REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 143 OF 2015

BRITISH AMERICAN TOBACCO KENYA LTD.....PETITIONER

VERSUS

THE CABINET SECRETARY FOR THE

MINISTRY OF HEALTH.....1ST RESPONDENT

THE TOBACCO CONTROL BOARD.....2ND RESPONDENT

THE ATTORNEY GENERAL OF KENYA.....3RD RESPONDENT

RULING

Introduction

1. The petitioner approached the Court by way of an application brought by way of notice of motion under certificate of urgency dated 14th April 2015 in which it seeks the following orders:

> ***1. This application be certified urgent and be heard ex parte in the first instance.***
>
> ***2. Pending the hearing and determination of this application inter partes, a conservatory order do issue staying the coming into force and implementation and or operation of the tobacco Control Regulations 2014. Legal Notice No 169 of 2014 published in the Kenya Gazette Supplement 161, legislative Supplement No 156 of 2014.***
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> ***3. In the alternative to 1 above, a conservatory order do issue staying the coming into force and implementation and/or operation of regulations 3 to 39 (both inclusive) and 45 of the Tobacco Control Regulations 2014, Legal Notice No. 169 of 2014 published in the Kenya Gazette Supplement 161, legislative Supplement No156 of 2014 pending the inter partes hearing of this application.***
>
> ***4. Pending the hearing and determination of this petition a conservatory order do issue staying the coming into force and implementation and/or operation of the Tobacco control Regulations 2014, Legal Notice No 169 of 2014 published in the Kenya Gazette Supplement 161, Legislative supplement No 156 of 2014.***

5. In the alternative to 4 above, a conservatory order do issue staying the coming into force and implementation and/ or operation of Regulations 3 to 39 (both inclusive) and 45 of the Tobacco Control Regulations 2014, Legal Notice No 169 of 2014 published in the Kenya Gazette Supplement 161, Legislative Supplement no 156 of 2014 pending the hearing and determination of this petition.

6. Any further order or relief that this court deems fit to make to meet the interests of justice.

7. The costs of this application be provided for.

2. The application is supported by the affidavit of Constance Anjiri Anyika, sworn on 14th April 2015 and is based on the following grounds:

1. Petitioner has made requests to the first respondents to supply the technical information and guidance documents within the Technical Repository in accordance with Regulation 10 of the Tobacco Control Regulations 2014 (the Regulations). The 1st respondent has not provided this information. The petitioner is unable to start making preparations for the printing of health warnings because it does not know exactly what is required.

2. The 2nd respondent has as recently as March 2015 promised to provide the information within a week but has failed to do so.

3. The procedure set out in the statutory Instruments Act, 2013 was not followed in the making of the tobacco Control Regulations 2014 (the regulations), particularly as follows;

a. There was no proper consultation of stakeholders in violation of part II of the Statutory Instrument Act as read together with Article 10 of the Constitution in that:

i. None of the concerns raised by the petitioner in its written submissions to the respondents were considered.

ii. None of the petitioner's letters were responded to

b. In as far as the petitioner is aware, no regulatory Impact Statement was prepared as required by part III of the Statutory Instruments Act.

4. The regulations constitute an infringement of the petitioner's constitutionally guaranteed rights as set out in Constitution of Kenya, 2010 have been violated and/or are threatened to be violated in inter alia the following ways:

a. Section 7(2)(f) of the Tobacco Control Act, 2007 as read with Regulation 37 which require manufacturers and/or importers of tobacco products to make a contribution of 2 percent of the value of the tobacco products manufactured or imported to the Tobacco Control Fund are not only discriminatory and contrary to Article 27 of the Constitution, but are also unreasonable, oppressive and punitive to the tobacco industry.

b. The petitioner's right to equality and freedom from discrimination under Article 27 is violated by the provisions of part v of the regulations which unreasonably and unjustifiably limit this right by prohibiting interactions and engagements between public officials and tobacco industry players.

c. The petitioners' right to property protected under Article 40 has been violated and/ or threatened to be violated by the provisions under part III of the Regulations which require tobacco manufacturers to disclose information which would constitute an infringement of

intellectual property rights.

d. The health warnings set out under part III of the Regulations are wide, vague and disproportionate and constitute an unnecessary and unjustifiable limitation or a threat to the petitioner's right to benefit from its intellectual property protected by Article 40.

