REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 201 OF 2020

IN THE MATTER OF: ARTICLES 22(1), 22(2)(d), 23(1), 23(3), 258(1),

258(2)(d) AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLES 10, 27, 118 AND 201 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 70 & 73 OF THE

INSURANCE ACT, CHAPTER 487 (AS AMENDED IN 2015)

AND

IN THE MATTER OF: REGULATIONS 21, 22 OF THE INSURANCE REGULATIONS

UNDER SECTION 180 OF THE INSURANCE ACT, CHAPTER 487 (AS AMENDED IN 2015)

AND

IN THE MATTER OF: THE VALUE ADDED TAX ACT, 2013 AS AMENDED

BY THE TAX ALWS (AMENDMENT) ACT, 2020

AND

IN THE MATTER OF: ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS

AND FREEDOMS OF PERSONS ENGAGED IN THE BUSINESS OF

PROVISION OF INSURANCE

BETWEEN

THE ASSOCAITION OF KENYA INSURERS (AKI)

(Suing through its Chairman Mr. Mathew Koech).....PETITIONER

AND

THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT

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

NATIONAL ASSEMBLY.....3RD RESPONDENT

AND

THE INSURANCE REGULATORY AUTHORITY (IRA).....INTERESTED PARTY

RULING

1. The Petitioner; The Association of Kenya Insurers (AKI) suing through its Chairman, Mr. Mathew Koech, through a Notice of Motion dated 17th June 2020 seek the following orders:-

a) Prayers 1 - Spent

b) Prayers 2 – Spent

c) That a conservatory order do issue staying and/or suspending further implementation, administration, application and/or enforcement of paragraph 10 of Part II of the firs Schedule of the Value Added Tax Act, 2013 as amended by the Tax Laws (Amendment) Act, 2020 pending the hearing and determination of the Petition.

d) Prayer 4 – spent.

e) Costs of this Application be provided for.

2. The application is based on the affidavit of Mathew Koech sworn on 17th June 2020 and on the grounds on the face of the application running form (a) to (m).

3. The 1st Respondent is opposed to the application and relies on ground of opposition dated 30th June 2020 being as follows:-

a) The orders sought are not based on any empirical evidence of implementation but based on the apprehensions sustained by the Petitioners commercial interests.

b) Every Law passed by the National Assembly enjoys the Presumption of Constitutionality unless proved otherwise and the presumption can only be rebutted after a full hearing of the Petition on its merits.

c) That the Petitioner has not laid out a case for the granting of conservatory orders as a constitutional relief as opposed to ordinary litigation.

d) The imposition of Taxes is a Constitutional Imperative granted to the Legislature and cannot amount to a violation of Constitutional rights.

4. The 2nd Respondent similarly is opposed to the application and has filed grounds of opposition dated 24th June 2020 setting out seven (7) grounds of opposition being as follows:-

a) That the impugned amendment made to paragraph 10 of Part II of the First Schedule to the Value Added Tax Act, 2013 by the Tax Laws (Amendment) Act, 2020 to remove insurance agency and brokerage services form the list of VAT 2020, to remove insurance agency and brokerage services from the list of VAT exempt services effective April 25, 2020 enjoys the general presumption of constitutionality. The said presumption can only be rebutted after a full hearing of the Petition on its merits.

b) That the Petitioner's own admission at paragraph 5 to 10 and 16(d)(i) to (xii) to the Affidavit of Mathew Koech sworn on June 17, 2020 confirms that the legislation complied with Article 10(2)(a) and 18(1)(b) of the Constitution to the extent that there was a meaningful public participation prior to the promulgation of the impugned Act.

c) FURTHER AND WITHOUT PREJUDICE to paragraph 2 above, the public participation process was fully undertaken by the National Assembly pursuant to Article 118(1)(b) of the Constitution. That as much as lack of public participation is the gravamen of the Motion and Petition filed herein, the National Assembly which undertook the same is not a party; consequently granting the Orders sought in the interim and the final declarations sought, in the Petition, will not only be an affront to the twin doctrines of constitutional avoidance/defence and separation of powers but it will also be condemning the Legislature unheard.

d) That pursuant to Section 22 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya, Sections 70(1), 73(2) and 73(5) of the Insurance Act, Cap 487 (As amended in 2015) stand repealed. There is no lacuna or hiatus in transition. Respectfully, the pleaded uncertainty, ambiguity and breach in paragraphs 11 and 20 of the Certificate, Paragraph K of the Motion and paragraphs 19, 20, 22, 23, 24, 25, 26 and 27 of the Supporting Affidavit of Mathew Koech deposed on June 17, 2020; and paragraphs 65 to 70 of the Petition are unfounded and cannot form the basis of issuing Orders and Declarations in the interim or ultimately.

e) That the Petitioner, representing 51 insurance companies, is pursuing individual/private commercial interests aimed at maintaining their book-profits veiled as violation of rights. The alleged violations, if any, are narrow and subservient to the wider public interests of protecting the constitutional mandate of the national Assembly and the Executive under Articles 93 – 96 & 109; and Articles 115 of the Constitution, respectively.

f) That the Petitioner has not demonstrated that it has attempted to invoke Article 119 of the Constitution and failed for it to seek redress by invoking the jurisdiction of this Court.

g) The instant petition and the accompanying interlocutory Application are scandalous, frivolous and bad in law and they form a classical description of an abuse of the due process of this honourable Court.

5) The 3rd Respondent filed Notice of Preliminary objection raising the following grounds of objections:-

a) It is trite law that in order to institute proceedings as in the present Petition, the entity must have the legal capacity to institute proceedings before the Court.

b) The question of whether one is a juridical person is one of law and substance that goes to the root of the petition and as such the basis upon which the present petition has been brought is compromised completely.

c) The lack of legal capacity is not a technical question or a question of form but rather a question of substance that cannot be accommodated within the provisions of Article 159(2)(d) of the Constitution.

d) There is no evidence that the ASSOCIATION OF KENYA INSURERS, the Petitioner herein, is a legal body duly registered and with capacity to institute legal proceedings in its own name.

e) The Petitioner is therefore not a person as contemplated by Article 258 of the Constitution and is incompetent to institute the proceedings herein.

f) Further, the petition and the Notice of Motion dated 17th June, 2020 is incurably defective on the grounds that:-

> ***i) Contrary to Order 4 Rule 1 of the Civil Procedure Rules, petition and the Notice of Motion dated 17th June, 2020 has not been instituted by a competent person.***
>
> ***ii) The second plaintiff/applicant has no locus standi to institute this suit and the said application on behalf of the first plaintiff.***
>
> ***iii) Mr. Mathew Koech, the deponent to the affidavits sworn on 17th June, 2020 and filed in support of the Petition and the Notice of Motion dated 17th June, 2020 as no locus standi to institute these proceedings on his own behalf or on behalf of the unincorporated entity known as the Association of Kenya Insurers.***
>
> ***iv) Under the Societies Act the Association of Kenya Insurers has no capacity to sue on its own behalf or be sued in relation to matters in issue.***
>
> ***v) Mr. Mathew Koech, the deponent tot the affidavits sworn on 17th June, 2020 and filed in support of the petition and the Notice of Motion dated 17th June, 2020 has no authority to capacity to sue on behalf of the Association of Kenya Insurers or at all.***

g) From the foregoing, it is clear that the Petition and the Notice of Motion herein are in bad in law, speculative, baseless and an abuse of the court process and should be dismissed with costs to the 2nd Interested Party.

