



**Gikenyi & 41 others v Cabinet Secretary Lands & 13 others (Petition E154,  
E173, E176, E181, E191 & 11 of 2024 (Consolidated)) [2024] KEHC 8475 (KLR)  
(Constitutional and Human Rights) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8475 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E154, E173, E176, E181, E191 & 11 OF 2024 (CONSOLIDATED)  
OA SEWE, JM CHIGITI & JWW MONG'ARE, JJ  
JULY 11, 2024**

**BETWEEN**

MAGARE GIKENYI ..... 1<sup>ST</sup> PETITIONER  
PAULINE NDATA KINYANJUI ..... 2<sup>ND</sup> PETITIONER  
PHILEMON ABUGA NYAKUNDI ..... 3<sup>RD</sup> PETITIONER  
SHALLUM KAKA NYAKUNDI ..... 4<sup>TH</sup> PETITIONER  
JAMLICK OTONDI ORINA ..... 5<sup>TH</sup> PETITIONER  
TRADE UNIONS CONGRESS OF KENYA ..... 6<sup>TH</sup> PETITIONER  
MOSES NTHURIMA ..... 7<sup>TH</sup> PETITIONER  
OMTATAH OKOITI ..... 8<sup>TH</sup> PETITIONER  
MADZAYO ..... 9<sup>TH</sup> PETITIONER  
ENOCH KIO WAMBUA ..... 10<sup>TH</sup> PETITIONER  
OLE KINA ..... 11<sup>TH</sup> PETITIONER  
EDWIN SIFUNA ..... 12<sup>TH</sup> PETITIONER  
OKONG'O OMOGENI (SC) ..... 13<sup>TH</sup> PETITIONER  
KAJWANG MOSES OTIENO ..... 14<sup>TH</sup> PETITIONER  
GODFREY OSOTSI ..... 15<sup>TH</sup> PETITIONER  
MOHAMED FAKI MWINYIHAJI ..... 16<sup>TH</sup> PETITIONER  
JOHNES MWARUMA ..... 17<sup>TH</sup> PETITIONER



SENATOR CRYSTAL ASIGE .....	18 <sup>TH</sup> PETITIONER
DAN MAANZO .....	19 <sup>TH</sup> PETITIONER
AGNES KAVINDU MUTHAMA .....	20 <sup>TH</sup> PETITIONER
DR. OBURU ODINGA .....	21 <sup>ST</sup> PETITIONER
RICHARD ONYONKA .....	22 <sup>ND</sup> PETITIONER
BEATRICE A OYOMO .....	23 <sup>RD</sup> PETITIONER
CATHERINE MUYEKA MUMMA .....	24 <sup>TH</sup> PETITIONER
HAMIDA KIBWANA .....	25 <sup>TH</sup> PETITIONER
HEZENA LAMALETIAN .....	26 <sup>TH</sup> PETITIONER
BETH KALUNDA SYENGO .....	27 <sup>TH</sup> PETITIONER
SENATOR SHAKILA ABDALLA MOHAMED .....	28 <sup>TH</sup> PETITIONER
EDDY GICHERU OKETCH .....	29 <sup>TH</sup> PETITIONER
ELIUD KARANJA MATINDI .....	30 <sup>TH</sup> PETITIONER
ODIWUOR OTIENO .....	31 <sup>ST</sup> PETITIONER
BLAIR ANGIMA OIGORO .....	32 <sup>ND</sup> PETITIONER
VICTOR OKUNA .....	33 <sup>RD</sup> PETITIONER
FLORENCE KANYUA LICHORO .....	34 <sup>TH</sup> PETITIONER
JOHN ISAAC .....	35 <sup>TH</sup> PETITIONER
ALFRED KIPTOO KETER .....	36 <sup>TH</sup> PETITIONER
KELVIN KINYUA .....	37 <sup>TH</sup> PETITIONER
ANDREW MWENDWA .....	38 <sup>TH</sup> PETITIONER
HARON NZOMO .....	39 <sup>TH</sup> PETITIONER
KENYA HUMAN RIGHTS COMMISSION .....	40 <sup>TH</sup> PETITIONER
KATIBA INSTITUTE .....	41 <sup>ST</sup> PETITIONER
PETER OKIRO .....	42 <sup>ND</sup> PETITIONER