5. Some of the Regulations as more particularly set out in the petition filed herein are made outside the jurisdiction donated by the parent Act, the Tobacco Control Act, 2007 (the Act) and are therefore unlawful and unenforceable.

6. Some aspects of the Regulations as more particularly set out in the petition filed herein are very wide in scope and go beyond the intention of the Act and are not known to have been made in any jurisdiction in the world.

7. The regulations constitute an unnecessary restriction and burden on an otherwise legal business and go beyond the known principles of tobacco control.

8. The cost of complying with the Regulations is enormous and places players in the tobacco industry at the risk of shutting down their businesses.

9. The regulations will have a huge negative impact on the petitioner's business and the tobacco industry as a whole unless the enforcement is stopped by this Court.

10. The regulations will come into force on 5th June 2015 and the petitioner will be required to comply with them unless the Court stays their coming into force.

11. Unless the orders sought herein are granted, the petitioner stands to suffer substantial and irreparable loss.

3. The respondents oppose the application and petition and have filed an affidavit in reply sworn by the Cabinet Secretary for Health, Mr. James W. Macharia, on 12th of May 2015. The application was argued before me on 27th May 2015.

Background

4. Certain facts that give rise to the present petition and application for conservatory orders are undisputed. The tobacco industry in Kenya, in which the petitioner is one of the major players, is regulated by the provisions of the Tobacco Act, 2006 (hereafter "the TCA"). Under section 53 of the TCA, the Minister responsible for health, now the Cabinet Secretary for Health, is empowered to make regulations in respect of the industry. On 5th December 2014, the Tobacco Control Regulations 2014 were published by the first respondent in the Kenya Gazette as Legal Notice No 169, Legislative Supplement No 161. Regulation 1 thereof provides that the Regulations shall come into force six months from the date of publication in the Kenya Gazette. According to the petitioner, the six months end on 5th June 2015, when the Regulations should then come into force.

The Submissions

Submissions by the Petitioner

5. In his submissions on behalf of the petitioner, Mr. Kiragu Kimani relied on the affidavit of Mrs. Constance Anjiri Anyika sworn on 14th April 2015, the further affidavit sworn by Mr. Simukai Munjanganja on 27th April, 2015 and the further supplementary affidavit of Rowlands Nadida sworn on 6th May, 2015. The petitioner also relied on its written submissions and authorities.

6. According to the petitioner, the Court should exercise its authority to stay the coming into force of the

Tobacco Control Regulations 2014 which are contained in the Kenya Gazette of 5th December 2014 pending the hearing and determination of the petition which challenges the constitutionality of the Regulations. The petitioner contends that the enactment of the Regulations has not met the constitutional and statutory requirements in their formulation as the Cabinet Secretary has made regulations on matters that he is not statutorily empowered to regulate.

7. With respect to jurisdiction, the petitioner contends that Article 22 allows a party to come to Court for relief even in circumstances where a violation of rights has not occurred but is threatened, while Article 23(3)(c) grants the Court the jurisdiction to grant appropriate relief, including a conservatory order.

8. It is the petitioner's contention that it has met the required threshold for the grant of conservatory relief. It contends that the facts on which the application and petition are founded have not been challenged by the respondents, and it is its case therefore that it has made out a prima face case.

9. The petitioner contends that, contrary to the contention of the respondents that the Regulations cannot come into force until they have been considered by Parliament, the Regulations will come into force on 5th June 2015 in accordance with regulation 1 which states that they come into force upon expiry of six months from the date of publication, which is 5th December 2014. The petitioner cites the provisions of the Statutory Instruments Act (SIA), section 1 of which it submits makes clear that a statutory instrument comes into force on the date specified in the instrument. The petitioner relies on the decision of Korir J in **Republic v Attorney General & 11 Others Ex-Parte Child in Family Focus [2014] eKLR** in which the Court held that section 23 of the SIA is drafted in a language similar to that of section 9 of the Interpretation and General Provisions Act which provides that an Act of Parliament shall come into operation on the day on which it is published in the Gazette or as provided for in the Act.

