



**Law Society of Kenya v National Assembly & 3 others (Petition E050 of 2023)
[2023] KEHC 17266 (KLR) (Constitutional and Human Rights) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17266 (KLR)

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

PETITION E050 OF 2023

HI ONG'UDI, J

MAY 12, 2023

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

THE NATIONAL ASSEMBLY 1ST RESPONDENT

**THE COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY 2ND
RESPONDENT**

**CABINET SECRETARY NATIONAL TREASURY AND ECONOMIC
PLANNING 3RD RESPONDENT**

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. By way of a Notice of Motion dated 27th March 2023 filed pursuant to Articles 19, 20, 22, 23 and 159 (2)(d) of *the Constitution* and Rule 19, 23 and 24 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedom Practice and Procedure Rules)*, 2013, the petitioner seeks the following orders that:

(i), (ii) & (iii) Spent.

- iv. Pending the hearing and determination of the amended petition inter partes, a conservatory order be issued restraining the 2nd respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of Regulation 5 of The *Excise Duty (Excisable Goods Management System) (Amendment) Regulations*, 2023.



- v. The Costs of this application be provided for.

The Petitioner's case

2. The application was supported by the grounds it's the face, the the supporting affidavit sworn on 27th March 2023 and a further affidavit dated 18th April 2023 both sworn by the petitioner's Chief Executive Officer Florence Muturi. The petitioner is challenging the constitutionality of the *Excise Duty (Excisable Goods Management System) (Amendment) Regulations*, 2023 which were gazetted vide Legal Notice No. 30 of 2023. Their main ground being that the Regulations' enactment did not comply with the mandatory provisions of *the Constitution*.
3. It was deposed that the Regulations were procedurally improper for lack of public participation. It was noted that following the gazettelement of the Legal Notice, no change had been effected in the content owing to the alleged public participation. Likewise that the Regulations had flouted the provisions in the *Statutory Instruments Act*, 2013 to wit, no regulatory Impact Statement was prepared by the 3rd respondent prior to their enactment.
4. It was further deposed that the Regulations were substantively improper since they seek to increase the price of the excise stamps which is a threat to the survival of manufacturing businesses engaged in the sale and distribution of consumable products. She dubbed as a tax burden to the manufacturers and tax payers.
5. She deposed that Regulation 5 of the 2017 Regulations informs that the purpose of issuing excise stamps is for tax administration as opposed to revenue collection. In view of this she averred that the 2nd respondent was arbitrarily imposing the excise stamp fees as a means of revenue collection contrary to the provisions of Article 201 (1) (b) of *the Constitution*. Further that there had been no capability enhancements on the tax stamps to justify any increases in prices.
6. Consequently, she deposed that the impugned adjusted tax rates threaten the sanctity of the right to life as well as the right to human dignity as enshrined under Article 26, 28 and 43 of *the Constitution*. She prayed for conservatory orders to be granted to protect majority of the manufacturers and distributors of consumable excisable goods and consumers.
7. In the further affidavit, it was deposed that the Gazette Notice dated 14th April 2023 showed that the impugned Regulations were issued subject to a special issue of Legislative Supplement No.12 pursuant to Kenya Gazette Supplement No. 33 dated 21st March 2023. She deposed that there was no such issue published in the Kenya Gazette Special Issue of 21st March 2023. It was further deposed that the Regulations were currently being enforced by the 2nd respondent despite being a violation of *the Constitution* and Section 11(4) of the *Statutory Instruments Act* which requires a statutory instrument be laid before the National Assembly within seven days of its publication. This was despite the 1st respondent in its affidavit stating that the legislative process was yet to be concluded.
8. She deposed that the 2nd respondent had already sent out email communication to the manufacturers of consumable excisable goods notifying them that the Regulations were in effect from 31st March 2023 in spite of the same being gazetted on 14th April 2023. She as a result urged this Court to protect the public from the impunity with which the Regulations have been enforced.



