



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 22 OF 2015**

**BETWEEN**

**KENYA ASSOCIATION OF STOCK BROKERS AND INVESTMENT  
BANKS.....PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup>  
RESPONDENT**

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

**RULING**

**Introduction**

1. This ruling relates to an application filed by the petitioner on 13<sup>th</sup> April, 2015 seeking a review of the judgment delivered by this Court on the question of the re-introduction of the Capital Gains Tax (CGT) with respect to stocks and shares. In the said application, the applicant/petitioner prays for orders, at prayers 4, 5, 6 and 7 when are still subsisting, that:

*(1) This Honourable Court be pleased to review the judgment dated 20<sup>th</sup> March, 2015 to the extent that it was found and held that the petitioner had misread or misunderstood the provisions of Section 35 (3A) and (3B) of the Income Tax Act as they did not apply to investment shares even prior to the repeal of the Sections and that proviso expressly excluded the application to investment shares under Part II of the Eighth Schedule to the Income Tax Act.*

*(2) A declaration do issue that paragraph 18 of the Eighth Schedule to the Income Tax Act is vague and contradictory and therefore unconstitutional as it refers to Section 35 (5) of the Income Tax Act when Section 35 (3A) and (3B) which mandated stockbrokers to collect and remit taxes under Section 35 (5) has been repealed thereby exposing the petitioner’s members to arbitrary criminal prosecution contrary to Article 10 of the Constitution.*

*(3) An injunction restraining the Kenya Revenue Authority, the second respondent herein, from commencing,, instituting or proceeding with any enforcement action against the members of the petitioner in relation to and/or on account of their failure to file returns on and/or pay taxes charged under Section 10 and 23 of the Finance Act, 2014 on behalf of their clients.*

*(4) The costs of this application be provided for.*

### **The Case for the Applicant/Petitioner**

2. In support of its application, the petitioner has filed an affidavit sworn on its behalf by Mr. Wilson Njoroge Ngigi on 13<sup>th</sup> April, 2015 and submissions dated 4<sup>th</sup> May, 2015. Its case was presented by Learned Counsel Mr. Amoko.
3. The petitioner contends that the proviso that had been relied on by this Court in the judgment dated 20<sup>th</sup> March, 2015 had been repealed by section 26 of the Finance Act, 2006 and as such is no longer in force. It contended that this Court inadvertently but erroneously relied on a repealed provision that is no longer part of the law when it dismissed the petitioner's arguments based on the provisions of section 35 (3A) and (3B) of the Income Tax Act. It contends therefore that there is an error apparent on the face of the record which warrants a review of the said judgment.
4. The petitioner contends that as a result of the error, the Court dismissed its argument, thus placing its members at risk of arbitrary criminal prosecution for failure to collect and remit CGT as provided under paragraph 18 of the Eighth Schedule to the Income Tax Act.
5. According to the petitioner, prior to the year 2006, the proviso to section 35 (3A) excluded the application of that section to investment shares under Part II of the Eighth Schedule to the Act; that this ended on 1<sup>st</sup> January, 2007 when section 26 of the Finance Act, 2006 came into operation repealing the proviso to section 35 (3A); that after the said repeal, it is not clear under which provision of Section 35 its members could collect and remit CGT. It was its contestation therefore that if its members proceed to collect and remit CGT when there is no clear statutory basis for doing so, they risk facing suits from their clients, which puts them in an extremely awkward position on how to conduct their business. It submits therefore that it is necessary for the Court to review its judgment and the finding that the proviso to section 35 (3A) expressly excluded the application of that section to investment shares, and that CGT is therefore still chargeable under paragraph 18 of the Eighth Schedule.
6. The applicants while relying on the finding of the court in **Wananchi Group (Kenya) Limited vs Communications Commission of Kenya and Another [2014] eKLR**, submitted that even though there are no provisions directly providing for review of decisions in constitutional petitions, on the basis of the provisions of Article 22 and 159 (2) (d) of the Constitution, the Court is duty bound, should sufficient reasons be established, to review its decisions. In this regard, it was its position that the instant application is brought under Article 22 of the Constitution. It reiterated that the reliance on a repealed proviso of the law in paragraph 119 and 120 of the judgment is a sufficient reason to review the decision.
7. It was its averment in response to submissions in this regard by the respondents, that a notice of appeal is not an appeal but evinces an intention to appeal and as such, the assertion by the respondents that it cannot seek a review of the decision after filing a notice of appeal is baseless in law and ought to be disregarded in its entirety. Accordingly, it was its argument that under Article 23 of the Constitution, this Court is at liberty to grant any appropriate relief and it matters not at what stage of the proceedings the orders are sought as this Court has discretion to grant the said appropriate reliefs as was held in **Pharmaceutical Manufacturing (K) Co Ltd and 3 Others vs Commissioner General of the Kenya Revenue Authority and 2 Others [2015] eKLR**. It argued, further, that the discretion given to this Court under Article 23 (3) of the Constitution is not limited by the orders sought in the petition or the application for the Court is at liberty to grant any relief it deems appropriate in the circumstances.