10. With respect to the threat to its constitutional rights, the petitioner submits that the Regulations threaten its constitutional rights and those of a host of others, including tobacco farmers, local printing and adhesives companies, over 1,000 people directly employed by manufacturers and importers of tobacco products, over 80,000 people in the supply chain of tobacco products, as well as retailers, wholesalers and stockists of tobacco products.

11. With respect to the principles to be applied in considering whether to grant conservatory orders, the petitioner has relied on the decisions of the Court in, inter alia, the cases of **Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General [2011] eKLR; Muslims for Human Rights (MUHURI) & 4 Others vs Inspector General of Police & 2 Others [2014] eKLR**; **Martin Nyagah Wambora vs Speaker of the County Assembly of Embu & 3 Others [2014]eKLR.** I shall revert to the principles established in these cases later in this ruling.

12. The petitioner challenges the Regulations, further, on the basis that there were a number of procedural improprieties in their enactment, including, among others, the failure to conduct adequate consultations as required by the Constitution and section 5 of the SIA, failure to prepare a Regulatory Impact Statement as required by sections 6 to 8 of the SIA; that further, regulations 37 and 38 of the Regulations on the solatium compensatory contribution are unconstitutional and the solatium compensatory contribution is ultra vires the powers and authority under the TCA; that regulations 20 to 36 of the Regulations that excessively limits interactions between public authorities and the tobacco industry are ultra vires the power of the Cabinet Secretary under section 53 of the TCA and also unconstitutional for violating, inter alia, Articles 27, 47, 37 and 10 of the Constitution.

13. The petitioner further asserts that the requirements of regulations 3 to 11 with respect to packaging and labelling is unconstitutional in that, among other things, they breach the principle of legal certainty, are a threat to the petitioner's intellectual property rights under Article 40 of the Constitution, are disproportionate and unjustified, and violate the freedom of expression and international treaties applicable in Kenya.

14. The petitioner submits that the Court would not, contrary to the assertions by the respondents, be interfering with the role of Parliament if it issued the orders sought. Its role was to consider whether,

pending the hearing of the petition, the Regulations should be suspended, while the role of Parliament is to consider whether the Regulations meet the requirements of the law in accordance with section 13 of the SIA. It is its submission that even if the orders are issued, it does not stop Parliament from doing what it needs to do under section 13.

15. According to the petitioner, the respondents were themselves already taking steps to enforce the Regulations, and if the Regulations come into force, the petitioner has to comply with them, which could put it in the awkward position of facing prosecution even before its grievances have been heard.

16. The petitioner further submits that the penalties imposed by the regulations contravene section 25 of the SIA, and it is its case that the threat posed by the coming into force of the Regulations are real and the Court should exercise discretion in its favour.

17. With respect to the public interest consideration in determining whether or not to grant conservatory orders, the petitioner's position is that the public interest includes the law being followed to the letter, and whether the requirements of the SIA has been followed. The petitioner urged the Court to grant the orders that it was seeking as all it sought was a maintenance of the status quo, noting that it was ready to expedite the hearing of the petition.

Submissions by the Respondents

18. In response to the application, the respondents rely on the affidavit sworn by Mr. James W. Macharia the Cabinet Secretary for Health, as well as their written submissions and authorities. The submissions were made by Learned State Counsel, Mr. Mohamed Ado.

19. The respondents submit that this application raises three issues for consideration: the first is whether the Court can issue orders suspending the Regulations and secondly, whether the Regulations are capable of constitutional violation and can be subjected to constitutional interrogation at this stage. The third issue, according to the petitioner is whether, if the regulations come into force, the rights of the petitioner will be violated.