The 1st Respondent case

9. The 1st respondent opposed the application by filing its grounds of opposition dated 12th April 2023, which I summarize as follows:
- i. That there was no urgency in the application as it had been filed prematurely.
 - ii. The orders sought were of a final nature.
 - iii. That the prayers sought have already been addressed by this Honourable Court in its ruling delivered with respect to the Notice of Motion application dated 21st March 2023.
 - iv. That the petitioner has failed to demonstrate the manner in which the respondents have violated the principles of taxation as outlined within *the Constitution*. Further that the allegations did meet the specificity test. That no violation of *the Constitution* and the law had been exhibited.
 - v. That the petition herein is seeking to illegitimately interfere with the exclusive mandate of the respondents with regard to, the passing of Regulations with regard to the implementation, administration, application and enforcement of regulations under the *Excise Duty Act*.
 - vi. That the petitioner has failed to meet the conditions precedent for the grant of conservatory orders in the application herein. (See: *Peter Gatirau Munya v Dickson Mwenda Kitbinji & 2 others* [2014]eKLR. The petitioner has failed to demonstrate any imminent danger of violation of their rights requiring the immediate intervention of the court at this stage. (See: *Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 others* [2014] eKLR).
 - vii. That the orders sought in the application fly in the face of public interest and this honourable court ought therefore to dismiss the application and petition herein.

The 2nd Respondent's case

10. The 2nd respondent in response to the application also filed grounds of opposition dated 6th April 2023 which I summarize as follows:
- i. The 2nd respondent is authorized under the *Kenya Revenue Authority Act*, 1995 to administer Revenue Acts of Parliament and Regulations listed under the First Schedule to the *Kenya Revenue Authority Act*, 1995 which includes the *Excise Duty Act*, 2015.
 - ii. The Cabinet Secretary in charge of National Secretary and Economic Planning is empowered under Section 45 of the *Excise Duty Act*, 2015 to make Regulations prescribing any fee or charge to be levied on excisable goods imported into or manufactured in Kenya.
 - iii. The 2nd respondent complied with the law and Regulations set out above and under sections 5 and 9(i) & 22 of the *Statutory Instruments Act*, Article 10



& 201(a) of *the Constitution*, while preparing the draft and issuing the public notice dated 17th January 2023. There was public participation.

- iv. That the Courts have restrained from interfering with the executive process and only come in when it is demonstrated that an important element was missed or ignored during the process. See: *Free Kenya & 6 others v Independent Electoral and Boundaries Commission 74 others, Kenya National Commission on Human Rights (Interested party)* [2022]eKLR).
- v. The application is juridically incompetent based on the constitutional principle of separation of powers among the various arms of government, is bad in law and amounts to an abuse of the Court's process.

The 3rd & 4th Respondent's case

11. The 3rd & 4th respondents did not file any response to the petitioner's application but supported the 1st and 2nd respondent's responses.

The Parties' submission

The Petitioner's submissions

12. The petitioner through its advocates, Okwach and Company Advocates filed written submissions and a case digest with a list of authorities dated 21st April 2023. Counsel submitted while relying on the cases of *Speedex Logistics Limited & 2 others v Director of Criminal Investigations & 3 others* [2018] eKLR and *Tom Odhiambo Ojienda v Kenya Revenue Authority & another* [2018] eKLR that grant of conservatory orders does not amount to a determination of the final petition as proposed by the respondents.
13. Counsel similarly relying on the well settled principles in the cases of *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR; *Hugh Glenister v President of the Republic of South Africa & others Case CCT 41/08*; [2008] ZACC 19 at para 33, Ngcobo, J in *Doctors for Life International v Speaker of the National Assembly and others (CCT12/05)* [2006] ZACC 11 and *Speaker of National Assembly v Attorney General and 3 others* [2013] eKLR rebutted the respondents argument that this Court lacks jurisdiction owing to the doctrine of separation of powers.
14. Examining the principles that must be satisfied before grant of conservatory orders, counsel submitted that the petitioner had fulfilled the requisite conditions to showing it has an arguable case. He submitted that the impugned Legal Notice No.30 of 2023 was unlawful as it was implemented without following the legislative procedure contrary to Article 10 and 118 of *the Constitution* as read with Section 5, 6, 8 and 11 of the Statutory Instrument Act that require meaningful public participation.
15. He further questioned why the 1st respondent had submitted that the legislative process was still ongoing yet the Regulations were already in effect as averred by the 2nd respondent. He asserted that this was a clear indication of violation of the law. In support reliance was placed on the case of *Centre for Rights and Awareness (CREAW) & 7 others v Attorney General, Nairobi High Court Petition No 16 of 2011* where it was held that the threshold of a prima facie case is to show that the case is arguable, not frivolous and that it is arguable with a likelihood of success. Additional reliance was placed on the case of *Sammy Ndung'u & 5 others v Governor, Laikipia County* [2016] eKLR.



