Okello & another v Assembly & 2 others; Shop & Deliver Limited t/a Betika & 7 others (Interested Party) (Constitutional Petition E010 of 2021) [2021] KEHC 94 (KLR) (20 September 2021) (Ruling)

Isaiah Onyango Okello & another v National Assembly & 2 others; Shop and Deliver Limited & 7 others (Interested parties) [2021] eKLR

Neutral citation: [2021] KEHC 94 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CONSTITUTIONAL PETITION E010 OF 2021

GV ODUNGA, J

SEPTEMBER 20, 2021

IN THE MATTER OF: THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA (2010)

IN THE MATTER OF: THE VIOLATION OF ARTICLES 3, 10, 20, 21, 23, 40, 43, 45, 47, 201 AND 258 OF THE CONSTITUTION

BETWEEN

ISAIAH ONYANGO OKELLO ..... 1ST PETITIONER

CLIFF ODOLO MBOYA ..... 2ND PETITIONER

AND

NATIONAL ASSEMBLY ..... 1ST RESPONDENT

COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY .... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

SHOP & DELIVER LIMITED T/A BETIKA ..... INTERESTED PARTY

MOZZART BET KENYA LIMITED T/A MOZZART BET . INTERESTED PARTY

SPORTY BET LIMITED ..... INTERESTED PARTY

BLUE JAY LIMITED T/A BETWAY ..... INTERESTED PARTY

KARECOP HOLDINGS LIMITED T/A ODIBETS ..... INTERESTED PARTY

PEVANS EAST AFRICA LIMITED ..... INTERESTED PARTY

ASSOCIATION OF GAMING OPERATORS, KENYA ..... INTERESTED PARTY

MILESTONE GAMES LIMITED T/A SPORTPESA ..... INTERESTED PARTY

RULING

1. The petitioners are adult males of sound mind, who engages in gaming as a source of entertainment and earning upon which they support themselves and their family and dependents.

2. The 1st respondent is the National Assembly of Kenya, a body established under the Constitution of Kenya and vested with amongst others the responsibility of enacting laws for the Republic of Kenya.

3. The 2nd respondent is the Commissioner General of the Kenya Revenue Authority, a public body established by law and vested with the responsibility of amongst others, collecting taxes and administering tax laws within the Republic.

4. The 3rd respondent is the Attorney General of the Republic of Kenya and also the chief legal adviser of the Government of the Republic of Kenya and has a legal obligation to advise and guide the government and the Respondents in all matters relating to the Constitution and the law.

5. The 1st to 6th and 8th interested parties are limited liability companies that provide a platform for betting on which punters place odds and wage on games while the 7th interested party is an association of gaming players in Kenya and works on advocacy to improve the welfare of gaming customers.

The Petitioners' Case

6. According to the petitioners, they are citizens of Kenya and punters who engage in acts of betting on several platforms operated by the interested parties who are duly licensed to carry on the business of gaming within the Republic of Kenya.

7. Going by the definition of Excise duty as a form of tax levied by the government on the sale of specified goods or services, it was pleaded that the petitioners and punters are not sellers of any category of specified goods or services in the gaming sector but investors who stake bets on platforms provided by the interested parties. To do so, they use mobile phone platforms provided by the interested parties with support from mobile phone companies to carry out their gaming activities. In this regard, it was pleaded that the petitioners maintain a mobile money wallet on the mobile platforms from which they transfer money to the interested parties' wallets to wage a bet and also withdraw monies that may have been earned through winnings. All these transactions, according to them, are subject to excise duty on the mobile phone money transfer charges payable to the government as specified in the Part II (Excisable Services) of the First Schedule to the *Excise Duty Act*. (hereinafter referred to as "the Act).

8. According to the petitioners, as punters, the petitioners pay total of 20% withholding tax on all their winnings from games staked while the Interested Parties also pay a total of 15 % betting tax on the gross gaming revenue. The Petitioners also pay additional tax through charges on mobile phone excise tax every time they transfer moneys from their wallets to stake a bet and whenever they withdraw winnings.

9. It was however pleaded that the respondents, under Part II of the First Schedule to the Act, which provides rates of excisable services have through the *Finance Act 2021* introduced an Excise Duty of 7.5

% on betting stake which sum is to be computed on the amount wagered or staked by the player. The petitioners contended that in introducing the excise tax on deposits amounts staked or wagered by the petitioners and other punters, the Respondents will in essence tax a punter just for having money and being a player and taking a risk [stake] and without effectively consuming the good/service which in fact is being purchased.

10. The petitioners lamented that the respondent's seek to irregularly levy tax on the amounts staked by the Petitioners and other punters despite the petitioners and other punters neither providing a specified excisable service nor consuming an excisable service from the Interested Parties. In their view, the effect of this provision of the law is that the Respondents will be levying tax on a punter on his stake whether he wins or losses. A direct comparison would be to say that the respondents desires to tax a person for merely having money in his possession.

11. They further asserted that the respondents will be charging excise duty on the entire value of the transaction as provided in the First Schedule to the which conflicts with the substantive provisions of section 9 thereof on what constitutes the base and value of an excisable service. According to them, for instance, a person using mobile money transfer services to transfer KES 500, the excise duty is levied on the transaction charges collected by the telecommunication company (the basis of the tax is the transaction charge by the telecommunications company), and not on the KES 500 transferred. Similarly, in banking, excise duty applies on the transactional banking charges/ fees and not on the money deposited or withdrawn by an account holder.

12. According to the petitioners, the net effect of this law is to the effect that a punter will be losing 7.5 % of his money just by merely placing a bet. This is akin to a bank account holder losing 7.5 % of his money just by merely depositing his money into a bank account. Another example would be an investor who deposits his money in unit trusts who is made to pay 7.5% of his deposits just by merely depositing the money; or an investor in treasury bonds and bills being made to pay 7.5 % of his deposits as excise duty just by merely depositing the money for the transaction.

13. The petitioners lamented that since punters already pay a total of 20% withholding tax on their winnings, to subject the petitioners and other punters to additional tax in the manner proposed in the impugned law amounts to double taxation on the same transaction which is contrary to the principles of taxation generally. The net effect of this provision, they contended, is to ultimately deprive the Petitioners and other punters of their property over a cumulative period. In a tabular form, they explained the effect of the impugned law and reiterated that since they use online and mostly mobile phone telephony services in waging bets on platforms provided by the interested parties on their pay bill wallets they pay excise duty on money transfers from their mobile money accounts to the interested parties' pay bill wallets through transactional fees and charges.

14. According to the petitioners, in the gaming industry, the amount staked is not the fee charged for the service and since there is no fee charged to place a bet, there is no basis for the respondent's imposition of excise duty in line with the provisions of section 9 of the Act. According to them, the correct value of the excisable service would be the transactional charges when transferring funds (or when withdrawing) from his/ her mobile money wallet or the gross gaming revenue tax that is paid by the betting companies under the Act.

15. The petitioners averred that there are offshore betting companies and operators found online including amongst others Bet365 and 22Bet who have access to the Kenyan gaming public but are not subject to the local tax laws. The said companies will not be subject to the introduced and impugned 7.5% excise duty and thereby giving them an undue advantage in the gaming business. The petitioners' contention was that whereas the petitioners and other punters who wage bets on the platforms offered by the

interested parties will be subjected to the impugned tax, offshore, online platforms offered by other companies will not be affected by this provision thereby leading to a capital flight to these foreign companies at the expense of Kenya. This will be detrimental to the economic interests of the Republic.

16. It was pleaded that international best practice has been that betting and gaming companies are only taxed on their gross gaming revenue which is calculated as the difference between the amount wagered minus the amount paid out. However, the impugned law seeks to go beyond the international practice and best practice by seeking to levy a tax on amounts wagered or staked, a position that has been adopted under the *Betting, Gaming and Licensing Act* which imposes a gaming tax.

17. Since, the impugned tax is levied on amounts wagered and not gains or profits, all punters, it was contended that even those making losses on their wagered bets are required to pay the excise duty on their sums staked. This, according to the petitioners, means that a punter who has no profit or is in a loss-making position will still have to pay the exercise duty on his wagered stake. The impugned law, in their view, in essence seeks to tax a transaction that has not occurred, yet in principle a tax should only be imposed on a transaction that has occurred whereupon the tax becomes payable based on the transaction. A direct example would be to require a party to pay stamp duty on an agreement to sell even before the agreement is executed.

18. The petitioners averred that there are instances where a punter will wage a bet and cancel the same before the event occurs or the game gets delayed, postponed or cancelled and in such instances whereas there is no active bet, under the impugned law, the punter will still be expected to pay excise duty on his waged amount. Their complaint was that the net effect of the impugned provision is that the petitioners and other punters will have to consistently pay the respondents 7.5 % of their capital contribution every time they wager a bet leading to exhaustion of funds. Since the petitioners' stakes in bets are mostly recycled bets from winnings staked, continued taxation based on amounts staked will lead to exhaustion of the petitioners' funds through multiple taxation of the same funds with the effect that within no time, once the petitioners' funds are exhausted, they will not be able to engage in gaming activity any more.

