



**Taxwatch Africa v Attorney General & 4 others (Petition E008 of 2025) [2026] KEHC 779 (KLR) (26 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 779 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
PETITION E008 OF 2025  
PJO OTIENO, J  
JANUARY 26, 2026**

**BETWEEN**

**TAXWATCH AFRICA ..... PETITIONER**

**AND**

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

**THE CABINET SECRETARY, MINISTRY OF INTERIOR AND NATIONAL ADMINISTRATION ..... 2<sup>ND</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**THE NATIONAL TREASURY ..... 4<sup>TH</sup> RESPONDENT**

**THE NATIONAL ASSEMBLY ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**Background of the Application**

1. The Petitioner/Applicant moved this Court by way of a Constitutional Petition dated 16<sup>th</sup> December 2025, challenging what it describes as a sustained pattern of unconstitutional and illegal adjustments of excise duty on alcoholic beverages between the years 2018 and 2025. The Petitioner contends that the Respondents have progressively and deliberately implemented illegal fiscal policies outside the procedural and substantive confines of the *Excise Duty Act*, 2015, and the *Statutory Instruments Act*, 2013.
2. The dispute is rooted in the enactment of the *Excise Duty Act*, 2015, and specifically the various Legal Notices and Finance Acts that have sought to vary the rates of excise duty applicable to beer, cider, wines, and spirits. It is alleged that the Respondents have breached the ten percent statutory ceiling for annual adjustments enshrined in Section 8(1) of the *Excise Duty Act*, 2015.



3. The Petitioner asserts that these measures have not only breached the express statutory caps on tax adjustments but have also been executed without the mandatory Regulatory Impact Statements and meaningful public participation, did not obtain parliamentary approvals, and are thus null and void ab initio. The petitioner thus alleges that the consequence of the excise duty increases has been to drive the legitimate products out of reach, fuelling a massive boom in the illicit alcohol trade, which now allegedly constitutes 60% of the market and causes annual revenue losses exceeding Kshs. 71 billion.
4. The respondents deny the allegations and fault the petition for being not only, res judicata and sub judice, but also an attempt to invite the court to engage in judicial outreach by invading the executive and legislative realms of policy and legislation formulation.

### **The Application**

5. Contemporaneous with the petition, the Applicant filed a Notice of Motion dated 16<sup>th</sup> December 2025, seeking various conservatory and mandatory orders pending the inter partes hearing and final determination of the substantive suit. The orders sought in the application are crafted thus:
  - i. Spent
  - ii. A conservatory order suspending the operation and enforcement of excise duty rates on alcoholic beverages introduced or enhanced by the Finance Act, 2025.
  - iii. A temporary conservatory order restraining the 3<sup>rd</sup> Respondent (KRA) from demanding, collecting, or implementing the current excise duty rates and preserving the status quo ante by maintaining the rates prescribed under Legal Notice No. 245 of 2015.
  - iv. An order restraining the Respondents from altering, amending, or varying excise duty rates inconsistently with Legal Notice No. 245 of 2015.
  - v. An order directing the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to update the iTax system to reflect the 2015 excise duty rates.
  - vi. A conservatory order directing the suspension of implementation for several specific Legal Notices, including LN No. 239 of 2018, LN No. 217 of 2021, LN No. 176 of 2022, LN No. 204 of 2022, LN No. 215 of 2024, and LN No. 104 of 2025.
6. The Applicant's motion is premised on twelve grounds detailed on the face of the application and in the supporting affidavit. The core grievance is that Section 8(1) of the *Excise Duty Act* explicitly limits the Cabinet Secretary to adjusting duty rates by no more than 10% of the rate in force. The Applicant contends that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have systematically violated this safeguard through cumulative and compounded increments that have, in several years, exceeded 25% in a single cycle.
7. Specifically, the Applicant points to the year 2022, where the excise duty on spirits allegedly rose by 20.3% via the Finance Act and was subsequently followed by a further inflation-based increase of 6.3% via Legal Notice No. 204 of 2022, resulting in a total effective increase of 27.9% within one fiscal year. Such compounding, it is argued, violates the doctrine of legality and fiscal restraint.
8. Furthermore, the Applicant asserts that the impugned tax measures were implemented in opacity, without affording the public, consumers, or industry stakeholders any opportunity for consultation, commentary, or scrutiny, contrary to Articles 10, 118, and 201 of *the Constitution*. The Applicant highlights the absence of Regulatory Impact Statements (RIS) as mandated by the *Statutory Instruments Act* for any regulations likely to impose significant costs on the public. It is argued that continuing to collect taxes based on void instruments is a gross abuse of state power.