16. On whether the petitioner would be prejudiced, if the orders are not granted, counsel submitted that manufacturers, distributors and consumers of excisable goods would be greatly prejudiced if the conservatory orders are not granted for the reason that there would be no refund accorded to them or to the end consumers. On the flipside, it was stated that no prejudice was demonstrated to be suffered by the respondents if the orders are issued.
17. Counsel in addition submitted that the matter was one of public interest since it was clear that in the end the consumer would be forced to bear this burden due to the transferred costs to the consumers. Relying on the case of *Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party)* [2020] eKLR, he submitted that since the new fees were already in force, the petitioner had moved to court to prevent further implementation of the impugned rates.
18. On the issue whether the substratum of the petition would be rendered nugatory, counsel submitted that in view of the manufacturers and the public, in the event the reliefs were not granted and the petition decided in the petitioner's favor, there would be no way of recovering the fees. This is because a refund would be impossible especially in the case of consumers who cannot be traced and the manufacturers would have lost their share of the market.
19. Counsel in the same way urged the court to take note of the notoriety of the 2nd respondent when it comes to issuing refunds as seen in the cases of *Ericsson Kenya Limited v Attorney General & 3 others* [2014] eKLR, *Isaiyah Luyaro Odando v KRA & others* [2022] eKLR.

The 1st Respondent's submissions

20. Counsel, Michelle Omuom on behalf of the 1st respondent filed written submissions dated 26th April 2023. While citing the case of *Okiya Omtatab Okoiti v Attorney General & 5 others* [2020] eKLR she urged the Court to be careful not to make final findings on the matter since all the parties must still have the ability and flexibility to prosecute their cases.
21. She went on to submit that the application was filed at a time when the impugned *Excise Duty (Excisable Goods Management System) (Amendment) Regulations, 2023* were still under consideration in the legislative process. It was noted that gazettelement of the Regulations was the stage before consideration by the Parliament.
22. In view of this, counsel opposed the application as being premature and an encroachment on the legislative mandate as protected by the doctrine of separation of powers. In effect she stated that owing to this doctrine, this Court ought to down its tools. In support reliance was placed on the Supreme Court case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition Nos. 14A, 14B & 14C of 2014)* [2014] eKLR where it was held that Courts should frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies. Similar reliance was placed on the case of *Ndoria Stephen v Minister for Education & 2 others* [2015] eKLR. Counsel correspondingly argued that the application at this juncture, invoked the political question doctrine as discussed in the case of *Kiriro wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR.
23. On consideration as to whether conservatory orders ought to be granted in this matter, counsel urged the court to be guided by the well settled principles as seen in the Supreme Court case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR where it was held that 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. Also see: *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae)* [2019] eKLR.

The 2nd Respondent's submissions

24. The 2nd respondent through its Counsel, Andambi Chabala filed written submissions dated 25th April 2023. Counsel submitted that the impugned Regulations were enacted in accordance with *the Constitution* and the law, and the court ought not to intervene in the case. He relied on Court of Appeal decision in *Pevans East Africa Limited & another v Chairman, Betting Control and Licensing Board & 7 others* [2018] eKLR.
25. On whether the petitioner ought to be granted the conservatory orders, counsel submitted that the petitioner had not demonstrated a prima facie case with the chance of success. Alluding to the petitioner's argument that the impugned Regulations were not tabled before Parliament, he submitted that vide a letter dated 14th April 2023, the Cabinet Secretary, National Treasury transmitted a copy of the statutory instrument to the Clerk for tabling before the National Assembly. It was asserted that this was done within the 7 sitting days after the publication of the statutory instrument.
26. On whether the petitioner will be prejudiced, counsel submitted that the petitioner had not demonstrated prejudice to the required threshold to warrant grant of the orders. Nevertheless, it was noted that even if there was, the same ought to be weighed against the prejudice likely to be occasioned to the wider industry players and their consumers for lack of proper funding to support administration of excise industry. He urged the court to decline granting the orders.
27. On whether the petition would be rendered nugatory, Counsel submitted that if the orders are granted the petition would indeed be rendered nugatory. The reason being that whatever projected fee to be collected would remain uncollected without the possibility of ever collecting the same should the petition fail. If on the other hand the petition succeeds, the 2nd respondent was able to remedy the manufacturers by applying the extra cost already paid towards the future stamps. In conclusion Counsel submitted that the application does not disclose any reasonable cause of action and so ought to be dismissed.