19. It was noted that the 1st respondent in its report adopted in the year 2020 recognized the adverse effect of the impugned tax on wagered stakes on betting companies in Kenya and proceeded to delete a similar proposal in the Finance Bill 2020 and that the reasons that led to the said deletion have not changed and in any event, the industry has been in more dire straits than even in 2020.

20. According to the petitioners, contrary to article 27 of the Constitution, the impugned law discriminates against the Petitioners and other local punters to the extent that it levies tax against them on money held as opposed to winnings or transactions engaged in, a treatment which is not accorded to persons who wager bets on offshore platforms. Further, the petitioners being investors and players are discriminated against under the impugned law by being required to pay a tax on their investments whereas persons who invest in the money market; on treasury bills and bonds; on unit trusts; in the stock market or deposit their monies in bank accounts are not subjected to pay a similar excise duty on their deposits. According to the petitioners, persons who invest on the stock market are only required to pay tax on their income/ profits and where the stock on which they invest suffers losses they are not subjected to pay tax. The impugned law however, discriminates against the petitioners and other punters to the extent that it requires them to pay a tax on their waged investment whether they win or lose and similar treatment is not accorded to persons who invest in the stock market.

21. It was the petitioners' case that since there is no justifiable reason why the respondents would accord differential treatment to the petitioners against other investors in the gaming industry or in the money market, the impugned tax is punitive and meant to penalise the petitioners and other punters unfairly.

22. Apart from article 27, it was contended that article 40 of the Constitution is contravened to the extent that the impugned provision seeks to arbitrarily deprive the petitioners and other punters their property staked or wagered on bets. The petitioners complained that the respondents through the impugned provision seek to arbitrarily and without adequate compensation, deprive the petitioners and other punters their property in money just for merely being punters who desire to participate in gaming.

23. To the extent that the impugned law seeks to burden the petitioners and other punters and expropriate their investments/stakes irrespective of whether they win or lose leading to depletion of that investment over time, it was the contention of the petitioners, that article 43 which secures the economic and social rights of every person, including the right to engage in the social and economic life of the society in which a person operates by pursuing economic ventures that uplifts his social and economic status, was contravened since their right to earn a benefit was thereby threatened through the impugned law.

24. In addition, it was their contention that the impugned law contravenes the provisions of article 201(b) of the Constitution which provides as a principle to guide public finance system that the burden of taxation shall be shared fairly. To the extent that the impugned law seeks to place the burden on taxation on the petitioners and other punters at the expense of international gaming players and investors in the money markets, it violates the equity and fairness principle on sharing of burden of taxation. Further, the impugned excise duty is levied on amounts wagered by a punter and not on winnings or gains from a stake, all punters irrespective of whether they win or lose will be required to pay an excise tax out of their pocket or capital investment.

25. The petitioners reiterated that the impugned law contravened section 5 of the Act which provides that excise duty is chargeable on excisable goods which demonstrates that the imposition of excise duty is pegged on provision of a service by a licensed person. In this case, it was contended that the petitioners and other punters do not provide any services to qualify to be considered as qualified for payment of excise duty as sought by the impugned provision. In addition, the impugned provision seeks to levy excise on monies owned by a person that the person seeks to invest and not on any service provided by the person.

26. The petitioners further complained that whereas section 15 of the Act provides for licensing of suppliers of excisable services under the Act and makes it a criminal offense for one to provide excisable services without a license, the impugned provision does not provide a framework for licensing of the Petitioners and other punters hence is ambiguous and self-contradictory and incapable of being implemented.

27. The petitioners therefore sought the following reliefs:

    (i) A declaration that section 4A of Part II of the First Schedule to the Excise Duty Act as introduced by the Finance Act, 2021 is illegal and unlawful and contrary to the provisions of article 10 of the Constitution and as such null and void ab initio;

    (ii) A declaration that section 4A of Part II of the First Schedule to the Excise Duty Act as introduced by the Finance Act, 2021 is illegal and unlawful and contrary to the provisions of article 27 of the Constitution and as such null and void ab initio;

    (iii) A declaration that section 4A of Part II of the First Schedule to the Excise Duty Act as introduced by the Finance Act, 2021 is illegal and unlawful and contrary to the provisions of article 40 (1) (a) and (2) (a) of the Constitution and as such null and void ab initio;

(iv) A declaration that section 4A of Part II of the First Schedule to the Excise Duty Act as introduced by the Finance Act, 2021is illegal and unlawful and contrary to the provisions of article 46(1) of the Constitution and as such null and void ab initio;

(v) A declaration that section 4A of Part II of the First Schedule to the Excise Duty Act as introduced by the Finance Act, 2021 is illegal and unlawful and contrary to the provisions of article 201 (b) (i) of the Constitution and as such null and void ab initio;

(vi) An order of prohibition be and is hereby issued restraining the 2nd respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of section 4A of Part II of the First Schedule to the Excise Duty Act, as introduced by the Finance Act, 2021, by collecting and/or demanding payment of Excise duty on betting;

(vii) The costs of this Petition be borne by the respondents;

(viii) Any other or further order or relief that this Honorable Court deems fit to grant.

28. Together with the Petition, the petitioners filed a Notice of Motion dated 8th July, 2021 in which they sought the following order:

1) That this Application be certified as urgent to be heard ex parte in the first instance.

2) That pending the hearing and determination of this Application inter partes, a Conservatory Order be and is hereby issued restraining the 2nd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of section 4A of Part II of the First Schedule to the Excise Duty Act as introduced by the Finance Act, 2021 by collecting and/or demanding payment of the 7.5 % excise duty on wagered amounts on stakes;

3) That pending the hearing and determination of this Petition inter partes, a Conservatory Order be and is hereby issued restraining the 2nd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of section 4A of Part II of the First Schedule to the Excise Duty Act as introduced by the Finance Act, 2021 by collecting and/or demanding payment of the 7.5 % excise duty on wagered amounts on stakes;

4) That the Costs of this Application be provided for.

29. The said application was based on an affidavit sworn by Cliff Odolo Mboya, the 2nd petitioner herein on 8th July, 2021. After reiterating the facts contained in the petition, the deponent averred that the tax burden imposed on the petitioners is unsustainable, inequitable, and excessive and is outright discriminative against the petitioners and other punters. It was averred that unless the conservatory order sought is granted, the petitioners and other punters a will fatally suffer from the imposition of the illegal and unconstitutional excise tax as the 2nd Respondent will implement the impugned tax.

30. They lamented that if that is done, then they will suffer untold prejudice because their gross wagered amounts will be subjected to an excessive, discriminative and illegal tax. Moreover, the enforcement of the impugned legislations stands to kill the betting industry in Kenya and the livelihoods of millions of Kenyans sustained by the same. It was their view that since death of a business is certainly not a damage

that can be remedied by way of damages, it is in the interest of Justice that the court grants interim reliefs at the very least to preserve the businesses and activities of the betting companies and individuals who depend on the same pending the hearing and determination of this Application and Petition.

31. In respect of the application, the petitioners relied on the case of *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* it was submitted by the petitioners' that article 23 of the *Constitution of Kenya*, as read with the provisions of article 165 and rule 23 of the Constitution of Kenya (Protection of rights and Fundamental Freedom) *Practice and Procedure Rules*, 2013, (otherwise referred to as "the Mutunga Rules") clearly grants this Court powers to hear and determine an application for Conservatory Order or Interim Orders in order to secure the subject matter in dispute.

32. According to the petitioners, the jurisdiction of this Court at this point is limited to examining and evaluating the material placed before it, to determine whether the Applicant has made out a *prima facie* case to warrant grant of Conservatory Orders. In this regard they relied on the decision of the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* and the case of *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae)* Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR.

33. It was submitted that in the instant case, the applicants have shown that they have a case which discloses arguable issues with a likelihood of success. The applicants herein and in their petition are alleging violation of rights and arguable Constitutional issues. Their gravamen is that petitioners and other punters will suffer untold prejudice since their gross wagered amounts will be subjected to an excessive, discriminative and illegal tax should the impugned law continue to be operational. The enforcement of the impugned legislation stands to destroy the livelihoods of Kenyans. According to them, the action taken by the respondents flies in the face of the Constitutional provisions in particular article 23 of the Kenyan Constitution. This Petition therefore discloses prima facie arguable issues for trial.

34. Based on the decision in *Centre for Rights Education and Awareness another v Speaker of The National Assembly & 2 others* , it was submitted that the effect of section 4(a) of the Excise Duty Act excising 7.5% on betting stake is that a punter will lose 7.5% of his money by merely placing a bet while at the same time paying 20% withholding tax on their winnings. This subjects the punters to additional tax in the manner proposed in the said Act which amounts to double taxation on the same transaction contrary to the principles of taxation. This in turn has deleterious consequences which deprives the Petitioners/ Applicants and other punters of their property over a cumulative period.

35. As regards public interest, reliance was placed on the Indian Supreme Court in the case of *Dattraj Nathuji Thaware v State of Maharashta, Indian & Others* on the definition of what public interest is and it was submitted that public interest lies in favour of preserving and protecting values and interest. The impugned legislation as it stands, it was contended affects the livelihoods of many Kenyans who make a living out of betting hence public interest would be greatly jeopardized and compromised should this court decline to grant the interim orders preserving the substratum of the suit herein, which will in turn cause irreparable harm to the public.

