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 of 2023) [2023] KEHC 25656 (KLR) (Constitutional and Human Rights) (10 July 2023) (Ruling)

Neutral citation: [2023] KEHC 25656 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E181 OF 2023

M THANDE, J

JULY 10, 2023

BETWEEN

OKIYA OMTATAH OKOITI ..... 1ST PETITIONER

ELIUD KARANJA MATINDI ..... 2ND PETITIONER

MICHAEL KOJO OTIENO ..... 3RD PETITIONER

BENSON ODIWUOR OTIENO ..... 4TH PETITIONER

BLAIR ANGIMA OIGORO ..... 5TH PETITIONER

VICTOR OKUNA ..... 6TH PETITIONER

FLORENCE KANYUA LICHORO ..... 7TH PETITIONER

AND

THE CABINET SECRETARY FOR THE NATIONAL TREASURY AND PLANNING ..... 1ST RESPONDENT

THE HON ATTORNEY GENERAL ..... 2ND RESPONDENT

THE NATIONAL ASSEMBLY ..... 3RD RESPONDENT

THE SPEAKER NATIONAL ASSEMBLY ..... 4TH RESPONDENT

AND

COMMISSIONER-GENERAL, KENYA REVENUE AUTHORITY INTERESTED PARTY

THE SENATE ..... INTERESTED PARTY

CONSUMERS FEDERATION OF KENYA (COFEK) ..... INTERESTED PARTY

KENYA EXPORT FLORICULTURE, HORTICULTURE, AND ALLIED WORKERS UNION ..... INTERESTED PARTY

RULING

1. This Court is tasked to determine three Applications. The first Application is dated 29.6.23 and filed by the Petitioners, brought pursuant to Articles 20, 22, 50(1), 23(2), 159(2) (d), 165, and 258 of the *Constitution* of Kenya 2010 and Rules 19 and 24 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013). The Petitioners seek the following orders:

    1. Spent.

    2. That pending the hearing and determination of the application and/or the Petition, the Honourable Court be pleased to issue a conservatory order suspending the *Finance Act*, 2023.

    3. That pending the hearing and determination of the application and/or the Petition, the Honourable Court be pleased to issue an interim order of prohibition prohibiting the Respondents and interested parties or their agents howsoever acting from giving effect to the *Finance Act*, 2023.

    4. That pending the hearing and determination of the application and/or the Petition, the Honourable Court be pleased to issue conservatory orders suspending the scheduled coming into force of the following provisions of the *Finance Act*, 2023:

        a. Sections 18, 21, 23, 24, 26, 32, 34, 38, 44, 47, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 of the Act, which were not in the Bill but were introduced on the floor of the National Assembly.

        b. Sections 2(a) & (c); 5(a) & (b); 17(a); 21(b) & (c); 25(a); (b)(iii) & (c); 26(a), (b)(v), (vii), (viii), & (ix); 30; 37(a) & (b); 38(a); 45; 47(b)(ix) & (c); 75; 76; 77 & 78; 79; 80; 81; 82; 83; 84; 85; 86; 88; 89; 90; 91; 92; 93; 94; 95; 96; 97; 98; 99; 100; 101; and 102 of the Act which required but did not get the input of the Senate.

    5. That pending the hearing and determination of the application and/or the Petition, the Honourable Court be pleased to issue an interim order of prohibition prohibiting the Respondents and interested parties or their agents howsoever acting from giving effect to the following provisions of the Finance Act, 2023:

        a. Sections 18, 21, 23, 24, 26, 32, 34, 38, 44, 47, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 of the Act, which were not in the Bill but were introduced on the floor of the National Assembly.

        b. Sections 2(a) & (c); 5(a) & (b); 17(a); 21(b) & (c); 25(a); (b)(iii) & (c); 26(a), (b)(v), (vii), (viii), & (ix); 30; 37(a) & (b); 38(a); 45; 47(b)(ix) & (c); 75; 76; 77 & 78; 79; 80; 81; 82; 83; 84; 85; 86; 88;

89; 90; 91; 92; 93; 94; 95; 96; 97; 98; 99; 100; 101; and 102 of the Act which required but did not get the input of the Senate.

6. This Honourable Court be pleased to certify that the petition raises substantial questions of law and forthwith refer the case to Her Ladyship the Chief Justice for the empanelment of a bench of an uneven number of judges, being not less than three, pursuant to Article 165(4) of the *Constitution* of Kenya, 2010.

7. The Honourable Court be pleased to forthwith place both the Petition for interpartes hearing before Her Ladyship the Chief Justice for priority hearing.

8. 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.

9. Costs be in the cause.

2. The Application is premised on the grounds on the face of it and on the verifying affidavit by Okiya Omtatah Okoiti sworn on even date. The grounds are, that;

i. On 26th June 2023, His Excellency the President of Kenya assented to the Finance Bill 2023(the Bill), and the resultant Finance Act 2023 (the Act) was to come into operation or deemed to have come into operation on 1st July 2023 save for sections 10, 26(b) (xiii), 52, 56, 63, 64 and 74 which are to come into effect on 1st September 2023 and sections 5(c), 6, 12, 14, 20, 25, 26(a), 26(b) (iii), 26 (b) (v), 26 (b) (vii), 26(b) (ix), 26(b) (x), 26(b) (xii), and 27 which are to come into effect on 1st January 2024.

ii. The Finance Act 2023 is unconstitutional as it was enacted in violation of the *Constitution* and the *Public Finance Management Act* (PFM Act), and due to its contents. It was processed / considered in a manner that violated the express provisions of Article 110(3) of the *Constitution*; it was not subjected to the preliminary but mandatory concurrence of the two speakers of Parliament as required under Article 110(3) of the *Constitution* as evidenced by letter addressed to the Speaker of the National Assembly REF: SSN/SNA/6/VOL.II/045, dated 15th June 2023 by the Speaker of the Senate protesting that his counterpart had not complied with the said constitutional provision and case law. He cited the Supreme Court case of Advisory Opinion No. 2 of 2013; *Speaker of the Senate and another v the Attorney General and another*; the National Assembly Standing Order 121(2) (as amended on 2nd June 2022) and Senate Standing Order 127 (1), (2), (3) & (4).

iii. Sections 2(a) & (c), 5 (a) & (b), 17(a), 21(b) & (c), 25(a), (b) (iii), & (c), 26(a) (b) (v), (vii), (viii), & (ix)(*Income Tax Act* (Cap 470); 30, 37(a) & (b), 38(a) (Value Added Tax, No. 35 of 2013); 45, 47(b) (ix) & (c) (*Excise Duty Act*, No. 23 of 2015); 75 (The Betting, Gaming and Lotteries Act (Cap 131); 76, 77 & 78 (The *Kenya Roads Board Act*, No. 7 of 1999); 79, 80, & 81 (The *Kenya Revenue Authority Act*, No. 2 of 1995); 82 & 83, (The Retirements Benefits Act, 1997); 84, (The *Employment Act*, No. 11 of 2007); 85, 86, (The Alcoholic Drinks act, 2010); 88, 89(The *Statutory Instruments Act*, No. 23 2013); 90-99 (The *Retirement Benefits (Deputy President and Designated State Officers) Act*, 2015; 100 & 101 (The *Special Economic Zones Act*, 2015); and 102 (The *Export Processing Zones Act*, 1990) of the Act were as a result irregularly and unconstitutionally enacted into law without being subjected to consideration by the Senate. He cited the cases of *in Re the Matter of the Interim Independent Electoral Commission*, Sup. Ct. Const. Appl. 2 of 2011 and *Speaker of the National Assembly & another v Senate & 12 others* (Civil Appeal E084 of 2021.

iv. The Finance Bill, 2023 which resulted in the impugned Act, violated Article 114(3) of the *Constitution* as the matters in the said Bill and the subsequent Act went beyond incidental matters in a Finance Bill and the failure to present the Finance Bill 2023 to the Senate violated section 40(3) of the *Public Finance Management Act*, 2012.

v. Sections 18, 21, 23, 24, 26, 32, 34, 38, 44, 47, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 of the Act that were not in the Finance Bill, 2023 were sneaked into the Finance Act, 2023 without being subjected to public participation contrary to Articles 10(2), 118 and 201 of the *Constitution*.

vi. Besides amending the thirteen laws, the Act also amended the four other laws, which were not in the Bill. To wit, The *Retirement Benefits Act*, 1997 (sections 82-83); The *Alcoholic Drinks Control Act*, 2010 (sections 85-86); The *Special Economic Zones Act*, 2015 (sections 100-101); and The Export Processing Zone Act, 1990 (section 102). The consequence is that they were not subjected to public participation hence were voided. He cited the cases of South African *Iron and steel Institute and others v Speaker of the National Assembly and others* [2023] ZACC 18.