8. The applicant placed reliance on the decisions in **Commercial Bank of Africa Ltd vs David Njau Nduati [2013] eKLR**, and **Anthony Gachara Ayub vs Francis Mahinda Thinwa [2014] eKLR** and submitted that the issue of reliance on a repealed provision is not a ground of appeal but review. Furthermore, while relying on Mulla on the Code of Civil Procedure, page 2724, it was its submission that a judgment can be reviewed if there is an error on a point of law that is apparent on the face of the judgment; for example, failure to consider a particular section of an Act. In this regard therefore it maintained that there is no legal basis for the contention that a matter of law cannot form a ground for a review and as such, the instant application is properly before this Court and should be determined on its merits and not on the multiple technicalities raised by the respondents.
9. The petitioner submitted with respect to the repealed proviso that the National Assembly by repealing Section 35 (3A) and (3B) of the Income Tax Act but retaining paragraph 18 of the Eighth Schedule which refers to section 35 (5) was not clear on whether it intended CGT to be a transactional tax which ought to be collected at the end of each transaction or income tax to be assessed by the tax payer and paid at year end along with a taxpayers' annual personal income tax filing.
10. It averred that the issue of whether section 35 (3A) is applicable to Part II of the Eighth Schedule to the Income Tax Act is vital to its argument on the inconsistency introduced by section 10 (a) and 23 of the Finance Act, 2014 and that the parties did not have a chance to address the Learned Judge on this issue as it would have allowed the parties to clarify any issue that was not clear. It is its argument further that at the time of writing the said judgment the Learned Judge was operating from the position that section 35 (3A) of the Income Tax Act did not apply to Part II of the Eighth Schedule to the Income Tax Act.
11. It was its submission therefore that if this Court reaches the conclusion that the provisions in question are vague and contradictory, it should grant the appropriate relief, allowing their prayers 4, 5, 6 and 7, to ensure its members are not exposed to arbitrary criminal prosecution for failing to collect and remit CGT when the statute is not clear on the manner in which it ought to be done.

### **The Case for the 1<sup>st</sup> Respondent**

12. The Attorney General (AG) opposed the application and filed submissions dated 30<sup>th</sup> April, 2015. Its arguments as presented by Learned Counsel, Mr. Moimbo are, first, that there is no provision for seeking a review of the judgment of the Court under any of the provisions cited in making the present application save for Order 45 Rule 1 of the Civil Procedure Rules. It contended, secondly, that this Court cannot extend the application of interim orders that were issued by consent of parties which have lapsed. It was also its contention that the applicant is in essence seeking a re-determination of the case after judgment has been given on grounds that were not sought in the original petition nor alleged or argued before judgment was given, noting that the applicant has preferred an appeal to the Court of Appeal by lodging a Notice of Appeal.
13. Mr. Moimbo submitted that a party cannot pursue an appeal and review of the same judgment concurrently as the applicant proposes to do in the circumstances of the present case; that an alleged erroneous view of the law is not a ground for review of a judgment and that the application is in bad faith and an abuse of process. According to the AG, the applicant never sought the prayers he is seeking in the instant application and as such, they cannot now be sought after judgment under the guise of review, for pleadings cannot be amended after judgment.
14. The AG furthermore submitted that the substance of the judgment did not turn on the issue that the applicant is seeking review on, to the extent that a decision on the issue would be inconsequential to the substance of the judgment rendered. In any event, the petition was premised on allegations of unconstitutionality of the provisions of the Finance Act whose provisions were held to be constitutional and which finding is not the subject matter of the current application. To that extent according to the 1<sup>st</sup> respondent, the instant application can only be academic at best as the

applicant herein under the guise of review, to resort to peripheral matters to unsettle a well-reasoned decision.