ANALYSIS AND DETERMINATION

6. I have very carefully considered the parties pleadings hereinabove; the parties rival submissions and from the same the following issues arise for determination.

> ***a) Whether Petitioner has capacity to sue?***
>
> ***b) Whether the Court has jurisdiction to hear this Petition?***

c) Whether Court can grant conservatory orders in the instant application?

d) Under what circumstance can the Court grant conservatory orders?

e) Whether, failure to grant conservatory orders, the petition alleging violation of or threat of violation of rights will be rendered nugatory?

f) 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?

g) Whether public interest must be considered before granting of a conservatory order?

A. WHETHER PETITIONER HAS CAPACITY TO SUE?

7. The 3rd Respondent filed a preliminary objection dated 3rd July 2020 together with a Replying Affidavit sworn by Michael Sialai, the Clerk of the National Assembly, in response to the Petitioner's Petition and application. The 3rd Respondent in its preliminary objection prays both the application and petition be dismissed. The 3rd Respondent main ground for seeking dismissal of the petition and the application is premised on the ground, that the petitioner herein is not a body known in law, that is capable of instituting proceedings before this Court.

8. It is 3rd Respondents' contention that; as a general rule; unincorporated legal persons including societies, clubs, and business-names can only bring proceedings through their registered or elected officials or in their proprietor's names. In respect of this proposition the 3rd Respondent sought support from the case of ***The Fort Hall Bakery Supply Co. vs. Fredrick Muigai Wangoe (1959) E.A. 474 at 475. Templeton J, relying on Banque Internationale de Commerce de Petrograd vs. Goukassaow [1923] 2 KB 682*** where it was held that the entity before the court was a mere name only and could not maintain the action. In the latter decision at page 688, Bankes L.J. delivered himself as follows:-

"the party seeking to maintain the action is in the eye of our law no party at all but a mere name only, with no legal existence".

9. The 3rd Respondent further urge that from the supporting affidavit of Mathew Koech sworn on 17th June 2020 and his further affidavit sworn on 6th June, 2020, the entity known as "The Association of Kenya Insurers" exists only in the mind of the aforesaid deponent. The 3rd Respondent goes on to aver that there is at all, no evidence that either the said Petitioner or the alleged deponent Mr. Mathew Koech exists or at all. It urges further that it is trite law, that in order to institute proceedings as in the present Petition, the entity must have the legal capacity to institute proceedings before court.

10. The question as to whether one is a judicial person is one of the law and substance that clearly goes to the root of the petition and as such the basis upon which the present petition has been brought. The 3rd Respondent urge this principle has been compromised in this petition.

11. It is trite that lack of legal capacity is not a technical question of form but is rather a question of substance that cannot be accommodated within the provisions of ***Article 159(2)(d) of the Constitution*** which provides:-

159. Judicial authority

(2). In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities"

12. The 3rd Respondent asserts that there is no evidence that The Association of Kenya Insurers, the Petitioner herein, is a legal body duly registered and with capacity to institute legal proceedings in its own name or through Mr. Mathew Koech. The 3rd Respondent contend that the Petitioner is therefore ***"not a person"*** as envisaged under ***Article 258 of the Constitution*** and is therefore incompetent to institute the proceedings.

13. The 3rd Respondent further attacks the Notice of Motion and Petition averring the same are incurably defective on the grounds that:-

"a) Contrary to Order 4 Rule 1 of the Civil Procedure Rules, petition and the Notice of Motion dated 17th June, 2020 has not been instituted by a competent person.

b) The second plaintiff/applicant has no locus standi to institute this suit and the said application on behalf of the first plaintiff.

c) Mr. Mathew Koech, the deponent to the affidavits sworn on 17th June, 2020 and filed in support of the Petition and the Notice of Motion dated 17th June, 2020 has no locus standi to institute these proceedings on his own behalf or on behalf of the unincorporated entity known as The Association of Kenya Insurers.

d) Under the Societies Act the Association of Kenya Insurers has no capacity to sue on its own behalf or be sued in relation to matters in issue.

e) Mr. Mathew Koech, the deponent to the affidavits sworn on 17th June, 2020 and filed in support of the petition and the Notice of Motion dated 17th June, 2020 has no authority or capacity to sue on behalf of the Association of Kenya Insurers or at all."

14. From the above it is 3rd Respondent's submission that the application and Petition herein are bad in law; speculative, baseless and on abuse of the court process and prays that the same be dismissed with costs.

15. It is 3rd Respondents contention that the preliminary objection meets the tests set out in the case of ***Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696*** where it was stated that:-

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

16. The 3rd Respondent state that it is trite, that in order to institute proceedings as in the present Petition, the entity must have legal capacity to institute proceedings before court. It places its reliance on this preposition in the case of ***Kituo Cha Sheria v. John Ndirangu Kariuki & another [2013] eKLR,*** where Honourable Justice Kimondo held:-

"40. That is apt in the present circumstance. Form a legal standpoint, the entity known as Kituo Cha Sheria exists only in the internal constitution of the Legal Advice Centre. The edition of the constitution annexed to the replying affidavit is undated. It ends abruptly at page 11. The execution pages are not attached. It is not even clear whether it was similar to the constitutive instruments and documents presented for registration in 1993 before the Non-Governmental Organizations Co-ordination Board. In the petition, at paragraph 1, the petitioner, Kituo Cha Sheria, describes itself as a "non-governmental organization." There is no evidence of such registration. The entity so registered is the Legal Advice Centre. I readily find that Kituo Cha Sheria is not a party at all but a mere name. It is not illegal. But is can only maintain an action in that name thorough the officials named in the constitution of Legal Advice Centre or any other person nominated by its board. In the alternative and more conveniently, Legal Advice Centre trading as Kituo Cha Sheria can maintain such action. Needless to say, the Legal Advice Center can of course maintain action in its own name. The Legal capacity of a party to institute proceedings in court is not a technical matter or one of form. It is not a simple mis-description of names as obtained in the case of A. N. Phakey vs World Wide Agencies Ltd [1948] Vol XV EACA 1. Far from it, it is a substantive matter of law that cannot be accommodated within the latitude of article 159 (2)(d) of the Constitution…"

17. The 3rd Respondent further referred to the case of ***Kituo Cha Sheria vs. John Ndirangu Kariuki & another (Supra)***, where the High Court considered the question of lack of legal capacity and it was held that:-

"…The incompetence of the present petitioner to sue is not then a simple technical matter. As I have stated earlier, it cannot be cured by the provisions of article 159 2(d) of the constitution or Rule 4 of the Petition Rules. The failure to bring an action by a recognized juridical person is one of the law and substance. It goes to the root of the petition. The substratum upon which the petition has been brought is thus compromised completely."