Cross-Petitioner's Case

36. The 7th interested party, on his part filed a cross-petition dated 21st July, 2021.

37. According to the Cross-petitioner, it is registered under section 10 of the *Societies Act*, and though there are 88 betting companies, gaming 39 and 17 public lotteries in Kenya, the bulk of which operate within Nairobi County, as of 30th June, 2021, AGOK had 29 of members comprising 3 betting companies, 24 gaming companies and 2 lotteries who collectively have over ten thousand employees.

38. It was pleaded that the Gaming and Lotteries Industries have witnessed significant growth over the past ten years or so and that the Exchequer collects an annual average in taxes of Kshs 15 billion from the industry.

39. It was pleaded that there have been several attempts to impose excise duty on various aspects of the Gaming industry. On 5th May, 2021, the National Assembly's Departmental Committee on Finance and National Planning ("NA's Committee") through its Chairperson Hon Gladys Wanga, introduced the Finance Bill, for the enactment of "An Act of Parliament to amend the law relating to various taxes and duties; and for matters incidental thereto." Following its first reading on 11th May, 2021, the Finance Bill committed to NA's Committee for consideration and facilitation of public participation. Pursuant thereto, the NA's Committee received representations, views and memoranda from stakeholders, across the board who would be affected by the proposed introduction of paragraph 4A of Part II of the First Schedule of the bill and concerns were raised that it was not an excise as no goods were being supplied nor was any service being provided; it was too high and would drive investors out of the market.

40. It was however pleaded that without considering the said objections the NA Committee proposed to amend the Finance Bill by raising the tax to 30% and apportioning it across betting, gaming, price competitions and lotteries at 7.5% each. It was however pleaded that no notice was given to any of those who would be affected by the proposed amendments to extend excise duty to gaming, lotteries and prize competitions, nor were the industry players given any opportunity to make any representations to NA's Committee. After the Bill was passed on the 24th June 2021, it was assented to by the President on 29th June 2021 as The Finance Act, 2021 ("the Finance Act") and the impugned section was to come into operation on 1st July, 2021.

41. According to the Cross-petitioner, the 2nd respondent is in the process of enforcing that paragraphs 4B and 4D of Part II of the First Schedule to the Excise Duty Act, 2015 introduced by section 32 of the Finance Act, 2021.

42. The Cross-petitioner complained that there was no public participation at all in respect to the 7.5% Excise Duty on Gaming and 7.5% Excise Duty on Lottery nor could there be any such participation as it was introduced as an amendment in NA's Committee's Report on the floor of the House during the second reading of the Finance Bill, 2021. Accordingly, the respondents failed to directly engage industry organizations/associations, such as the Petitioner, which have been at the forefront of the development of the regulatory framework for the Gaming Industry.

43. It was further pleaded that section 39A of the *Public Finance Management Act*, 2012 was violated since in passing the impugned amendment i.e. paragraphs 4B and 4D of Part II of the First Schedule to the EDA, the National Assembly failed to discharge its duties as stipulated in the aforesaid mandatory provisions as none of these prescribed factors were taken into account. The said facts were outlined as follows:

    (a) Given the manner in which casinos operates i.e. customers purchase chips which is then wagered for a specific sum in a specific game it is impossible for operators to collect the proposed excise duty on the sums staked or wagered.

    (b) It is impractical to collect or implement the collection of a tax based on amounts wagered and/or staked on slot machines as it is impossible for casino operators to determine the price of wagers. Slot machines use digital technology that generates random numbers which determine the outcome in a game.

(c) With regard to lottery, participants purchase tickets with numbers for a specific amount so as to participate in a predetermined lottery prize. Numbers are then drawn randomly and winning of the lottery prize is determined by matching the numbers on the tickets with the winning numbers. It is therefore impossible to base any tax on amounts wagered and/or staked as there are none.

(d) This is an indirect tax on all players in a population already heavily burdened with indirect taxation.

(e) International trends are deadest against the imposition of taxes on amounts wagered and/or staked. There is little or no precedent for such taxes elsewhere in the world.

(f) The gaming and lottery industry is already heavily taxed with the following taxes, barely made it of adverse effects of the global COVId-19 pandemic.

(i) Corporate tax at the rate of 30% on profits for resident companies

(ii) Gaming tax of 15% of the gaming revenue

(iii) Gamers and participants in lotteries are also required to pay withholding tax at the rate of 20% on gross winnings

(g) A 7.5% tax, if enforced, will have the effect discouraging customers from participating in gaming and lotteries with obvious negative impact on investments, employment as well as overall revenue collection.

44. According to the cross-petitioner lamented that unlike, betting, the EDA makes no provision at all for cater to the levying of excise duty on gaming. The cross-petitioner just like the petitioners, pleaded that gaming does not constitute the provision of a service or the supply of goods upon which excise duty may be levied since the amount wagered or staked is not payment for a service but a sum risked by the punter for chance of higher reward. According to the cross-petitioner, indeed, it was in light of previous challenges to attempts to impose excise duty on gaming taxes were introduced. The cross-petitioner disclosed that by section 126(A) of the *Customs and Excise Act*, Chapter 572 of the Laws of Kenya (repealed), introduced by section 2 of the *Finance Act*, imposed a duty at the rate of 5% on gaming takings. However, this was challenged in JR Misc. Application No. 879 of 2004 in which interim orders were granted suspending the implementation of the said section 126(A). Before the proceedings were heard and determined, by section 4 of the *Finance Act*, 2009, section 126A was repealed.

45. The Cross-Petitioners therefore seek:

(a) A declaration that paragraphs 4B and 4D of Part II of the First Schedule to the Excise Duty Act, 2015 introduced by section 32 of the Finance Act, 2021, are unconstitutional and therefore null and void and of no legal effect.

(b) Such other and/or further relief as this Honourable Court may deem fit to grant.

(c) An order that the costs of and occasioned by this Petition be borne by the Respondents.

46. The cross-petitioners similarly filed a Motion dated 21st July, 2021, in which they sought the following orders:

1) That for reasons to be recorded service of this application be dispensed with at first instance in respect of prayer 2.

2) That pending hearing and determination of this Application, the respondent be strictly enjoined and restrained whether by itself or by its servants, agents or otherwise howsoever from implementing and/or seeking to enforce in any manner howsoever the impugned provisions of paragraphs 4B and 4D of Part II of the First Schedule to the Excise Duty Act, 2015 introduced by section 32 of the Finance Act, 2021.

3) That pending hearing and determination of the Petition herein, the respondent be strictly enjoined and restrained whether by itself or by its servants, agents or otherwise howsoever from implementing and/or seeking to enforce in any manner howsoever, the impugned provisions of paragraphs 4B and 4D of Part II of the First Schedule to the Excise Duty Act, 2015 introduced by section 32 of the Finance Act, 2021.

4) That the costs of and occasioned by this application be provided for.

47. The application was supported by an affidavit sworn by Jane Karigu Kiragu, the 7th interested party's Chairperson on 21st July, 2021.

48. After reiterating the facts set out in the Petition, the deponent averred that given the manner in which casinos operate i.e. customers purchase chips which are then wagered for a specific sum in a specific game, it is impossible for operators to collect the proposed excise duty on the sums staked or wagered. Further, it is also impractical to collect or implement the collection of a tax based on amounts wagered and/or staked on slot machines as it is impossible for casino operators to determine the price of wagers since slot machines use digital technology that generates random numbers which determine the outcome in a game.

49. With regard to lottery, it was deposed that participants purchase tickets with numbers for a specific amount so as to participate in a predetermined lottery prize. Numbers are then drawn randomly and winning of the lottery prize is determined by matching the numbers on the tickets with the winning numbers. It is therefore impossible to base any tax on amounts wagered and/or staked as there are none.

50. The cross-petitioner lamented that this is an indirect tax on all players in a population already heavily burdened with indirect taxation yet international trends are deadest against the imposition of taxes on amounts wagered and/or staked and there is little or no precedent for such taxes elsewhere in the world. The gaming industry, it was averred, is already heavily taxed, and barely made it of adverse effects of the global COVID-19 pandemic. A 7.5%, if enforced, will have the effect discouraging customers with obvious negative impact on investments, employment as well as overall revenue collection.

51. As regard to relief in the nature of conservatory orders, it was submitted on behalf of the cross-petitioner that given the manner in which the amendments were introduced in the absence public participation in respect to the 7.5% Excise Duty on Gaming and 7.5% Excise Duty on Lottery the same having been introduced as an amendment in NA's Committee's Report on the floor of the House during the second reading of the Finance Bill, 2021, this is a compelling reason for the grant of the orders sought.

52. Secondly, there was blatant violation of section 39A(4) of the Public Finance Management Act, 2012 and relied in the decision in *Association of Kenya Insurers (AKI) (suing through its Chairman Mr Mathew Koech) v Kenya Revenue Authority & 2 others; Insurance Regulatory Authority (IRA) Interested Party* .