20. Mr. Mohamed submitted that in granting conservatory orders, the Court must consider whether the petitioner has demonstrate a prima facie case based on a real danger which is imminent, true and factual, not fictitious and not imaginary. Counsel placed reliance on the case of **Centre for Rights Education and Awareness (CREAW) and 7 Others vs Attorney General and Others** (supra) and the decision in **Martin Nyaga Wambora vs Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR.**

21. It was also the respondents' submission that the petitioner must show that if the orders are not granted, the petition will be rendered nugatory. Mr. Mohamed submitted that there is no threat that is imminent as what the petitioner was challenging were regulations which have not come into force, and what the petitioner had placed before the Court is an academic challenge with no basis. It was the respondents' submission, in reliance on the decision in **Macfoy vs United Africa Co. Ltd (1961) 3 ALL E. R 1172** that ***"you cannot put something on nothing and expect it to stay there"*** that the substratum of the application and petition is nothing, since they are based on something that is proposed, and that is pending before Parliament.

22. The respondents further rely on the public interest principle enunciated in the case of **Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013** that the Court should be mindful of the public interest. It was their submission that the Court should be very cautious when giving conservatory orders especially in relation to these Regulations which concern 40 million Kenyans. According to the respondents, they would not, should the Regulations come into force, be affecting the business of the petitioner but would be regulating it.

23. The respondents' further argue that Article 95 vests Parliament with the sole duty to make provisions with the force of law; that what was before Parliament has no force of law until it is considered by Parliament; that the term "considered" has many meanings, including rejection, and it was not possible to

say at this stage what Parliament will do. It was therefore the respondents' case that the duty of the Court is to interrogate what Parliament has passed properly; that what the Court is being asked to do is interpret regulations which are not yet in force, and that the role of the Court has not yet arrived.

24. With regard to the question whether the regulations would come into effect as stipulated in the SIA, Counsel submitted on behalf of the respondents that parliamentary processes take procedure over the general provisions of the law, and that Parliament should be given the chance to act.

25. The respondents further submit that the petitioner had not met the test set in **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** and **Meme Vs Republic & Another [2004] eKLR.** They concede that the Court has jurisdiction to suspend the Regulations, but the authority should be exercised on behalf of the people of Kenya, and the authority does not allow the jurisdiction to be exercised in a vacuum. Counsel further submitted, with regard to whether or not the Regulations were likely to violate the rights of the petitioner, that the respondents were willing to sit and discuss the implementation of the Regulations if they come into force, noting that Article 159 provides for alternative dispute resolution, but that the respondents are not implementing anything at the moment. It was their view that the application is devoid of merit, is premature and should be dismissed.

Rejoinder

26. In his response to the respondents' submissions, Mr. Kimani noted that the respondents were asking the petitioner to wait for Parliament to act. He, however, asked the Court to take judicial notice of the fact that Parliament is on recess and will come back to discuss urgent pending Bills. He observed that Parliament had the Regulations since 11th December, 2014, yet the 5th of June was in the coming week. It was his submission therefore that the petitioner's apprehensions were real; that the petitioner has met the test in the **Anarita Karimi Njeru case**; and that it has set out in the petition in detail how the Regulations violate its rights.

27. Mr. Kimani further submitted that the law is as is set out in section 23(1) of the Statutory Instruments Act; that there is no conflict whatsoever in what Parliament is doing under section 13(1) of the said Act and what the Court is being asked to do; that what Parliament does under section 13(1) is different from what the Court needs to do; and the Court need not wait for Parliament to Act. Mr. Kimani further submitted that the law cannot be dependent on the action or inaction of Parliament or any of its committees; that the operation of the Regulations has to be in accordance with section 23(1) of the SIA, and on the basis of Article 22, the Court has latitude to grant orders that ensure that a level playing field is maintained.

Determination

28. In addressing my mind to this matter, I bear in mind several principles applicable to the grant of conservatory orders that have been enunciated in several decisions by courts in this jurisdiction. First, the petitioner must show a prima facie case with a likelihood of success, and that if the conservatory orders are not granted, he is likely to suffer prejudice. As Musinga J (as he then was) observed in the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General:**

> ***"...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."***

29. I am also guided by the words of Ibrahim J (as he then was) in **Muslims for Human Rights (MUHURI) & 2 Others vs Attorney General & 2 Others** in which he stated:

"I would agree with my Brother, that an applicant seeking Conservatory Orders in a Constitutional case must demonstrate that he has a "prima facie case with a likelihood of success."