**AND**

SECRETARY LANDS .....	1 <sup>ST</sup> RESPONDENT
CABINET SECRETARY, NATIONAL TREASURY .....	2 <sup>ND</sup> RESPONDENT
ATTORNEY GENERAL .....	3 <sup>RD</sup> RESPONDENT
NATIONAL ASSEMBLY .....	4 <sup>TH</sup> RESPONDENT
SENATE .....	5 <sup>TH</sup> RESPONDENT



MINISTRY OF LANDS, PUBLIC WORKS, HOUSING AND URBAN DEVELOPMENT .....	6 <sup>TH</sup> RESPONDENT
NATIONAL HOUSING CORPORATION .....	7 <sup>TH</sup> RESPONDENT
KENYA SLUM UPGRADING, LOW COST HOUSING AND INFRASTRUCTURE TRUST FUND .....	8 <sup>TH</sup> RESPONDENT
COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY ....	9 <sup>TH</sup> RESPONDENT
COMMISSION ON REVENUE ALLOCATION .....	10 <sup>TH</sup> RESPONDENT
CONTROLLER OF BUDGET .....	11 <sup>TH</sup> RESPONDENT
AUDITOR GENERAL .....	12 <sup>TH</sup> RESPONDENT
NATIONAL LAND COMMISSION .....	13 <sup>TH</sup> RESPONDENT
COUNCIL OF GOVERNORS .....	14 <sup>TH</sup> RESPONDENT

## RULING

1. There are two (2) applications for conservatory orders before the Court. The first application is dated 2<sup>nd</sup> April, 2024 by the 6<sup>th</sup> Petitioner, Trade Unions Congress of Kenya (the Petitioner in Petition E173 of 2024); and the second is dated 8<sup>th</sup> April, 2024 by the 8<sup>th</sup> to 39<sup>th</sup> Petitioners (the Petitioners in Petition E181 of 2024).
2. The Petitioners in Petition 11, E154, E176, and 191 of 2024 also filed applications for conservatory orders but elected to withdraw the same when the matters came up for mention on 3<sup>rd</sup> June, 2024.

### **The Application dated 2<sup>nd</sup> April, 2024 (Petition E173 of 2024)**

3. The Application dated 2<sup>nd</sup> April, 2024 is brought under Articles 22, 23, 43, 159, and 165 (3)(b) of *the Constitution* of Kenya, 2010 as read with Rules 4(1), 8 (1), 9 (1) and *the Constitution* of Kenya (Protection of Fundamental Freedoms (Practices and Procedures Rules, 2013).
4. The 6<sup>th</sup> Petitioner seeks for the following orders: -
  - (a) Spent
  - (b) That pending the hearing and determination of this petition inter-partes a conservatory order be issued staying or suspending further implementation, administration, application, or enforcement of sections 3 and 4 of the Affordable *Housing Act*, 2024 pending the hearing and determination of the petition.
  - (c) That the court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders or favour the cause of justice.
  - (d) That costs of the Application be provided for.
5. The application is supported by the grounds on its face, and on the annexed affidavit sworn by Dr. Charles Mukhwaya.



6. Condensed, the grounds are that sections 4(2)(b) and 7 of the Affordable *Housing Act* expose individuals to undue financial burden contrary to the principles of fairness and equity; reduce some employees' net pay below one-third of their wages, contrary to Section 19(3) of the *Employment Act*, 2007, and offend the right to fair labour practices including the right to fair remuneration and therefore amount to a violation of Article 41 of *the Constitution*.
7. The petitioner further averred that the Act places an unfair burden on employees who have already acquired homes and are in the process of paying for their homes, thereby threatening their other social and economic needs. It was therefore the contention of the petitioner that, it is in the public interest for the Court to grant conservatory orders to protect and enforce the rights and fundamental freedoms in the Bill of Rights.