53. The 8th interested party who supported the application argued that the petitioners and interested parties whose fundamental rights and freedoms have been violated and are threatened with further violation through implementation of the impugned law by the respondents should have those rights

and freedoms preserved and protected from further violation pending the hearing and determination of the Petition. The justice of this case is for the court to restore the parties to the status quo ante the impugned laws pending the hearing and determination of the Petition.

54. According to the said interested party, the action of collecting excise duty on stakes has the cumulative effect of dwindling the applicants' capital sum progressively leading to exhaustion and depletion. It may therefore happen that by the time the Petition is heard the total sum originally staked by a punter will have been exhausted. It was submitted that deducting a percentage of the applicants' stake every time they wager a bet will over time lead to a full exhaustion of the sums committed to stakes whether the applicants' win or lose. There is therefore a real fear and chance that the applicants will not be in position to carry on with their bets and stakes even if the Petition will have been decided in their favour since all their stakes will have gone into paying for excise duty and ultimately exhausted.

55. According to them, the sums collected from the applicants' stakes and wagered bets will not be recoverable even if the Petition were to be decided in their favour ultimately since there is no mechanism put in place for the recovery of the sums that would be collected from the applicants' if the Petition herein were to succeed. They will have therefore lost their revenue with no possibility of recovering the same. It was contended that the implementation of the impugned law poses an existential threat to local betting companies since they will be facing an unfair discrimination compared to offshore betting companies leading to their collapse.

2nd Respondent's Case

56. On its part the 2nd respondent took a preliminary objection to the Petition based on the following grounds:

    1) The Cross Petition contravenes rule 15 (3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which it pinned on and therefor fatally defective;

    2) The Cross petitioner is an interested party incapable in law of filing the Cross Petition in the nature of the Cross Petition filed herein hence fatally defective.

57. In its submissions on the preliminary objection, the 2nd respondent, KRA, relied on the definition of "interested party" in rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as adopted in *Judicial Service Commission v Speaker of the National Assembly and Attorney General*.

58. It was therefore submitted that the interested party is not a primary party to the dispute as he is not a respondent. In this case, however, the interested party invoked rule 15(3) of the said Rules. According to KRA, since the rule only provides for the "respondent" as opposed to interested party, the Interested Party cannot purport to file a cross Petition. In this regard reliance was placed on *Jasper Ndeke Shadrack v Director of Public Prosecutions & another; Florence Wangari Hungi & 4 others (Intended Interested parties)* and the decision of the Supreme Court in *Methodist Church in Kenya v Mohamed Fugicha & 3 others* and it was therefore submitted that therefore follows that under rule 15(3) only a respondent and not an interested party can file a Cross-Petition. The Cross- Petition filed herein by the interested party is therefore fatally defective and should be struck out.

59. According to KRA, the interested party cannot file a cross Petition in the nature filed before the court. However, the interested party in the cross petition before the court seeks to introduce new issues to the extent that it challenges different sections 4B and 4C which relates to gaming and lotteries while the Petition as filed by the Original Petitioners challenges section 4A. Further the Cross Petition is premised on the ground that section 4B and section 4C were never subjected to public participation

which is a different ground than that which section 4A is challenged by the Original Petitioners which was that the same contravene article 27, 40, 43 and 47 of the Constitution.

60. In support of its submissions, KRA, relied on the definition of "Cross Petition" in US Legal as:

Cross petition is an application for a legal remedy made by a defendant against the plaintiff in the same court.

61. It also cited *Black Law dictionary* which defines a "Cross claim" as:

A claim asserted between Co-defendants or Co-Plaintiffs in a case and that relates to the subject of the original claim or counterclaim

62. It was submitted that a cross Petition is therefore a claim by the Co-Defendants/Respondent as against the Petitioner and not a fresh claim against the Respondent.

63. As to what the court should make of a cross-petition fashioned as such, KRA, relied on the view expressed by the Supreme Court in *Francis Karioki Muruatetu & another v Republic & 5 others* and *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 3 others* and submitted that the Cross Petition to the extent that it intends to introduce news issues relating to section 4B and 4C that are not part of the Petition herein which only deals with section 4A is fatally defective and should be struck out with costs to the respondents.

64. As regards the relief for conservatory orders, it was submitted that the 2nd respondent has gone to the platforms of all the betting companies and established that they are charging excise duty already on the punters as such the allegation that they have not configured their systems is misguided and the same is therefore not an impossible obligation. Further the tax in question is a consumer tax and once charged should be remitted to the 2nd respondent and not used to unlawfully enrich the Interested Parties. Since the excise duty is a consumption tax borne by the final consumer who cannot be traced by the 2nd respondent, the obligation is on the betting companies to withhold at the point of charge of the betting service. It was submitted that KRA will not be in a position to recover the related tax should the Court finally find that the same was Constitutional and was properly enacted, if it the Court suspends the legislation at this point. Accordingly, it was submitted that suspending the enforcement of a consumption tax which cannot later be recovered not only cause irrecoverable loss on the 2nd respondent but also strain the financing of the Government operations which are dependent on the taxes.

65. It was submitted that the Finance Act, 2021 enjoys the presumption of constitutionality which principle has been accepted by the Superior Court and this presumption of constitutionality can only be rebutted through the hearing and determination of the Petition hence a stay should not be granted at this stage.

66. In KRA's view, the Application fails to demonstrate any constitutional provision which has been violated and that the legislative authority of the people at the national level is vested in and exercised by Parliament in accordance with articles 94, 109 and 118 of the Constitution and the court have always refrained from interfering at the interim stage as the legislature is deemed to have followed the process.It was submitted thatthe impugned provision was subjected to public participation and even some of the interested parties herein provided their comments for consideration. Accordingly, since the enactment of the section 32 and the corresponding section 33 met the mandatory requirements of the Constitution and its standing orders, this Application raises no justifiable issues to warrant the suspension and is therefore incompetent and misconceived both in law and fact.

67. In support of its submissions, KRA relied on *Board of Management of Uhuru Secondary School v City County Director of Education and 2 others*, *Gatirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others* and *Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another* and submitted that the Cross Petition having been filed by an interested party contrary to the express provisions of the rule 15(3) of the Mutunga Rules that allows only the respondent to file a cross Petition, the Application by the 7th Interested Party fails on this limb.

68. It was further submitted that the 2nd respondent in the replying affidavit has clearly in the detailed response outlined the process under which the impugned provision relating to betting underwent during the enactment including the public participation forum during which the parties herein were allowed to participate in the process and that the indeed the 8th interested party submitted his comments on the same and attended the public participation discussions. Further the minutes of the Departmental Committee on Finance and National Planning clearly show that the issues relating to lotteries and gaming were subjected to public participation in the presence of stakeholders before the same was placed on the floor of the house for discussion.

69. It was however submitted that the 2nd Respondent has further gone to great lengths to demonstrate how the betting industry operates and that the stake is the charge levied by the betting Companies to enable the Punter access the betting service thus proper with section 9 of the Excise Duty Act.

70. According to KRA, since neither the petitioners nor the interested parties have pointed out the charge for the betting, gambling of lottery service which ought to be placed the excise duty in the alternate to the stake which they contest, it follows that on the face of the documents on record the Petitioners have failed to demonstrate a *Prima Facie* case capable of success based on the decision on *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* .

71. On whether the petitioner will suffer prejudice, KRA relied on the definition of the word "prejudice" in *Black Law Dictionary*, 8th Edition at page 1218 as:

Damage or detriment to one's legal rights or claims

72. On this ground, the court was urged to take into account that the excise duty is a consumption tax borne by the final consumer who cannot be traced by the 2nd respondent hence the obligation on the betting companies to withhold at the point of charge of the betting, gaming or gambling service. According to KRA, tax laws never place any obligation on consumers to file a return or make a declaration at any time other than that of purchase as it will be untenable considering the amount of time one person make a purchase. The 2nd respondent will therefore not be in a position to recover the related tax should the Court finally find that the same was Constitutional and was properly enacted, if it the Court suspends the legislation at this point. It was pointed out that the petitioners have not provided documentary evidence or otherwise that betting, gambling or lottery is their source of livelihood and that KRA has demonstrated that the interested parties have already configured their systems and are charging excise duty.

73. Accordingly, it was submitted that no prejudice has been demonstrated on the part of the petitioners or the interested parties, only on the part of the 2nd respondent. In this regard, KRA relied on *Energy Dealers Association & 1 other v The Honourable Attorney General and 3 others*,*Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others* and *Robert N Gakuru & another v County Government of Kiambu & another*. According to KRA, betting, gambling or lottery remains a hobby which the Punters/ Players can pick up way after the suit is determined. Further the Punters/Players/gamblers who feel the need to recover any excise duty paid can invoke the provisions of section 47 of the *Tax Procedures Act* for recovery of any taxes paid in error should the Court finally find that the Taxes were

improper. Therefore, in its view, prejudice in this case only falls on the 2nd respondent and not the Petitioners or the interested parties as such the Application fails on this limb.

