



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.302 OF 2019**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 1,10,19,20,21,22,23,24,40,47,94,95,114 AND 201 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 3 OF 2012**

**AND**

**IN THE MATTER OF EXCISE DUTY ACT, 2015**

**AND**

**IN THE MATTER OF THE STATUTORY INSTRUMENTS ACTS, NO. 23 OF 2013**

**AND**

**IN THE MATTER OF EXCISE DUTY (EXCISABLE GOODS MANAGEMENT SYSTEM) REGULATIONS, 2017**

**AND**

**IN THE MATTER OF ENFORCEMENT & INTERPRETATION OF THE CONSTITUTION**

**JETLAK FOODS LIMITED.....1<sup>ST</sup>PETITIONER**

**DELMONTE (K) LIMITED.....2<sup>ND</sup> PETITIONER**

**PZ CUSSONS E A LIMITED.....3<sup>RD</sup> PETITIONER**

**BLUE PLASTICS & WATER CO. LTD.....4<sup>TH</sup> PETITIONER**

**AVIANO LIMITED.....5<sup>TH</sup> PETITIONER**

**KENAFRIC INDUSTRIES LIMITED.....6<sup>TH</sup> PETITIONER**

**KEVIAN KENYA.....7<sup>TH</sup> PETITIONER**

**BUYLINE INDUSTRIES LIMITED.....8<sup>TH</sup> PETITIONER**

**BEIERSDORF EAST AFRICA LTD.....9<sup>TH</sup> PETITIONER**

**L'OREAL EAST AFRICA.....10<sup>TH</sup> PETITIONER**

**KENYA TEA PACKERS LIMITED.....11<sup>TH</sup> PETITIONER**

(All suing as members of the Kenya Association of Manufacturers and Manufactures importers distributors and Retailers of bottled water, juices, Non-Alcoholic Beverages and Cosmetics Products)

VERSUS

THE CABINET SECRETARY,

THE NATIONAL TREASURY.....1<sup>ST</sup> RESPONDENT

KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

AND

SISPA SECURITIES SOL S.A, currently trading

as SICPA S.A.....INTERESTED PARTY

RULING

**Petitioners' Case**

1. The petitioners through a petition dated 30<sup>th</sup> July 2019 seek to invoke the discretionary power bestowed upon this court to restrain the Respondents from rolling out an on-going "excise tax" collection mechanism, as contemplated under the Excise Duty-(*Excusable Goods Management System Regulation 2017*). The petitioners are further through a Notice of Motion dated 30<sup>th</sup> July seeking issuance of a conservatory orders in the nature of an injunction restraining and staying 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their agents, officers or any persons from implementing or mandatory implementation of Excise Duty (*Excusable Goods Management Systems*) Regulations 2017 published in the Legal Notice No. 58 of 30<sup>th</sup> March 2017 and subsequent public Notice published in Saturday Newspapers by 2<sup>nd</sup> Respondent to take effect on 1<sup>st</sup> September 2019 pending *inter-partes* hearing and determination of the application and the petition, and that status quo ante in respect of the Excise Duty (*Excisable Goods Management System Rules 2017*) be maintained.

**Response by 1<sup>st</sup> and 3<sup>rd</sup> Respondents**

2. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents are opposed to both the Petition and Notice of Motion. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition dated 9<sup>th</sup> August 2019, urging both the Petition and Notice of Motion is res judicata and is subject of Nairobi Civil Appeal No. 76 of 2018 in which orders of stay of the judgment of the Honourable Court in High Court Constitutional **Petition No. 532 Okiya Omtatah Okioti vs The Commissioner General, Kenya Revenue Authority & others**, have been stayed. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents further rely on the 1<sup>st</sup> and 3<sup>rd</sup> Respondents Replying affidavit by Dr. Julius Muoki Muia, Principal Secretary National Treasury sworn on 27<sup>th</sup> August 2019.