18. The 3rd Respondent reiterates that in the instant petition there is no evidence demonstrating, that the Association of Kenya Insurers, the Petitioner herein, is a legal body duly registered and with capacity to institute legal proceedings in its own name. That it is not a person as contemplated by ***Article 258 of the Constitution*** and is incompetent to institute the proceedings herein. The 3rd Respondent further state that a none existence entity cannot establish a prima facie case and prays the preliminary objection to be allowed and both the application and petition dated 17th June 2020 be dismissed with costs.

19. The Petitioner on the other hand counters the 3rd Respondent's preliminary objection. The Petitioner on definition of the ***"locus Standi"*** seeks to rely on definition in ***Black's Law Dictionary, 9th Edition page 1026*** where it is defined as follows:-

"the right to bring an action or to be heard in a given forum."

20. On the 3rd Respondent's contention, that the Petitioner is non-existent entity and does not have ***"locus standi"*** to file the instant petition, the Petitioner seeks refuge from several Articles of our Constitution. It is Petitioner's contention that the Constitution of Kenya 2010; requires in determination of constitutional issues to have a purposive approach to statutory interpretation.

21. The ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*** (otherwise referred to as ***"Mutunga Rules")*** under ***Rule 3*** provides for scope of the Rules and their overriding objective which is to facilities access to Courts under ***Article 48 of the Constitution. Article 48 from clear*** reading of ***Rule 3***, it commands this court to interpret the Rules in accordance with ***Article 259(1) of the Constitution*** with view to advancing and realizing the rights and freedom enshrined in the Bill of Rights and values and principles of the Constitution.

22. ***Article 259(1) of the Constitution*** on the construing the constitution provides as follows:

"259. Construing this Constitution

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance."

23. The Petitioner in urging that they have ***"locus standi"*** sought to refer to the decision in the case of ***Council of County Governors v Lake Basin Development Authority & 6 others [2017] eKLR***- in submitting that they have the ***"locus standi"*** to institute a petition for the interest of tits members. In addressing the question of locus standi of the County Governments to file a petition in the above case, the court held as:-

> ***"…the provisions of Article 22 have lifted the veil on the hitherto locus standi doctrine that for a long time blocked many a people from accessing justice. Under this provision, "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, to is threatened." Further under Article 258(1), "Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention." In both cases, a person can institute proceedings in their won interest, they may institute in the interest of a group or class of persons. Article 260 seals it all by defining the term 'person' to include a company, association or other body of persons whether incorporated or unincorporated.*** *(Emphasis supplied).*

24. ***Article 22(2) of the Constitution*** in no uncertain words provides that ***"Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of the Rights has been violated or infringed or is threatened*** and:-

> ***" (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***
>
> ***(a) a person acting on behalf of another person who cannot act in their own name;***
>
> ***(b) a person acting as a member of, or in the interest of, a group or class of persons;***
>
> ***(c) a person acting in the public interest; or***
>
> ***(d) an association acting in the interest of one or more of its members."***

25. ***Article 258(1) (2) (a) – (d) of the Constitution*** provides as follows:-

> ***"258. Enforcement of this Constitution***
>
> ***(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***
>
> ***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***
>
> ***(a) a person acting on behalf of another person who cannot act in their own name;***
>
> ***(b) a person acting as a member of, or in the interest of, a group or class of persons;***
>
> ***(c) a person acting in the public interest; or***
>
> ***(d) an association acting in the interest of one or more of its members."***

26. The Petitioner has complied with the provisions of ***Article 22 and 258 of the Constitution*** in this Petition. The proceedings by the petitioner claim contravention or threatened violation of the constitution on behalf of 31 Insurance Companies. The issues raised thereon clearly raise constitutional matters. The petitioner has attached copies of the minutes showing the uncontested elections of Mr. Mathew Koech as Chairman of the Petitioner.

27. The Supreme Court in the case of ***Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others [2014] eKLR***, clarified the issue of locus standi raised in an application challenging the status of an NGO, as it had been deregistered and, thus, legally non-existent. The Supreme Court held that:-

> ***"…we think that the fact that it is unincorporated does not necessarily deny it capacity to litigate claims of this nature under the Constitution. Under Article 260 of the Constitution, a person includes a company, association, or other body of persons whether incorporated or unincorporated…****(Emphasis supplied).*

28. The Constitution is clear on ***"locus standi"*** as to who has the right to institute court proceedings. ***Article 22 and 258 of the Constitution*** states in no uncertain terms, every person has the right to institute court proceedings claiming violation of Constitutional right or threatened violation or claiming that the constitution has been contravened or is threatened with contravention. This can be done by person on his/her

behalf in addition in acting on behalf of another person or as a member of or in the interest of a group or class of persons or in public interest or in the interest of one or more of its members. ***Article 260 of the Constitution*** defines, a person as including a company, association, or other body of persons whether incorporated or unincorporated. I therefore find the 3rd Respondent's Preliminary Objection to be misplaced and contrary to clear provisions of the Constitution and the decision of the Supreme Court in ***the Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others (Supra)***.

B. WHETHER THE COURT HAS JURISDICTION TO HEAR THIS PETITION?

29. The High Court is an institution constitutionally empowered to determine as to whether a legislation is inconsistent with the constitution or was passed in contravention of the constitution subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court.

30. Under ***Article 165(3(d)(i) and (ii) of the Constitution***, the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and 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.

31. The Constitution provides under ***Article 2(1) and (2)***, that the Constitution is the Supreme Law of the Republic and binds all persons and all State organs at both levels of government and no person may claim or exercise State authority except as authorised under the Constitution. Therefore, there is only supremacy of the Constitution and given that the Constitution is supreme, every organ of State performing a Constitutional function must perform it in conformity with the Constitution. So, where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression.

32. From the pleadings in the Petition and the Notice of Motion by the Petitioner, the Court is under obligation to determine whether the impugned Amendment is inconsistent with the constitution or was passed in contravention of the Constitution. From the aforesaid I find that it has been sufficiently demonstrated that his court has jurisdiction to hear and determine the issues raised in the instant petition.

C. WHETHER COURT CAN GRANT CONSERVATORY ORDERS IN THE INSTANT APPLICATION?

33. The jurisdiction of this Court to grant conservatory orders is clearly provided for under ***Article 23(3)(c) of the Constitution***, where it is clearly provided that in any proceedings brought under Article 22 a Court may grant appropriate relief; including a conservatory order. It should be noted that ***Rule 23 of Mutunga Rules*** echoes the said constitutional provision. I therefore find that a strict interpretation of ***Article 23(3)(c) of the Constitution*** show that the reliefs (specified thereunder) are available where a party is alleging a right or fundamental violation or threat. This court is alive to the provisions of ***Article 19(3)(a) and (b) of the Constitution*** which clearly provides ***the right and fundamental freedoms in the Bill of Rights***.