74. As to whether the alleged violation will render the suit nugatory, KRA cited the decision of the Court of Appeal in *Nairobi Civil Appeal No 211 of 2016 - Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others* which quoted with approval the definition of "nugatory" in *Reliance Bank Ltd v Norlake Investments Ltd*. According to KRA, since the court in the suit herein has been invited to make a determination as to whether the Part 4A, 4B and 4C of the First Schedule of the Excise Duty are unconstitutional, the decision not to grant the conservatory order would not render the final decision of little or no legal consequences since you don't need a conservatory Order to argue on the constitutionality of the law. Even if the orders are not granted the importance or the weight of the Order will not be watered down, the law will be unconstitutional upon pronouncement. It was submitted that the petitioners have not demonstrated how the failure to grant the Orders will render the case nugatory since nothing perishable or in the danger of being exhausted has been placed before the Court.

75. It was submitted that the interested parties are merely withholding tax agents and it has been demonstrated that they are already charging excise duty on stakes as such they should continue to withhold and remit the same to the 2nd Respondent.

76. As regards public interest, reliance was placed on The *Black Law's Dictionary* 8th Edition at page 1266 which defines "Public Interest" as well as *Dattraj Nathuji Thaware v State of Maharashta, Indian & others* [2004] INSC 755 SC 755 of 2004and it was submitted that legislations are enacted in public interest and enjoys the presumption of constitutionality. In this regard reliance was placed on *Energy Dealers association & 1 other v The Honourable Attorney General and 3 others* [2021] eKLR and *Kizito Mark Ngaywa v Minister of State for Internal Security and Provincial Administration & another* [2011] eKLR where the court relied on *Ndyanabo v Attorney General* (2001) 2 EA 485. It was submitted that the Finance Act, 2021 which was enacted to respond to various challenges in the country. Suspension of the Act at this stage when it has not even been proven to be unconstitutional will have a very grave impact on the population of this country as the country will suffer grave financial impacts. First, the state will not be able to meet its various budgetary allocations and this means that services will not be delivered to the people. Secondly, the tax is not likely to be recovered in the event that the Act is found to be constitutional. According to KRA, this presumption of constitutionality can only be rebutted through a hearing and determination of the petition and this Court should not issue a stay at this stage.

77. It was submitted that the petitioners and the interested party have not provided any real danger that they will suffer prejudice if conservatory are not granted. According to KRA, the petitioner in their submission with regard to prejudice only avers that the enactment will lead to double taxation to which the 2nd respondent has responded and shown how excise duty is distinct and Income Tax and that the two are levied at different stages hence not double tax. On the other hand, the Interested Parties are just withholding agents and not the bearers of the taxes, hence they cannot raise prejudice.

78. In the result, KRA prayed that the Applications for the conservatory by the petitioners and the 7th interested party order are improperly before the court and ought to be struck out with costs to the 2nd respondents.

79. The preliminary objection was supported by the 2nd respondent based on the same grounds raised by the KRA.

80. Both the 1st and the 3rd respondents supported the preliminary objection based on the same grounds. The 1st respondent, in addition relied on the case of R*epublic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) ex parte Kenya Ports Authority & another* [2021] eKLR, and J*apthet Muroko & another v Independent Electoral and Boundaries Commission (IEBC) & 3 others* [2017] eKLR. According to the 1st respondent, what emerges from the above decisions is the principle established in our jurisprudence that an interested party is a peripheral party in a suit and cannot introduce new issues for determination by the court.

81. It was therefore submitted that the 7th interested party, does not bear the right to file a cross-petition as this is a preserve of a respondent and that since an interested party is a peripheral party in a suit, he cannot introduce new issues for determination by the Court. It was therefore urged that the Cross petition herein together with the Notice of Motion Application are incompetent, have no basis in law and should be struck out with costs to the 1st respondent.

82. Suffice it to state that the said two respondents also opposed the applications for the grant of conservatory.

Opposition to the Preliminary Objection.

83. In response to the preliminary objection, the 7th interested party submitted that there is no claim that KRA nor any of the respondents is prejudiced by the manner in which the Cross-Petition had lodged. Nor can there be any such claim. It is totally inconceivable that any of the original Petitioners, the respondents nor the Interested Parties can possibly be so prejudiced by the Cross-Petition.

84. According to the 7th interested party, whereas, rule 15(3) speaks only of 'respondents', a literal application of the said rule would mean that any document other than a Replying Affidavit by a respondent, is not authorized by the Mutunga Rules- an absurdity that only needs to be stated to be rejected. According to the 7th interested party, restricting cross-petitions to respondents only as urged by KRA would not promote the purposes, values and principles of the Constitution; would undermine the rule of law and human rights and fundamental freedoms by increasing the procedural minefields of litigation; undermines the development of law and does nothing to contribute to good governance.

85. The 7th interested party distinguished the present case from *Methodist Church in Kenya v Mohamead Fugicha & Another* [2019] eKLR case since in its view what the Supreme Court frowned at was treating an averment in a replying affidavit as constituting a Cross-Petition since a cross-petition must contain all the information required of petitions as stipulated in rule 10(2) of the Mutunga rules. By entertaining such a paragraph as a cross petition on appeal, the petitioner's right's right to be heard under articles 25 and 50 of the Constitution were violated as there was no Cross-Petition properly before the court.

86. As for the decision in *Jasper Ndeke Shadrak v Director of Public Prosecution and another* [2020], it was submitted that the same is not binding on this court. In that case the application simultaneously sought joinder of a party as an interested party and leave to lodge Cross-Petitioner. It failed because that judge held that an intended interested party could not do so. According to the 7th interested party, this decision is not supported by any legal provision or authority. It was submitted that the decision is not only is the decision distinguishable but as the reasoning was somewhat opaque the Court should not follow it.

87. It was further submitted that the contention that the 7th interested party intends to improperly expand the scope of the Petition by introducing a fresh cause of action is misplaced since both the Petition

as well as the Cross-Petition are concerned with amendments introduced on gambling, gaming and lotteries- excise duty at a rate of 7.5% across the board by section 32 of the Finance Act, 2021. While appreciating that the point of emphasis is different and AGOK relies on additional grounds, that does not amount to introducing a new cause of action. It is the same provisions of the same act levying similar excise duty. According to the 7th interested party the issue in *Francis Karioki Murutetu & another v Republic & 5 other* [2016] eKLR was the proper interpretation and application of section 23 of the Supreme Court Act & rule 25 of the Supreme Court Rules which provisions are not quite similar with those of 7(1) of the Mutunga rules. The former contains much more elaborate provisions for joinder of interested parties than rule 7. This was a criminal appeal concerned the constitutional propriety of mandatory death penalty for conviction of murder as a preordained sentence. In their respective submissions, the intended interested parties sought to challenge the constitutionality of the death penalty en tout. The Supreme Court faithful to the terms of the aforesaid section 23 and rule 26, dismissed the applications as going beyond what was permissible by introducing new issues thus could be form the basis of showing they had a stake in the litigation. In these proceedings, which may correctly be characterized as public interest litigation, from the onset, the Petitioners recognized that AGOK has an interest in the proceedings- so it need not demonstrate a stake in the proceedings. It is admitted and accepted by all. Unlike any of the cases relied on by KRA, the Petitioner does not take exception to the Cross-Petition. The subject matter of the cross-petition is excise duty at the rate of 7.5 as applied to lotteries and gaming as introduced as amendments to the Excise Duty Act by section 32 of the Finance Act. According to the 7th interested party, this does not amount to framing own issues or introducing a fresh cause of action.

88. The case of *Raila Amolo Odinga & others v IEBC & others* [2017] eKLR, it was submitted similarly involved section 23 of the Supreme Court Act and rules 25 of that Court's rules. The intended interested party from the outset sough raise a new altogether different challenge to the contested elections. The original election Petition challenged the voting process. The intended interested party sought top challenge the eligibility of the candidates. This was held to be outside the permissible limits under section 23 and rule 25.

89. As regards *Fugicha* Case, it was submitted that the new issue that attracted the Supreme Court's was while the original Petition was directed at propriety of an education's officer direction of dress -code, the purported cross petition sought address the constitutionality on bans on hijab.

90. It was submitted that the preliminary objection does not advance article 259 not rules 3 to 5 since striking out the cross-petition will only lead to filing of another petition which is likely to be consolidated for joint hearing and determination.

Determinations

91. I have considered the applications the subject of this ruling as well as the preliminary objection taken against the cross-petition.

92. I will start with determining the fate of the cross-petition herein.

93. The preliminary objection is two-pronged. First, it is argued that the Cross Petition contravenes rule 15(3) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (otherwise known as "Mutunga Rules" and hereinafter referred to as "The Rules") upon which the Cross-petition is pinned and therefore fatally defective. Secondly, it is contended that the Cross Petitioner as an interested party is incapable in law of filing the Cross Petition in the nature of the Cross Petition filed herein hence fatally defective.

94. Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 defines the term "interested party" as:

a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.

95. This definition was adopted in *Judicial Service Commission v Speaker of the National Assembly and Attorney General,* High Court Constitutional and Human Rights Division Petition No 518 of 2013, 2013 e[KLR].