**The 2<sup>nd</sup> Respondent's Response**

3. The 2<sup>nd</sup> Respondent is opposed to both the Notice of Motion and the Petition through its grounds of opposition dated 6<sup>th</sup> August 2019. The 2<sup>nd</sup> Respondent contend that this matter is res judicata, the same having been litigated upon before this very same court, where issues of public participation on the implementation of the Excise Goods Management System (**EGMS**) were adjudicated upon in Nairobi High Court **Petition No. 532 of 2017 Okiya Omtatah Okioti vs The Commissioner General, Kenya Revenue Authority**, where the same subject matter is now subject of appeal on the Court of Appeal Nai. Civil Appeal No. 76 of 2018, where the said court, issued a ruling on 11<sup>th</sup> May 2018 staying the judgment of the High Court, decision, the effect of which stay was to okay the implementation of Excise Goods Management System (**EGMS**). The 2<sup>nd</sup> Respondent further relies on affidavit sworn by Emily Karambu Muthaura for 2<sup>nd</sup> Interested Party.

**The 1<sup>st</sup> Interested Party's Response**

4. The 1<sup>st</sup> Interested Party filed a Notice of Preliminary Objection dated 23<sup>rd</sup> August 2019 setting out three main points of preliminary objections as follows:-

a) The matters raised herein are res judicata and this Court cannot delve into them.

b) This Honourable Court having pronounced itself on the matters raised in the present proceedings is indeed functus officio and cannot entertain the same.

c) The matters raised in the Application and Petition are sub-judice as the very same issues await consideration and adjudication in the Court of Appeal in Civil Appeal No. 125 of 2018 – SICPA Securities SOL SA vs. Okiya Omtatah Okioti & 2 others hence this Court cannot delve into them as it would effectively countermand the Court of Appeal and usurp its jurisdiction to adjudicate over matters before it.

**d) The Application and Petition offend the doctrine of separation of powers.**

The 1<sup>st</sup> Interested party further relied on Replying affidavit by Marek Relelski.

**The 2<sup>nd</sup> Interested Party's Response**

5. The National Assembly filed a Notice of Preliminary Objection dated 28<sup>th</sup> August 2019 contending, that the Honourable Court lacks jurisdiction to hear and determine either the application or the petition for reasons that the issues and subject matter raised in the petition and the application herein are res judicata by having been heard and determined in Milimani Constitutional and Human Rights Division **Petition No. 532 of 2017 OkiyaOmtatahOkoiti vs Commissioner General, Kenya Revenue Authority & 2 others** through judgment delivered on 12<sup>th</sup> March 2018. That the application and petition contravenes the provisions of section 7 of the Civil Procedure Act (Cap 21) Laws of Kenya and should therefore be dismissed in *limine*.

**Petitioners Response**

6. The petitioners in response to the affidavits filed by Emily Karambu Muthaura for 2<sup>nd</sup> Respondent and Marek Relelski for the 1<sup>st</sup> Interested Party filed supplementary affidavit by Sohini Shah sworn on 23<sup>rd</sup> August 2019.

**Analysis and Determination**

7. I have considered the Petition, the Notice of Motion, the grounds of opposition, the affidavits, Replying affidavits, the supplementary affidavit, the counsel oral submissions as well as the counsel rival written submissions, and the two Notice of Preliminary objections are similar and as the 1<sup>st</sup> Respondent had sought its Notice of Preliminary Objection be determined first, I will continue the same for the purposes of determining the Notices of Preliminary objection. The issues for determination are therefore as follows:-

**a) Whether matters raised herein are Res judicata and whether this court can delve into them?**

**b) Whether this Honourable Court having pronounced itself on the matters raised in the present proceedings is indeed *functus officio* and cannot entertain the same?**

**c) Whether the matters raised in the Application and petition are *sub-judice* and whether the same issues await consideration and adjudication in the Court of Appeal in Civil Appeal No. 125 of 2018 – SICPA securities Solsa vs OkiyaOmtatahOkoiti & 2 others and whether this court can delve into them as it would effectively countermand the Court of Appeal and usurp its jurisdiction to adjudicate over matters before it?**

**d) Whether the application and the petition offend the doctrine of separation of powers?**

**A) Whether matters raised herein are Res judicata and whether this court can delve into them?**

8. The 1<sup>st</sup> Interested Party Notice of Preliminary Objection, which is supported by all the Respondents but opposed by the petitioners is, that the matters or issues which the petitioners seek to be adjudicated upon in this petition; were same matters substantially raised and adjudicated upon by this Honourable Court in High Court **Petition No.532 of 2017 OkoyaOmtatahOkoiti vs CommissionerGeneral, Kenya Revenue Authority and 2others**, in which judgment was delivered on 12<sup>th</sup> March 2018. The 1<sup>st</sup> Interested Party contend the Court of Appeal has in the Appeal pending before it, rendered a decision paving way for the implementation of **EGMS** which the petitioners seek to stop in these proceedings. The 1<sup>st</sup> Interested Party contention is, that the present petition is *Res Judicata*. It is further 1<sup>st</sup> Respondent's contention the doctrine of Res judicata prohibits the re-opening of such issues in a fresh suit before the same court.