vii. The type of housing levy envisaged at section 84 of the Act cannot be included in the Finance Act, as the Act must only contain measures to collect revenue to finance the budget expenditure estimates, yet there are no housing expenditure estimates to be financed by the levy.

viii. The Finance Bill, 2023 and the Appropriation Bill 2023 were assented into law on 26th June 2023 in violation of Article 220(1) of the *Constitution* and section 40(3) of the PFM Act, 2012; there were no revenue estimates in the Appropriation Act as required under Article 220 of the *Constitution* rendering the Finance Act unconstitutional.

ix. The Finance Bill was not presented as provided in section 40(3) of the PFM Act, 2012 by the Cabinet Secretary to Parliament setting out the revenue raising measures for the national Government together with a policy statement expounding on those measures.

x. The Finance Act, 2023 was supposed to have been enacted within 90 days after passing the appropriation Bill, but it was passed concurrently with the estimates.

xi. The constitutional rights of the Petitioners and of other Kenyans will be gravely compromised and violated if the orders prayed for are not granted.

xii. The matter herein meets the objective standard by which the discretion of this Court ought to be exercised judicially to certify the instant petition as raising a substantial question of law. He cited The Supreme Court of India case of *Sir Chunilal v Mehta and sons Ltd. v Century Spinning and Manufacturing Co. Ltd*.

xiii. The Respondents will not be prejudiced if the orders are granted and it is in public interest to grant the orders; the Petitioners have also established a prima facie case warranting the grant of the orders sought.

The 3rd and 4th Respondents' Response

3. The 3rd and 4th Respondents filed replying affidavit sworn on 30.6.23 by Rt. Hon. (Dr.) Moses M. Wetangula, E.G. H., M.P Speaker of the National Assembly. He deposed that annexure OOO.4 of letter dated 15.6.23 from the Speaker of the Senate to the Speaker of the National Assembly was obtained illegally and irregularly from the 2nd interested Party in violation of the said party's right to

privacy under Article 31(d) of the *Constitution* and therefore inadmissible as evidence under Article 50(4) of the *Constitution*. The said letter is also inadmissible as evidence under section 35 of the *Evidence Act*, Cap. 80 Laws of Kenya.

4. The Speaker of the National Assembly averred that the Speakers of the Houses of Parliament jointly resolved that the Finance Bill, 2023 does not affect County Governments as evidenced by letters between them dated, 2.5.23, 3.5.23, 15.6.23, 20.6.23 and 21.6.23. The letter of 15.6.23 (annexure OOO.4) to the Petitioners' verifying affidavit was withdrawn and repudiated. It is therefore of no probative value and inadmissible as evidence. The same should be expunged from the record. He further deposed that the Petitioners misled the court to grant the exparte order by failing to disclose a full account of the correspondence exchanged between the 2 Speakers with regard to the consideration of the Finance Bill. Consequently, this Court should discharge the exparte conservatory orders of 30.6.23. he further stated that the Petitioners failed to disclose their previous applications for conservatory orders dated 31.5.23 and 26.6.23 were not granted and are pending before this Court. According to him, the Finance Act, 2023 aims at yielding additional revenue of Kshs. 211 billion for the Fiscal year 2023/ 24. The 2023 BPS was submitted to Parliament and tabled in the National Assembly on 15.2.23. It was considered and approved by the Budget and Appropriations Committee, after extensive public participation in various counties before its approval by the National Assembly. The 2023 BPS was approved by the National Assembly and formed the basis for the finalization of the 2023/ 2024 budget for the national Government under Section 25(8) of the *Public Finance Management Act*.

5. The Speaker further averred that in accordance with the revenue ceilings approved through the 2023 BPS, the Estimates of Revenue and Expenditure for the Financial year 2023/ 2024 for the Executive, Parliament, and the Judiciary were submitted to the National Assembly on 27.4.23 in accordance with Article 221 of the *Constitution*, The estimates were then submitted to the Budget and Appropriation Committee for consideration and public participation which facilitated extensive public participation on the Estimates before their approval. The National Assembly adopted the Budget and Appropriation Committee's said report and approved estimates of Revenue and Expenditure of the Executive, the Judiciary and Parliament for the Financial Year 2023// 2024. It is against this backdrop that the Division of Revenue Act, 2023 the County Allocation of Revenue Act, 2023, the Appropriation Act, 2023 and the Finance Act, 2023 were conceived, debated and enacted in accordance with the *Constitution*.

6. Concerning the chronology of the enactment of the Finance Act, 2023, he averred that the Bill went through the First Reading on 4.5.23 and thereafter committed to the National Assembly's Departmental Committee on Finance and National Planning for consideration, public participation and reporting to the House pursuant to the provisions of Standing Order 127. At publication the Bill had 84 clauses and sought to amend the *Income Tax act* (Cap 470); the *Value Added Tax Act* (No. 35 of 2013); The *Tax Appeals Tribunal Act* (No. 40 of 2013); the *Excise Duty Act*(No. 23 of 2015); the *Ta Procedures Act* (No. 29 of2015); the *Miscellaneous Fees and Levies Act* (No. 29 of 2016); the *Unclaimed Financial Assets Act* (No. 40 of 2011); the *Statutory Instruments Act* (No. 23 of 2013); the *Betting, Gaming and Lotteries Act* (Cap 131), the *Kenya Roads Board Act*, 1999, the *Kenya Revenue Authority Act* 1995, the *Employment Act*, 2007, and the *Retirement Benefits (Deputy President and Designated State Officers*(Act No. 8 of 2015. Following the placement of the advertisements in the print media on 7th and 8th May, 2023 requesting comments on the Bill from members of the public and relevant stakeholders pursuant to Article 118(1)(b) of the *Constitution* and Standing Order 127(3), the Committee received memoranda from 1,080 stakeholders. In line with the requirements of Article 118 of the *Constitution*, it invited stakeholders vide letters dated 18.5.23 and 26.5.23 for a stakeholder's engagement from 22nd – 29th May 2023 with 133 stakeholders making oral presentations

before the Committee. It further conducted a public hearing on 31.5.23 at the Kenyatta International Conference Centre and held meetings with the National Treasury and the Kenya Revenue Authority. In discharging its mandate therefore, the National Assembly considered all the views received from the public and stakeholders and as a consequence, some amendments were proposed to the Bill as contained in the Committee report.

7. Concerning the provisions of the Finance Bill, 2023, he averred that clauses 2 to 27 proposed to amend the *Income Tax Act*; Clauses 28 to 34 proposed to amend the *Value Added Tax Act*; Clause 30 proposed to amend the Tax Appeal Tribunal Act; Clauses 37 to 43 proposed to amend the *Excise Duty Act*; Clauses 44 to 66 proposed to amend the *Tax Procedures Act*; Clauses 67 to 84 proposed to amend the *Miscellaneous Fees and Levies Act*; Clause 73 proposed to amend the Betting, Gaming and Lotteries Act; Clause 74 proposed to amend the Kenya Road Boards Act, 1999; Clause 75 proposed to amend the *Kenya Revenue Authority Act*, 1995; Clause 76 proposed to amend the *Employment Act* , 2007; Clauses 77 proposed to amend the *Unclaimed Financial Assets Act*; Clause 78 proposed to amend the *Statutory Instruments Act*; Clauses 80-84 proposed to amend the *Retirements Benefits (Deputy President undesignated State Officers) Act* (No. 8 of 2015). He averred that the Finance and National Planning Committee tabled its report on public participation on the Finance Bill, 2023 on the House on 13th June 2023. The Second reading of the Bill was undertaken on 14.6.23 wherein the Finance Bill and report on public participation were debated. On 20th and 21st June, the Finance Bill was considered clause by clause as well as all the proposed amendments to the Bill and was subsequently passed on 21.6.23 with amendments, and assented to by His Excellency the President on 26.6.23. Under Article 210 of the *Constitution*, tax can only be imposed through legislation. Pursuant to the provisions of Articles 95(4) (c),114, 109 (3), 209(1) and 221(1) of the *Constitution*, the Finance Bill was enacted by the National Assembly. Hence it is the policy makers and the legislators who are better placed to do the balancing act of determining whether taxes should be imposed on certain goods and services in order to fund the basic rights like food medicine, shelter and education.