## **The Case for the 2<sup>nd</sup> Respondent**

15. Kenya Revenue Authority (KRA), the 2<sup>nd</sup> respondent, filed a replying affidavit sworn on its behalf by Mr. James M. Ojee on 30<sup>th</sup> April, 2015. In the said affidavit, Mr. Ojee deposed that the Finance Act, 2014 introduced the CGT on transfer of property including stocks and securities which the applicants deal with; that section 10 of the said Act amended Section 34 of the Income Tax Act by an insertion of the rate of five percent of tax charged under section 3 (2) (f) on the capital gain. He deposed, further, that the present application for review does not and cannot alter the constitutional question that was raised in the petition, and the assertion that the proviso had been repealed does not alter the constitutional enquiry or question. He avers that the provisions for charging CGT is section 3 (2) (f), 34 (i) (j) and the Eighth Schedule of the Income Tax Act as amended by the Finance Act, 2014.
16. In his submissions on behalf of KRA, Learned Counsel, Mr. Ontweka, conceded that the proviso to section 35 had indeed been repealed by Act No 10 of 2006, while the two provisions, 35A and 35B, had also been repealed in the Finance Act 2014. Mr. Ontweka submitted that the question of the proviso was not a challenge to the 2<sup>nd</sup> respondent and is why guidelines were being issued with respect to the collection of the CGT.
17. In KRA's view, the petitioner's apprehension related to the collection of CGT, and the amendment to the Income Tax Act with respect to the collection of the tax, was the bone of contention. The CGT was to be collected under section 3 (2) (f), 34 (i) (j) and section 18 of the Eighth Schedule. It was its case that it had not demanded the tax using the repealed sections, and it was always very clear that the proviso had been repealed.
18. Mr. Ontweka submitted that the tax the petitioners' members were required to deduct was from certain income, the one charged under 3(2)(f) in respect of capital gains; that the petitioner's argument in its petition was that section 10 and 23 of the Finance Act violated their constitutional rights, which argument has already been answered by the decision.
19. To the petitioner's application for temporary relief on the basis of the Pharmaceutical Manufacturing Co. decision, Mr. Ontweka observed that the Court had, in that decision, in order to balance competing interests, directed that the tax be deposited in Court, which could not be done in the present case as the parties affected had approached the Court as a group.
20. It was also KRA's submission that the petitioner had filed **Civil Application No 111 of 2015 (Urgent 88/2015)** seeking the same reliefs from the Court of Appeal as it was seeking from this Court. It contended therefore that the present application was an abuse of process, and the application should therefore fail.

## **Determination**

21. In determining the application for review before me, I must first address the question whether this Court has jurisdiction to review its decisions. The petitioner argues that it does while the AG maintains that there is no provision in law for such review.
22. This Court has addressed its mind to this question in several decisions. In **Anders Bruel t/a Queenscross Aviation vs Kenya Civil Aviation Authority and Another [2013] eKLR**, this Court considered the provisions of Articles 22 and 159 (2) (d) of the Constitution and expressed the view that:

*“My understanding of these provisions is that even if there is no specific provision in the Rules allowing the court to review its decision, should the court*

*find that a case has been made out for review of its decision, then it would be duty bound to review its decision”*

23. It reached the conclusion that should the circumstances justify a review, then it would be justified in granting the orders sought on review. See also the decision in **High Court Petition No. 88 of 2010- Multiple Hauliers East Africa Limited –vs- The Attorney General.**

24. I also agree with the petitioner, on the authority of **High Court Petition No. 98 of 2012 - Wananchi Group Limited vs Communication Commission of Kenya and Others**, that even though it has filed a notice of appeal, in light of the holding in **Yani Haryanto vs E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992**, I would be inclined to view the notice of appeal as set out in that matter:

*“A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...”*

25. And further:

*“Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal”.*

26. In this case, however, the existence of **Civil Application No 111 of 2015 (Urgent 88/2015)** does put a different complexion on the matter. Not only has the applicant lodged a notice of appeal, it has also filed an application which, according to the respondents, which is not disputed by the petitioner, seeks the same orders as are sought in this application. It was not disclosed to the Court at the hearing hereof what the position was in respect of the said application. However, the reasoning behind rule 6 of the Civil Procedure Act is unassailable: a Court should not engage in hearing and determining a matter which another Court is seized of, and in this case, a Court of superior jurisdiction. That being the case, it is my view improper for this Court to enter into a determination of the issues raised in the application for review.

27. It may, however, be that I am mistaken in this view, I will therefore consider the application for review, and the determination I would have come to had there not been a similar application pending in the Court of Appeal.

28. The application is based on the argument that there is an error apparent on the face of the record. What constitutes an error on the face of the record was addressed in **Serengeti Road Services vs CRDB Bank Limited [2011] 2EA 395** in which the Court stated that:

*“There is no clear definition of what amounts to an error on the face of the record since it would vary on the facts of every case. An error on the face of the record, however, is one that must be such as can be seen by one who runs and reads, that is an obvious and patent mistake and not something that can be established by a long drawn process of reading on points on which there may be conceivably two opinions.”*

29. The Court of Appeal in the case of **National Bank of Kenya Ltd vs Ndungu Njau, Nairobi Civil Appeal No 211 of 1996** (unreported) (cited by Visram J (as he then was) in **Elijah Githinji Wachira vs Gerald Gikonyo Kanyuira & Another [2004] eKLR** acknowledged that:

*“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or*

***omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter.***

***Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”***

30. In an application for review, therefore, the Court is not being asked to re-hear the case afresh or to look at it from a different perspective. Rather, it is being asked to review the case on the basis of an error that is apparent on the face of the record. Such an error, in my view, must be such an error as would affect the outcome of the decision that was reached by the Court. Put differently, was the error apparent on the face of the record such as would affect the issue on which the dispute before the Court turned?

31. In the present case, the petitioner argues that the Court relied on a repealed provision of the law, namely, the proviso to section 35 of the Income Tax Act. It is conceded by the respondents that the proviso had been repealed in 2006. Indeed, while the Income Tax Act available on the Kenya Law Reports website at the time of writing the judgment under review indicated that the proviso was still in force, inquiries subsequent to the filing of the present application resulted in a confirmation that the Act available on the website had not been updated. The petitioner is therefore correct that the Court did make reference to a proviso of the Income Tax that had been repealed.

32. The question, however, is what impact the reference to this proviso had on the outcome of the matter before the Court. To determine this question, it is useful to consider the issues before the Court, the findings thereon, and whether such findings were or could have been affected by the repealed proviso.

33. It is useful to set out the issues that were before the Court, and the determination in respect thereof. In the concluding paragraphs of the decision, I summarised the issues in dispute, and the responses thereto subsequent to the analysis that appears elsewhere in the judgment, as follows:

***i. Whether Section 10 (a) and Section 23 of the Finance Act 2014 are unconstitutional for being enacted contrary to the mandatory provisions of Article 201 of the Constitution which requires public participation in financial matters:***

Debate on the Finance Bill, which re-introduced the capital gains tax took place in accordance with the standing orders of the National Assembly. The provisions with regard to capital gains tax were already in the legislation. They had been debated with a view to their re-introduction in 2006 and 2013, and again in 2014 before enactment of the Finance Act. There was therefore no violation of the principle of public participation in the circumstances of this case.

***ii. Whether Section 10 (a) and Section 23 of the Finance Act 2014 are inconsistent with Article 10 of the Constitution due to their contradictory and vague nature:***

It was the clear legislative intent, through the provisions of Section 10(a) of the

Finance Act, to re-introduce capital gains tax and set a rate of five percent in respect thereto. The effect of the Section was therefore to impliedly repeal the provision of Section 16 of the Eighth Schedule. The provisions of Section 10(a) and 23 of the Finance Act 2014 are therefore not unconstitutional for being vague and contradictory.