30. In the Muhuri case, secondly, the Court should consider the need to conserve the status quo, preserve the subject matter, so that the petition is not rendered nugatory. Ibrahim J went on to observe as follows in the **Muhuri** case:

"What is clear to me from the authorities is that strictly a "Conservatory Order is not an injunction as known in Civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory. Through a Conservatory Order the court is able to "give such directions as it may consider appropriate for the purpose of securing of … the provisions of the Constitution (see – BANSRAJ above)". A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise.

31. Thirdly, the Court should be girded by the public interest principle. In the case of **Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013,** the public interest principle was enunciated by the Supreme Court as follows:

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

32. What emerges from the above pronouncements is that the Court is not, at the stage where it considers whether or not to grant conservatory orders, required to enter into a detailed analysis of facts and law. What is required is for the petitioner to show that it has a prima facie case with a likelihood of success, and that if the conservatory orders are not granted, it will suffer prejudice.

33. Further, the Court should grant conservatory orders in order to preserve the *"subject-matter or set of circumstance that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory"*.

34. The Court must also, as both parties to this matter submit in reliance on the **Gatirau Peter Munya** case, be mindful of the public interest in determining whether or not to grant conservatory orders. These are the principles that I will apply to the facts before me in determining whether or not to grant the conservatory orders sought by the petitioner.

35. The parties are agreed on various facts in this matter. They are agreed that the 1st respondent is empowered under section 53 of the Tobacco Control Act to pass Regulations for the control of the tobacco industry in Kenya. They are also in agreement that pursuant to these powers, the 1st respondent enacted the Tobacco Control Regulations 2014, which were gazetted on 5th December 2014. The point of departure emerges in two respects: first, with respect to when the regulations come into force, and secondly, whether or not they are inconsistent with the Constitution or are ultra vires the statutory powers of the 1st respondent, and therefore pose a threat to the constitutional rights of the petitioner.

36. I believe that there is also no dispute with regard to the jurisdiction of the Court. Article 22 of the Constitution grants to every person the right to***"…institute court proceedings claiming that a right or***

fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

37. The respondents have argued that this petition is premature and that the petitioner has not shown a violation of its rights. The petitioner responds that the regulations pose a threat of violation of its rights. While considering similar arguments in the case of **Coalition for Reform and Democracy & Others vs The Attorney General & Others**, a 5-judge Bench of this Court observed as follows:

> ***[112.] "…we are satisfied, after due consideration of the provisions of Article 22, 165(3) (d) and 258 of the Constitution, that the words of the Constitution, taken in their ordinary meaning, are clear and render the present controversy ripe and justiciable: a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of the Constitution.***
>
> ***113. We take this view because it cannot have been in vain that the drafters of the Constitution added "threat" to a right or fundamental freedom and "threatened ……. contravention" as one of the conditions entitling a person to approach the High Court for relief under Article 165(3) (b) and (d) (i). A "threat" has been defined in Black's Dictionary, 9th Edition as "an indication of an approaching menace e.g. threat of bankruptcy; a Person or a thing that might cause harm" (emphasis added). The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another…"***
>
> ***114. The use of the words "indication", "approaching", "might" and "communicated intent" all go to show, in the context of Articles 22, 165(3) (d) and 258, that for relief to be granted, there must not be actual violation of either a fundamental right or of the Constitution but that indications of such violations are apparent."***

38. In this matter, the petitioner alleges that the Regulations, which it submits are coming into force on 5th June 2015, threaten violation of its rights under Articles 27, 37, 47, as well as Article 10 of the Constitution. It also cites several procedural irregularities in the enactment of the Regulations, stating as follows at paragraphs 38-41 of the affidavit of Ms. Anyika:

> ***38. I am advised by Kiragu Kimani and verily believe it to be true, that pursuant to section 5(1) of the statutory Instruments Act 2013 (the "SIA") where a proposed regulations is likely to have a substantial direct or indirect impact upon business or restrict competition, the regulation making authority is required to consult with persons likely to be affected.***
>
> ***39. The regulations as published by the 1st respondent have a substantial direct and indirect effect on the business of the petitioner and other players in the tobacco industry in Kenya.***
>
> ***40. The petitioner will, for instance, incur substantial additional costs to comply with the new labelling and packaging requirements under the Regulations.***
>
> ***41. The 1st and 2nd respondents who made the regulations did not consult the tobacco industry as required by the SIA***
>
> ***42. I am advised by Kiragu Kimani, which advice I verily believe to be true that section 6 of the SIA requires a regulations making authority to prepare a regulatory impact statement ("RIS") if the proposed regulation is likely to impose significant costs on the community or part of a community.***
>
> ***43. I am further advised by Kiragu Kimani, which advice I verily believe to be true, that***
>
> > *a.* ***The RIS must state the reasons for the proposed regulations; and provide an explanation of the effect of the proposed regulations, reasons why other means are not appropriate and an assessment of costs and benefits.***

b. ***The Cabinet Secretary responsible for making the regulations is required by law to issue a certificate confirming the validity of the RIS and***

c. ***A RIS must be notified in the Kenya Gazette and a newspaper likely to be read by people who are affected by the regulations. These notices must allow for at least 14 days from publication for persons affected by the regulations to make comments."***

39. I have read the replying affidavit of Mr. James Macharia in response to the allegations of the petitioner. The position that the respondents take, as expressed in the said affidavit and also set out in the oral and written submissions made on their behalf by Mr. Mohamed, is that the application and petition are premature as there are no regulations capable of Constitutional interpretation.

40. Mr. Macharia reiterates the powers of his office to make regulations under section 53 of the Tobacco Control Act, 2007 on the recommendations of the Tobacco Control Board. He further states that he made the Tobacco Control Regulations, and on 5th December 2014, through Legal Notice No 169, Legislative supplement No 161, gazetted the Regulations and set the date of coming into force as six months after the publication date. He further deposes that in accordance with section 11 of the Statutory Instruments Act, 2013, he submitted the Regulations to the Clerk of the National Assembly for the purpose of their being tabled before Parliament. The decision of Parliament would be communicated to him, and he shall comply with the directions of Parliament.

41. It is his averment that he replied to the petitioner's letter on 17th April 2015 informing it that the Regulations are before Parliament and that his Ministry is awaiting the report from Parliament. It is his further averment that the Attorney General also wrote to the petitioner on 22nd April 2015 informing it that the technical repositories and the digital storage devices for the Regulations shall be released to it after receives the Parliamentary Report on the Regulations in accordance with section 17 of the Statutory Instruments Act.

42. It is his contention therefore that the present application is premature and purely exploratory, seeks to pre-empt the debate and passage of the Regulations by Parliament, and would amount to interference with the legislative mandate of Parliament.

43. However, as submitted by the petitioner and contended in the affidavits in support of the petition and application, the Tobacco Regulations 2014 come into force on 5th June 2015. This is in accordance with regulation 1 of the said Regulations. The respondents argue that the Regulations cannot come into force until Parliament approves them, which they acknowledge has not been done, and is unlikely to be done before 5th June 2015. Should they not be considered as provided under section 13 of the Statutory Instruments Act, then they will come into force by dint of regulation 1, in accordance with section 23 of the Statutory Instruments Act. As observed by Korir J in **Republic v Attorney General & 11 Others Ex-Parte Child in Family Focus** (supra):

"A reading of the two sections reveals that a statutory instrument's commencement date is "on the date specified in that behalf in the statutory instrument" or if no date is so specified, "it shall come into operation on the date of its publication in the Gazette."

44. It is apparent therefore, contrary to the submissions by the respondents, that the Regulations are set to come into force on 5th of June 2015. That being the case, and in light of the finding that a party can come to Court under Article 22 should its rights be threatened with violation, then the present petition is properly before me.

45. The question, however, is whether the petitioner has met the criteria for the grant of conservatory orders. In determining this question, I consider several factors. First, the Regulations require certain actions from the petitioner, which have, as is evident from the affidavit of Ms. Anyika, major financial implications. Should the petitioner fail to meet the requirements of the Regulations, then they are exposed to penal consequences under the Regulations, which they allege are in violation of section 25 of the SIA.

