REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 235 OF 2018

IN THE MATTER OF ARTICLES 22, 23, 35, 47 AND 201 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FINANCE BILL, 2018 THE EXERCISE DUTY ACT 23 OF 2015.

KENYA BANKERS ASSOCIATION.......................PETITIONER

VERSUS

THE ATTORNEY GENERAL........................1ST RESPONDENT

THE KENYA REVENUE AUTHORITY......2ND RESPONDENT

RULING

1. This ruling relates to the application dated 29th June 2018 in which the petitioner/applicant herein seeks inter alia, orders that:

> ***"A conservatory order do issue to delay 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 until such time as a proper definition of " money transferred by banks" is provided and sufficient time allowed for alteration of the computer systems operated by the banks to implement the charge of the duty."***

2. The application was brought on the grounds that the Budget speech read by the Cabinet Secretary National Treasury on 14th June 2018 made reference to a "Robin Hood Tax" on the transfer of money in excess of kshs 500,000 for the first time and that the material provision which is contained in Clause 31 (b) (ii) of the Bill introduced new paragraphs 5 and 6 in Part 11 of the 1st Schedule which reads

> ***" 5 Excise duty on fees charged for money transfer services by banks, money transfer agencies and other financial service providers, shall be ten per cent.***
>
> ***6. Excise duty on money transferred by banks, money transfer agencies and other financial service providers shall be 0.05 per cent of the amount transferred in case of money transfer of five hundred thousand shillings or more".***

3. According to the applicant, paragraphs 5 is a variation of what was previously paragraph 3 of Part 11 of the First Schedule and is in respect to excise duty on fees charged by banks for money transfer services which is defined at Part 111 of the First Schedule of the Excise duty Act as " includes services of sending and withdrawal of money" while paragraph 6 is a new provision imposing duty on the amount of money transferred yet the previous excise duty was on the fee charged by the bank providing the money transfer services.

4. The applicants case is that the Finance Bill, 2018 (herein after **"the Bill"**) is dated 19th June 2018 and that the Kenyan Gazette of 22nd June 2018 stated that an order under the Provisional Collection of Taxes and Duties Act had been issued which order purported that paragraph 6 of Part 11 of the First Schedule to the Excise Duty Act 2015 was to come into force on 1st July 2018.

5. According to the applicant, the order contravenes the requirements of the Provisional Collection of Taxes and Duties Act because the Bill had not been published on 14th June 2018 when the Cabinet Secretary issued the order and therefore the power in Section 2 of the Provisional Collection of Taxes and Duties Act had not arisen.

6. The applicant therefore contended that the conservatory orders sought were necessary in order to prevent any attempt by the 2nd respondent to act on such order because there was no public participation before the introduction of the new excise duty as is required by the Constitution and further, that there was insufficient time for the implementation on the new duty in view of the fact that information about the new duty was not provided in time or at all contrary to the provisions of Articles 35 and 47 of the Constitution. The applicant also stated that there was lack of clarity in the terms in which duty is imposed because there was no definition of what constitutes "money transferred by banks " thereby making it difficult, if not impossible, to implement the tax without disrupting the applicant's member's businesses.

7. The application was supported by the affidavit of Habil Olaka, the petitioner's Chief Executive Officer, dated 29th June 2018 wherein he states that on 25th June 2018, the petitioner wrote a letter to the Cabinet Secretary National Treasury raising grave concerns on the impugned Bill which letter never elicited any response. The letter was annexed to the supporting affidavit and marked "HO1".

8. He further reiterates that the introduction of new excise duty will require changes in the bank software which will take time as most of the software vendors are based outside Kenya.

?9. The 1st respondent filed grounds of opposition in response to the application in which it states that the motion does not meet the threshold for the grant of conservatory orders as the petitioner had not demonstrated that it has a *prima facie* case with likelihood of success and neither had the petitioner shown any real danger that they will suffer as a result of the alleged violation or threatened violation of the constitution.