#### **The Application dated 8<sup>th</sup> April 2024 (Petition E181 of 2024)**

8. The Application dated 8<sup>th</sup> April, 2024 is brought under Articles 20, 21, 22, 23[3], 48, 50[1], 159[2] [d], 165, 258 and 259[1] of *the Constitution* of Kenya Rules 3, 4, 8, 10, 11, 13, 15, 18, 19, 23 and 24 of *the Constitution* of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013. The Petitioners seek for the following orders: -
  1. That the Honourable Court be pleased to certify this application as extremely urgent and hear it ex-parte in the first instance and service hereof be dispensed with as its object will be defeated unless it is so certified and heard expeditiously. (spent)
  2. That pending the inter-partes hearing and determination of the application and/or the Petition, the Honourable Court be pleased to issue a conservatory Order suspending Section 2(1) of the Affordable *Housing Act*, 2024, to the extent that it appoints the Commissioner General of the KRA as the collector of the affordable housing levy, and sections 4 and 5 of the Act, which impose the levy.
  3. That pending the inter-partes hearing and determination of the application and/or the Petition, the Honourable Court be pleased to issue a temporary Order of prohibition prohibiting the respondents and the Government of Kenya in general, or its agencies, from continuing to implement or give effect in any way whatsoever or howsoever, to Section 2(1) of the Affordable *Housing Act*, 2024, to the extent that it appoints the Commissioner General of the KRA as the collector of the affordable housing levy, and sections 4 and 5 of the Act, which impose the levy.
  4. That pending the inter-partes hearing and determination of this application and / or the petition, the Honourable court be pleased to issue a temporary order of prohibition prohibiting the Respondents and the Government of Kenya in general, or its agencies, from continuing to implement or give effect in any way whatsoever to section 60 of the Affordable *Housing Act*, 2024 to the extent that it attempts to retroactively address issues previously declared unconstitutional by the High Court in *Okoti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others*; *Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties)* (Petition E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated), (2023) KEHC 25872 (KLR), due to the absence of a legal framework.
  5. That this Honourable Court be pleased to certify that the petition raises substantial questions of law to be heard by an uneven number of judges, being not less than three, and forthwith refer the case to Her Ladyship the Chief Justice for the empanelment of the bench of judges



to hear and determine the motions herein pursuant to Article 165(4) of *the Constitution* of Kenya, 2010. (spent)