9. The socio-economic impact of these policies is described as catastrophic. The Applicant gives what it deems as evidence of systemic collapse in the formal alcohol industry, characterized by mass layoffs, business closures, and reduced contributions to GDP. More alarmingly, the price hikes have pushed low-income consumers toward unregulated and toxic illicit brews, leading to multiple fatalities and public health emergencies as well as surfacing international negative repercussions by adverse advisories.

### **Responses to the Application**

10. On their part, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents filed Grounds of Opposition dated 29<sup>th</sup> December 2025, raising fifteen points to challenge the motion. The Respondents argue that the Court lacks jurisdiction to entertain an application that invites it to suspend, vary, or rewrite fiscal legislation at an interlocutory stage, as doing so would violate the doctrine of separation of powers and interfere with Parliament's exclusive mandate over public finance.
11. The Respondents maintain that the impugned legislation enjoys a strong presumption of constitutionality, which cannot be displaced until a full hearing on the merits. They assert that the Petitioner has failed to plead constitutional violations with the requisite precision and has improperly sought to reinstate an outdated tax regime since 2015.
12. A central theme of the opposition by the three respondents is that the application fails to meet the threshold for conservatory orders set out in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR. They contend that any alleged economic prejudice is quantifiable and can be remedied at the final determination, meaning the substratum of the petition is not at risk of being rendered nugatory. Furthermore, they argue that the public interest militates against suspending taxes already factored into the national budget, as this would cause serious fiscal disruption and institutional conflict.
13. The 3<sup>rd</sup> Respondent also opposed the application and filed a Preliminary Objection dated 28<sup>th</sup> December 2025 whose gist is to seek the dismissal of the Petition and the Notice of Motion on the ground that the Honourable Court lacks jurisdiction because the issues raised therein are *res judicata*. It points to the judgment of the High Court in *Odando & Another vs Kenya Revenue Authority & 6 others; Law Society of Kenya (Interested Party) KEHC 22375 (KLR)* and contends that the issue pleaded and sought for determination herein, public participation in excise duty adjustments and the scope of parliamentary oversight over fiscal legislation, were canvassed and decided in that case. Consequently, the 3<sup>rd</sup> Respondent argues that the current suit is an attempt to relitigate settled matters and amounts to an abuse of the court process.
14. The 3<sup>rd</sup> Respondent's response is further articulated in the affidavit of Josephine Mugure, an officer within the Policy and Tax Advisory Division with the respondent. The deponent posits that excise duty rates can be amended through two mutually exclusive processes; substantive amendments to the Act by the National Assembly, or, by the cabinet secretary the inflation adjustment mechanism under Section 8. It is pointed out that the current challenged rates were enacted through substantive amendments in the Finance Act, 2025, which followed a full legislative process including extensive public participation.
15. The Respondent has furnished evidence of participation for the Finance Act, 2025, noting the receipt of 203 written memoranda and 401 online submissions via Parliament's portal. Regarding the inflation-linked Legal Notices from previous years, the 3<sup>rd</sup> Respondent asserts that these were purely mechanical and formulaic adjustments based on official KNBS data, intended only to maintain the real value of taxes. They contend that such adjustments were tabled before the National Assembly and were



subject to scrutiny by the Departmental Committee on Delegated Legislation. There was however no documentation to support the tabling.

16. Specifically, the 3<sup>rd</sup> Respondent denies that there has been any breach of the statutory ceiling, arguing that the Petitioner has failed to identify any specific instance of formula misapplication. They claim that the licensed manufacturing sector remains stable and that the Petitioner's claims of sectoral ruin are speculative and not supported by official data from KNBS or KRA.
17. The 5<sup>th</sup> respondent, on his part, filed both grounds of opposition and a Replying Affidavit sworn by the Deputy Clerk, Jeremiah Ndombi, MBS. In the grounds of opposition, the respondent raised 12 points. The first three challenge the court's jurisdiction on the basis of *res judicata* and *sub judice*, contending that the court lacks geographical jurisdiction and further alleging that the matter is a product of forum shopping.
18. On the merits, the respondent contends that the threshold for grant of conservatory orders as established by precedence have not been met, that matters of policy and legislation on revenue collection are beyond the court and the petition thus invites the court to encroach on the mandate of other arms of government contrary to the doctrine of separation of powers and lastly that the law faulted in the petition enjoys the presumption of constitutionality which had not been rebutted.
19. In the replying Affidavit, it asserted that the petition is bad for being sub-judice an earlier one, Nbi, constitutional pet. no. E526 of 2025, challenging the entire Finance Act; that the Finance Act which amended the schedule to the *Excise Duty Act*, was enacted after a robust public participation and stakeholder engagement, and was assented to by the president, and was informed by policy to tax luxury goods more while easing tax on essential commodities. It was then stressed that with the increased rate, there was an estimated additional revenue of about 20.5 billion which had been factored into the budget, and that to issue conservatory orders would disrupt the implementation of the budget in a negative manner. The deponent then asserts that all the legal notices were duly issued with all the requisite approvals, and were thus beyond assault, and stressed the position that the threshold for grant of conservatory orders had been missed by the applicant. He sought and pleaded that the application be dismissed with costs.