96. Rule 15(3) of the said Rules which provides that:

(3) The respondent may file a cross-petition which shall disclose the matter set out in rule 10 (2)

97. A literal reading of the said rule clearly permits the "respondent" to file a Cross-Petition. There is no other provision under the Rules that permits an interested party to file a cross-petition. The question that arises is whether an interested party can similarly file a cross-petition. Makau, J in *Jasper Ndeke Shadrack v Director of Public Prosecutions & another; Florence Wangari Hungi & 4 others (Intended Interested parties)* [2021], found that:

> "17.... the Constitution and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 has not provided for filing of Cross-Petition by an Intended interested party or interested party in the same Petition. The Intended interested parties were not at any time barred before seeking to be enjoined in these proceedings from filing their individual respective petitions without seeking to be enjoined and had they opted to do so they would have rightly exercised their constitutional rights to access justice. I find that it would be an abuse of court process for intended interested parties to seek to be enjoined as interested parties and at the same time file either a Petition or cross Petition in the same proceedings. I find the intended interested parties cross-Petition or Petition to be bad in law and warrants dismissal in limine."

98. In dealing with the status of an interested party, the Supreme Court, by a majority, in *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR expressed itself, *inter alia,* as follows:

> "[40] In addressing the cross petition, the status of the 1st respondent in the High Court petition cannot be overlooked. The 1st respondent was admitted to the suit as an 'interested party.' The question then arises as to whether an 'interested party' has the capacity to institute a 'cross petition'. [50] The 2nd and 3rd respondents' case in the High Court was made through a replying affidavit sworn on 17th October 2014 by the 2nd respondent, on behalf of herself and the 3rd respondent. She stated that the decision to allow the Muslim students to adorn hijabs was only meant to mitigate the animosity that had caused much unrest in the school, and to allow the students to settle down and prepare for national examinations.
>
> (51) The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with article 32 of the Constitution. It is on this basis that he cross-petitioned at paragraph 34 of his replying affidavit, for the Muslim students to be allowed to wear the hijab, in accordance with articles 27 (5) and 32 of the Constitution.

(52) The cross-petition was expressed in straight terms: "I am swearing this affidavit in opposition to the petition herein for it to be dismissed with costs, and ... I am also cross-petitioning that Muslim Students be allowed to wear a limited form of hijab (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with article 32 of the Constitution of Kenya, and their right to equal protection and equal benefit of the law under article 27 (5) of the Constitution."

(53) What should we make of a cross-petition fashioned as such" Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in *Francis Karioki Muruatetu & Another v. Republic & 5 others,* Sup Ct Pet 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

> "Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court" [emphasis supplied].

(54) In like terms we thus observed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others,* Civil Appeal No 290 of 2012 (paragraph 24):

> "A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

(55) Against such a background, the trial Court ought not to have entertained issues arising from the cross-petition by the interested party, especially in view of Article 163 (7) of the Constitution which provides that 'All courts, other that the Supreme Court, are bound by the decisions of the Supreme Court." Moreover, this cross-petition did not comply with Rule 15 (3) of the Mutunga Rules which speaks to a respondent filing a cross-petition; and it was also

not in conformity with Rule 10 (2) of these Rules. Rule 10(3) cannot also be invoked as the replying affidavit of the interested party does not fit any of the descriptions contained therein.

(56) We further note that the petition is unyielding that the cross – petition did not meet the set out requirements, it was defective and inconsistent with the Mutunga Rules, further, they argue that consideration of the same by the Appellate Court violated their right to fair trial denying them opportunity to prepare and canvass the issue raised in the cross-petition.

(57) We agree that the issues set out in the cross-petition did not afford the opportunity for the Petitioner to respond to the same effectively. Firstly, because it introduced a different cause of action from that raised in the original Petition; and secondly, because it was not framed in a manner, for which there was a known laid out procedure for an exhaustive response. The fact, that the petitioner may have referred to the issues therein through oral arguments, could not, as wrongfully determined by both the High Court and the Court of Appeal, have amounted to formal pleadings in response to those issues. As such we find that both superior Courts violated the Petitioner's right to be heard, as provided for under Articles 25 and 50 of the Constitution.

(58) Furthermore and with due respect to the Appellate Court, we are persuaded that the cross-petition was improperly before the High Court, and ought not to have been introduced by an interested party, and in that light, it should not and could not have been entertained by the Court of Appeal; neither court having proper jurisdiction to do so.

(59) In the same breadth, we recognize that the issue as contained in the impugned cross petition is an important national issue, that will provide a jurisprudential moment for this Court to pronounce itself upon in the future. However, to do so, it is imperative that the matter ought to reach us in the proper manner, so that when a party seeks redress from this court, they ought to have had the matter properly instituted, the issues canvassed and determined in the professionally competent chain of courts leading up to this Apex Court. In view of this, it is our recommendation that should any party wish to pursue this issue, they ought to consider instituting the matter formally at the High Court.

99. My understanding of the said decision is that the Supreme Court was not only dealing with the manner in which the purported cross-petition was brought but also the locus standi of the interested party to bring the same. It found, in no uncertain terms that an interested party has no locus to cross-petition under rule 15(3) of the Mutunga Rules aforesaid. It also found that such an interested party cannot urge new substantive issues not the subject of the existing petition.

100. That position seemed to resonate with its earlier position in *Francis Karioko Muruatetu & another v Republic & 5 others*, Sup Ct Pet 15 & 16 of 2015 (consolidated); [2016] eKLR where the court held that:

> " [42]Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.

[43]...Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed."

101. In fact, the Supreme Court took issue with the fact that the Court of Appeal did not follow its said earlier decision.

102. The same position was adopted by the same Court in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR where, in refusing to join a new interested Party who intended to introduce new issues, stated that:

> " [12] When the applicant introduces a new petition, with issues not already laid before the Court, he is improperly making claims on a cause that belongs to other parties, in the main proceedings. This cannot be allowed. We are also not convinced that the applicant would suffer any prejudice, if his proposed intervention is declined."

103. In the cross-petition, one of the issues intended to be raised is the issue of public participation and whether it was in order for the 1st Respondent to introduce fresh amendments on the floor of the House after public participation and without subjecting the same to the said process of public participation. I agree that the said ground is substantive and cannot be termed as a collateral ground to the other grounds since on its own, it is capable of impugning the resultant legislation.

104. That new substantive issues ought not to be introduced by an interested party in that capacity was also appreciated in *Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) ex parte Kenya Ports Authority & another* [2021] eKLR, where it was held that:

> " 33. What emerges from the above decisions is the principle established in our jurisprudence that an interested party is a peripheral party in a suit and cannot introduce new issues for determination by the Court. Further, that in determining the matters before it, the Court will only consider the issues raised in the pleadings by the principal parties."

105. Similarly in *Japthet Muroko & another v Independent Electoral and Boundaries Commission (IEBC) & 3 others* [2017] eKLR, it was held that:-

> " 29. Participation of an interested party should not amount to introduction of new causes of action altogether. In the Muruatetu case, referred to above, the court thus stated: [42] Therefore in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the court. That stake cannot take the form of an altogether a new issue to be introduced before the court. [43]....Any interested party or amicus curiae who signals that he or she intends to steer the court towards a consideration of those 'new issues' cannot, therefore, be allowed."

106. What my understanding of these authorities is that an interested party's stake must be a stake in the action as commenced and not a stake that is introduced by itself.

107. It is however alluded that the petition herein is a public interest litigation. It is true that in public interest litigation, courts have been reluctant to permit the proceedings to be conducted in the same manner as adversarial proceedings where the parties are free to determine the course their action takes. In such cases, for example, where the parties are nolonger keen to proceed with the action, courts do readily permit other parties interested in carrying on with the matter to do so in the interest of the public so that an issue germane to the public is not lost merely because, for reasons other than the merits of the action, the petitioner may nolonger be keen in pursuing the matter. In such cases, the new party may well introduce new issue by amending the petition. That however is not the scenario before me.

108. Article 163 (7) of the Constitution which provides that:

'All courts, other that the Supreme Court, are bound by the decisions of the Supreme Court."

109. Whereas article 163(3) of the Constitution binds all Courts to a decision of the Supreme Court, it does not necessarily mean that the said Courts must agree with the decision of the Supreme Court. What is required is that at the end of the day, the decision of the Supreme Court must be binding notwithstanding whatever reservations the other Courts may have regarding the said decision. This was appreciated in *Mwai Kibaki v Daniel Toroitich Arap Moi* Civil Appeal Nos 172 & 173 of 1999 [2008] 2 KLR (EP) 351; [2000] 1 EA 115 where it was held that:

> " The High Court, while it has the right and indeed the duty to critically examine the decisions of the Court of Appeal, must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that obiter dictum if applicable. It is necessary for each lower tier to accept loyally the decisions of the higher tiers. Even in the same tier, where it has taken the freedom to review its own decisions, it will do so cautiously. Precedent is regarded as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as an orderly development of legal rules..." [Underlining mine].

110. A similar view was expressed in *National Bank of Kenya Ltd v Wilson Ndolo Ayah* Civil Appeal No 119 of 2002 [2009]KLR 762 //where it was held:

> " It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter."