6. That the Honourable Court be pleased to forthwith place both the application and the petition for inter-partes hearing before Her Ladyship the Chief Justice for priority hearing. (spent)
7. That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.
8. That costs be in the cause.
9. The Application is supported by the grounds on its face, and the Supporting Affidavit sworn by Okiya Omtatah Okoiti dated 8<sup>th</sup> April, 2024.
10. The core averments were that Section 2(1), 4 and 5 of the Act violate Articles 2(2), 10(2) of *the Constitution* to the extent that they appoint Commissioner General of the KRA as the collector of the affordable housing levy; yet the responsibility of the Commissioner General is strictly restricted to the affairs of the KRA; that the Commissioner General cannot fulfil functions donated to another statutory authority; and that the collection of the Levy will be outside the law, exposing the funds to theft since the monies cannot be lawfully kept in any of the existing funds under Article 206 of *the Constitution*, including the consolidated fund.
11. It was also deposed that the Executive arbitrarily set the affordable housing levy at the rate of 1.5% in the quashed Section 84 of the Finance Act, 2023 without any study being commissioned to justify that rate or show the costs for operating the fund. The petitioners further averred that monies cannot be lawfully collected from the public before the Affordable Housing Fund is fully operational and without an expenditure line garnered by way of approval of estimates of revenue and expenditure of the Fund by the Board under Section 17(2)(j) of the Act.
12. Also, it was contended that the national government cannot legally collect funds before critical institutions established under the Act, such as the Fund's Board, are operationalised. The petitioners impugned this arrangement as being contrary to Article 10 on the principles of governance, Article 47(1) on fair administrative action, Article 201 on principles of public finance, and Article 232 on principles of public service.
13. In addition, the petitioners took issue with Section 60 of the Act which provides that payments, actions, commitments, and projects related to affordable housing, previously initiated without a valid legal basis and subsequently declared unconstitutional, will now be considered lawful under the new Act, as if they were constitutional from the beginning. In the petitioners' view, this is an attempt to retroactively address issues previously deemed unconstitutional by the courts due to the absence of a legal framework. The petitioners contend that the provision poses a threat to the principles of legal certainty and fairness as enshrined in *the Constitution* of Kenya, and therefore ought to be contained by way of a conservatory order.
14. The Petitioners pointed out that the issue of the weight of the contracts, commitments, and projects related to affordable housing - previously initiated without a valid legal basis - was dismissed in a ruling dated 26<sup>th</sup> January, 2024 by the Court of Appeal, in *National Assembly & 47 others v Okiiti & 169 others (Civil Application E577, E581, E585 & E596 of 2023)* (Consolidated) (2024) KECA 39 (KLR), where the court declined to stay the judgment and decree of the High Court in Petition



No. HCCHRPET E181 of 2023 (supra), pending the hearing and determination of intended and impending appeals by parties dissatisfied with parts of the High Court decision.

15. The petitioners argued that the Petition is arguable as they have made out a prima facie case with a high chance of success; that the Petition will be rendered nugatory unless the conservatory orders are granted, and that if the orders sought are not granted, their rights and those of other Kenyans will be prejudiced. They added that the respondents would suffer no prejudice if the orders were granted as the balance of convenience favours the granting of the orders sought.

## The Responses

16. In response to both applications, filed in Petitions 173 and in 181 of 2024, the Senate filed Grounds of Opposition dated 11<sup>th</sup> April 2024. It contended that the petitioners had not met the conditions precedent for the grant of conservatory orders as set out in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR; which conditions require one to demonstrate a prima facie case with the likelihood of success; irreparable loss; that the substratum of the petition will be rendered nugatory and that it is in the public interest to grant the said conservatory order.
17. The Senate opposed the grant of conservatory orders on the ground that, if granted, it would violate the right to accessible and adequate housing as guaranteed under Article 43(1)(b) of *the Constitution*. It stated that access to adequate housing upholds national values and principles of governance that guarantee human dignity, social justice, equity, inclusiveness, and equality.
18. The Senate further maintained that the imposition of the housing levy is constitutional, legitimate, and legal per Articles 209 and 210 of *the Constitution*, and is necessary for the government to achieve and meet its obligation of providing accessible and adequate housing to its citizens.
19. The Senate urged the court to not grant the conservatory orders sought as the effect of such an order would amount to the determination of the constitutionality of the Act herein before the Petition can be heard and determined. It was their case that the general principles of law dictate that a statute is presumed valid and consistent with *the Constitution*.
20. The Kenya Revenue Authority also opposed the applications. It filed Grounds of Opposition dated 15<sup>th</sup> April, 2024 contending that the application had failed to consider salient provisions of Section 5 of the *Kenya Revenue Authority Act* that permits their appointment as a collection agent for the Government or any of its agencies.
21. The Kenya Revenue Authority also reiterated that the right to housing has been embedded under Article 43(1)(b) of *the Constitution* as well as various international instruments that Kenya is a signatory to, such as the United Nations Human Rights Declaration, 1948, International Covenant on Economic, Social and Cultural Rights, 1996 and the Istanbul Declaration and Habitat Agenda, 1996.
22. The Kenya Revenue Authority averred that for the court to issue conservatory orders, it must first determine whether the implementation of Sections 3 and 4 of the Affordable *Housing Act* is unconstitutional and contravenes the provisions of Articles 20, 28, 40, 41 and 43 of *the Constitution*, as well as Section 19(3) of the *Employment Act*. It was emphasized, that this question can only be answered at the hearing of the Petition.
23. The Kenya Revenue Authority further contended that the petitioners have not provided any proof before this court to demonstrate that Sections 3 and 4 of the Affordable *Housing Act* are inconsistent with *the Constitution*, or that they go against the provisions pertaining to deductions of wages as provided for under Section 19(3) of *Employment Act*. Thus, it was asserted that to grant the orders sought would work against the public interest.