9. The 1<sup>st</sup> Interested Party urges once a court gives a judgment or makes an interpretation that judgement in law is a judgment in rem, thus binding everybody and not only the parties in that case. That the legal background of the matters before the court is, that the petition and the application before the court essentially impugn The Excise Duty (*Excisable Goods Management Regulation*) 2017. The petition and the application seek to halt the application of **EGMS** on bottled water, juices, soda and other alcoholic beverages and cosmetics effective 1<sup>st</sup> September 2019. The Excise Duty (*Excusable Goods Management Regulations*) 2017 came into force by Legal Notice No. 53 made by the 1<sup>st</sup> Respondent on 30<sup>th</sup> March 2017 pursuant to section 45 of the Excise Duty Act, 2015. The Act in its preamble states it is an Act of Parliament "to provide for the charge, assessment and collection of excise duty, to make administrative provision relating thereto and for connected purposes."

10. Section 28 of the Excise Duty provides as follows:-

**"28. Excise stamps and other markings**

**(1) The Cabinet Secretary may in the regulations specify—**

**a) The excisable goods to which excise stamps shall be affixed;**

**b) The systems for management of excise stamps and excisable goods, and**

c) **The place and time of affixing excise stamps.**

(2) **The Commissioner shall, by notice in at least two newspapers of national circulation, specify the types and descriptions of excise stamps to be affixed on goods specified under subsection (1).**

(3) **If excisable goods are manufactured for export, or for delivery to persons listed in subparagraph (2) or (3) of the Second Schedule, the goods shall be marked with such inscriptions as the Commissioner may specify to facilitate the tracking and tracing of the goods.**

(4) **A person shall not remove excisable goods specified in subsection (1) from the place designated for affixing stamps unless the goods have been affixed with stamps in accordance with the regulation.**

(5) **Notwithstanding subsection (4), the Commissioner may in exceptional circumstances, and with prior approval of the Cabinet Secretary, allow removal of excisable goods from excise control without affixing excise stamps on the goods."**

11. From the aforesaid section 28 (1) (a) and (b) of the Excise Duty Act, the 1<sup>st</sup> Respondent is mandated to make lawful regulations to specify:-

a) **The excisable goods to which excise stamps shall be affixed.**

b) **The system of management of excise stamps and excisable goods.**

From the aforesaid it is clear that the enactment of the Excise Duty (*Excisable Goods Management Regulations*) 2017 is therefore in exercise of lawful role as bestowed upon the 1<sup>st</sup> Respondent by Parliament through enactment of the Excise Duty Act.

12. The Interested Party pursuant to a contract awarded to it by **KRA** provides Excisable Goods Management System ("**EGMS**") to be deployed by **KRA** to enable it attain the aims contemplated under the Excise Duty Act and the Regulations made thereunder.

13. The Interested Party contend, that both the award of the subject contract to the 1<sup>st</sup> Interested Party, the EGMS and the Excise Duty (*Excisable Goods Management Regulations*) 2017 have been challenged in Petition 532 of 2017 **Okiya Omtatah Okoiti vs The Commissioner General, Kenya Revenue Authority and the Court of Appeal in Civil Appeal No. 125 of 2018 SICPA Security Solsa vs Okiya Omtatah Okoiti**. The two matters herein substantially form the basis of the issue raised by the 1<sup>st</sup> Interested Party; the 2<sup>nd</sup> Interested Party and the Respondents, that this court lacks jurisdiction to entertain the proceedings hereto. It is 1<sup>st</sup> Interested Party's contention, that the matters raised in this petition are *Re judicata*, whereas the petitioners contend otherwise.