111. Omolo, JA in *Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others* Civil Appeal No 238 of 2003 expressed himself as hereunder:

> " The learned judge of the High Court had no jurisdiction to over-rule a decision of the Court of Appeal even if she disagrees with the decision and the comments in her judgement must be ignored as having been made without jurisdiction and in violation of the well-known doctrine of precedent. Like all other judges in her position, under the doctrine of precedent, she is bound by the decision of the Court of Appeal even if she may not approve of a particular decision and any attempts to over-rule or side-step the court's decisions can only result in unnecessary costs to the parties involved in the litigation."

112. This position was restated in *Cassell & Co Ltd v Broome & another [*1972] AC 1072 in which the court held:

> " The fact is and I hope it will never be necessary to say so again, that in the hierarchical system of the courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously".

113. Whereas I may not necessarily agree with the broad position taken by the Supreme Court in *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR line, hook and sinker, the Constitution binds me to follow the same. Consequently, I find the cross-petition filed by the 7th interested party herein incompetent and the same is hereby struck out. As the application for conservatory order by the said party is based on the said Cross Petition, it follows that the said application is similarly incompetent and is hereby struck out. There will be no order as to the costs of both proceedings.

114. That now leads me to the conservatory order sought by the petitioner. In Mombasa High Court Petition No 669 of 2009 – *Bishop Joseph Kimani & others v Attorney General & ors,*Ibrahim, J (as he then was) pronounced himself as follows:

> " It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment...It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain...I am still of the view that "there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void." It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first."

115. Majanja, J on his part in *Susan Wambui Kaguru & ors v Attorney General another* [2012] KLR expressed himself inter alia as follows:

> " I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious legal arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I

cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so."

116. What clearly comes out is that the power to suspend legislation during peace time ought to be exercised with care, prudence and judicious wisdom where it is shown that the operation of the legislative provision are a danger to life and limb at that very moment and where the national interest demand and the situation is certain. On my part I would modify that view by adding to the phrase "a danger to life and limb" the words "or where there is imminent danger to the Bill of Rights" since aaticle 19(1) of the Constitution provides that the "Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies" and article 21(a) provides that "it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights." However, at the stage of the application for conservatory order the Court ought not to make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so. In other words, where there are strong and cogent reasons conservatory orders may be granted.

117. Under article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution. If anyone is in doubt, article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. 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.

118. Where in my view, the court is convinced that the orders ought to be granted, I do not see why the Court should shy away from doing so. On this note I wish to associate myself with the holding of Mulenga, JSC in *Habre International Co Ltd v Kassam and others* [1999] 1 EA 125 to the effect that:

> " The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this."

119. I similarly agree with this Court's decision in *Re Kadhis' Court: Very Right Rev Dr Jesse Kamau & others v The Hon Attorney General & another* Nairobi HCMCA No 890 of 2004 where it was held that:

> " The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must

be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."

120. In my view this holding is even more appropriate in cases where the court is called upon to uphold the provisions of the Constitution.

121. Article 23 of the Constitution does not expressly bar the court from granting conservatory orders where a challenge is taken on the constitutionality of legislation. The only rider is that the case must be one which falls under article 22 of the Constitution. This however does not mean that Courts ought to readily suspend legislation simply because a challenge has been made to a statute. I agree that power ought to be exercised very sparingly where the Court is satisfied that it ought to be exercised. However, it can be exercised.

122. Whereas I agree that there is a presumption of Constitutionality of Statute that is a rebuttable principle. This was clearly appreciated in *Ndyanabo v Attorney General* [2001] 2 EA 485 where it was by the Constitutional Court in Tanzania as follows:-

> "...Thirdly; until the contrary is proved, a legislation is presumed to be Constitutional. It is a sound privilege of Constitutional construction that if possible, a legislation should receive such a construction as will make it operative and not inoperative. Fourthly, since, as stated, a short while ago, there is a presumption of Constitutionality of legislation, the onus is upon those who challenge the Constitutionality of the legislation, they have to rebut the presumption. Fifthly where those supporting a restriction on a fundamental right rely on a claw back or exclusion clause in doing so, the onus is on them, they have to justify the restriction."

123. It is therefore clear that that in interpreting the Constitution, the Court should be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation's status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction.

124. I wish to associate myself with the holding of Mbogholi Msagha, J (as he ten was) in *Macharia v Murathe & Another* Nairobi HCEP No 21 of 1998 [2008] 2 KLR (EP) 189 (HCK) where he expressed himself inter alia as follows:

> "The learned counsel cited several authorities from the English jurisdiction to advance his submission that the Courts have no jurisdiction to question whatever takes place in Parliament. Britain does not have a written Constitution hence the sovereignty of Parliament. But in Kenya we have a Constitution whose supremacy as set out therein is unambiguous and unequivocal. In a democratic Country governed by a written Constitution, it is the Constitution which is supreme and sovereign...it is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because ...the Constitution itself makes provision in that behalf, and the amendment of the Constitution

can be validly made only by following the procedure prescribed by the... [Constitution]. That shows that even when Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers and Judges take oath of allegiance to the Constitution for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe their allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature...in the literal absolute sense."

125. In the same vein, Nyamu, J (as he then was) in *Republic v Public Procurement Administrative Review Board & another Ex Parte Selex Sistemi Integrati* Nairobi HCMA No 1260 of 2007[2008] KLR 728 pronounced himself as follows:

> " The other reason why this Court cannot blindly apply the so called ouster clauses is that, unlike the English position where judges must always obey, or bow to what Parliament legislate, is, because Parliament is the supreme organ in that legal system. Even there judges have refused to blindly apply badly drafted laws and have in some cases filled the gaps in order to complete or give effect to the intention of the legislature. In the case of Kenya it is our written Constitution which is supreme and any law that is inconsistent with the Constitution is void to the extent of the inconsistency (see s 3). Our first loyalty as judges in Kenya is therefore to the Constitution and in deserving cases, we are at liberty to strike down laws that violate the Constitution."

126. That brings me to the present case.

127. Article 165(3)(d)(ii) of the Constitution donates to the High Court the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. The Judiciary as a bastion of the rights of the people is the safeguard and watchdog of the rights, which are fundamental to human existence, security and dignity.

128. Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality, in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits. See Rawal, J (as she then was) in *Charles Lukeyen Nabori & 9 others v The Hon Attorney General & 3 others* Nairobi HCCP No 466 of 2006 [2007] 2 KLR 331.

129. Under what circumstances can the Court grant conservatory orders?

130. In *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR this Court expressed itself as follows:

> " Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies

in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

131. This position was reinforced by the Supreme Court in G*itirau Peter Munya v Dickson Mwenda Kithinji and 2 ors* (*supra*) where the highest Court in the land held:

> "'Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

132. Whereas it is true that in applications seeking to suspend legislation care must be taken to ensure that courts do not readily accede to the temptation to render legislation stillborn and that such power ought not to be exercised lightly, to hold that the court can only grant conservatory orders where the court is satisfied that the challenged provisions are unconstitutional would in my view be stretching the standard too far. The law as I understand it is that in considering an application for conservatory orders, the court is not called and it is indeed forbidden from making any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition.

133. As regards the principles guiding the grant of conservatory orders, Leonala, JSC in *Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another* [2016] eKLR summarised the main principles as follows:

> " It therefore follows that an applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is:

a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution;

b. Whether if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

c. The public interest must be considered before grant of a conservatory order."

134. In *Nubian Rights Forum & 2 others -versus- Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae)* Petition Nos 56, 58 & 59 of 2019 [2019] eKLR it was held that the principles required to be satisfied before granting Conservatory Orders or interim Conservatory Orders compromise of the following: -

a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice;

b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights;

c) Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory; and

d) The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

135. At this stage the first condition the applicant is required to establish a prima facie case with a likelihood of success.

136. What are the issues which the petitioners intend to canvass at the hearing of the petition? What has provoked this petition, according to the petitioners, is the action by the Respondents, under Part II of the First Schedule to the Excise Duty Act, which provides rates of excisable services to introduce, through the Finance Act 2021, an Excise Duty of 7.5 % on betting stake which sum is to be computed on the amount wagered or staked by the player. That action, it was contended, amounts to taxing a punter just for having money and being a player and taking a risk [stake] and without effectively consuming the good/service which in fact is being purchased hence taxing a person for merely having money in his possession. Therefore, by merely placing a debt, a punter will be losing 7.5 % of his money which is akin to a bank account holder losing 7.5 % of his money just by merely depositing his money into a bank account. It was further contended that since punters already pay a total of 20% withholding tax on their winnings, to subject the Petitioners and other punters to additional tax in the manner proposed in the impugned law amounts to double taxation on the same transaction which is contrary to the principles of taxation generally. The net effect of this provision, they contended, is to ultimately deprive the Petitioners and other punters of their property over a cumulative period.

137. The Petitioners averred that since there are offshore betting companies and operators found online including amongst others Bet365 and 22Bet who have access to the Kenyan gaming public but are not subject to the local tax laws, the said companies will not be subject to the introduced and impugned 7.5% excise duty and thereby giving them an undue advantage in the gaming business. According to the Petitioners, the impugned law seeks to go beyond the international practice and best practice by seeking to levy a tax on amounts wagered or staked, a position that has been adopted under the Betting, Gaming and Licensing Act which imposes a gaming tax.