> ***"19. Rights and fundamental freedoms***
>
> ***(3) The rights and fundamental freedoms in the Bill of Rights—***
>
> ***(a) belong to each individual and are not granted by the State;***
>
> ***(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter;"***

From the above it is clear that, the rights and fundamental freedoms are not strictly restricted to those expressly set out in the Bill of Rights, as they include the rights to fundamental freedoms recognized or conferred by law, except to the extent of their inconsistent with Chapter 4 on the Bill of Rights and subject only to the limitations contemplated in the Constitution.

34. The 1st Respondent urge in its grounds of opposition, that every law passed by the National Assembly enjoys the presumption of constitutionality unless proved otherwise and the presumption can only be rebutted after full hearing of the petition on its merits.

35. The Courts have time and again declared enactment as void and invalid. I therefore find that the courts in exercise of their jurisdiction as provided by the Constitution have jurisdiction in deserving cases to stay and/or suspend provisions of an enactment, if to do otherwise is likely to render whatever decision the court may arrive at a mirage.

36. The Petitioner's submissions is clearly substantiated by a decision of the Court of Appeal in the case of ***Attorney General & Another vs Coalition for Reform and Democracy & 7 others, Civil Application No. Nai 2 of 2015 (Ur 2/2015); [2015] eKLR*** in which the Court stated:-

"…while the Court appreciates the contextual backdrop leading to the enactment of the SLAA, it must also be appreciated that it is not in the interest of justice to enact or implement a law that may violate the Constitution and in particular the Bill of Rights. Constitutional supremacy as articulated by Article 2 of the Constitution has a higher place than public interest. when weighty challenges against a statute have been raised and placed before the High Court, if, upon exercise of its discretion, the Court is of the view that implementation of various sections of the impugned statute ought to be suspended pending final determination as to their constitutionality, a very strong case has to be made out before this court can lift the conservatory order. The State would have to demonstrate, for example, that suspension of the statute or any part thereof has occasioned a lacuna in its operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace…"

D. UNDER WHAT CIRCUMSTANCE CAN THE COURT GRANT CONSERVATORY ORDERS?

37. The requirements for granting conservatory orders in a constitutional petition is well laid down. The test which an applicant has to meet before granting of the conservatory orders are now well settled.

38. In the case of ***Wilson Kaberia Nkunja v. The Magistrates and Judges Vetting Board and others Petition No. 154 of 2016 [2018] eKLR*** a five Judge bench set out three tests which an applicant is required to meet before granting of the conservatory orders in a Constitutional Petition. The five Judge bench stated:-

> ***"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 a 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."***

39. The Court also dealing with the issue of granting conservatory orders in the case of ***Board of Management of Uhuru Secondary School v. City County Director of Education and 7 others (2015) eKLR*** summarized the principles for grant of conservatory orders as including the following:-

> ***"i) First, the need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice;***
>
> ***ii) 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;***
>
> ***iii) Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory; and***
>
> ***iv) The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to gran or deny a conservatory order."***

40. The Supreme Court in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR*** set out the principles for grant of conservatory orders where the Court 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 the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merits of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.*** *(Emphasis supplied).*

41. The Respondents are all opposed to granting conservatory orders urging that the Petitioner has not met the test set out for granting of conservatory orders. The Respondents assert that the Petitioner has failed to establish a prima facie case with a likelihood of success; that the conservatory orders will not enhance the constitutional value and objects of a specific right on freedom in the Bill of Rights; that it has not been established that, if conservatory orders is not granted, the Petition or its substratum will be rendered nugatory and the public interest will not be served by a decision to exercise discretion to grant conservatory orders.

42. This Court is alive to the fact that at the time of considering an application for conservatory orders, it is not called upon and it is indeed forbidden from making any definite findings either of fact or law as that is the province of Court that will ultimately hear and determine the petition. At this stage the applicant is required to establish a prima facie case with a likelihood of success. In the case of ***Centre for Rights Education and Awareness (CREAW) & 7 others v. Attorney General Petition No. 16 of 2011 (2011] eKLR*** Hon. D. Musinga J (as he then was) pronounced himself thus:-

> ***"…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."*** *(Emphasis supplied)*

43. "A prima facie case; it has been held is ***not a case where most succeed at the hearing of the main case.*** However, it is not a case which is frivolous. It follows the applicants has to show that he/she has a ***case which discloses arguable issues and in this case, arguable constitutional issues***.

44. A close perusal of the Petition reveals that the Petition raises questions regarding the constitutionality of the impugned Amendment; particularly that:-

"i) the law as amended/impugned decision is uncertain and unambiguous as it imposes VAT on the services of the Petitioner's members which are expressly VAT exempt.

ii) application of VAT on insurance agency fees and commissions will affect the insurance companies' compliance with the Insurance Act by breaching the prescribed limits imposed by the Insurance Act in relation to management fees to be charged by insurance companies; and

iii) increase in management expenses because of VAT may also lead to further taxation for Life Business as described above.

iv) The Petitioner's members despite being directly affected and key stakeholders in the insurance industry were not afforded an opportunity to participate in the legislative process leading to the enactment of the TLAA which contains the Impugned Amendment; and

v) the Petitioners members were not afforded adequate and reasonable opportunities to engage in public participation in the legislative process leading to the enactment of the TLAA which contains the impugned Amendment."

45. The Respondent contend pursuant to ***Section 22 of the Interpretation and General provisions Act; Cap 2 Laws of Kenya; Section 70(1) 73(2) and 73(5) of the Insurance Act, Cap 487 (as amended in 2015)*** stand repealed. That in the circumstances it is averred that there is no lacuna or hiatus in transition. It is contended that the pleaded uncertainty, ambiguity and breach in paragraphs 11 and 20 of the Certificate, paragraphs K of the Motion and paragraphs 19, 20, 22, 27 of the supporting affidavit of Mathew Koech deponed on 17th June 2020; and paragraphs 65 to 70 of the Petition are unfounded ant cannot form the basis of issuing orders and declarations in the interim or ultimately.

46. The Respondents rely on ***Section 22 of Cap 2 Laws of Kenya*** which clearly provides that:-

"Where a written law repeals wholly or partially a former written law and substitutes provisions for the written law repealed, the repealed written law shall remain in force until the substituted provisions come into operation."

47. The Respondent submit that the effect of the legislated ***Tax Laws (Amendment) Act 2020*** is that it ***repealed Section 70(1), 73(2) and 73(5) of the Insurance Act Cap 481 (Amended in 2015)*** under the provisions of ***Section 22 of CAP 2 Laws of Kenya***.