Analysis and Determination

28. Having carefully considered the parties pleadings, submissions, cited cases and the Law, it is important to state that the instant application mainly seeks to have the status quo maintained pending the hearing of the petition. As I consider this application I am conscious of the fact that this determination does not require the court to enter into the merits of the petition but simply make a finding on whether the set principles for grant of conservatory Orders have been satisfied. I therefore find that the issues falling for determination are:
 - i. Whether this court has jurisdiction to entertain the application.
 - ii. Whether the conservatory orders sought should be granted pending the hearing of the petition.

Whether this Court has jurisdiction to entertain the application

29. The jurisdiction of this Court to entertain the instant application was challenged by the respondents, who argued that the nature of orders sought by the petitioner, violates the doctrine of separation of powers.



30. It has been established that jurisdiction is everything, without it, a court has no power to make one more step. (See: *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR). Unmistakably in each matter where the issue is raised the court is required to first handle the matter before proceeding.
31. This Court's jurisdiction to entertain matters is found under Article 165 (b) & (d) of *the Constitution*, which provides:
- b. Subject to clause (5), the High Court shall have-
 - d. Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191.
32. In the case of *A.O.O & 6 others v Attorney General & another* [2017] eKLR the Court held that:
- “Article 165 (3) (d) (i) & (ii) of *the Constitution* vests power to the High Court to hear any question respecting the interpretation of *the Constitution* including the determination of the question whether or not any law is inconsistent with or in contravention of *the constitution* and also the question whether anything said to be done under the authority of *the constitution* or of any law is inconsistent with, or in contravention of, *the constitution*. An unconstitutional statute is not law; and more important judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of statutes. The judiciary has a special role in our system with respect to constitutional interpretation. Courts are bound by *the Constitution* and must interpret it when a dispute so requires.”
33. Expounding on the mandate of the different arms of government in view of the doctrine of separation of powers, the Constitutional Court in South Africa in the case of *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11 opined as follows:
- “The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle ‘has important consequences for the way in which and the institutions by which power can be exercised’.
- But under our constitutional democracy, *the Constitution* is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its



legislative authority, Parliament ‘must act in accordance with, and within the limits of, the Constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled’. Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfil their constitutional obligations...”

34. It goes without saying that this Court has a duty to uphold the values and principles of the Constitution. The role of the Court in this petition is not interference with the mandate of the 1st respondent. Its role is to ascertain as the guardian of the Constitution that its dictates are upheld and adhered to. This mandate is instinctively distinct from the legislative role. I find that this court has jurisdiction to entertain this application as it is clear from the Article 165(3)(d) that the court has jurisdiction to inquire into the legality of any act done or said to be done pursuant to the Constitution.

Whether the conservatory orders sought should be granted pending the hearing of the petition

35. The petitioner herein argues that the *Excise Duty (Excisable Goods Management System) (Amendment) Regulations, 2023* have been enacted in violation of the Constitution principle of public participation and statutory requirements under the *Statutory Instruments Act, 2013*. The petitioner is aggrieved since the impugned Regulations which are allegedly in force, are in breach of the dictates of the law. In light of this the petitioner submitted that grant of conservatory orders was imperative to maintain the status quo pending interrogation of the legality of the Regulations by this court.
36. The respondents on the other hand argued that they had so far adhered to the legal principles of making the Regulations. The 1st respondent dubbed the application as premature since the Regulations were yet to be tabled before Parliament. On the flipside, the 2nd respondent argued that the orders sought would restrain it from implementing and enforcing the Regulations which were sent to Parliament vide a letter dated 14th April 2023.
37. The guiding principles upon which courts make findings on issuance of conservatory orders are well settled with numerous authorities pronouncing their minds on the subject. The Court in the case of *Law Society of Kenya (supra)* summarized the threshold for grant of conservatory orders as follows:

- “24. From various authorities of the Courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following:-
- a. First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
 - b. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
 - c. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - d. The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.”