***iii. Whether the said sections contravene the right to property guaranteed under Article 40 of the Constitution in so far as they provide for charging capital gains tax on capital gains that were acquired before 1<sup>st</sup> January 2015.***

I find and hold that the provisions of Section 10 (a) and 23 of the Finance Act 2014 are not retrospective in effect and do not therefore violate or threaten the right to property under Article 40.

34. With respect to the proviso that has given rise to the present application, the relevant parts of the judgment are as follows:

### **Repeal of Sections 35(3A) and (3B)**

[119.] “The petitioner has also challenged the provisions of the Finance Act 2014 due to the fact that Section 11 thereof has repealed Sections 35 (3A) and (3B) of the Income Tax Act. It has contended that as a result of this repeal, one would have no basis under Section 35 (5) of the Income Tax Act to deduct taxes on the sale of marketable securities and remit to KRA, and that stockbrokers would have no basis for withholding taxes under Section 35(5). It has also argued that by repealing Section 35 (3A) and (3B) but retaining paragraph 18 of the Eighth Schedule which refers to Section 35 (5), the National Assembly was not clear on whether it intended capital gains tax to be a transactional tax which ought to be collected at the end of each transaction or income tax to be assessed at the end of each year. The petitioner relied on the decision in **Keroche Industries Ltd** to emphasise the importance of clarity with regard to statutory provisions touching on taxation matters.

[120.] With respect, these submissions on the part of the petitioner appear to be based on a misreading or misunderstanding of the provisions of Section 35(3A) and (3B). These Sections provided as follows:

***(3A ) A person shall upon payment -***

***(a) to an individual or a non-resident body of persons in respect of the gross amount or aggregate consideration of a transaction the income or proceeds from which is subject to tax pursuant to section 3(2)(f); or  
(b) to a resident body of persons in respect of the gross amount or aggregate consideration of a land transaction the income or proceeds from which is subject to tax pursuant to section 3(2)(f), deduct tax therefrom at the appropriate rate;***

***Provided that this subsection shall not apply to the transfer of investment Shares as defined in Part II of the Eighth Schedule in which event tax shall be deducted in accordance with that Part.***

***(3B) The provisions of subsection (3A) shall not apply where a person entitled to chargeable property by way of security or to the benefit of a charge or encumbrance on that property deals with the property for the purpose of enforcing or giving effect to the security, charge or encumbrance.***

[122.] My reading of the provisions in question is that, as is clear from the proviso to Section 3A, they did not apply to investment shares even prior to the repeal of the sections. The proviso expressly excluded the application to investment shares under Part II of the Eighth Schedule. CGT in respect of investment shares is therefore still chargeable under Section 18 of the Eighth Schedule. The petitioner's contentions are therefore without merit."

35. In its petition, the petitioner was unhappy about three things: First, it alleged that the provisions of section 10 (a) and Section 23 of the Finance Act 2014 were unconstitutional for being enacted contrary to the mandatory provisions of Article 201 of the Constitution which requires public participation in financial matters. Secondly, it was its contention that the two provisions of the Finance Act were inconsistent with Article 10 of the Constitution due to their contradictory and vague nature. Thirdly, its argument was that the two sections contravene their right to property under Article 40 of the Constitution in so far as they provide for charging capital gains tax on capital gains that were acquired before 1<sup>st</sup> January 2015. Even had the Court had before it the proper provisions of the Income Tax Act, including the fact that the proviso had been repealed, would it have made a difference to the issues in contention?
36. In my view, the finding with respect to the repeal of the proviso to section 35(3A) and 35(3B) of the Income Tax Act had no impact on the decision of the Court with respect to the three concerns expressed by the petitioner with respect to the Finance Act 2014.
37. It is, however, useful for the avoidance of doubt to consider the relevant provisions and the proviso in question. These provisions, which I reiterate for the sake of clarity, were as follows:

***(3A) A person shall upon payment -***

***(a) to an individual or a non-resident body of persons in respect of the gross amount or aggregate consideration of a transaction the income or proceeds from which is subject to tax pursuant to section 3(2) (f); or***