46. It is also their contention, which has not been denied by the respondents, that the respondents did not publish the regulations until 2nd February 2015, and that they have not been given certain information that they seek from the respondents. It is also their case that the regulations were not formulated in accordance with the Constitution or the Statutory Instruments Act which require, inter alia, public participation and stakeholder engagement.

47. I note that the allegations by the petitioner have not been controverted by the respondents. In his submissions, Mr. Mohamed for the respondents submitted that the issues being raised by the petitioner will be discussed once the Regulations come into force after they have been considered and approved by parliament.

48. However, in light of the clear provisions of the Statutory Instruments Act, it cannot be proper especially under the current constitutional dispensation, who promises discussions in the middle of proceedings for a party to be left at the mercy of the regulator, when the law clearly sets out the processes to be followed in the enactment of regulations, and in the manner in which those regulations come into force.

49. The present petition raises critical issues on the process of enactment of the Tobacco Control Regulations 2014, and on whether the constitutional and statutory process for enactment were complied with. It also raises the question whether, should the Regulations be enforced, there shall be violation of the petitioner's rights, inter alia, under Articles 27 and 40 of the Constitution.

50. In my view, the petitioner has made out a case for the grant of conservatory orders. Prima facie, there is a violation of constitutional and statutory provisions with respect to public participation under Article 10, and a threat of violation of the petitioner's rights under the Constitution. Should the Regulations come into force as they clearly must in light of regulation 1 and section 23 of the Statutory Instruments Act, then the issues that this petition raises will have been rendered nugatory, as the petitioner will be under an obligation to comply with the Regulations.

51. As observed by Ibrahim J (as he then was) in the **Muhuri** case, the Court should grant conservatory orders to maintain the status quo, preserve a certain set of facts and circumstances, so as not to render the matter before the Court nugatory. In my view, this is one matter in which the status quo should be preserved.

52. The respondents have argued that the public interest demands that the orders sought should not issue, in the interests of the 40 million Kenyans who may be exposed to the hazards of smoking. I agree that tobacco presents health perils which have been recognised, and which are already the subject of control under the Tobacco Control Act, and which are also targeted by the Tobacco Control Regulations 2014.

53. I however, also agree with the petitioner that the public interest demands that laws and processes that are laid down for the enactment of legislation and regulations to control any industry should be followed. It may, in the long term, do greater damage to the public interest to turn a blind eye on allegations of constitutional or fundamental rights violations or threat of violation, where a prima facie case has been made out, in the name of protecting the public interest.

54. In any event, if, as the respondents so stoutly maintained through Learned State Counsel, Mr. Mohamed, the Regulations cannot come into force until Parliament has deliberated and considered them as mandated under section 13 of the Statutory Instruments Act, then the public interest has not yet been considered and protected.

55. For the above reasons, I am satisfied that the orders sought by the petitioner pending the hearing and determination of this petition are merited. I therefore grant the following orders:

> ***i). That a conservatory order be and is hereby issued staying the coming into force and implementation of the Tobacco Control Regulations 2014, Legal Notice No 169 of 2014 published in the Kenya Gazette Supplement 161, Legislative supplement No 156 of 2014 pending***

the hearing and determination of this petition.

ii) That the costs of this application shall be in the cause.

56. It should be noted that order (i) above is directed only at coming into force and implementation of the Tobacco Control Regulations 2014. It is not intended to stop or in any way interfere with the Parliamentary process with regard to the Regulations provided for under section 13 of the Statutory Instruments Act. It is, however, worth noting that given the fact that Parliament has yet to address itself to the Regulations in accordance with section 13 of the Act, the provisions of section 23 of the Act imply that the Parliamentary process has been overtaken by the operation of law.

Dated, Delivered and Signed at Nairobi this 4th day of June 2015

MUMBI NGUGI

JUDGE

Mr. Kiragu Kimani, Mr. Walter Amoko, Mrs. Kashindi & Mr. Tugee instructed by the firm of Hamilton Harrison & Mathews & Co. Advocates for the petitioner/applicant

Mr. Mohamed Adow instructed by State Law Office for the respondent