10. The 1st respondent contends that the Bill is yet to be enacted by Parliament and that it is therefore premature for the applicant to claim that there was no public participation before the enactment of the Bill. The 1st respondent's case is that the gazettement of the impugned order to implement immediate tax matters by the Cabinet Secretary-National Treasury is anchored in law as the constitution empowers the National Government to impose taxes including excise tax.

11. The 2nd respondent opposed the application through the replying affidavit of one Tobias Oula, the Assistant Manager in the Banking Sector of the respondent's Domestic Taxes Department (Large Tax Payers Office) dated 9th July 2018 wherein he explains the statutory functions of the 2nd respondent. He further explains that the concept of fees charged for money transfer services is not a new concept as the Excise Duty Act took effect in 2015 and that the contention that the term "money transferred by banks" was not defined has no basis since banks were able to comply before, even without such definition. He also states that banks have already notified their customers, through sms and notices on local dailies about the charge of excise duty at the rate of 0.05% on transfer of amount of kshs 500,000 and above which means that they already understand the meaning of the term "money transferred by banks" as shown in annexture marked "KRA1". He adds that the government will loss substantial tax revenue if the application is granted.

12. Parties canvassed the application by way of written submissions which I have carefully perused. The submissions were further highlighted during the hearing of the application.

DETERMINATION

13. Upon careful consideration of the application dated 29th June 2018, the respondents' respective responses and the submissions tendered in court, I note that the main issue for determination is whether or not the application meets the threshold for granting of the conservatory orders sought.

14. In the oft cited case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] e KLR,** the Supreme Court laid down the principles governing the granting of conservatory orders as follows:

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

15. In the instant case, the applicant does not challenge the validity of the Finance Bill 2018 *per se*, they instead seeks an order to delay the implementation of the excise duty introduced at paragraph 6 Part 11 of First Schedule of the Excise duty Act 2015 until such a time as a proper definition of the term "money transferred by banks" is provided and sufficient time allowed for the alteration of the banks computer systems to implement the charge of duty.

16. The applicant's case is that while the definition of the "money transfer services" has been provided, there is no definition of "money transferred by banks" thereby creating an ambiguity that violates its constitutional right to clear legislation.

17. The applicant's case was that it did not understand the meaning of the term "money transferred by banks" and that immediately it became aware of the Bill, it wrote a letter dated 25th June 2018 to the Cabinet Secretary, National Treasury seeking inter alia, an adjustment on the effective date of the Bill and guidelines on the implementation of the duty.

18. I have perused the applicant's said letter dated 25th June 2018 and I note that it states in part, as follows:

> "***Effective date***
>
> ***The tax is earmarked to take effect as from 1st July 2018. The minimum period that banks require to adjust banking systems to comply with this requirement is between 3 and 6 months based on the core banking system in use.***
>
> ***We have requested service providers of the systems to provide representation on this challenge and we will forward these representations to your office as we obtain them.***
>
> ***Based on the above circumstances we are seeking deferral of the implementation date in line with the recommendation of the system vendors.***
>
> ***Lack of guidelines***
>
> ***We also note with profound concern that the Finance Bill 2018 has not provided any guidelines on how the duty is to be applied and not specific exclusions from the duty is provided. Furthermore no definition of money transfer is provided to appropriately guide banks an application of the duty".***

19. From the above extract of the applicant's letter, it is clear that the issue of lack of clarity of the impugned paragraph was raised by the applicant, as the major stakeholder in the banking industry, to the concerned Cabinet Secretary the moment the applicant realized that their members would encounter challenges in the implementation of the Bill. Quite unfortunately, the Cabinet Secretary did not respond to the letter in question thereby leading to the filing of the instant case.

20. When the matter was first mentioned before me on 4th July 2018, counsel for the applicant pointed out that its members had difficulty in implementing the proposed taxation due to lack of clarity on what exactly to charge the duty on due to lack of definition of the term "money transferred by banks". On the said date, this court, while adjourning the matter, urged the parties to consult so as to get to an understanding on what the tax in question meant or referred to.

21. From the above foregoing, it is apparent that the applicants have all along maintained that they are unable to implement the impugned paragraph of the Bill due to lack of clarity on the definition of the term "Money transferred by banks." It would then appear that the respondents expect the applicant to implement the proposed tax without clarification and based on their own individual interpretation of the impugned paragraph.

