiss the petition.

4th respondent's submissions

40. Mr. Atingo, learned counsel for the 4th respondent, substantively reiterated the contents of their response in the replying affidavit. Counsel relied on the decision in *Commissioner of Domestic Taxes v Thika Road Baptist Church Ministries* [2022] KEHC 644 (KLR) to buttress the argument that tithes, free will donations and offerings to churches and other religious organizations do not fall within the scope of income for purposes of paying income tax.
41. Learned counsel urged the court to find that tax exemptions under section 13 of the *Income Tax Act* are not discriminatory as they are provided subject to scrutiny and ascertainment by the Commissioner of Domestic Taxes who issues a tax exemption. Counsel relied on the decision in *Republic v Commissioner of Domestic Taxes & another exparte Kenton College Trust* [2013] eKLR.
42. Mr. Atingo again relied on the decisions in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR; *Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR and the *Mumo Matemu case* to support the position that the petition offends the doctrine of separation of powers and urged the court to dismiss the petition with costs.
43. Mr. Kinyanjui, learned counsel for the 4th interested party relied on their replying affidavit and associated himself with the submissions made by counsel for the 1st, 2nd, and 3rd respondents. Counsel added that their affidavit demonstrated that Zakat supports equality; is not an income; is not expended for profit and does not perpetrate discrimination.
44. The 5th respondent and the 1st to 3rd interested parties did not take part in these proceedings.

Determination

45. I have considered the pleadings and arguments by the parties. Two issues arise for determination, namely; whether the petition is sub judice, and depending on the answer to this issue, whether the impugned sections 3(2) and 13 of the *Act* as read with Part I of the First Schedule to the *Act* are unconstitutional.

Sub judice

46. The respondents argued that the petition is sub judice because the issue was determined in *Eliud Matindi v Cabinet Secretary, National Treasury & Planning & 4 others* [2023] KEHC 114 (KLR) and that decision has been challenged in Civil Appeal No. E330 of 2023 - *National Assembly & another v Eliud Karanja Matindi & 4 others* whose determination is now pending. The petitioner argued



that the decision on the constitutionality of the impugned sections was obiter as the issue was not in principle before the High court for determination.

47. Section 6 of the [Civil Procedure Act](#) provides that

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

48. Sub judice, as a principle of law, is the opposite of res judicata. Unlike res judicata which requires that the previous suit should have been finally determined by a court of competent jurisdiction, sub judice, requires the proceeding or litigation in the subsequent suit to be pending in a court of competent jurisdiction. Sub judice as a fundamental legal principle, prevents re-litigation of issues that are pending before another court of competent jurisdiction. The principle is intended to avoid multiplicity of suits so that different courts seized of the same issue between the same parties do not render contradictory decisions. In that respect, sub judice serves to uphold the principles of judicial efficiency, fairness, and the rule of law.

49. The essence of sub judice is that once a matter has been instituted in a court of competent jurisdiction, no other court of similar jurisdiction should entertain a subsequent suit in which the matter in dispute is directly and substantially in issue in the earlier suit still pending in another court. The overarching objective of sub judice is to prevent multiplicity of proceedings, ensure the finality of judicial decisions and promote judicial economy and certainty in the legal system.

50. In [Satyadbyan Ghosal v Deorajin Debi & Anr.](#) 1960 SCR (3) 590; 1960 AIR 941, the Supreme Court of India elucidated the concept of “directly and substantially in issue” under section 10 of the [Indian Civil Procedure Code \(Code of Civil Procedure\)](#) the equivalent of section 6 of our [Civil Procedure Act](#). The Court held that for sub-judice to apply, it is not necessary that the entire subject matter of the subsequent suit should have been directly and substantially in issue in the former suit. Rather, it suffices if the matter in issue was relevant for the determination of the former suit.

51. The Supreme Court of Kenya dealt with the issue in [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) [2020] KESC 54 (KLR) and stated:

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

(See also [Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex-parte Law Society of Kenya](#) [2020] eKLR.



52. As this Court stated in *Mweresa & 3 others v Social Health Authority & another; Law Society Of Kenya & 3 others (Interested Parties)* (Petition E524 of 2024) [2025] KEHC 8365 (KLR),

“Sub judice ...upholds the principles of fairness and equity by ensuring that parties are not subjected to vexatious and oppressive litigation; provides finality to judicial decision-making process; fosters certainty in legal processes and instils public confidence in the judicial system.”

53. To determine whether or not a matter is sub judice, one has to look at the facts of the latter suit or proceedings, including the prayers sought visa vis the facts of the former suit as well as the parties in the two suits. In other words, cases must be civil in nature; must have been filed at different times; matters in issue must be substantially similar; courts should have jurisdiction over the subject matters; parties should be the same or litigating through their representatives or same title and the suits or proceeding should be pending.

54. The reason why the respondents argued that this petition is sub judice was because the issues raised in this petition are pending before the Court of Appeal in Civil Appeal No. E330 of 2023 – *National Assembly & Anor v Eliud Karanja Matindi & 4 others*. This Civil Appeal arose from the decision in petition No. E E280 of 2021 *Eliud Matindi v Cabinet Secretary, National Treasury & Planning & 4 others* on 17th February 2023 in which the court declared section 13(2) of the Act unconstitutional stating:

“It is hereby declared that section 13(2) of the *Income Tax Act* is unconstitutional to the extent that it authorizes Income Tax waivers through a notice in the Gazette and for specified persons without regard to the dictates of article 210 of the *Constitution*. To the extent of the inconsistency, in particular the use of the Kenya Gazette, instead of legislation, to effect tax waiver, is struck down.”