8. According to the Speaker, a majority of the proposals in the Finance Bill 2023 enjoyed the support of members if the National Assembly. Further that by virtue of Article 109 and 110 of the *Constitution*, the law is now established that a Finance Bill, which imposes taxes and contains other revenue raising measures to finance the operations of the national Government, is a Bill not concerning county Governments and is only considered in the National Assembly. He made reference to the cases of *Speaker of the National Assembly & another v Senate & 12 others* (Civil Appeal E084 of 2021) [2021] KECA 282 (KLR) and Civil Appeal 11 of 2018 *Pevans East Africa Limited and Others v Chairman, Betting Control & Licensing Board and Others*. As Speaker, he was satisfied that the entire provisions of the Finance Bill 2023 do not concern county Governments and did not therefore require consideration by the Senate regarding Sections 2(a) & (c), 5(a) & (b) , 17(a) , 21(b)& (c), 25(a) (b) (iii) & (c), 26 (a), (b) (v), (vii), (viii) & (ix), section 25, 26, 30, 37, 38, 45, 59, 75, 77, 84, and 89. Further, that there is nothing unconstitutional for the National Assembly to amend a Bill from initial form because as a Bill goes through debate and public participation, the House co-opts proposed amendments and drops some proposals as it deems fit. Further that while the Petitioners allege that the National Assembly sneaked many provisions into the approved Bill on the floor of the House without subjecting them to public participation, the said allegations are not founded on fact since all the impugned amendments were introduced in accordance with the Standing Orders, informed by submissions from public participation and considered by the House. In this regard, he made reference to Sections 18, 21, 23, 24, 26, 32, 34, 38, 44, 47, 69, 72, 79-81, 82-83, 85-86, 100-101, and 102 of the Finance Act, 2023.

9. Concerning public interest, the Speaker averred that given that the national Government's main source of revenue is taxes, declaring the impugned amendment unconstitutional will impact on the entire budget for the year 2023/2024 and affect the operations of the Government. Further that taxation is

a policy decision within the exclusive mandate of the executive and hence this Court lacks jurisdiction to delve into policy decisions. He urged that the entire pleadings and applications be dismissed with costs to the 3rd and 4th Respondents.

1st Interested Party's Response

10. The 1st Interested Party filed replying affidavit by Josephine Mugure sworn on 4.7.23. She deposed that the Cabinet Secretary for National Treasury and Planning submitted the Finance Bill, 2023 to the 3rd Respondent in accordance with Sections 39A and 40 of the *PFMA*. She further deposed that the Application does not meet the threshold for granting of conservatory orders and that the Petitioners are urging this Court to usurp the legislative role and are advancing a political argument to restore status quo in terms of implementing the Finance Act 2023, whereas all these considerations had been made by the 3rd Respondent before the Finance Bill 2023 was passed. On the threshold for granting conservatory orders, she deposed that for this Court to grant prayers 2 to 5 of the Application, it must first determine the questions whether, there was any procedural impropriety in the enactment of the Finance Act 20232, whether there was public participation before the enactment of the Finance Act 2023, whether the impugned sections were procedurally incorporated in the Finance Act, 2023 and whether the Housing Levy envisaged under the Finance Act 2023 was established in accordance with Article 206(1)(a) of the *Constitution* which can only be determined at the hearing of the Petition.

11. Josephine Mugure further averred that the enactment of the Finance Act 2023 met the mandatory requirements of the *Constitution* and the Standing Orders. The Application therefore raises no justifiable issues to warrant the suspension and therefore incompetent and misconceived both in law and fact. She urged the court not to grant any conservatory orders pending the hearing and determination of the Petition and Application herein. On whether a prima facie case has been established, she stated that the Application was majorly grounded on non-compliance with Article 110(3) of the *Constitution* by the 2 Speakers of Parliament. The Speaker of Senate having expressly stated that there was indeed concurrence, the Petition does not meet the test for a prima facie case. On the presumption of constitutionality, she deposed that the Finance Act and the impugned sections enjoy the presumption of constitutionality as stated by the Court in *Law Society of Kenya v Attorney General & another* [2019] eKLR and such presumption can only be rebutted through the hearing and determination of the Petition. Hence a stay should not be granted at the interlocutory stage. On irreparable damage, she averred that the implementation of the Finance Act 2023 is aimed at collection of Kshs. 211 Billion, above what is provided for in the previous tax Acts that were in force prior to the instant amendment. The public therefore stands to lose Kshs. 578,082,192 for every day the interim orders remain in force and these taxes shall not be recoverable in the event the Court rules in favour of the Respondents.

12. It was further averred that the tax statutes provide for mechanisms by which tax paid in error or overpaid is refunded to the tax payers. Consequently, the Petition shall not be rendered nugatory. In contrast, the 1st Interested Party does not have any way of recovering the taxes due should they not be levied and the Court rules against the Petitioners. Regarding public interest, she deposed that it is in the public interest that the 1st Interested Party should be allowed to continue with the enforcement of the Finance Act, 2023 as properly enacted by the National Assembly and assented to by His Excellency the President. The 1st Interested Party therefore opposes the orders sought on the ground that, they are final in nature and would defeat the 1st Interested Party's interests. The Application having failed to meet the threshold for granting interim orders lacks merit and ought to be dismissed with costs.

2nd Interested Party's Response

13. The 2nd Interested Party filed replying affidavit sworn on 1.7.23 by Rt. Hon. Amason Jeffah Kingi, EGH, Speaker of the Senate. He asserted that he conducted the business of the Senate in accordance with the *Constitution* and the Senate's Standing Orders particularly in relation to the role of dispensing the obligation in Article 110(3) of the *Constitution*. He reiterated the averments of the 3rd and 4th Respondents on compliance with Article 110(3) of the *Constitution* and having concurrence with the Speaker of National Assembly on the issue in question. He further deposed that Sections 10, 26 (b) (xiii), 52, 56, 63, 64 and 74 of the Finance Act will commence on 1.9.24 and Sections 5(c), 6, 12, 14, 20, 25, 26(a), 26(b) (iii), (ix), (x), (xii) and 27 will commence on 1.1.24. Thus, in view of the futuristic commencement dates, this Court ought to set aside the conservatory orders as there is no imminent danger that the impugned provisions will be implemented before the hearing and determination of the application and amended petition. His view is that the Petitioners have not met the conditions precedent for issuance of conservatory orders. Further that the conservatory orders issued on 30.6.23 are greatly against the public interest as the effect of the orders is to suspend the Government's revenue raising measures and therefore bring the Government to a halt. Further, that the Government stands to suffer grave prejudice for the revenue lost in uncollected taxes owing to the suspending of the implementation of the Finance Act, 2023 and thus the Senate will not be able to deliver services its citizens. The said tax is not likely to be recovered and this will occasion a lacuna in the operations or governance structure.

The 4th Interested Party's Response

14. The 4th Interested Party filed grounds of opposition dated 4.7.23. The grounds raised are that the Application does not meet the threshold for grant of conservatory orders under the relevant provisions of the law and rules and procedures of the Court; that the orders sought in the Application shall infringe on the rights of citizens enshrined in the Bill of Rights; that the Application is anchored on political considerations disguised as constitutional violations and public interest; that the Application is not in the greater public interest and is premised on a Petition based on grounds which cannot be ascertained as they are speculative and/or political propaganda and ought to be dismissed.

15. In his replying affidavit sworn 4.7.23, David Benedict Omulama, averred that the Finance Act, 2023 is constitutional, was enacted following due process and does not violate any provisions of the *Constitution* or any law. Further that the Finance Bill 2023 did not require submission to the Senate and or concurrence between the 2 Speakers before introduction to the National Assembly. He deposed that it was not within the capacity of the Petitioners to know what consultations on any Bill goes on between the 2 Speakers and hence without an affidavit from the Speaker of Senate in support of the Petitioners' allegations in paragraph 6, the Petitioners do not have authority to complain on behalf of the Speaker of the Senate on the matter. He further stated that the Supreme Court Advisory No. 2 of 2013, Speaker and another v the Attorney General and another was a good advisory addressing circumstances which are different from the present circumstances and therefore cannot be used as an authority on the present case. Further that all provisions referred to in the table under paragraph 16 were amended only to the extent of taxation which is the mandate of the National Assembly and were not in respect of the functions of the County Governments as alleged. Also, that the authority *in the matter of the Interim Independent Electoral Commission*, Sup Court. appl. 2 of 2011 does not apply to the present application as the amendments effected on the cited provisions without the input of the Senate do not bear a significant impact on the conduct of County Governments which have no role in levying national taxes.