14. **Section 7 of the Civil Procedure Act (Cap 21) Laws of Kenya** provides:-

**"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

**Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.**

**Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

**Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

**Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

**Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

**Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."**

15. In **DSV Silo vs The Owners of Sennon (1985) 2 ALL ER104**, which has been cited with approvals in **Bernard Mugo Ndegwavs James Nderitu Githua & 2 others (2010) eKLR** and **Gitau Kamau vs Ndungu Kamau & another (2017) eKLR** the court stated the following as requirements for establishing that a matter is *res judicata*:-

a) **The matter in issue is identical in both suits;**

**b) That the parties in the suit are substantially the same;**

**c) There is concurrence of jurisdiction of the court;**

**d) That the subject matter is the same and**

**e) That there is a final determination as far as the previous decision is concerned.**

16. Under explanation 6, it is clear from the explanation where persons litigate *bona fide* in respect of a public right or of private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of section 7 of the Civil Procedure Act, be deemed to claim under the person so litigating. In this petition it should be noted, that all the petitioners herein portray themselves as litigating a public right. The matters they are litigating are in respect of a public right or of a private right were the same matters as had been raised and adjudicated in **Petition No. 532 of 2017, OkiyaOmtatahOkoiti vs The Commissioner General, Kenya Revenue Authority, the Cabinet Secretary National Treasury, SICPA Securities SOLSA** as demonstrated in the extract of petition at Annexure MR-1 to the affidavit of Marek Relelski at pages 11 to 28 and pages 1 to 136 of the Interested Party's Bundle of documents.

17. It is clear that the court which heard the matter was presided over by Hon. Justice Mativo, who upon consideration of the petition before him and parties responses, proceed to deliver judgment on 12<sup>th</sup> March 2018; allowing the petition (*a per annexure of copy of judgment at MR-1 to the affidavit of Marek Relelski at pages 1 to 28*).

18. This court has had an opportunity time to peruse petition No. 532 of 2017 and the decision of Hon. Justice Mativo and the following comes out clearly:-

**"a) The matter directly and substantially in issue in the present petition and application has been directly and substantially been in issue in Petition No. 532 of 2017.**

**b) The said issues have been raised, heard and finally decided by a Court competent to try the same."**

19. Upon perusal of the petition in Hc Petition No. 532 of 2017 and the present petition it turns out that the same are similar in substance, and as such the petitioners are indeed seeking to re-open the matters, that were raised in petition No. 532 of 2017 with a view to circumvent the fate of the decision already rendered in the said petition. I find that the court should put on legal lenses and view the matter under the provision of section 7 of the Civil Procedure Act and apply the test espoused by the Supreme Court of Kenya in **Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & another (2016) eKLR** at paragraph 57, 58 and 59 where it stated as follows:-

**"...where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."**

20. I now find it prudent to proceed to examine and compare the contents of petition filed in petition No. 532 of 2017 and the present petition No. 302 of 2019. The comparison below reveals as follows:-

ITEM	PETITION NO. 532 OF 2017	THE PRESENT PETITION
1	Sought to challenge a Notice marking the advent of affixation of Excise Stamps on Bottled Water, Juices, Soda and Other Non-Alcoholic Beverages and Cosmetics  <i>(See Paragraphs 5 to 6 of the Petition at Page 3 of Annexure to Interested Party's Replying Affidavit)</i>	Seeks to challenge and restrain notice marking advent of the affixation of excise stamps.  <i>(See Paragraph 33 and Prayer A of the Petition)</i>
2.	Posited that the advent of the Excise Duty (Excisable Goods Management Regulations) 2017 was unconstitutional for want of public participation  <i>(See Paragraph 7C of the Petition at Page 5 of the Annexure to Interested</i>	States that The Excise Duty (Excisable Goods Management Regulations) 2017 were enacted without public participation.