***(b) to a resident body of persons in respect of the gross amount or aggregate consideration of a land transaction the income or proceeds from which is subject to tax pursuant to section 3(2)(f), deduct tax therefrom at the appropriate rate;***

***Provided that this subsection shall not apply to the transfer of investment Shares as defined in Part II of the Eighth Schedule in which event tax shall be deducted in accordance with that Part.***

***(3B) The provisions of subsection (3A) shall not apply where a person entitled to chargeable property by way of security or to the benefit of a charge or encumbrance on that property deals with the property for the purpose of enforcing or giving effect to the security, charge or encumbrance.***

38. So far as the Court can gather from the somewhat scattered amendments to the Income Tax Act. These provisions of the Income Tax Act has been the subject of several amendments over the years, including an amendment in the 1976 Income Tax (Amendment) Act; the 1978 Finance Act No 8; and an amendment introduced in 1979 vide the 1979 Finance Act No 13 which deleted the whole of subsection (3A) of section 35 and substituted it with new provisions. In 2006, section 26 of the Finance Act, No 10 of 2006 brought in further amendments. It provided as follows:

***Section 35 of the Income Tax Act is amended-***

***(a) In subsection (1), by inserting the words "fruits or vegetables" immediately after the word "flowers" appearing in paragraph (a);***

***(b) In subsection (3)-***

**(i) By deleting the words “consultancy, agency or contractual fee” appearing in paragraph (f) and substituting therefor the words “management or professional fee”;**

**(ii) By adding a new paragraph immediately after paragraph (g) as follows-**

**(h) rental payments in respect of assets leased under a finance lease as defined in the Income Tax (Leasing) Rules, 2002;**

**(c) in subsection (3A), by deleting the proviso.** (Emphasis added.)

39. These amendments did not, however, affect the provisions of section 35 (5) of the Income Tax Act, which provides as follows:

***Where a person deducts tax under this section he shall, on or before the twentieth day of the month following the month in which the deduction was made,***

***(a) remit the amount so deducted to the Commissioner together with a return in writing of the amount of the payment, the amount of tax deducted, and such other information as the Commissioner may specify; and***

***(b) furnish the person to whom the payment is made with a certificate stating the amount of the payment and the amount of the tax deducted.***

40. The petitioner's complaint with regard to the provisions of section 35(5) relates to whether it renders CGT a transactional tax or a final tax to be calculated at the end of the year. As the Court had already found in its judgment, such a question relates to the implementation of the provisions of the Finance Act and does not relate to the core issues raised by the petition.

41. The petitioner submitted at the hearing of the application for review with respect to the repealed proviso that by repealing Section 35 (3A) and (3B) of the Income Tax Act but retaining paragraph 18 of the Eighth Schedule which refers to section 35 (5), the National Assembly was not clear on whether it intended CGT to be a transactional tax which ought to be collected at the end of each transaction or income tax to be assessed by the tax payer and paid at year end along with taxpayers' annual personal income tax filing. It was its contention that the issue of whether section 35 (3A) is applicable to Part II of the Eighth Schedule to the Income Tax Act is vital to its argument on the inconsistency introduced by section 10 (a) and 23 of the Finance Act, 2014. It was also its submission that the parties did not have a chance to address the Court on this issue.

42. In light of my observations with respect to the proviso above, it appears to me that the petitioner seeks to raise an issue, by way of review, that it had not canvassed at the hearing of the petition. The effect of this would be to ask the Court to reconsider its decision, as it were, sit on appeal thereon. This, I believe, is not within the ambit of an application for review. This falls within the jurisdiction of the Court of Appeal, to which I understand the petitioner has already lodged a notice of appeal.

43. In the circumstances, I find no merit in the application. It is hereby dismissed, but with no order as to costs.

**Dated, Delivered and Signed at Nairobi this 15<sup>th</sup> day of July 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr. Amoko & Mr. Ondieki instructed by the firm of Hamilton Harrison & Mathews & Co. Advocates for the petitioner/ applicant.**

**Mr. Moimbo holding brief for Mr. Bitta instructed by the State Law Office for the 1<sup>st</sup> respondent.**

**Mr. Ontweka instructed by the firm of Otweka & Co. Advocates for the 2<sup>nd</sup> respondent.**