138. It was contended that since, the impugned tax is levied on amounts wagered and not gains or profits, all punters, even those making losses on their wagered bets are required to pay the excise duty on their sums staked. The impugned law, in their view, in essence seeks to tax a transaction that has not occurred, yet in principle a tax should only be imposed on a transaction that has occurred whereupon the tax becomes payable based on the transaction.

139. According to the petitioners, contrary to article 27 of the Constitution, the impugned law discriminates against the petitioners and other local punters to the extent that it levies tax against them on money held as opposed to winnings or transactions engaged in, a treatment which is not accorded to persons who wager bets on offshore platforms. Further, the petitioners being investors and players are discriminated against under the impugned law by being required to pay a tax on their investments whereas persons who invest in the money market; on treasury bills and bonds; on unit trusts; in the stock market or deposit their monies in bank accounts are not subjected to pay a similar excise duty on their deposits.

140. Apart from article 27, it was contended that article 40 of the Constitution is contravened to the extent that the impugned provision seeks to arbitrarily deprive the petitioners and other punters their property staked or wagered on bets. The Petitioners complained that the Respondents through the

impugned provision seek to arbitrarily and without adequate compensation, deprive the Petitioners and other punters their property in money just for merely being punters who desire to participate in gaming.

141. In addition, it was their contention that the impugned law contravenes the provisions of article 201(b) of the Constitution which provides as a principle to guide public finance system that the burden of taxation shall be shared fairly. To the extent that the impugned law seeks to place the burden on taxation on the petitioners and other punters at the expense of international gaming players and investors in the money markets, it violates the equity and fairness principle on sharing of burden of taxation. Further, the impugned excise duty is levied on amounts wagered by a punter and not on winnings or gains from a stake, all punters irrespective of whether they win or lose will be required to pay an excise tax out of their pocket or capital investment.

142. The Pptitioners reiterated that the impugned law contravened section 5 of the Act which provides that excise duty is chargeable on excisable goods which demonstrates that the imposition of excise duty is pegged on provision of a service by a licensed person. In this case, it was contended that the petitioners and other punters do not provide any services to qualify to be considered as qualified for payment of excise duty as sought by the impugned provision. In addition, the impugned provision seeks to levy excise on monies owned by a person that the person seeks to invest and not on any service provided by the person.

143. At this stage and considering the material placed before me the issue raised by the petitioners regarding discrimination is clearly arguable and unfair sharing of the burden of taxation contrary to the provisions of article 201(b) of the Constitution which are not merely frivolous. The basis of my finding is the decision in *Kenya Bankers Association v Kenya Revenue Authority* (2018) eKLR where reference was made to *R v Inland Revenue Commissioners exp National Federation of Self Employed and Small Business Limited* [1981] UKHL 2 at page 22 where the Court was:

> " ...persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within complex comprised in the management of tax, every part of which it is their duty, if they can, to collect."

144. Similarly, in *Samura Engineering Limited & others v Kenya Revenue Authority* HC Petition No 54 of 2011 [2012] eKLR Majanja, J at paragraph 58 emphasised that:

> " ...Kenya Revenue Authority as the State agency charged with the collection of taxes is bound by the provisions of the Bill of Rights to the fullest extent in the manner in which it administers the laws concerning the collection of taxes. The values contained in Article 10 must all times permeate its functions and activities which it is mandated to carry out of by statute.""

145. In *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR it was the court's view at paragraph 92 that;

> " ...it is safe to state that the Constitution prohibits unfair discrimination. In my view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than

others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization."

146. I have identified only some of the issues raised by the petitioners. In my view these are not frivolous issues. To the contrary, they require to be investigated further by the Court. In this petition, I am satisfied that the issues raised herein disclose substantial questions of constitutional law as what is at stake is the balancing of the need to secure the government's revenue sources on one hand and the protection of the Bill of Rights on the other both of which the State is enjoined to attain. In *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR it was held that:

> "(20) The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are settled. In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest."

147. However, apart from establishing a prima facie case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her. See *Centre for Rights, Education and Awareness (CREAW) & 7 others v The Hon Attorney General,* Nairobi HC Pet No 16/2011, *Muslims for Human Rights (MUHURI) & 2 others v The Attorney General & Judicial Service Commission*, Mombasa HC Pet No 7 of 2011 and *V/D Berg Roses Kenya Limited & another v Attorney General & 2 others* [2012] eKLR.

148. In the Privy Council Case of *Attorney General v Sumair Bansraj* (1985) 38 WIR 286Braithwaite JA expressed himself follows:

> "Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction...but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of...the provisions" of the Constitution...In the exercise of its discretion given under section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation

of the word in section 14 (2) "subject to subsection (3) and the enactment of section 14(3) in the 1976 Constitution must have...the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too...The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."

149. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of S*teve Furgoson & another v The AG & another* Claim No CV 2008 – 00639 – Trinidad & Tobago. The Honourable Justice V Kokaram in adopting the reasoning in the case of *Bansraj* above stated:

> " I have considered the principles of *East Coast Drilling v Petroleum Company of Trinidad And Tobago Limited* (2000) 58 WIR 351 and I adopt the reasoning of *BANSRAJ* and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the Constitutionality of the legislation academic."

150. Musinga, J (as he then was) in Petition No 16 of 2011, Nairobi – *Centre for Rights Education and Awareness (CREAW) & 7 others* on his part stated:

> " ...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

151. In The *Centre for Human Rights and Democracy & others v The Judges and Magistrates Vetting Board & others* Eldoret Petition No 11 of 2012, it was held by a majority as follows:

> " In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."

152. From the authorities cited herein and in my own holding hereinabove, the power to suspend legislation during peace time ought to be exercised with care, prudence and judicious wisdom where it is shown that the implementation of the legislative provision are a danger to life and limb or there is imminent danger to the Bill of Rights at that very moment and where the national interest demand.

153. As regards real danger, it is the ptitioner's position that if the conservatory orders sought in the Application filed herewith are not granted, the petitioners and other punters will fatally suffer from the imposition of the illegal and unconstitutional excise tax as the 2nd respondent will implement the impugned tax. The mere fact that the said tax is implemented, however, does not necessarily amount to real danger for the purposes of suspending legislation.

154. They lamented that if that is done, then they will suffer untold prejudice because their gross wagered amounts will be subjected to an excessive, discriminative and illegal tax. Moreover, the enforcement of the impugned legislations stands to kill the betting industry in Kenya and the livelihoods of millions of Kenyans sustained by the same. It was their view that since death of a business is certainly not a damage that can be remedied by way of damages, it is in the interest of Justice that the Court grants interim reliefs at the very least to preserve the businesses and activities of the betting companies and individuals who depend on the same pending the hearing and determination of this Petition.

155. While the implementation of the legislation may well have ripple effects on how the betting industry operates, it has not been contended that the said implementation has the immediate effect of leading to closure of business. For the Court to be satisfied of existence of real danger, it was held in *Energy Dealers Association & 1 other v The Honourable Attorney General and 3 others* [2021] eKLR that:

> " Courts must, in dealing with Petitions brought under various provisions of the constitution, be careful in determining the prejudice at least at the preliminary stages. I say so because, at such stage of the proceedings, the provisions of the Constitution alleged to have been infringed or threatened with infringement are yet to be subjected to legal scrutiny. Therefore, the damage or threat thereof to the rights and fundamental freedoms of to the Constitution must be so real that the Court can unmistakably arrive at such an interim finding. Such a breach or threat should not be illusory or presumptive. It must be eminent."

156. The petitioners do not dispute the fact that whatever payment shall have been made pursuant to the said legislation can be recovered however tedious the process might be. It has been contended which is not disputed that some, at least, of the interested parties are already complying with the provisions which are being challenged by the petitioners. That being the case, it is my view and I find that public interest militates against the suspension of the impugned provisions since at the end of the day, should the Petitioners succeed, the 2nd respondent may be directed to refund whatever shall have been collected. On the other hand, the Respondents aver, which averments has not been seriously challenged, that should the petition fail, the 2nd respondent would not be able to recover the lost taxes.

157. In the foregoing premises, I find that taking into account the principle of proportionality, it would be prudent not to suspend the impugned legislation at this stage of the proceedings.

158. Accordingly, while I strike out the 7th interested party's cross-petition and the Motion dated 21st July, 2021 but with no order as to costs, I similarly dismiss the Notice of Motion dated 8th July, 2021 with no order as to costs.

159. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS 20TH DAY OF SEPTEMBER, 2021

G V ODUNGA

JUDGE

Delivered the presence of:

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Mr Osiemo for the Petitioner and holding brief for Mr Willis Otieno for the 8th Interested Party

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Miss Akama for Mr Kuyioni for the 1st Respondent

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Mr Ochieng for the 2nd Respondent

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Miss Odhiambo for Miss Robi for the 3rd Respondent

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Miss Ndaegu for Mr Amoko for the 7th Interested Party/Cross-Petitioner

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CA Martha