24. The Attorney General filed a Replying Affidavit dated 11<sup>th</sup> April, 2024 sworn by Charles M. Hinga, the Principal Secretary. He deponed that the Petition violates the doctrines of presumption of constitutionality of statutes, constitutional avoidance, and separation of powers.
25. The deponent also contended that the petitioners stand to suffer no prejudice if conservatory orders are not granted as the impugned sections if eventually found to be unconstitutional, can still be invalidated and declared unconstitutional. Mr. Hinga added that the effect of suspending Section 2(1) would be to suspend the entire Act, because it cannot be implemented without a person or entity to collect the levy.
26. Additionally, it was averred that the Affordable *Housing Act* is a separate legislation that has followed the conditions set by the High Court in *Okoti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others {Interested Parties}* (Petition E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated), (2023)KEHC 25872 (KLR) to ensure compliance with *the Constitution* and rule of law in accordance with the decision of the Honourable Court. He pointed out that, the Act has established the requisite legal framework for the collection of the affordable housing levy and the implementation thereof.
27. On their part, the National Housing Corporation filed Grounds of Opposition dated 11<sup>th</sup> April, 2024 as well as a Replying Affidavit sworn on 27<sup>th</sup> May 2024 by David Mathu Njuguna, the Managing Director/Chief Executive Officer.
28. It was the Corporation's case that they have been a significant contributor to the country's achievement of its objective of providing decent housing as required under Article 43(1)(b) of *the Constitution*. The Corporation indicated that it operates as a commercial entity that is distinct from the government, even though it performs a complementary role in the provision of affordable housing.
29. The Corporation reiterated that the applications for temporary orders have not complied with the prerequisites set in *Gatirau* (supra) as the Affordable *Housing Act* enjoys the presumption of constitutionality until otherwise proved before the court. The Corporation is convinced that the petitioners have not discharged their burden of proving that the Act impugned Act goes against the constitutional principles.
30. In response to the petitioners' assertion that the Act attempts to retroactively address issues that had previously been declared unconstitutional, the Corporation averred that it appears the petitioners are intent on raising similar issues that have already been determined in *Okoti & 6 others* (supra). The court was consequently urged to dismiss the applications with costs to the respondents.
31. The Trade Union Congress of Kenya filed a Supplementary Affidavit sworn on 5<sup>th</sup> June, 2024 by Dr. Charles Mukhwaya. The averments therein are a regurgitation of the main point raised in their application, namely, that the continued collection of the housing levy pending the hearing and determination of the Petition is a violation of the rights of Kenyan workers as enshrined in the Bill of Rights.

### **Analysis and Determination**

32. The Court has considered the applications, responses and submissions by parties; and the issues for determination that arise therefrom are:
  - (a) Whether the Applicants have satisfied the conditions for the grant of conservatory orders.
  - (b) Whether or not the applicants are entitled to temporary orders of Prohibition.