	<b>Party's Replying Affidavit)</b>	(See <b>Paragraph 33</b> and <b>Prayer E</b> of the Petition
3.	Alleged that the EGMS system was a financial burden and portended further taxation.  <i>(See Paragraphs 7C , 10 and 13 of the Petition at Pages 5 , 6 and 8 of the Annexure to the Interested Party's Replying Affidavit)</i>	States the cost of implementing EGMS is a financial burden to the manufacturers.  (See <b>Paragraphs 48, 49, 50, 52,67</b> and <b>Prayer F</b> of the Petition)
4.	Alleged that the Excise Duty (Excisable Goods Management Regulations) 2017 were not considered by the National Assembly contrary to the provisions of the <u>Statutory Instruments Act</u> and should therefore not have been conferred with the force of law.  <i>(See Paragraphs 37 to 43 of the Petition at Pages 23 to 24 of the Annexure to the Interested Party's Replying Affidavit)</i>	Challenges the constitutionality of the Statutory Instruments Act and by extension the Excise Duty (Excisable Goods Management Regulations) 2017  (See <b>Paragraphs 35 , 43 to 45</b> and <b>Prayer D</b> of the Petition)

21. Upon applying the test of whether the matters is directly and substantially in issue in petition No. 532 of 2017 and the present petition No. 302 of 2019, it is clear the issues are directly and substantially the same. Further this court proceeded to consider the issues framed for determination by the Hon. Justice Mativo at paragraph 32 of his decision, which were as follows:-

- a) **Whether the Court is divested of jurisdiction under the doctrine of exhaustion of remedies.**
- b) **Whether there was adequate public participation in the enactment of the impugned Gazette notices and in the decision to acquire and implement the EGMS.**
- c) **Whether the first Respondent violated the law governing direct procurement in awarding the tender to the third Respondent.**
- d) **Whether the impugned legal instruments are null and void on grounds that they were enacted in a manner that violated the constitution and/or Statutory Instruments Act.**
- e) **Whether the imposition of the tax creates an unfair tax burden on the public and the manufacturers and on whether it offends Article 43(1) (a), (c) & (d) rights.**
- f) **Whether the EGMS system it duplicates functions of KBS and the Anti-Counterfeit Agency.**
- g) **Whether the Petitioner is guilty of material non-disclosure.**

22. From the issues framed by the Hon. Justice Mativo, it turns out, that the issues as framed are in every material respect substantially the same as the issues this court will be called upon to determine in the present petition. It is hard and difficult to differentiate petition number 532 of 2017 with present petition. The present petition is a "*cosmetic face lift*" of petition No. 532 of 2017. I find in the circumstances the matters raised before this court are res judicata and this court cannot exercise jurisdiction over the same.

**B) Whether this Honourable Court having pronounced itself on the matters raised in the present proceedings is indeed *functus officio* and cannot entertain the same?**

23. The 1<sup>st</sup> Interested party urges, that upon delivering of judgement in petition No. 532 of 2017 this court became *functus officio* and its role in the matter ended then. It is further urged given, that the decision of Hon. Justice Mativo is subject of an Appeal in the Court of Appeal in **Civil Appeal No. 125 of 2018 SICPA Securities SOL SA vs Okiya Omtatah Okoit** this court is *functus officio*. It is further urged the court having pronounced itself in its judgment it cannot revisit the matter.

24. It is trite that on account of doctrine of *functus officio*, once court delivers its final judgment on a matter, it cannot revisit the same matter nor can it entertain the matters raised before it, as in doing so, would amount to re-opening the very same matter upon which it had pronounced itself. In the case of **Telcom Kenya Limited vs John Ochanda (suing on his own behalf and behalf of 996 former employees of Telkom Kenya Limited (2014)eKLR**, The principle of *functus officio* was discussed. The court expressed itself as follows:-

**“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19<sup>th</sup> Century. In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);**

**“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:**

**Where there had been a slip in drawing it up, and,**

**Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186”**

25. I therefore find that following a final decision in Petition No. 532 of 2017 by Hon. Justice Mativo, this court has become *functus officio*. This court cannot purport to revisit the already determined matter and which is pending an appeal at the Court of Appeal. This court cannot sit on appeal on its own matter. I find this court is barred from a merit based re-engagement on the matters in this petition it has no alternative save to down its tools.