38. The Supreme Court while addressing its mind on the issue in the case of *Gatirau Peter Munya* (*supra*) gave guidance as follows:

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

Also see: (i) *Mwaniki Gabuba & 10 others v County Government of Embu & 2 others* [2021] eKLR (ii) *Centre for Rights, Education & Awareness* (*supra*).

39. The legal issues raised herein revolve around the legality of the legislative process adopted by the respondents in enactment of the *Excise Duty (Excisable Goods Management System) (Amendment) Regulations*, 2023. The petitioner argued that there was no adequate public participation and further challenged the legal validity of the Gazette Notices (Special Issue – Legislative Supplement No.12).
40. Additionally the petitioner decried the upward increase of the price of the excise stamps. This was stated not only to ran afoul Article 201 of *the Constitution* but also the fundamental rights under Articles 26, 28 and 43 of *the Constitution*. The petitioner urged the Court to take note of this burdensome imposition of taxes which is a threat to the survival of the manufacturing businesses engaged in the sale and distribution of consumable products and the public.
41. The respondents’ generally asserted that the petitioner had failed to establish a case for grant of the orders at this stage. They denied breaching *the Constitution* and the law. Moreover, that the question on increase of the price of the excise stamps was invoking the political question doctrine. It is reasonable to infer for all intents and purposes that this application discloses a prima facie case due to the raised issues of legality of the impugned Regulations. Equally, the application highlights a threat to fundamental rights and freedoms as envisaged in *the Constitution*. Plainly these issues require further examination at the hearing of the petition so that this court may arrive at a definitive finding.
42. Turning over to the second principle, I observe from the 1st and 2nd respondents’ responses that there exist two positions. While the 1st respondent maintains that the legislative process is still ongoing, the 2nd respondent asserts that the legislative process is complete. This in turn would mean that the impugned Regulations are in force. This is in the face of the challenge to their legality and threat to violation of the constitutional rights of the manufacturers and the public. Why would there be a different position on this between the 1st & 2nd respondents unless there is something being hidden from the court?
43. In my view, the petitioner is not only likely to suffer prejudice as a result in the event that the Regulations are not legally compliant but also have their constitutional rights infringed. In the same way, there is a chance that hearing of the petition and achieving its purpose will be rendered nugatory in that regard. This because the very threat the petition seeks to protect against will continue to persist unless the status quo is maintained awaiting the determination of the petition. I find that the petitioner has satisfied the second principle.



44. Lastly, the Supreme Court in its wisdom in the case of Gatirau Peter Munya (supra) observed that the grant of conservatory orders have a public interest connotation. In my understanding, the court has a duty to balance the interests of the petitioner and the respondents. The petitioner seeks to stop what it deems a procedurally improper legislative process whereas the respondents are mandated to enact statutory instruments in line with the law.
45. The principle of public interest as established by the Supreme Court exhibits a unique aspect to consider in grant of conservatory orders which is, the court should avoid adopting a construction which is adverse to public interest. In doing so however the Court in *Anne Mumbi Waiguru v County Assembly of Kirinyaga* [2020] eKLR cautioned as follows:
- “38...the deployment of conservatory orders in the exercise of supervisory jurisdiction by the High Court over the other arms of government should be done with utmost restraint and only where overt violation of *the Constitution* and the law has been shown. Otherwise, constitutional organs that are carrying out their lawful functions should be left alone....The state has its rights too...The critical factor in cases of this kind is the exercise of the discretion of the judge who must “hold the scales of justice evenly not only between man and man but also between man and state.”
46. From the facts and submissions before this court, I take note of the fact that the respondents as State organs are required to carry out their mandate in compliance with *the Constitution* and the set statutory laws. Exercise of this mandate contrary to the law, not only prejudices the petitioner but the public at large. In this matter, I am persuaded that the public interest outweighs the respondents mandate and tilts in favour of the petitioner.
47. Bearing the above discussion in mind, I am satisfied that the principles for grant of the conservatory orders sought in this matter have been satisfied and grant of the orders will aid in meeting the ends of justice.
48. The upshot is that the Notice of Motion application dated 27th March 2023 has merit and is accordingly allowed, in terms of prayer no.(iv). Costs shall be in the cause. The parties are urged to fast track this matter which must be heard within the shortest time possible. Directions to be taken thereafter.

Delivered virtually, dated and signed this 12th day of May 2023 in open Court at Milimani, Nairobi.

H. I. Ong’udi

Judge of the High Court