16. It was further deposed that the circumstances around *Speaker of the National Assembly and the Senate & 12 others* (Civil appeal E084 of 2021) are different from the current circumstances which are in respect of taxation by the National Government and the process of enacting Finance Bill which is a preserve of the National Assembly. He denied that the Finance Bill which resulted in the Finance Act, 2023 violates Article 114(3) as all the cited Acts which were amended had only the aspect of taxation, including deleting or including a clause that would contribute to tax and revenue raising for the State. The provisions cited in paragraphs 22, 23 and 24 of the Application were amended in line with the need to raise revenue through taxation and therefore the provisions of Article 114, 10(2), 118 and 201 were not violated. According to him, the law on the housing levy is meant to provide a legal mechanism to collect revenue for purposes of housing programs. Formulation of other regulations and facilitative agencies can follow the enactment of the law and in the meantime, the *Housing Act* is in place and any other budgetary allocations can be achieved through supplementary budgeting. The the Finance Bill 2023 and the Appropriation Bill 2023 were assented into law on 26.6.23 in accordance with the *Constitution*. Suspending of the Finance Act 2023 shall occasion heavy financial losses to the Government by denying it revenue with which to finance services and projects. Further whereas the Respondents shall be prejudiced by the suspension of the Finance Act, the Petitioners shall not be prejudiced in any manner that they may not be compensated if their Petition succeeds. In contract, the Petitioners have not stated how they will pay damages to the 1st Respondent for loss of revenue that is meant to finance the budget. He thus urged the Court to consider the greater public interest and dismiss the application.

The 3rd and 4th Respondents' Application

17. The second Application under consideration is dated 30.6.23 and filed by the 3rd and 4th Respondents seeking:

    1. Spent
    2. Pending the inter partes hearing and determination of this application, this Honourable Court be pleased to stay Order No. 3 of the ex parte Orders made on 30th June, 2023 suspending the entire Finance Act, 2023.
    3. This Honourable Court be pleased to vary and/or set aside in its entirety Order Number 3 of the exparte Orders of this Honourable Court issued on 30th June 2023.
    4. An order be and is hereby issued expunging from the Court record Exhibit "OOO-4" annexed to the Petitioners' Verifying Affidavit in support of the Petitioners' Notice of Motion dated 29th June, 2023.
    5. Costs of this application be borne by the Petitioners.

18. The Application is premised on the grounds on the face of it and on the affidavit sworn on even date. by Rt. Hon. (Dr.) Moses M. Wetangula E.G. H. M.P., Speaker of the National Assembly. He reiterated the contents of his replying affidavit in response to the Petitioners' Application, emphasizing that the Petitioners breached the duty of candor in their ex-parte applications by failing to make a full and frank disclosure of the correspondence exchanged between the Speakers, regarding consideration of the Finance Bill, 2023; that the ex-parte conservatory orders of 30.6.23 suspending the coming into force of the entire Finance Act were obtained through material misrepresentation and deliberate concealment of material facts; that the said Act is a crucial piece of legislation that impacts on the entire budget of a particular year and if interfered with, the operations of Government will be affected; that the urgency

in the matter is that the said ex- parte conservatory orders have suspended immediately, a raft of policy measures aimed at yielding an additional revenue of Kshs. 211 billion for the Fiscal Year 2023/24 which is part of the Kshs. 2.571 trillion projected revenues for the said year; that also suspended are various measures meant to cushion Kenyans against the high cost of living, and various Government programs to rationalize tax policies and fiscal consolidation framework through amendment of statutes. He asserted that the Petitioners do not stand to suffer any prejudice if the said ex-parte conservatory orders are set aside, but that the public stand to suffer irreparable prejudice if the same are not set aside. It is therefore in the interest of fairness and justice that the orders sought be allowed as prayed.

1st and 2nd Respondents' Application

19. The third application for consideration is filed by the 1st and 2nd Respondents and is dated 1.7.23. They seek the following orders:

    1. Spent
    2. This Honourable Court be pleased to discharge, set aside and/ or vary the ex-parte order issued on 30th June 2023 in this matter, ex-parte in the first instance, pending the hearing and determination of the instant application.
    3. Pending the hearing and determination of the present application, the Honourable Court be pleased to stay, ex parte, any further proceedings in this matter save for the hearing and determination of this application.
    4. Pending the earing and determination of this application, the Honourable Court be pleased to stay all other proceedings touching on, related to and/ or otherwise arising from the Finance Bill 2023 and the Finance Act 2023.
    5. Upon hearing of this application, the Honourable Court be pleased to discharge, set aside and/ or vary the ex-parte order issued on 30th June 2023 in this matter pending the hearing and determination of the amended petition.
    6. The ex-parte order issued on 30th June 2023 by Hon. Lady. Justice Thande in Petition No. E181 of 2023 be and is hereby discharged and set aside.
    7. Costs of this application be borne by the 1st to 7th Petitioners/ Respondents
    8. Any other order or relief that the Honourable Court deems just, fair and expedient.

20. The application is premised on the grounds on the face of it and on the affidavit sworn on even date by Prof. Njuguna S. Ndungu, the 1st Respondent. The grounds are, that the ex-parte orders issued on 30.6.23 have occasioned a miscarriage of justice; that unless the said orders are set aside or varied, the Respondents will be greatly prejudiced and functions of Government adversely affected; that the court failed to take into account that its jurisdiction had been challenged by two separate preliminary objections filed by the 1st and 3rd Respondents dated 14.6.23 and 16.6.23; that the granting of the ex-parte orders was greatly prejudicial to the Respondents and was not proper in law; that the initial matter was filed under certificate of urgency on 31.5.23 and placed before lady Justice Hedwig Ongudi on 2.6.23 and upon considering the application seeking interim conservatory orders and the grounds in support therein, the Honourable Court declined to grant any interim conservatory orders; that having seen no merit in granting orders at the bill stage of the Finance Bill 2023, the Court cannot now grant any conservatory orders against an Act of Parliament that enjoys the presumption of legality

and constitutionality; that the Honourable Court set the 5.7.23 for directions for the Petition in which one of the issues for consideration is disposal of the two preliminary objections challenging its jurisdiction; that the ourt ought to, at the first instance, upon filing of this application set aside the interim conservatory orders issued on 30.6.23.

21. It was further deposed that the doctrine of judicial restraint ought to have been exercised in favour of interpartes hearing rather than ex-parte conservatory orders in light of the circumstances of the matter and the gravity of the orders sought; that the orders issued affect several Government bodies and independent institutions that are not party to this Petition and have not gotten an opportunity to be heard; that the Petitioners added other parties as petitioners, new respondents and interested parties without leave of court which should have been done vide a formal application; that the application seeks substantive orders against interested parties who are not named as respondents in the Petition; that the Finance Act does not have a saving provision to offer interim or saving measures. There is therefore no alternative available to the Republic in light of the orders issued by the Court.

Analysis and determination

22. I have carefully considered the Applications herein, the rival responses as well as the vary able oral submissions by the parties' respective counsel and the parties acting in person. The following issues fall for determination:

    i. Whether the orders of 30.6.23 should be set aside.

    ii. Whether the test of conservatory orders has been met.

    iii. Whether the matter should be certified as raising a substantial question of law under Article 165(4) of the *Constitution*.

Whether the orders of 30.6.23 should be set aside

23. The Application dated 29.6.23 came before me on 30.6.23. Upon considering the same and noting the averments that the impugned Finance Act was to come into operation on 1.7.23, I was satisfied that the Petitioners satisfied the tests for granting conservatory orders. I was persuaded that it was necessary to issue the conservative orders to preserve the substratum of the Petition pending the hearing and determination of the same. my view was that without the conservatory orders as sought the Petition was at risk of being rendered a mere academic exercise.

24. Prof. Githu Muigai, SC for the 1st and 2nd Respondents submitted that the orders in place ought not to and would not have been granted had the Petitioners not abused court process and misled court. The jurisdiction of Court was already a matter canvassed before court. They knew it and did not disclose it. They also did not disclose that several attempts had been made to obtain orders but failed. The orders having been denied several times and were not available to be granted. A good litigator ought to have disclosed this to the Court. As such, the Petitioners cannot now be rewarded by extension of those orders. He further submitted that where a party files multiple actions on the same matter, this amounts to abuse of the Court process.