48. In dealing with the issue of uncertainty, and ambiguity of impugned Amendment the Applicant referred to the case of ***Keroche Industries Ltd vs. Kenya Revenue Authority & 5 others (2007) eKLR***; where Nyamu J (as he then was) held:

"One of the ingredients of the rule of law is certainty of law. Surely the most focused deprivation s of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regulating of law. This is a vision and a value recognized by our constitution and it is an important pillar of the rule of law." *(Emphasis supplied)*

49. The Applicant contention is that it is not in dispute that the services of its members under ***paragraph 2 of Part II of the First Schedule to the VAT Act*** are VAT exempt; hence the Petitioners are not VAT registered. It clear that the implementation of the impugned Amendment is that the Petitioner's members are now paying and will pay VAT on the otherwise exempt services unless the court grants the interim order.

50. The 1st Respondent did not provide the basis for claim of the VAT in view of the Petitioner's submissions but only in its grounds of apposition to the application avers the imposition of Taxes is a constitutional imperative granted to the legislature and cannot amount to a violation of constitutional rights.

51. In the instant application the applicant has clearly demonstrated in its application, that the law on one hand provides that the services of the petitioner's members are VAT exempt; yet on the other hand through the impugned Amendment is now subjecting the otherwise exempt services to VAT. The Applicant to demonstrate this have gone ahead and attached sample copies of invoices raised and forwarded to the members of the Petitioners by the insurance intermediaries. I find this is a clear and deserving matter in which petitioner has a right to certainty of the law and in which a court of law should not allow such ambiguity and uncertainty to continue unchecked.

52. The Court in the case of ***Kenya Breweries Association v. Attorney General & another; Central Bank of Kenya (Interested Party) (2019) eKLR*** in declaring ***Section 63 of the Finance Act, 2018*** unconstitutional for; inter alia; lack of certainty held that:-

" …Having found that section 63 of the Finance Act, 2018 is ambiguous and vague, I find that the enactment is void for vagueness as a citizen would not be able to know in advance what are the legal consequences that flow from the impugned section of the Finance Act, 2018 I find that the members of the petitioner are unable in, view of the ambiguity and vagueness of Section 63 of the Finance Act, 2018, to know what is regulated and the manner of that regulation. I further find that Section 63 of Finance Act, 2018 and consequently Section 31A of the Banking Act lack certainty; it is confusing due to being imprecise and vague…"

53. It is eventually clear that on this basis, alone, the Petitioner has made a prima facie case of a likelihood of success, for which a Court can issue a Conservatory Order. The Court in ***Kenya Bankers Association v Attorney General & another [2018] eKLR*** in granting a Conservatory Order to suspend the implementation of the excise duty introduced by the ***Finance Bill 2018*** in Paragraphs ***6 Part 11 of the First Schedule of the Excise Duty Act, 2015*** held that:

"…reiterate that the implantation of excise duty on money transferred by banks is an important issue that cannot be left to guesswork or the individual interpretation by the banks. I find that the fact that the applicant has raised the issue of ambiguity in the law in question calls the attention of the respondents to make a clarification on the issue so as not to leave it to the subjective interpretation of those who are supposed to implement it…"

54. As clearly submitted by the Petitioners/Applicants I find that the uncertainty and ambiguity of the impugned Amendment makes it impossible for the Petitioner's members to plan for the Tax burden that has been indirectly imposed on their services; which are VAT exempt. It is also a challenge for the Petitioners; as the insurance companies have no way of passing on the costs of VAT to policy holders. It turns out that therefore the imposition of VAT would therefore be a significant increase in the expenses and liability of the petitioner's members whose income is already adversely affected in the current COVID-19 pandemic.

55. In the case of ***Eco-bank Kenya Limited v. Commissioner for Domestic Taxes (2012) eKLR*** the Court dealing with issue of uncertainty and predictability of applicability of economic activates stated thus:-

"The Appellant and other business people have a right of certainty and predictability in the in the applicability of economic activities this right necessarily militates against polices, regulations and procedures which are haphazardly resorted to by public regulatory bodies without adequate notice to those who conduct or behaviour is to be regulated."

56. It is Petitioners contention in the instant application, that although the 2nd Respondent has indicated that the impugned Amendment is targeted at Insurance Agency and brokerage services; the actual costs of the imposition of VAT on those services will be borne by the Petitioner's members whose service are VAT exempt under the VAT Act. It therefore turns out clearly that the final effect of the impugned Amendment is to create uncertainty; ambiguity and absurdity which the Court is obligated not to countenance. I therefore find that the impugned Amendment of the VAT by the TLAA is uncertain; and ambiguous and its implementation should be suspended pending the hearing and determination of the issues raised in the Petition before this Court.

57 It is further submitted that he ambiguity of the impugned Amendment and the confusion created to the entire Insurance industry is further characterized by the following:-

"i) The Insurance Act (Cap 487) (the Insurance Act) provides that there shall be prescribed limits of the management expenses that can be incurred by insurance companies. Section 70 of the Insurance Act as read with Regulation 21 of the Insurance Regulations provides that insurers shall not incur management expenses above certain prescribed limits in a particular financial year. These limits are set at the end of each financial year which is end of December for the insurance industry. Therefore, the 14% VAT that became effective in April 2020 could not have been factored in when setting the management expenses for the year 2020.

ii) The input Vat charged on the commissions will be an added cost to insurers. This will therefore have the impact of increasing the management expenses incurred by an insurer leading to a breach of the provisions of the Insurance Act.

iii) Further, for Life Business, any excess management expenses above the permitted amounts as a result of the application of VAT at 14% would be further subject to corporation tax at the rate of 25%.

iv) The VAT cost therefore imposes an additional tax burden to the Insurance companies as follows:

a) Application of VAT on insurance agency fees and commissions will affect their compliance with the Insurance Act by breaching the prescribed limits imposed by the Insurance Act in relation to management fees to be charged by insurance companies; and

b) Increase in management expenses because of VAT may also lead to further taxation for Life Business as described above."

58. The Petitioner contend that the integrity of the entire process leading to the passing of the impugned Amendment Is wanting and the final product completely lacking any legitimacy and legality whatsoever. It is stated by the Petitioner that public participation being one of the foundation principle of democracy and allowing citizen to contribute to decisions likely to affect them never took place in this matter. One of the key objectives of public participation is to ensure interaction through various forms including; listening, dialogue, analysis or details to ensure that the decision made is both suitable and acceptable, was not given a chance.

59. The Respondents contend that there was sufficient public participation before the impugned amendment was introduced to ***paragraph 10 of Part II of the First Schedule of the Value Added Tax Act, 2013***.

60. It is further urged by the 3rd Respondent that the National Assembly did conduct public participation and took the views of public into account and evidence of public participation is annexed in Mr. Sialai's Replying Affidavit under exhibit marked MS-1. It is further stated that the Stakeholders Memoranda and the petitioner's members, were duly represented thorough the memoranda received from the Chief Executive Officer, *Anjarwalla & Khanna*, the advocates on record for the Petitioner, ***M/s Bima Intermediaries Association of Kenya (BIAK)*** and the Association of Insurance Brokers which were considered by the Committee. The Committee subsequently took into account the views of the two and made its recommendations on the submissions.