**C) Whether the matters raised in the Application and petition are *sub-judice* and whether the same issues await consideration and adjudication in the Court of Appeal in Civil Appeal No. 125 of 2018 – SICPA securities Solsa vs OkiyaOmtataOkoiti& 2 others and whether this court can delve into them as it would effectively countermand the Court of Appeal and usurp its jurisdiction to adjudicate over matters before it?**

26. In this petition, and as submitted by Counsel herein the judgment by Hon. Justice Mativo, in **Petition No. 532 of 2017 is subject of pending appeal No. Civil Appeal No.125 of 2018 SICPA Securities SOL SA vs OkiyaOmtatahOkoiti**. From the Replying affidavit of the 1<sup>st</sup> Interested party at page 66, 67 – 75 the following documents are duly annexed:-

**a) The Notice of Appeal from the decision of Hon. Justice Mativo delivered in Petition No. 532 of 2017**

**b) The Ruling of the Court of Appeal on an Application under Rule 5(2)(b) of the Court of Appeal rules “Being an Application for stay of judgement and orders of the High Court of Kenya John M. Mativo J dated 12<sup>th</sup> March, 2018”**

27. It is evidently clear from the ruling of the Court of Appeal that the issue for determination before it, was whether the Court of Appeal *“should stay the execution of the judgment and decree of Hon. Justice Mativo in Petition No. 532 of 2017.”*

The Court of Appeal in dealing with the matter before it stated thus:-

**“Wishing to stay the execution of the judgment and decree of the High Court before the lodging, hearing and determination of the intended appeal, SICPA and KRA have approached this Court by way of two Notices of Motion all dated 21<sup>st</sup> March 2018 principally brought under Rule 5 (2) (b) of the Court of Appeal Rules.”**

28. The Court stated further as follows in considering the matters before it:-

**“The High Court was persuaded that Legal Notice No. 53 of 30<sup>th</sup> March, 2017 was enacted in a manner inconsistent with the Constitution and the statutory instruments Act on account of want of adequate public participation prior to its enactment and proceeded to issue the following declarations.”**

29. The Court of Appeal upon considering all the arguments both for and against the Application to stay the orders of Hon. Justice Mativo held as follows:-

**“Counsel for SICPA, the CS and KRA submitted that in determining the applications, this Court ought to give due regard to proportionality. Although counsel did not elaborate much on this aspect, in our view applying proportionality principle requires an assessment of the balance between the competing parties’ interests. In Kenya Pipeline Company Limited v Stanley MungaGithunguri [2011] eKLR, this Court observed that one of the principal aims of the overriding objective is to approach the exercise of power or discretion under any proviso or rule, with a sense of balance or proportionality. In this case, the intended appellants stand to lose substantial, if not colossal amount of money in the event that this Court refuses to grant the orders sought and the appeals ultimately succeed. It is obvious that they will not be able to recover the money and the loss considering that they had already invested Kshs. 1.886 billion in the system. Neither can the effect of the counterfeit products on the Kenyan society be ignored. Thus refusal to grant a stay would cause such hardship as would be out of proportion to that which is likely to be suffered by Okiya.**

**Counsel for the trio further argued that public interest be considered as the government, which represents public interest, would lose close to Kshs. 20 billion in the event this Court declines to intervene. We agree with the submissions. Finally, Okiya on his part would not be prejudiced by grant of the orders sought. He has alleged none and none is fathomable.**

**Accordingly, and in the interest of justice and in the unique circumstances of this case, the order that best commends to us is to stay the judgment and decree of the High Court rendered on 12<sup>th</sup> March 2018 in its entirety pending the lodging, hearing and determination of the appeals.”**

30. It is noted in this matter, that following the stay orders issued by the Court of Appeal, the Respondents moved the Supreme Court in

Application No. 15 of 2018 OkiyaOmtatahOkoi vs SICPA Securities SOL SA & others. In its Ruling the Supreme Court took cognizance of the Court of Appeal's ruling and the considerations that went into the said ruling. The Supreme Court at paragraph 13 of its decision stated as follows:-

**“In a Ruling dated 11<sup>th</sup> May, 2018, the Court of appeal stayed the Judgment and decree of the High Court in its entirety pending the hearing and determination of the appeals. The Court of Appeal in doing so stated that the Appellants stood to lose substantial, if not colossal, amounts of money in the event it refused to grant the stay and the appeals ultimately succeeded. The Court also stated that it had approached the exercise of power or discretion of discretion under Rule 5(2) (b) with a sense of balance or proportionality”.**

31. From the above it is clear, that the decision by Hon. Justice Mativo has not been upheld or set aside as the appeal is still pending determination by the Court of Appeal. I find that the petitioners herein seek to obtain the very same orders as made by Hon. Justice Mativo and stayed by the Court of Appeal, the matter in my view is *sub-judice* and I find that I should not entertain the same.