25. Mr. Kiragu Kimani, SC assisting Prof Muigai, submitted that there is a misconception to whether there is allegation of violation of rights then public interest can only be preserved by stopping the alleged violation which is wrong and that each case must be looked at by its peculiar facts. He further submitted that there is no saving or transition provisions in the Finance Act. It is therefore wrong to suggest that all that is sought is suspension of single statute and it does not have knock on the effect on the operation of Government. Referring to Article 221(6) and sections 6, 25, 35, 37, 39 of the

PFM Act, the Finance Act and Appropriation Act are inextricable and have strict timelines set by the *Constitution* and Statute. He argued that the suggestion that denial of conservatory orders destroy substratum of petition because there is no mechanism for recovery of tax is misplaced. According to him, public interest requires court to exercise its restraint. and not to extend orders. On empanelment, he submitted that once the orders are extended and file taken for empanelment it will take weeks.

26. Hon. Murugara for the 3rd and 4th Respondents submitted that the Finance Act complies with constitutional decision of High Court, Court of Appeal and Supreme Court. Extension of the interim orders is detrimental to the people of Kenya and the 3 arms of Government as it goes to the core of revenue that these institutions run on.

27. Mr. Mwendwa also for the 3rd and 4th Respondents submitted that the Finance Act 2023 is a very crucial piece of legislation that impacts on the entire budget of 2023/24. The operations of Government will be adversely affected because of the deficit brought about by order and that includes the operations of the 3 arms of Government. He reiterated, there were two applications on record dated 341.5.23 and 26.6.23 before the current application, which are still on record and have not been disposed of. The present Application thus offends principle of subjudice and ought not to have been heard. There was also material non-disclosure by the Petitioners; the reason why the previous orders were not granted is that they were premature. Thus, for the Petitioners to breathe life into the petition, they had to obtain a letter Exh OOO4 which was either stolen or obtained illegally. They therefore sought that the same be expunged from the record. Further that even without the letter the exhibit by the Speaker of National assembly they had 4 other letters attached pursuant to Article 110(3) that the speakers had resolved issues within Article 109(4) of the *Constitution*. The said correspondence was within reach of the 1st Petitioner and if he had requested the same would have been given to him. He cited the decision in *Kenya Railways Corp and others v Okiya Omtatah and 3 others* where the Supreme Court found that Sen. Omtatah offended Constitution by obtaining a letter from the Kenya Railways Corporation illegally and dismissed the Petition.

28. Mr. Mwendwa further submitted that the budget policy was introduced in February 2023 and that the entire legislative process was followed and cited Petition No. E244 of 2021 at para 90 where Mrima, J. found that it is interest of public court allows budgeting process to continue so that the Government can raise revenue. He asserted that under Articles 209 and 210 the authority to levy taxes are a preserved of the National Assembly. He urged that the Court to dismiss the Application and discharge orders which were issued through misrepresentation.

29. In response, Sen. Omtata argued that the Bill of Rights refers to state and not to Government or to county Governments. The letter which was said to be acquired illegally was copied to Senate majority and minority leaders and it became public. He further submitted that there is an application to cross examine the Speaker of Senate. He argued that the presumption of constitutionality is not a finding of constitutionality. He further asserted that there here was no prayer before this Court to suspend the Finance Act 2023. It became necessary when the Act was enacted. He further submitted that the Respondents have not demonstrated that revenue estimates were placed before Parliament. The objection to jurisdiction he argued was on matters that have been overtaken by events. He submitted that the power of the Court to grant stay is not limited by when applications are made. There is therefore no abuse of the court process. Lastly, that the Respondents have not demonstrated that the Bill did not contain matters for Senate.

30. On presumption of constitutionality of the Finance Act Hon. Otiende Amollo, SC submitted that where there is patent unconstitutionality, there is nothing to presume but only the *Constitution* to interpret. According to him, Article 50(4) does not lend itself to the proceedings herein as it refers to criminal trial. There is also no abuse of the court process as there is only one petition which was

amended due to change of circumstances and the Application was brought based on the change of circumstances.

31. Rule 25 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (Mutunga Rules) provides:

> An order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or on application by a party dissatisfied with the order.

32. Rule 22 makes provision for written submissions. Accordingly, the scope of Rule 25 appears not to apply to conservatory orders. Rule 3(8) however reiterates the inherent powers of the Court to justice as follows:

> Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

33. In the absence of explicit provisions in the Rules, the Court will fall back on the Civil Procedure Rules. I find support in this proposition in the case of *Karl Wehner Claasen v Commissioner of Lands & 4 others* [2019] eKLR, where the Court of Appeal had this to say of an apparent lacuna in the Rules:

> [I]n the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of the *Constitution*.

34. This Court has jurisdiction to review of orders as provided for in Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. Section 80 allows an aggrieved litigant to apply for review of an order or decree and empowers the Court to make such order as it deems fit as follows:

Any person who considers himself aggrieved—

> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act,
>
> may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

35. Order 45 Rule (1) of the *Civil Procedure Rules* stipulates the grounds upon which an order may be reviewed:

(1) Any person considering himself aggrieved—

> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree

was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

36. The law allows an aggrieved party to apply for review of an order on the basis of discovery of new and important matter or evidence which after due diligence, was not within his knowledge. Such application must be made without unreasonable delay. A mistake or error apparent on the face of the record is another ground upon which a party may seek review of orders. An order may also be reviewed for any other sufficient reason.

37. In the case of *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR the Supreme Court laid down the guiding principles in an application of review of Court orders as follows:

> (31) Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:
>
> (i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.
>
> (ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
>
> (iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
>
> (iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
>
> (v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
>
> (vi) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
>
> (a) as a result a wrong decision was arrived at; or
>
> (b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

38. On its part, the Court of Appeal in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the Court of Appeal held as follows:

> A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

39. The element of any other sufficient reason was considered in the case of *Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad* [2019] eKLR. Mativo, J. (as he then was) stated:

> 30. A court can review a judgment for any other sufficient reason. In the case of Sadar Mohamed v Charan Signh and Another[19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of *Civil Procedure*[20] (writing on Order 47 Rule 1 of the *Civil Procedure Code* of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.[21]
>
> 31. I also find useful guidance in *Tokesi Mambili and others v Simion Litsanga*[22] where they held as follows:-
>
> i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)
>
> ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.
>
> 32. I am not persuaded that the reasons offered by the applicant amounts to 'sufficient reason' within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. My finding is fortified by the holding in the case of Evan Bwire v Andrew Nginda[23]where the court held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.

40. In the present case, the Respondents have asked the Court to review its decision on the premise that there was abuse of the court process on account of material non-disclosure on the part of the Petitioners. They contend that the Petitioners failed to disclose that in their previous applications dated 31.5.23 and 23.6.23, the Court declined to grant the conservatory orders sought. Further, that the 1st Petitioner failed to make a full disclosure of the correspondence exchanged between the Speakers of the 2 Houses regarding the consideration of the Finance Bill, 2023. Their case is that the letter dated 15.6.23 relied on by the Petitioner to support his claim that there was no concurrence between the Speakers of the 2 Houses of Parliament, was illegally obtained. Additionally, there was other correspondence between the Speakers demonstrating that there was concurrence that the Finance Bill, 2023 did not concern counties and therefore did not need the input of the Senate. Their view is that the issue of concurrence of the 2 Speakers, on which the Application was anchored, had been resolved,

effectively leaving the Petition with no leg to stand on. The conservatory orders of 30.6.23 should therefore be set aside.

41. To counter the Respondents' contention, the Petitioners submitted that there was no abuse of the court process. Contrary to the assertions of the Respondents, they initially challenged the Finance Bill in their previous applications and there was no previous prayer for suspension of the Finance Act. The prayer became necessary when the Finance Bill was enacted into law and circumstances shifted. On concurrence, they submitted that this is supposed to be done before presentation of the Bill and not after the fact. They further challenged the concurrence by the 2 Speakers that the Finance Bill did not concern county Governments yet the Finance Bill and the resultant Act do in fact contain matters concerning county Governments and amends laws concerning their functions. As such, the concurrence is unconstitutional. To this end, the Petitioners have filed an application seeking to cross examine the Speaker of the Senate on this very issue. On the claim that the letter dated 15.6.23 was obtained illegally, it was submitted that the same was in the public domain hence could not have been obtained illegally.

42. In the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR, relied on by the 1st and 2nd Respondents, the Court of Appeal considered what constitutes abuse of the court process and cited with approval the stated:

> In the Nigerian Case of Karibu-whytie J Sc in *Sarak v Kotoye* (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-
>
> > "The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ..."
> >
> > The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-
> >
> > (a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action..."