61. The Respondent urge the ***Tax Law (Amendment) Act 2020*** were approved and passed after it had been subjected to public participation. The 3rd Respondent refers to the case of ***Law Society of Kenya vs. the Attorney General and 10 others Petition No. 3 of 2016*** as regards

public participation where the court held thus:-

> ***"The law is not that all persons must express their views or that they must be heard and that the hearing must be oral. Similarly, the law does not require the proposed legislation must be brought to each and every person whatever the person might be. What is required is that reasonable steps be taken to facilitate the said participation. Once this is done the court will not interfere simply because due to peculiar circuses of an individual, he or she failed to get the information. In other words, what is required is that a reasonable opportunity be afforded to the public to meaningful participate in the legislative process. Therefore, even in case where there are oral public hearings the mere fact that a particular person has not been so heard does not necessarily warrant the whole process being nullified."***

62. The 2nd Respondent on public participation relied in the case of ***Kenya Human Rights Commission v. Attorney General & another (2018) eKLR*** where the Court held that:-

> ***"..public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation, that is, people must be accorded an opportunity to participate in legislative process and this is a question of fact to be proved by the party that was required to comply with this constitutional requirement that indeed there was compliance,"***

63. The Petitioner urge, that the obligation to facilitate public involvement is a material part of the law-making process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. Some of the steps in organizing public participation include; identifying key stakeholders including those directly affected and can offer solutions making contact with key stakeholders and inviting them for meetings or to make submissions, holding meetings including making site visits where this is necessary.

64. It is urged on behalf of Applicant that the Petitioner is a key stakeholder and should have been contacted directly, taking into consideration the impugned VAT Amendment was being introduced for the first time to the insurance sector, the insurance sector is a highly regulated sector and it would have been necessary to understand, how it is regulated and the impact that additional tax by way of Vat would impact the entire sector. It is Petitioner's averment that failure to do so was in contravention of the Constitution.

65. ***Article 118(1) (b) of the Constitution of Kenya, 2020*** provides: Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees. This includes identifying key stakeholders including those directly affected and those that can offer solutions, providing necessary information and consulting them. ***Article 118(1)(b)*** requires Parliament in enacting legislation including amendments of existing legislation to ensure, that the spirit of public participation is attained both qualitatively and quantitatively.

66. It is of great importance to ensure public participate in a legislative process so as to comply with ***Article 118(1) (b) of the Constitution***. The limitation must give those wishing to participate sufficient time to prepare as members of public cannot participate meaningfully if they are given inadequate time to familiarize themselves with the Bill, consider the stance and formulate representations to be made.

67. It is Petitioner's contention that no sufficient time was given to the public and the Petitioner to study the Tax Bill, consider and understand the impact of the new law and to provide views on the proposed legislation in accordance to ***Article 118(1) (b) of the Constitution***. It is the Petitioner's case that VAT is a novel concept in the insurance industry and the financial services sector in general. It contends that Players in this Industry have not had to deal with VAT compliance and most of the intermediaries are not VAT registered in the first place. It is also averred that VAT was being introduced on services which have never been subject to VAT since the introduction of VAT in Kenya on 22 August, 1989 and that a period of one (1) week cannot be deemed to be sufficient for a new law to be introduced with far-reaching implications.

68. The Petitioner/Applicant further urge that whereas there was urgency in passing the Tax Bill into law, the urgency was only in relation to the need to legislate the various tax measures intended to cushion Kenyans from the negative impact of Covid-19 announced by the President on 25 March 2020. The Petitioner assert that there was no urgency to introduce VAT on insurance agency and brokerage services.

69. It is further Petitioner's contention that impugned Amendment was introduced at a time when the Government was giving tax incentives to Kenyans to cushion them against the harsh economic times occasioned by Covid-19. However, the effect of the Impugned Amendment is that the insurance sector in which the Petitioner's members carry out business were being subjected to additional tax burdens during the Covid-19 pandemic, instead of enjoying the tax incentives introduced by the Government. It is Petitioner's argument that the insurance sector is the only sector that was unfairly targeted for imposition of new taxes while other sectors were enjoying tax reliefs. This the Petitioner contend is in complete contravention of **Article 27 of the Constitution**.

70. The 3rd Respondent urge that as is clearly indicated in the Memorandum and objectives of the Tax Laws (Amendment) Bill, 2020) and the annexed submission from Treasury and the Kenya Revenue Authority, the National Treasury estimated that in 2018 alone, the government lost about Kshs.535 billion on account of various tax incentives, that are inherent in the tax laws. It is averred that the tax incentives in the Value Added Tax Act alone contributed to a whooping Kshs.370 billion on revenue loss. Therefore, there is a government policy shift towards gradually removing these tax incentives so as to raise revenue to offer services to the populace.

71. In the case of ***British American Tobacco Kenya PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR***, the Supreme Court of Kenya stated, that mere differentiation or inequality of treatment does not amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary for one to show that the selection or differentiation was unreasonable or arbitrary, that it did not rest on any basis, having regard to the objective, the legislature or the Constitution had in view. Unequal protection is not violated if the exception which was made was required to be made by some other provisions of the Constitution. It was not possible to exhaust the circumstances or criteria which would afford a reasonable basis

for classification in all cases.

72. It is contended in view of the above by the 3rd Respondent that; it is trite law therefore that differentiation and categorization of various taxes does not amount to discrimination. The High Court in ***Nelson Andaya Havi v Law Society of Kenya & 3 others [2018] eKLR*** stated as follows at paragraph 92.

> ***"92. From the above definition, 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."***

73. It is Petitioners contention that in view of the nature of the legislation or the decision to be made under the Tax Bill affecting an entire Insurance Industry and calling for a change in the conduct of the insurance business, the intensity of the impact of the legislation to the sector and the public, the 3rd Respondent did not offer a reasonable and meaningful opportunity for public participation.

74. The Petitioner further state that the decision or action taken by the Respondents flies in the face of the Constitutional provisions in particular the national values and principles of governance set out in ***Article 10 of the Constitution*** and specifically the need for public participation in the enactment of the Act in question.

75. The 3rd Respondent stated that Parliament has a Constitutional obligation to take legislative and policy measures to ensure that there is progressive realization of each and every right guaranteed by the Constitution.

76. ***Article 209 of the Constitution*** empowers the national Assembly to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax.