32. In matters of *sub-judice* section 6 of the Civil Procedure Act provides as follows:-

**"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or CAP. 21 Civil Procedure [Rev. 2019] 12 any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court."**

33. It is trite, that where a matter is *sub-judice*, and especially where it is pending hearing and determination in a higher court in the hierarchy of courts as provided under Article 162(1) and 164(3) of the Constitution, then this court should yield to the *sub-judice* rule and drop its tools. Considering the issues raised by the petitioners in these proceedings are pending before a Superior Court to this court with competent jurisdiction, I find the same is *sub-judice* and as such I decline the invitation to adjudicate the same.

#### **D) Whether the application and the petition offend the doctrine of separation of powers?**

34. Upon perusal of the application and the petition, it objectively reveals, that it is concerned with the mode and method of collection of excise tax and dictates to or directs the 2<sup>nd</sup> Respondent on the manner of deploying its tax collection mechanism. Considering the same, it is clear the prayers offend the notion of separation of powers and are not available to the petitioners as the mandate for collection and receipt of revenue is solely vested in Kenya Revenue Authority and no other.

Section 5 of the Kenya Revenue Authority sets out functions of KRA and shows a nexus between KRA and the Cabinet Secretary National Treasury.

35. The 1<sup>st</sup> Respondent in enacting the Excise Duty (*Excisable Goods Management System*) Regulation 2017, acted in accordance with his lawful mandate. That in effecting the said Regulations and producing the EGMS from the 1<sup>st</sup> Interested party, KRA was merely carrying out its lawful duty under the supervision of the 1<sup>st</sup> Respondent as contemplated by law, thus carrying out their roles as part of the Executive branch of government to collect taxes. I therefore find and hold that it is not in the province of this court to interfere with the role of the Executive and dictate how it should discharge its mandate, such is the imperative of the doctrine of separation of powers, so long as the Executive is lawfully executing its lawful mandate.

36. The separation of powers was considered in great detail in **MumoMatemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** where the court stated thus:-

**"(49) It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:**

**“[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions...”**

**(58) We respectfully suggest that such ambiguous application of doctrines can undermine proper judicial inquiry. It is therefore our considered view, that the superior court below misapplied the doctrine of separation of powers in its standard of review. We are of the view that had the court applied the rationality test in light of the principle of separation of powers, its analysis no less its result would have been different. We note here that the rationality test is a judicial standard fashioned specifically to accommodate the doctrine of separation of powers, and its application must generally reflect that understanding. This much has been noted by the South African Constitutional Court in *Democratic Alliance v The President of the Republic of South Africa & 3 Others*, CCT 122/11 [2012] ZACC 24, where it stated that:**

**“[42] It is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of**

executive decisions: it has been described by this Court as the “minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries.” And the rationale for this test is “to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other.”

[43] .....

“The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society.”

This applies equally to executive decisions.”

37. In accordance with the doctrine of separation of powers, the court cannot in my view be invited to dictate to the Respondents on how to carry out their mandate as by doing so would go beyond its judicial role. I find to that extent the prayers in the application and the petition invite the court to issue directives to the Respondents, the same offends the doctrine of separation of powers and that cannot be entertained at all.

38. Having considered the 1<sup>st</sup> Interested party’s preliminary objection, as well as preliminary objection raised by the 2<sup>nd</sup> Interested party, as well as that raised by the Respondents, as regards lack of jurisdiction of this court to delve into the matters raised in the application and the petition, and in view of the issues raised herein and upon their consideration, I find the preliminary objections to be merited. I find that this court has no jurisdiction to determine the application and petition after finding the subject matter to be *res judicata*; that the court is *functus officio*; that the matters raised in the application and petition are *sub-judice* and the application and petition offending the doctrine of separation of powers.

39. The upshot is that the 1<sup>st</sup> Interested party, preliminary objection, the 2<sup>nd</sup> Interested party preliminary objection and that of the Respondents that this court has no jurisdiction to entertain both the Application and the petition succeeds. This court has to put down its tools and decline to determine both the Application and the petition for lack of jurisdiction. The Application and the petition are dismissed. Each party to bear its own costs as the petitioners litigated a public interest matter under Article 22 of the Constitution of Kenya 2010.

Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of November, 2019.

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J .A. MAKAU

JUDGE