43. The record shows that at the time the Petition was filed, the subject was the Finance Bill, which was yet to be passed. I have looked at the applications on record. The application dated 31.5.23 sought conservatory orders suspending the debate on some sections of the Finance Bill and prohibiting the Speaker of the National Assembly from transmitting the same to His Excellency the President if it contained the said impugned sections. The application dated 23.6.23 sought a temporary order of prohibition, prohibiting the Speaker of the National Assembly from transmitting to the His Excellency President the entire Finance Bill 2023 as approved by the House. When the bill was subsequently passed and assented to, the Petitioners sought to amend to Petition. Indeed, at the time, Senator Omtata informed the Court that they sought to amend to the Petition instead of filing multiple petitions. There was no opposition to application for amendment, save by Mr. Kuyioni who argued that the proposed amendment was intended to circumvent the preliminary objections filed, which were on the basis that the Petition was premature. He sought that a formal application be filed. Given that pleadings had not closed, the Court allowed amendment of the Petition to reflect the changed circumstances. In light of the foregoing, it cannot be said that the Petitioners have filed a multiplicity of suits on the same issues. Additionally, the preliminary objections which challenged the jurisdiction

of the Court on the ground that the Petition was premature cannot now stand, given the amended Petition and fresh Application which have cured the prematurity. My finding therefore is that the assertion by the Respondents that there was abuse of the Court process, is not supported by evidence.

44. Further, there is still the contentious issue of whether the Bill and Act concern counties and that the Act amended laws relating to the functions of counties. There is also the allegation that some clauses which were not in the Bill were incorporated in the Act on the floor of the house, thereby offending the principle of public participation. Also contentious, is the letter of the Speaker of the Senate dated 15.6.23 (Exh OOO-4), which the Respondents seek to have expunged from the record on account that the same was obtained illegally. My finding is that all these are matters to be interrogated at the hearing of the Petition. The Court cannot at this stage delve into the same. Also to be considered at the hearing of the Petition is the contentious issue as to whether Government operations have ground to a halt and whether Finance Act 2022 continues to have and that it is only the additional taxes in Finance Act 2023 that are at stake.

45. The Respondents strenuously submitted that the conservatory orders have created a lacuna in Government operations. Given that the Government's main source of revenue is taxes, the conservatory orders and declaring the impugned amendment unconstitutional will impact on the entire budget for the year 2023/2024 and affect the operations of the Government. Further that taxation is a policy decision within the exclusive mandate of the executive and hence this Court lacks jurisdiction to delve into policy decisions. Additionally, that the conservatory orders suspending of the implementation of the Finance Act, 2023 will suspend the Government's revenue raising measures and will occasion a lacuna and thereby bring the Government to a halt. As such, the Government stands to suffer grave prejudice in terms of the revenue lost on account of uncollected taxes which are not likely to be recovered. This will go against public interest as the State will not be able to deliver services its citizens.

46. The Petitioners countered this by submitting that there is no lacuna and that the Finance Act 2022 continues in operation and that the Government continues to collect taxes. All that has stopped is the additional taxes in Finance Act 2023. The Respondents disagreed and argued that there are no saving or transitional provisions in the Finance Act to offer interim or saving measures. There is therefore no alternative available to the Republic in light of the orders issued by the Court. Notably, the strong rival positions were advanced by Parliamentarians.

47. The Court has considered the parties' submissions in this regard and finds that this very contentious issue cannot be interrogate by the Court at this stage and must await the hearing of the Petition.

48. Lastly, he submitted that Article 222 takes care of apprehension of the Respondents that Government operations will be halted. He urged the Court to uphold supremacy of the *Constitution* as required under Article 2 of the *Constitution*

49. In the case of *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* [2017] eKLR, Mativo, J. (as he then was) considered a similar application for setting aside of conservatory orders and stated:

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

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

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

50. I associate with the sentiments of the learned Judge, that even where as in the present case, the prejudice complained about is the loss of taxes, this has to be balanced with the legal requirement that all taxes must grounded on the law. The Petitioners have raised several grounds upon which they claim that the Finance Act in respect of which conservatory orders were issued, is unconstitutional. My view is that were the Court to set aside the conservatory orders, the Petition would be rendered a mere academic exercise. Further public interest requires that this Court must discharge its constitutional mandate of protecting the supremacy of the *Constitution* by ensuring that all laws conform to the *Constitution*.

51. In Petition No. E080 of 2023, Eliud Karanja Matindi v H. E. the President of the Republic of Kenya, in which the Petitioner challenged the creation of 27 extra positions in the public office of Chief Administrative Secretaries, Ong'udi, J. granted conservatory orders restraining and barring the appointees from assuming or continuing to act as chief Administrative Secretaries, and from earning any salary, remuneration and benefits. One of the appointees Dennis Njue Itumbi appealed against the orders and sought stay of the same in*Itumbi v Law Society Of Kenya & 55 Others* (Civil Application E126 Of 2023) [2023] KECA 593 (KLR) (26 May 2023) (Ruling), In its ruling of 26.5.23, the Court of Appeal declined to grant the orders sought and stated:

> A cursory look at the record as put to us clearly shows that the applicant's Motion heralding the intended appeal comes way ahead of its time. Put differently, it is premature as no substantive decision capable of being challenged on appeal was made by the learned Judge. We take to mind the fact that the orders and directions given on 31st April 2023 were merely procedural and suitably designed to prepare the platform for the parties to litigate their rights and interest in the consolidated petitions. Those orders and directions were in the nature of pretrial directions that do not in any way touch on the substantive issues in contention. Faulting the learned Judge for preserving the substratum of the petitions, and for setting timelines for filing and serving rival pleadings and submissions to expediate hearing and determination of the two petitions borders on mischief and stand in the way of the intended determination of the real issues in contention.

52. Similarly, in the instant case, the conservatory orders under challenge and issued on 30.6.23 were intended to preserve the substratum of the Petition, pending the hearing and determination of the same, and should remain in place to do just that.

53. In the end, I find that nothing has been placed before me to justify the setting aside of the conservatory orders issued on 30.6.23.

Whether the test of conservatory orders has been met

54. In support of the Petitioners' Application dated 29.6.23, Sen. Omtatah, the 1st Petitioner submitted that Petitioners had laid out a prima facie case which is that the process and contents of the Finance

Bill and Finance Act violate the *Constitution*; that the Finance Bill was not taken to the Senate yet it contained provisions concerning functions devolved to counties or shared between the County and National Governments and proposed amendments to laws enacted by the Senate and the National Assembly and should have been taken to the Senate; that the laws were amended that had nothing to do with finance; that the Finance Bill was financing a flawed process of budget making which did not accord to Article 220 as it did not contain estimates of revenue but only estimates of expenditure; that it is not possible to tell how Government seeks to finance its budget which violates Articles 220 and 221.

55. He further submitted that their case will be rendered nugatory as the law is illegal and violates Constitution and the people of Kenya stand to lose, if they are be subjected to an unconstitutional law. On the flip side, there will be no prejudice to the Respondents as status quo will remain and the only thing that will be missing is the additional taxes.

56. On public interest, it was submitted that it is in the public interest that Government acts within the confines of the law and that legislation must be constitutional. Further that the power to tax is not absolute and is limited by Articles 209 and 210. He further argued that where legislation touches on the Bill of Rights, there is need for justification and that is why revenue estimates are very important. He contended that the whole process was void ab initio and urged the Court to allow the orders to remain.

57. Mr. Eliud Matindi submitted that conservatory orders are to preserve substratum of the Petition as stated in Civil App E126 of 2023. He asserted that suspension of the Finance Act 2023 pending hearing and determination of main suit will not prejudice Respondents; that finance is not raised in one single shot and that this matter is unlikely to take one year to be concluded; that whereas the Respondents want to bring in Finance Act immediately, if the Petition succeeds, Kenyans will be taxed unlawfully; that the hardship that will be occasioned if Act is declared null and void cannot be compensated if orders are not granted. As to concurrence by the Speakers under Article 110, it is not the last word. The same is also in dispute and until it is resolved the conservatory orders should be extended because this goes to the validity of the Finance Act 2023. He urged the Court to exercise its jurisdiction and grant the orders pending the hearing and determination of Petition.