77. The 3rd Respondent in support of the above preposition referred to the case of ***Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiha Workers Union) v Kenya Revenue Authority & 3 others [2014] eKLR*** where the court held as follows:-

> ***"Finally, the imposition of taxes is a constitutional imperative and the power to impose taxes is reposed in the legislature. The imposition of tax by statute cannot, of itself, amount to arbitrary deprivation of property contrary to Article 40 of the Constitution."***

78. Further in the case of ***Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others v. Commissioner of Domestic Taxes & 2 others [2014] eKLR*** the Court held that;

> ***"The decision whether to impose a tax and to who is within legislative authority hence it has a right to decide what institutions fall within the definition of 'financial institutions' under the Act. That power falls squarely with the legislature. This Court cannot therefore intervene and therefore find nothing unconstitutional in regard to that aspect of the petition."***

79. Further, ***Article 210 (1) of the Constitution*** provides that ***"No tax or Licensing fee maybe imposed, waived or varied except as provided by the legislation."***

80. The Petitioner contend, that its members were not afforded an adequate opportunity for public participation before the TLAA which contains the impugned Amendment was passed into law. The Petitioner refers to the case of ***Republic v. Country Government of Kiambu Exparte Robert Gakuru & Jamofaster Welfare Association*** where the Court held that:

> ***"It should be appreciated that the yardstick for public participation was that a reasonable opportunity had been given to the members of the public and all interested parties to know about the issue and to have an adequate say. The Court went on to hold that it could have been expected of the legislature that a personal hearing would be given to every individual who claimed to be affected by the laws or regulations that were being made and that what was necessary was that the laws or regulations that were being made and that what was necessary was that the nature of concerns of different sectors of the parties should have been communicated to the law maker and taken in formulating the final regulations. The Court further held that what mattered was that at the end of the day a reasonable opportunity was offered to members of the public and all interested parties to know about the issues and to have an adequate say and that what amounted to a reasonable opportunity would depend on the circumstances of each case.***

81. The Petitioner/Applicant state that the 3rd Respondent's letter dated 1st April, 2020 **pages 4 to 6** of "MK 1" annexed to the Supporting Affidavit) calling for comments on the Tax Laws (Amendment) Bill, 2020 **(the Tax Bill)** which contained the Impugned Amendment was addressed to various stakeholders but **not** the Petitioner or any of the Petitioner's members.

82. It is further Petitioner's contention that the 3rd Respondent's notice published in a daily newspaper (page 7 of "MK 1" annexed to the Supporting Affidavit) indicated at **paragraph 13** on the proposed amendments to the VAT Act that:

> ***"The Bill also deletes certain categories of goods from the exempt list as enumerated in the First Schedule". The Petitioner's services were not among the category to be affected".***

83. It clear as submitted by the Petitioner/Applicant that from the information provided by the 3rd Respondent, the Bill would not have affected the services offered by the Petitioner's members. In any event, the Tax Bill which was published on 30th March 2020 (**pages 1 to 3** of "MK 1" annexed to the Supporting Affidavit) only proposed to delete services offered by insurance agents and brokers not the insurance companies.

84. In the decision of the ***Court of Appeal*** in ***Kiambu County Government & 3 others v Robert N. Gakuru & others [2017] eKLR*** in considering what/how much public participation is sufficient stated that this depends on what is reasonable in the circumstances of the case. The Court cited with approval the decision of the Constitutional Court of South Africa in ***Doctors for Life International v. Speaker of the National Assembly & others (CCT 12/05) (2006)*** and held:

> ***"Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens*** *(Emphasis by the Court)*

85. From the Counsel rival submissions and contents and upon considering authorities relied upon by both sides, I find that it has been demonstrated that the Petitioner has arguable case as regards as to whether Petitioner's were accorded adequate opportunity or not to engage in the public participation in respect of the Tax Bill passed into law on 25th April 2020; and whether the notice of less than a month from the date of publication was sufficient or not. It is further arguable whether the Petitioner's members were or were not part of the stakeholders invited to comment on the Tax Bill. From the above I find that the Petitioner's have demonstrated that they have arguable case.

86. The Court dealing with the case of ***Okiya Omtatah Okoiti v commissioner General, Kenya Revenue Authority & 2 others (2018) eKLR***, the High Court stated that:-

> ***"There are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided."***

87. I find from the way the public participation was conducted, it is possible the public were not provided with meaningful opportunities for public participation and therefore the TLAA might have been passed without meeting the critical Constitutional requirement. I therefore find the issue of public participation which the Petitioner raised in this Petition, pending its determination, justifies or warrants this Court's interrogation through a full hearing of the petition. I find from the above that it is clear that the Petition raises triable issues with chances of success and that this is justified and necessary for the conservatory orders sought to be granted in order to preserve the status of affairs to enable the court determine the issues raised on merits. I am satisfied based on the above, the Petitioner has demonstrated a case which discloses arguable issues and more particularly arguable constitutional issues. Accordingly therefore establishing a prima facie case with likelihood of success.

E. WHETHER, FAILURE TO GRANT CONSERVATORY ORDERS, THE PETITION ALLEGING VIOLATION OF OR THREAT OF VIOLATION OF RIGHTS WILL BE RENDERED NUGATORY?

88. The Court is alive to the fact that it is at this stage dealings with an intermediary application and not the substantive petition. The court at this stage of the proceedings must ensure that the ends of justice is not rendered nugatory.

89. ***Section 17 of the VAT Act*** allows the VAT registered tax payers to claim a credit for input VAT against their output VAT to ensure the input VAT is effectively passed on to final consumers. It is therefore clear that VAT is a consumption tax that should be borne by the final consumer of the supply. In view of the Petitioner's members being not registered for VAT for purposes of insurance business, it follows that they cannot claim credit for input for those services. This fact has not been rebutted by any of the respondents.

90. The 1st Respondent could not either offer a solution on this issue for consideration by court at this state.

91. ***Section 17(6) and 17(7) of the VAT Act***, it is urged by the Petitioner, that it limits the amount of input VAT clause to be where the input VAT is ***used to make exempt supplies.*** It is pointed out by the Petitioner, that main income for insurance companies is VAT exempt, thus Insurance Premiums; and as such the VAT will become an extra cost to the insurance companies and which they cannot claim by virtue of the provisions of VAT Act. This in my view appears to be a glaring absurdity that the court must avoid at this stage by granting interim orders.

92. It has further been shown by the Petitioner/Applicant, that the VAT cost imposes an additional tax burden to the insurance companies in the following manner:-

> ***"a) Application of VAT on insurance agency fees and commissions will affect their compliance with the Insurance Act by breaching the prescribed limits imposed by the insurance Act in relation to management fees to be charged by insurance companies. The court should not encourage breach of a law in the face of a clear ambiguous statute.***
>
> ***b) Increase in management expenses because of VAT may also lead to further taxation for Life Business as described above."***

93. The Petitioner/Applicant is at this stage seeking conservatory orders staying or suspending further implementation, administration,

application and/or enforcement of ***paragraph 10 of Part II of the First Schedule of the Value Added Tax Act, 2013*** as amended by the ***Tax Laws (Amendment) Act, 2020*** pending hearing and determination of this petition. This does not mean that if the court makes a finding that the law is constitutional, the Petitioner will evade their liability. That if the Court finds the law is constitutional, the 1st Respondent will be at liberty to demand taxes due. The 1st Respondent will not be prejudiced as it will be able to collect any taxes due together with interest from the Petitioner's members. I therefore find the 1st Respondent will not suffer any prejudice if the orders sought are granted. On the other hand, if the orders are refused; and the Petitioner's members continue to make payments and the law is found to be unconstitutional, the Petitioners will not be able to recover the money back by virtue of VAT Act and will be greatly prejudiced.