- (c) What order should issue on costs of the application.
33. The Applicants have sought conservatory orders to suspend the implementation of Sections 2(1), 3, 4 and 5 of the Affordable *Housing Act*, 2024; and a temporary order of prohibition to stop the implementation of Section 60 of the Affordable *Housing Act* to the extent that it attempts to retroactively address issues that had previously been declared unconstitutional by the High Court in *Okoiti & 6 others* (supra).
34. Under Article 23(3) of *the Constitution*, the High Court has jurisdiction to grant any appropriate relief including a conservatory order in instances of allegations of violation or infringement or threats of violation or infringement of a right or fundamental freedom. The provision states:
- In any proceedings brought under Article 22, a court may grant appropriate relief, including —
- (a) a declaration of rights;
  - (b) an injunction;
  - (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
  - (e) an order for compensation; and (f) an order of judicial review.
35. It is not in dispute that the threshold for the grant of conservatory orders was established in the case of *Gatirau* (supra) where the Supreme Court held: -
- “(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.
- (87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:
- (i) the appeal or intended appeal is arguable and not frivolous; and that



(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.

(89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through *the Constitution*. This Court has already ruled that election petitions are both disputes in personam and disputes in rem. While an election petition manifestly involves the contestants at the poll, the voters always have a stake in the ultimate determination of the dispute, hence the public interest.”

36. It is clear, then, that for a conservatory order to be granted, a party must show that they have an arguable case in which if the orders sought are not granted, the suit would be rendered nugatory. In addition, one must show that it is in the public interest to grant the orders sought.

#### **i. Whether the Petitions are arguable and not frivolous:**

37. The first question for determination is whether the petitioners have demonstrated an arguable case. As pointed out herein above, the respondents’ argument is that the petitioners have not made out a prima facie case because they have not demonstrated that the Affordable *Housing Act* violates *the Constitution*. Their contention is that the Act was enacted in accordance with the requirements set by the High Court in *Okoiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties) (Petition E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated)) [2023] KEHC 25872 (KLR) (Constitutional and Human Rights) (28 November 2023) (Judgment)*.

38. While we bear in mind that the Court cannot at this stage consider the merits of the case closely, we note that the matters at hand question the constitutionality of the Affordable *Housing Act*. The petitioners also raise issues concerning the legality of charging the Housing Levy which, in their view, violate the public’s socio-economic rights, and perpetuate unfair labour practices. In this regard, reliance was placed on Article 41 of *the Constitution*, which states in part that:

- (1) Every person has the right to fair labour practices.
- (2) Every worker has the right—
  - (a) to fair remuneration;
  - (b) to reasonable working conditions;
  - (c) to form, join or participate in the activities and programmes of a trade union; and
  - (d) to go on strike.



39. The applicants also contend that the impugned Act was passed without meeting the requirements of public participation under Article 201 which provides that public participation is one of the principles that guide issues of public finance. The Article states:

The following principles shall guide all aspects of public finance in the Republic—

- (a) there shall be openness and accountability, including public participation in financial matters; (b) the public finance system shall promote an equitable society, and in particular—
  - (i) the burden of taxation shall be shared fairly;
  - (ii) revenue raised nationally shall be shared equitably among national and county governments; and
  - (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;
- (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;
- (d) public money shall be used in a prudent and responsible way; and
- (e) financial management shall be responsible, and fiscal reporting shall be clear.

40. The applicants further challenge the constitutionality of the appointment of the Commissioner General of the KRA as the collector of the affordable housing levy under Section 2(1) of the Affordable [Housing Act](#) as well as the collection of the levy under Sections 3, 4 and 5 of the Act for offending the provisions of *the Constitution*.

41. These are certainly not frivolous contentions and therefore we agree entirely with the findings of the Court, (Hon. Mwita J.) in the ruling of 3<sup>rd</sup> May, 2024 in this matter, in which the question of whether the petitions are arguable, was considered. The Court held: -

“ 63. The consolidated petitions raise important issues, including allegations of violation of constitutional principles and contravention of *the constitution*. There is a further allegation that the impugned Act and its provisions violate the constitutional architecture relating to functions assigned to the two levels of government. The issues raised in the petition are of general national importance and are, therefore, substantial questions of law requiring certification.”