58. Hon. Otiende Amollo, SC submitted that the entire Act suffers from procedural unconstitutionality because, a total of 22 new clauses, being one quarter of the clauses, were introduced on the floor of House, which were not in the 1st or 2nd reading, and were brought as addendum contrary to Article 201 that envisages public participation. He further contended that the entire Act is substantially unconstitutional. Under the Section 20 of Part 1 as compared to Section 8(d) Part 2 of the Fourth Schedule, housing as a function is for the County Government while the National Government only retains the housing policy. Accordingly, in so far as housing levy was introduced and to be administered and controlled by the Cabinet Secretary, it is unconstitutional and amounts to amendment of Constitution. Counsel submitted that the purpose of the Finance Act is to amend laws relating to various taxes and duties. Where the Act covers more than taxes and duties then it must go to the Senate where it touches on the functions of Counties. Hence once they introduced areas beyond taxes and duties the Bill had to go to the Senate. He further contended that although Speakers of Senate and National Assembly were in agreement, they cannot agree to violate the *Constitution*.

59. Additionally, Counsel contended that the Finance Act under Section 84, infringes on fundamental rights in that the housing levy compels employers and employees to contribute 1.5%, but does not accrue any benefit to them. This amounts to involuntary servitude contrary to Article 30. Further that under Section 33, taxation of insurance on compensation amounts to double taxation. He further submitted that there will be no loss in stopping the Act until its constitutionality is established as the Finance Act 2022 will continue. If orders are not extended unlawful orders will be extracted and there

is no mechanism for refund. He urged that the conservatory orders be extended and direction be given on determination of the Petition within 30 days.

60. Benson Otieno, submitted that the purpose of concurrence of the Speakers under Article 110 is to advance principle of devolution and its importance in Kenya. Where the *Constitution* mandates the Senate's involvement in any bill introduced in the National Assembly there is no justification to circumvent the same. Further, that the requirement of Article 110 is not a secretive process between the Speakers of the Houses. Agreement must be reached constitutionally and in line with Standing Order 12 of the National Assembly and Standing Order 127 of the Senate. Lastly, he submitted that the Finance Act contains provisions that infringe on freedom of association as it compels people to involuntarily pull funds which will be held somewhere. It is thus only fair that the conservatory orders are extended.

61. Senator Maanzo for the 7th Petitioner, submitted that there was acrimony between Senate and National Assembly and that there is supposed to be communication. Mr. Kimanzi, assisting Sen. Maanzo submitted that the supremacy of the *Constitution* was in this case threatened by the action of the National Assembly in failing to involve the Senate in the matter in question. He argued that ignoring the role of Senate in legislation breached Article 196 and undermined the principle of devolution and the interest of the people of Kenya. He further submitted that under Articles 94 and 100-113 the exercise of legislative authority is not exclusive to a single House but requires joint participation of both Houses. He urged that the Court be guided by para 53-62 of the Supreme Court Advisory Opinion 2 of 2013 and extend orders in place. Lastly, he submitted that Article 222 takes care of apprehension of the Respondents that Government operations will be halted. He urged the Court to uphold supremacy of the *Constitution* as required under Article 2 of the *Constitution*.

62. Mr. Muhoro for the 1st Interested Party submitted that there was consensus that the Finance Act 2023 will raise an extra 211 Billion on top of what would be collected before enactment. This translates to Kshs. 578,082,192 that is projected to be collected on a daily basis. If the Court eventually rules in favour of the Respondents it will not be possible to collect taxes. In the unlikely event that this Court rules in favour of the Petitioners, there exists elaborate mechanisms for tax payers to be refunded. If orders are extended the 1st Interested Party and the public will suffer irreparably. The Petitioners' major ground is that there was no concurrence between the two Speakers who have filed affidavits confirming that there was concurrence. This takes away the prima facie case. He referred court to *Pevans East Africa Ltd & another v. Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR where court held that Finance Bill is a money Bill and that taxation was a National Government function and that Senate was not necessary to be included. On presumption of constitutionality of the Finance Act, counsel submitted that any statute by Parliament is presumed to be constitutional unless and until the same is proved otherwise. As such, the Finance Act should be construed to be constitutional.

63. Mr. Sigei for the 2nd Interested Party submitted that the replying affidavit by the Speaker of Senate gives insight to the substratum of Petitioners' case in terms of concurrence. The Speaker has confirmed that there was sufficient engagement. The Bill went through the relevant constitutional procedures before passing. He further argued that taxation is a function of National Government and this takes away the ground that the Petitioners have prima facie case. He too relied on the decision in the case of *Pevans East Africa Ltd & another v. Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR, that taxation is a function of the National Government, and that the decision was upheld by the Court of Appeal in Civil Appeal No. 11 of 2018. He submitted that the Senate Business Committee was convinced that the Bill was properly passed as it was a money Bill. He urged the Court not to extend the orders granted ex parte.

64. Mr. Issa, also for the 2nd Interested Party submitted that the challenge raised by the Petitioners is constitutionality of the Finance Act and that when the Court was convinced to grant orders the only ground was that there was no concurrence. The Speaker of Senate has confirmed that the process was done as exhibited by the letters. The constitutional duty of the Senate was discharged and the procedure was followed as set out in the Supreme court's Advisory Opinion No. 2 of 2013 that the 2 Speakers must agree. Counsel submitted that the presumption of constitutionality is satisfied. He cited Article 109(3) on the process of legislation before the National Assembly. He further submitted that Sections 35, 39, 40 and 41 of *Public Finance Management Act* show that the Finance Bill is required annually; The Cabinet Secretary tables all estimates before the National Assembly in each financial year. Under Section 41 of that Act, the submission that the previous Act remains valid does not have support of law. Citing the case of *Wanjiru Gikonyo v National Assembly* on presumption of constitutionality; and Civil Appeal E312 of 2022, he submitted that where there is a presumption of constitutionality, the Court must be cautious. Further that public interest militates against the conservatory orders. He urged court not to extend the orders and allow the Government to collect revenue and disallow the Petitioner's Application.

65. Mr. Omulama for the 4th Interested Party argued that the Petition upon which the conservatory orders are anchored, is based on falsehoods. It is frivolous and does not have chance to succeed and conservatory orders are not merited. On housing levy, he referred the Court to Articles 43, which provides that every person has a right to adequate housing and reasonable standards of sanitation. He further cited Articles 20, 21 and 22(2) that it is a fundamental duty of the State and State organs to protect rights in the Bill of Rights. He further contended that it is not true that housing is not a national Government function. His view is that the Petition and Application has taken a political angle and that political scores have been brought to bear. Counsel further submitted that the Petitioners have not explained how they will compensate the Respondents on taxes that will not be collected when the Petition fails. He urged the Court not to allow the Application dated 29.6.23 and allow the applications to set aside orders.

66. Article 23 of the *Constitution* has conferred upon this Court, the authority to uphold and enforce the Bill of Rights and provide remedies as follows:

> 1. The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
>
> 2. ...
>
> 3. 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.

67. A conservatory order is one of the appropriate reliefs available to a party who alleges and proves denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The purpose of conservatory orders is to preserve the substratum of the petition before Court pending the hearing and determination of the same. Rule 23 of the Mutunga Rules provides that despite any provision to the contrary, a Judge before whom a petition is presented shall hear and determine an application for conservatory or interim orders.

68. The threshold for the grant of conservatory orders was established by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR 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.
>
> (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*.

69. The Supreme Court set out the test for the grant of conservatory orders in 3 limbs. A party seeking conservatory orders must demonstrate to the Court that first, the petition is arguable and not frivolous. Second that unless the orders sought are granted the suit, were it to succeed, would be rendered nugatory. The first 2 limbs though linked to injunctions in private party matters, are also applicable in public law. The Supreme Court added the third test in the context of the *Constitution*, namely, that it is in the public interest that the orders sought are granted.

70. And in the case of Free Kenya Initiative & 6 others v Independent Electoral & Boundaries Commission & 4 others; Kenya National Commission on Human Rights (Interested party) [2022] eKLR Mrima, J. stated that the principles to be considered are not exhaustive and added the effect of the orders on the determination of the case, whether there is eminent danger to infringement of the human rights and fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of

constitutionality of statutes, whether the Applicant is guilty of laches, the doctrine of proportionality, among many others.

71. The matter before me is a challenge on the constitutionality of a statute. According to the Respondents, it is trite jurisprudence that every statute enjoys presumption of constitutionality. That Parliament must be presumed to have enacted a constitutional Act. For the Petitioners, it was submitted that a presumption of constitutionality is not a finding of constitutionality and that where there is patent there is patent unconstitutionality, as in the present case, there is nothing to presume but only the *Constitution* to interpret.