F. 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?

94. The Petitioner/Applicant aver that the impugned Amendment, which is targeted at intermediaries, has the effect of imposing VAT on the Petitioner's members whose services are VAT exempt under the VAT Act. It is further argued the imposition of VAT on the Insurance Sector is a novel concept as the Sector has not been subject to VAT since 1989. It is further stated that the impugned Amendment imposes VAT on the Petitioner's members services despite the fact that their services are exempt. It therefore follows from the aforesaid, the Petitioner's members will be forced to make financial payments that they are not able to recover back. This will therefore be an infringement on their Constitutional right to property under ***Article 40(1) and (2) of the Constitution*** which clearly provides:-

> ***"40. Protection of right to property***
>
> ***(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property —***
>
> ***(a) of any description; and***
>
> ***(b) in any part of Kenya***
>
> ***(2) Parliament shall not enact a law that permits the State or any person—***
>
> ***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or***
>
> ***(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4)."***

95. The Petitioner/Applicant seek conservatory orders as set out in their application. It is Petitioner's averment the granting of the conservatory orders as sought will ensure, that the Petitioner's members rights under ***Article 27 and 40 of the Constitution*** are not infringed by implementation and/or enforcing of the impugned Amendment. I find that the granting of the relief sought will enhance the constitutional values and objects of the above-mentioned Articles, in respect of the right and freedom in the Bill of Rights.

G. WHETHER PUBLIC MUST BE CONSIDERED BEFORE GRANTING OF A CONSERVATORY ORDER?

96. The Petitioner/Applicant has at pages 46 to 51 of the annextures to the application, annexed the President's address on the state interventions to cushion Kenyans as against Economic Effects of Covid-19 pandemic, given on 25th March 2020. At page 47, the President gave his rationale for the raft of the relevant measures:-

> ***"a. in recognition of the extra-ordinary nature of this global tragedy and its enormous local effects, and conscious of the solemn duty of the Government to guarantee the enjoyment of social, civil and economic rights; my administration has made and will continue to make targeted state interventions to cushion Kenyans from shocks arising from Covid 19.***
>
> ***b. I recognize the anxiety that this pandemic has caused millions of Kenyan families; fearful of what the future may hold for them and their children. And the possibility of job losses and loss of income weighing heavily on their minds.***
>
> ***c. In order to protect jobs for our people and to provide some certainty for both employer and employees…"***

97. The aforesaid orders; were directed at the National Treasury; the Central Bank of Kenya and all Kenyans, and that it is in the period preceding the President's speech that the impugned Amendments were done.

98. It is 2nd Respondent's contention that other than the Petitioner's complaint being heard on an alleged failure to conduct public participation, the same is a claim based on profits and purely commercial in nature. That it is all about increased tax and management costs of the Petitioner's business affairs.

99. It is further contended by the 2nd Respondent, that whereas the President's speech and the actions that followed thereafter from the National Assembly, including passing several pieces of legislation, were focused on cushioning Kenyans from the effects of Covid -19. The 2nd Respondent asserts that the Petitioner on the other hand is focusing on its narrow and selfish interests. The 2nd Respondent relies in the case of **Mwende Maluki Mwinzi v Cabinet Secretary, Ministry of Foreign Affairs & 2 others [2019] eKLR** at paragraph 107, where this court, made a finding that in some given circumstances public interests triumph over private interests. It stated as follows:-

> ***"We think that in a case like this, we must consider the likely effect of the orders sought by the applicant. We should take into account the special nature of the set-up of the Second Respondent. It is common ground that it is the sole supplier of electricity in the country and that has the duty to satisfy its ever surging number of consumers of that vital commodity. While we agree that the applicant has an undoubted right of challenging the decision of the superior court and that the court has a duty to see that procurement laws are not breached nevertheless the court has a reciprocal duty to ensure that it does not hamstring such bodies like the Second respondent from performing their lawful duty or duties as bestowed upon them by the relevant law."***

100. The 2nd Respondent urges, that the Petitioner's case does not raise any constitutional issues but it raises commercial issues and on that account is not merited. It is further contended, that the Petitioner's claim being commercial is subservient to the larger public interest espoused in the President's speech of 25th March 2020; whose rationale was to protect Kenyans from the effects of Covid-19 pandemic. The 2nd Respondent on this proposition sought to rely in the decision of the court in the **Mwende Maluki Mwinzi** case (Supra) and ***Baseline Architects Limited and 2 others v. National Housing Insurance Fund Board Management (2018)*** where the Court, separately, held that there are circumstances in which the public interest must be dominant over the interest of a private individual.

101. The Petitioner/Applicant aver that public interest will be served if the court suspend further implementation of an ambiguous state. The petitioner in support of this preposition sought support from the case of ***Eco-bank Kenya Limited v. Commissioner for Domestic Taxes (2012) eKLR*** where the Court held:

> ***"…the Appellant and other business people have a right of certainty and predictability in the applicability of economic activities. This right necessarily militates against polices, regulations and procedures which are haphazardly resorted to by public regulatory bodies without adequate notice to those whose conduct or behaviour is to be regulated…"***

102. The Petitioner is under obligation to demonstrate that unless the law is suspended, great and unmitigable loss will be suffered by public.

103. In the instant application the 1st Respondent has not shown that it will suffer any prejudice if the orders sought are granted. The impugned Amendment introduces VAT in the Insurance Industry for the first time since 1989 and no urgency has been exhibited for the passing the law during the Covid-19 pandemic. It is urged by the Petitioner that the 1st Respondent can hold off on implementation of the novel VAT in the Insurance Industry pending the Court making a determination on the Petition. I find that the suspension of the impugned Amendment Bill will not occasion a lacuna in the operation or government structure, which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace.

104. In the instant application, I find that court cannot be called upon to aid the furtherance of a constitutional breach as the court has a duty to uphold the constitution, which it must do without fear or favour as the Court owes its allegiance to the Constitution. The Court in execution of its discretion has to act judiciously and its decision in civil matters should be based on balance of probabilities.

105. The upshot is that I am satisfied that the Petitioner has met the standard of proof as required in a civil matters. In this matter the balance of convenience tilts in favour of granting the conservatory orders. I find the petitioner's application meritorious and I proceed to make the following orders:-

> ***a) The Notice of Preliminary Objection by the 3rd Respondent dated 3rd July 2020 is without merits and is accordingly dismissed.***
>
> ***b) The Petitioner herein has capacity to sue. The Petition herein is properly before Court and Court has jurisdiction to hear and determine both the application and the Petition.***
>
> ***c) A conservatory order be and IS HEREBY issued suspending further implementation, administration, application and/or enforcement of paragraph 10 of Part II of the First Schedule of the Value Added Tax Act, 2013 as amended by the Tax Laws (Amendment) Act, 2020 pending the hearing and determination of the Petition hereof.***
>
> ***d) Costs of the application be in the cause.***

Dated, Signed and Delivered at Nairobi on this 16th day of July, 2020.

.....

J. A. MAKAU

JUDGE