55. Following that decision, the National Assembly filed an application before the Court of Appeal for stay of execution of that decision (*Civil Appeal (Application) E176 of 2023*). The Court of Appeal granted stay of execution in a ruling delivered on 19th December 2023 (cited as [2023] KECA 1566 (KLR) (19 December 2023) (*Ruling*)) in the following words:

(38) We believe that the circumstances of this case warrant the grant of an order, which we hereby grant, temporarily suspending the coming into effect of the declarations made by the trial court with respect to Legal Notice No. 15 of 2021 and section 13 of the *Income Tax Act*. The suspension of the said declarations shall remain in force for a period of six (6) months from the date hereof, pending hearing and determination of the applicants’ appeal, which counsel for the applicants and the 2nd and 3rd respondents informed the court had already been filed.

At the hearing of this petition parties informed the court that the appeal was still pending. It was for that reason that the respondents argued that this petition is sub judice.

56. There is no dispute that the court declared section 13(2) unconstitutional rendering the section inoperative in terms of article 2(4) of the Constitution. The court did not however render itself on the constitutionality of section 3(2) of the Act. There is also no dispute that following the High Court decision, an appeal was lodged in the Court of Appeal which is still pending. An application for stay of execution of the High Court decision was filed and the Court of Appeal granted stay of execution of the High Court decision. The effect of the stay order was that the declarations of invalidity of both the section and the Gazette Notice were suspended so that they remain lawful until the Court of Appeal pronounces itself on the appeal.



57. The petitioner's response to the respondent's argument that the matter is sub judice was that the declaration of section 13(2) as unconstitutional was made obiter since it was not prayed for in the petition.
58. In order for the defence of sub judice to succeed, a party must establish that there are more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and that the suits are between the same parties or their representatives. All the factors are satisfied in this petition except that the petitioner herein is different from the petitioner in the previous petition but both are public interest litigants.
59. The fact of the matter is that what is pending before the Court of Appeal is the fate of, among others, the declaration of invalidity of section 13(2) of the Act. That is, the Court of Appeal will decide whether to affirm or reverse the High Court decision declaring that section unconstitutional. There being no dispute that the issue of constitutionality of section 13(2) of the Act is before the Court of Appeal, and even though the petitioner argued that the declaration of invalidity was made obiter, that is a matter for the Court of Appeal to decide now that the issue is before it. This court would have made its views known on the issue had there not been an appeal to the Court of Appeal. As it is now, this court cannot second guess how the Court of Appeal will render itself on that issue.
60. The pendency of the issue of constitutionality of section 13(2) before the Court of Appeal having been brought to the attention of this court, it would be inappropriate for this court to proceed to determine the issue yet the Court of Appeal is seized of the same matter. This court has no option but to heed of the observation of the Supreme Court in Law Society of Kenya v Attorney General & another (Petition 4 of 2019) [2019] KESC 16 (KLR).
61. In that case, while an appeal was pending before the Supreme Court, the High Court proceeded to deal with a matter raising the same issue and determined it notwithstanding the fact that a similar issue was before the Supreme Court. The Supreme Court then stated:
- “ [92.] We are greatly dismayed that the learned Judge did not take judicial notice of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have held his horses and acknowledge the hierarchy of the courts and await for this court to pronounce itself before rendering himself, if at all. As we perceive it, his judgment has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may [may or is]? also be contrary to this Judgement.”
62. The observation by the Supreme Court aptly captures the situation before this court. The issue of the constitutionality of section 13(2) is before the Court of Appeal and whichever way the Court of Appeal determines that issue, the decision of the Court of Appeal will be binding on this court. This court must therefore defer to the Court of Appeal which is superior in hierarchy to this court to avoid any contradiction or even confusion on the issue. The fact that this petition also challenges the constitutionality of section 3(2) of the Act does not on its own make much difference that would persuade this court to proceed to determine this petition when the broader question of the constitutionality of section 13(2) is pending before the Court of Appeal.
63. As the Supreme Court of India observed, it is not necessary that the entire subject matter of the subsequent suit be directly and substantially in issue in the former suit. It suffices if the matter in issue



is relevant for the determination of the former suit. (*Satyadhyan Ghosal v Deorajin Debi & Anr.* 1960 SCR (3) 590).

64. It is the view of this court that determination of the appeal before the Court of Appeal will be relevant to the present petition. If the Court of Appeal was to affirm the decision of the High Court that section 13(2) is unconstitutional and therefore invalid, this petition would have lost its substratum. In that respect, I agree with the respondents that this petition is sub judice in so far as the Court of Appeal is yet to pronounce itself on the constitutionality of section 13(2), an issue that is live before that Court.
65. That being this court's view of the matter, what then is the appropriate relief to grant in this petition?
66. Considering the outstanding issues in the civil appeal, namely; the constitutionality of section 13(2) of the *Income Tax Act* that is yet to be determined and this being a judgment and not a ruling, the appropriate course to take is to decline this petition so that the issues pending in the civil appeal can be resolved. Consequently, and for the above reasons, this petition is struck out. This being a public interest litigation, each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2025.

E C MWITA

JUDGE