72. There is a long line of decisions that enunciate the principle that support the position that there is a general presumption that every Act of Parliament is constitutional. In the case of Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR,a 3 Judge bench of this Court considered a constitutional challenge of a statute and stated:

> 95. We have been called upon to declare SLAA in its entirety, or at the very least certain provisions thereof, unconstitutional for being in breach of various Articles of the *Constitution*. In considering this question, we are further guided by the principle enunciated in the case of Ndyanabo v Attorney General [2001] EA 495 to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional.
>
> 96. However, we bear in mind that the *Constitution* itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 which we shall analyse in detail later in this judgment, there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article.

73. In the present case, the Petitioners contend that the Finance Act is unconstitutional on grounds that first, the Finance Bill giving rise to the Finance Act contained matters concerning Counties and ought to have been taken to the Senate for consideration, pursuant to the provisions of Article 110(3) of the *Constitution*, which was not done. The Petitioners challenge the assertion by the Respondents that there was concurrence between the Speakers of the 2 Houses that the Finance Bill was not a bill concerning counties. They challenge the constitutionality of that concurrence and seek to cross examine the Speaker of the Senate on the issue. They further contend that the concurrence is to be done prior to consideration of a Bill and not after as in the case herein. Additionally, the Petitioners insist that the Act concerns counties as it contains matters that touch on county Governments and their functions. The Act further amends laws that concern county Government functions. As such, the Bill ought to have been sent to the Senate for consideration. The Bill not having been sent to the Senate for consideration was, in their view, violation of the *Constitution* and went against the decision in In the Matter of the Speaker of the Senate & another [2013] eKLR, Advisory Opinion Reference No. 2 of 2013, the Supreme Court underscored the role of the Senate in legislation concerning counties.

74. Second, the Petitioners impugn the Finance Act on the ground that the same contains provisions that were not in the Finance Bill, but were "sneaked in" on the floor of the House. This goes counter to the requirement for public participation under Article 201 which provides that openness and accountability, including public participation in financial matters is one of the principles that shall guide all aspects of public finance in the country. Further that Section 84 the Finance Act infringes on fundamental rights and freedoms. It violates the right of freedom from servitude under Article 30 in

that it imposes a housing levy on employers and employees but does not accrue any benefit to them. It further and infringes on the right to freedom of association under Article 36 of the *Constitution* in that it compels people to involuntarily pull funding that will be held somewhere. Additionally, that taxation of insurance on compensation under Section 33 of the Act, amounts to double taxation.

75. Third, the Petitioners have also impugned the Finance Bill and the Finance Act in that neither contains revenue estimates in violation of Article 220(1)(a) which provides that the budget shall contain estimates of revenue and expenditure, differentiating between recurrent and development expenditure.

76. While the Court appreciates that each statute enjoys the presumption of constitutionality, where there is prima facie unconstitutionality, the Court should not shy away from granting conservatory orders. This Court is enjoined to protect the supremacy of the *Constitution* and notes that a presumption of constitutionality is not a finding of constitutionality. In this regard, I associate with the holding in *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* [2018] eKLR, where Odunga, J. (as he then was) stated:

> 42. In my view, if the Court has power to declare an enactment void and invalid, likewise the Court must have jurisdiction in deserving cases to suspend provisions of an enactment if to do otherwise is likely to render whatever decision the Court may arrive at a mirage. Our Constitution for example in Article 29(d) outlaws torture and freedom from torture is one of the fundamental freedoms which by virtue of Article 25 of the *Constitution* cannot be limited. If Parliament was to purport to pass an Act which introduces torture, it would be illogical for the Court to stand back and say that it has no jurisdiction to grant conservatory orders. To do so would amount to the Court ceding not only its powers but failing to protect the *Constitution* as envisaged in Article 21(a) of the *Constitution*. What use would a favourable determination of the petition be to the victim of torture if by the time of the determination, the torture has taken place and freedom lost beyond recall. I therefore do not subscribe to the notion that under no circumstances can conservatory orders be granted where a piece of legislation is under challenge.

77. I have considered all the issues raised by the Petitioners concerning the Finance Act and its implementation as outlined above. I am keenly aware I cannot at this stage delve into the merits of the case which must await the full hearing of the Petition. Suffice it to say however, that upon evaluation of the rival arguments by counsel, I have no difficulty in finding that the Petitioners have established a prima facie case with a probability of success. Further given the nature of the matter herein, I find that if the substratum of the Petition is not preserved by having in place conservatory orders, there is imminent danger of rendering the Petition nugatory and a mere academic exercise as the Act in question will have been implemented. This will militate against the public interest as there is a real risk of the public being subjected to an unconstitutional law, should the Petition succeed. Further, the prejudice that will be suffered by the Petitioners and the public by being subjected to a law that may ultimately be determined to be unconstitutional, far outweighs the prejudice to be suffered by the Respondents if the Petition were to fail. Indeed, a determination in favour of the Petitioners will be of no use to the Petitioners and the public if in the meantime, they are subjected to the impugned Act. I am therefore satisfied that notwithstanding the presumption of constitutionality of legislation, there is merit in granting conservatory orders in respect of the Finance Act under challenge.

Whether the matter should be certified as raising a substantial question of law under Article 165(4) of the Constitution

78. On the prayer for certification of the matter under Article 165(4) of the *Constitution*, Mr. Matindi he submitted that if the Court is satisfied, then it should certify the matter and Chief Justice will abide by the *Constitution* including expediency. Mr. Kiragu, SC likened it to kicking the matter into the long grass. According to him, the Hon. Chief Justice is not just sitting in her office twiddling her thumbs awaiting a request for empanelment of an expanded bench under Article 165(4) of the *Constitution*. His view was that the intention of the Petitioners is to get the conservatory orders and then have the matter taken to the office of the Hon. Chief Justice where it will take weeks. Mr. Matindi however asserted that that was not the Petitioners' intention at all.

79. Article 165(4) provides:

> Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

80. The matters that may be certified as raising a substantial question of law must be under Article 165(3) (b) or (d). These are matters that raise a question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Other matters that may be certified are those that involve a question whether any law is inconsistent with or in contravention of the *Constitution*, whether anything said to be done under the authority of the *Constitution* or of any law is inconsistent with, or in contravention of, this Constitution, 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. Also included herein is a question relating to conflict of laws under Article 191.

81. In the case of *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission* [2017] eKLR, Mativo, J when considering a similar application stated:

> In my view, the above considerations offer proper guidelines and an insight in determining whether or not a matter raises "a substantial question of law" for the purposes of Article 165(4) of the *Constitution*. The Court may also consider whether the matter is moot in the sense that the matter raises a novel point; whether the matter is complex; whether the matter by its nature requires a substantial amount of time to be disposed of; the effect of the prayers sought in the petition and the level of public interest generated by the petition. These however are mere examples since the Article employs the word "includes." Accordingly, the list cannot be exhaustive and the Courts are at liberty to expand the grounds as occasions demand.

82. The questions before this Court include whether the rights of the Petitioners and the public have been or will be denied, violated, infringed or threatened by the implementation of the Finance Act. Also to be determined, is whether the entire process of passing of the Finance Bill and Act said by the Respondents to have been done under the authority of this Constitution or of any law is inconsistent with, or in contravention of the *Constitution* and whether the Finance Act is unconstitutional. In particular there is the novel question as to whether the concurrence of the 2 Speakers that the Finance Bill did not concern Counties, can be challenged. Additionally, there is the question whether where implementation of a Finance Act has been suspended, as in the instant case, the Finance Act of the previous year can continue in operation. The Court is alive to the effect of the prayers sought in the

Petition and is also aware of the great public interest generated by the Finance Bill and the Finance Act. In light of the foregoing, I am inclined to exercise my discretion and allow the prayer for certification under Article 165(4) of the *Constitution*.

83. To allay any fears of delay, it is worthy to note that the Hon. Chief Justice has embraced technology, which is a key component of her vision of social transformation through access to justice. As such she is well able to discharge her mandate under Article 165(4), from whatever corner of the world she may be in, as she will no doubt appreciate the urgency and gravity of the matter.

84. In the end and in view of the forgoing, I make the following orders:

    i. The Applications dated 30.6.23 and 1.7.23 are hereby dismissed.

    ii. The Application dated 29.6.23 is hereby allowed as prayed.

    iii. Pursuant to Article 165(4), this matter is certified as raising a substantial question of law and the file is hereby transmitted to the Hon. The Chief Justice for assignment of a bench of not less than 3 Judges to hear and determine the Petition.

    iv. No order as to costs.

DATED AND DELIVERED IN NAIROBI THIS 10TH DAY OF JULY 2023

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M. THANDE

JUDGE