22. On their part, the respondents argued that since the applicants members had already issued notices to their customers informing them of the new excise duty on money transferred, that meant that they already understood the provision. The 2nd respondent argued that the terms "money transfer services" and "money transferred by banks" had the same meaning. I however do not agree with the respondent's argument because a plain reading of the impugned paragraphs show that they refer to different items of taxation and I find that the mere fact that some banks had issued notices to their customers does not mean that the issue of lack of clarity had been resolved.

23. Counsel for the respondent argued that the instant application was prematurely presented before this court in view of the fact that the Bill is yet to go through parliament for approval before it is passed into law. As I have already stated in this ruling, the applicant does not challenge the validity of the law in question but rather, the lack of clarity in the impugned paragraph. I find that the application cannot in the prevailing circumstances be said to be prematurely before the court considering that the effective date for the implementation of the impugned paragraph was 1st July, 2018 which means that the applicant's members are already expected to implement it.

24. My take is that the applicant's quest for a clarification of the meaning of the impugned paragraph is a matter that cannot be taken lightly bearing in mind the fact that the applicant's members handle their client's monies and are at all times expected to account for any debits that may be reflected in their clients' accounts whether the debits are in respect to withdrawals, bank charges or taxes. It for this reason that I find that the applicant's quest for clarity in the taxation requirement is valid as matters of taxation are important constitutional matters that cannot be left to chance or conjecture.

25. Furthermore, courts have on numerous occasions held that lack of clarity or certainty in any law makes the said law null and void. I am guided by the cases cited by the applicant being; the case of **Keroche Industries Ltd vs Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** wherein Nyamu J (as he then was) held:

> ***"one of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations 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."***

Similarly, in the case of **Grayned vs City of Rockford [1972] 408 US 104** the United Court Supreme Court stated:

> ***"a basis principle of due process that an enactment is void of vagueness if its prohibition are not clearly defined. Vagueness offends several important rules….a vague law impermissibly delegates basic police matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application".***

In the case of **Commissioner Of Income Tax V Westmont Power (K) Ltd [2006] eKLR** Alnashir Visram J. (ahtw) observed as follows:

> ***"Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity."*** *(emphasis mine).*

26. Going by the dictum in the above cited cases, I reiterate that the implementation 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. This court also takes notice of the fact that the impugned Bill is still in its nascent stage as it is yet to be legislated into law by parliament.

27. Without delving into the merits of the petition pending hearing before this court, I find that the applicant has demonstrated that the petition raises fundamental constitutional questions, including the principle of public participation, which will warrant interrogation by this court through a full hearing. In considering an application for conservatory orders, the court is not called upon and it is indeed forbidden from making any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the first condition the applicant is required to establish a *prima facie* case with a likelihood of success.

28. I find that, in the circumstances of this case, it will be necessary to grant the conservatory orders sought so as to preserve the subject matter of the suit as the respondents have not shown that they will suffer any prejudice if the implementation of the impugned paragraph is delayed. I am guided by the decision in **Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR** wherein this Court expressed itself as follows:

> ***"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."***

29. For the above reasons, having found that the applicant has established a prima facie case with a likelihood of success, I make the following orders:

a) Conservatory orders are hereby issued suspending the implementation of the excise duty introduced by the Finance Bill 2018 in paragraph 6 Part 11 of the First Schedule of Excise Duty Act 2015, until such time as proper definition of "money transferred by banks" is provided.

b) The costs of the application shall abide the outcome of the petition.

c) Considering the urgency of the matter and the public interest expressed by all the parties, I direct that the respondents file and serve replying affidavits to the petition within 14 days from today's date, and thereafter parties to file and exchange written submissions before the hearing date.

d) Hearing on 17th September 2018 to highlight submissions.

Dated, signed and delivered in open court at Nairobi this 19th day of July 2018.

W. A. OKWANY

JUDGE

In the presence of

Mr Fraser for the petitioner/applicant

Mr Obura for the 1st respondent

Mr Ontweka for the 2nd respondent

Court Assistant - Kombo