**ii. Whether the suit would be rendered nugatory if the orders are not granted:**

42. Turning to the nugatory aspect, the petitioners submitted that since neither the Affordable Housing Fund nor the Board is in place, the money will be exposed to theft and misappropriation; there being no clarity as to the Collector. In their submission, any further collection of the funds amount to a violation of Article 10(2) of *the Constitution* which provides for principles of national values that include good governance, integrity, transparency and accountability.

43. The petitioners further argued that under Section 11(2) of the Kenya Revenue Act, the responsibilities of the Commissioner General are restricted to the affairs of the Authority; and that as established under



- Section 3 of the Kenya Revenue Act, the Commissioner General is not the Authority which under Section 5 has the mandate to collect and account for revenues. They also contended that the Authority cannot delegate its functions and therefore it is in breach of the law for the Commissioner to collect the levy as provided in the Act.
44. We have also given consideration to the petitioners' argument that housing levy was placed at 1.5% without a study to show how the fund will be operated; and that no money can be collected from the public without an expenditure line and, in particular, a fully functional Affordable Housing Fund established under Section 8 of the Act.
45. We have weighed these arguments against the contentions by the respondents that that the Affordable *Housing Act* enjoys the presumption of constitutionality; that the Act establishes a legal framework for the collection of the levy; that collection of levies is not a novel thing in Kenya - as Kenya has the *Road Maintenance Levy Fund Act*, and *Petroleum Development Fund Act* that all provide for the collector of the levy as the Commissioner General; and that even though the collector has been indicated as the Commissioner General, the money will still be collected by the Kenya Revenue Authority.
46. On this question of the Commissioner General being the collector of the levy, the Ministry of Lands pointed out that in the Okoiti case (Supra) the court had no issue with the Commissioner General being the collector of the levy, but with the fact that the collector was gazetted by the CS, Ministry of Lands, Public Works, Housing and Urban Development, and not the CS, Finance as the levy therein was a tax under Article 209 of *the Constitution*.
47. We have similarly taken into consideration the Petitioners' arguments in connection with Section 60 of the Act. They contended that the provision stipulates that payments, actions, commitments, and projects that were initiated earlier prior to the declaration of unconstitutionality of certain provisions of the Finance Act, 2023 have been legitimized under the new Act and deemed constitutional from the beginning,
48. It is manifest from the foregoing that the contentious issues touch on the constitutionality of the impugned provisions of the Act. This Court recognizes that every Act of Parliament enjoys a general presumption of constitutionality; and therefore the issue as to whether or not the Petitions will be rendered nugatory must be viewed from that prism.
49. In *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR a Three-Judge Bench of this Court held: -
- “ 56. First, this Court is enjoined under Article 259 of *the Constitution* to interpret *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of *the Constitution* to protect and promote the purpose and principles of *the Constitution*.
57. Second, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise (see *Ndyanabo v Attorney General of Tanzania* [2001] EA 495). We therefore reiterate that this Court will start by assuming that the CDF Act 2013 is constitutional and valid unless the contrary is established by the petitioners...”



50. We are further in agreement with the findings of Hon. Ibrahim J. (as he then was) in *Kizito Mark Ngaywa v. Minister of State for Internal Security and Provincial Administration & Another* [2011] eKLR, in which the learned Judge took the following view: -

“I have considered the application for adjournment and that for temporary suspension of the regulations and the submissions by Counsel. When considering the matter, I recalled my decision in Petition No. 669 of 2009, *Mombasa Bishop Joseph Kimani & Others – v- Attorney General, Committee of Experts and Another* which I delivered on 6-10-2010. In the said case I was guided by the decisions of the Constitutional Court in Tanzania in *Ndyanabo –v- Attorney General* (2001) 2 EA 485 in which the said court presided over by the Hon. Chief Justice Samatta stated as follows: -

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

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

I am still persuaded by the above-mentioned principles of Constitutional interpretation. In the *Bishop Joseph Kimani* case, the court observed as follows: -

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

It is my view that the principle of presumption of Constitutionality of Legislation is imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law.

51. This principle was adopted by the Court of Appeal in its recent decision in *National Assembly (Supra)*, when faced with an application to issue conservatory orders to suspend Sections 30 to 38 of the Finance Act, 2023 pending the hearing and determination of the Appeal, as follows: -

“67. A reading of the said prayer leaves us with no doubt that the applicants are essentially inviting this court to suspend the operation of sections of the law on an application without hearing the appeal on merits. In principle, there is a general presumption that statutes enacted by parliament are constitutional, until the contrary is proved. Such a drastic order cannot be issued on an application. No court of law properly directing its mind to the law can grant such an order.



68. In summation, applying the general presumption that a statute is constitutional until declared unconstitutional, we find that the applicants have not demonstrated how the intended appeal which will determine whether the court's determination on the said sections will stand or not will be rendered nugatory..."

52. The import of the above precedents is clear, namely, that in matters involving the constitutionality or otherwise of statutes, the Court should be slow to grant conservatory orders unless the applicant shows a real risk of infringement of a fundamental right, or real danger to life or limb.
53. It is our finding, therefore, that, in this instance, the petitioners have failed to demonstrate either that the impugned provisions of the Act pose a danger to life or limb or threaten the bill of rights to warrant the issuance of conservatory order. It has further not been demonstrated that the collection of the Housing Levy is irreversible. Taking into consideration the above case law and the divergent positions of the parties on the nugatory aspect, we are not persuaded the Petitions will be rendered nugatory if the conservatory orders are not granted.

### **iii. Whether it is in the public interest that the orders be granted:**

54. The place of public interest in our constitutional order was defined in Republic v. County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya (2014) eKLR as follows:

“Public interest must conform to *the constitution* and the law as the rule of law is one of the national values of *the constitution* under Article 10 of *the Constitution*. There can never be public interest in breach of the law.”

55. It is indisputable that the Affordable Housing Levy is a matter that has generated a lot of public interest. On the one hand, the petitioners argued that if the orders sought are not granted, their rights and those of other Kenyans will be prejudiced; and that, in any event, the respondents will suffer no prejudice if the orders sought by them are granted. They also contended that the balance of convenience favours the granting of the orders sought.
56. On the other hand, the respondents urged that allowing the applications herein would work against the public interest. Their case was that reversing the effects of the conservatory orders may prove to be challenging, granted the fact that contracts have been signed by the Government and some of the infrastructure projects initiated.
57. It was also the contention of the respondents that if the Act is eventually found to be unconstitutional, refunds and rebates can be effected to the public. In their view the opposite is not possible in the event the Act is found to be constitutional. They posited that the Government would have lost millions of taxes and the opportunity to provide affordable housing to Kenyans.
58. Having considered these divergent positions, and having satisfied ourselves that the impugned statute enjoys the presumption of constitutionality until proved otherwise at the inter partes stage, we are convinced that public interest tilts in favor of not granting the conservatory orders as sought. We are mindful of the unique circumstances presented by the parties, and the need to balance the competing dimensions of what amounts to public interest.
59. In the result, it is our finding that the applicants have not made out a case to warrant the issuance of conservatory orders as sought.



60. Based on our analysis on the 1<sup>st</sup> issue, it is this court’s finding that an order for temporary prohibition as sought is likewise not warranted.

**Disposition**

61.

- (a) It is ordered that the Applications dated 2<sup>nd</sup> April 2024 and 8<sup>th</sup> April 2024 be and are hereby dismissed for want of merit.
- (b) We direct that the matter be prioritized for hearing during the term.
- (c) Costs be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF JULY 2024.**

.....

**OLGA SEWE**  
**JUDGE**

.....

**JOHN CHIGITI**  
**JUDGE**

.....

**JOSEPHINE MONG’ARE**  
**JUDGE**