## Submissions

20. The court has considered the rival submissions by the parties and commends them for the diligence and effort demonstrated.
21. For the Applicant, two sets of submissions were filed; submissions and supplementary submissions. In both, it is emphasized that Article 23(3) of *the Constitution* empowers the Court to grant conservatory orders to prevent the violation of fundamental rights. Relying on the case of Centre for Rights Education and Awareness (CREAW) & 7 Others vs The Attorney General (2011) eKLR, the Applicant submits that it only needs to demonstrate a *prima facie* case with a likelihood of success, and a real danger of prejudice. They argue that the Respondents have repeatedly ignored the culture of justification required by the 2010 Constitution, acting contrary to economic evidence and the principles of fair administrative action.
22. The Respondents, conversely, submit that jurisdiction is the foundation of judicial authority, citing Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd KLR 1. They argue that judicial intervention in fiscal policy must be circumscribed and is only justified where clear constitutional violations are established. They contend that the orders sought are mandatory and substantive, not preservative, and would amount to judicial re-engineering of the economy.



23. The Respondents place reliance on the Supreme Court’s decision in *Gatirau Peter Munya*, arguing that conservatory orders must be granted based on inherent merit and public interest. They submit that the public interest lies in budgetary certainty and that any interim destabilization of fiscal planning is inimical to the welfare of the state.

### Issues, Analysis and Determination

24. Having carefully considered the pleadings filed herein and the parties’ respective submissions, the court finds one preliminary issue to stand out for determination; whether the court has the jurisdiction to entertain the Petition and thus the Application. That issue must be resolved first before the court can consider whether the Applicants have made out a case for the granting of the conservatory orders.
25. To start with, it is trite law that jurisdiction is at the core of exercise of power by a court. Where there is no jurisdiction, the court cannot exercise power without violating the principles of rule of law and legality. See *Kharisa Kyango vs Law Society of Kenya (2014) eKLR* where while citing the Court of Appeal position in *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] eKLR*, the court reiterated that:
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given.”
26. Here, the Respondents argue that the Court lacks jurisdiction to suspend fiscal legislation, as taxation is an exclusive mandate of Parliament and the Executive, and that judicial interference in fiscal legislation, especially at an interlocutory stage violates the doctrine of separation of powers. They cite the doctrine of separation of powers and the presumption of constitutionality that attaches to every Act of Parliament.
27. While this Court acknowledges that *the Constitution* vests the power of taxation in Parliament under Articles 94, 95, and 209, that power is not absolute. Article 165(3)(d)(i) of *the Constitution* grants the High Court original jurisdiction to determine the constitutionality of any law or act. The doctrine of separation of powers does not create rigid, isolated arms of government that never interact. Rather, its essence is to ensure checks and balances so that no arm exceeds its defined authority. While it is the executive’s duty to formulate taxation policies and Parliament’s responsibility to legislate revenue-raising measures, both must comply with constitutional requirements. They must adhere to the national values and principles under Article 10 and the principles of public finance in Article 201. Accordingly, the High Court’s role is not to redesign fiscal policy but to ensure that the legislative and executive arms operate within *the Constitution*’s boundaries.
28. In exercise of its jurisdictional powers under 165(3)(d)(i) of *the Constitution*, this court is tasked with the duty of ensuring that the executive and legislature at all times act within the bounds of the law, and an attempt to overshoot such boundaries is amenable to supervision of the court.
29. The court’s oversight extends to the exercise of delegated legislative powers, such as the issuance of Legal Notices by the Cabinet Secretary. Such powers are not limitless; they derive from a legal mandate and must remain within the authority conferred. In exercising this power, the Cabinet Secretary must comply with the procedural safeguards established by the *Statutory Instruments Act* and respect the Bill of Rights. The allegation that the Respondents have breached the statutory 10% limit raises a question



of legality. Accordingly, the Court finds that, with respect to the alleged statutory breach, it has jurisdiction to determine whether the Respondents acted ultra vires their statutory and constitutional powers.

30. Regarding the fault that the petition offends the sub judice rule as argued by the 5<sup>th</sup> Respondent, the court notes that Nairobi Petition E428 of 2025 challenges the entire Finance Act, 2025 but is not concerned with the excise duty in particular. The sub judice rule is intended to prevent the risk of conflicting decisions on the same subject matter.
31. The instant petition is entirely on excise duty as a revenue stream and only touches on the Finance Act as far as it affected the excise duty on alcohol only. The Petitioner challenges specific Legal Notices and a pattern of compounding tax hikes that are not issues in the Nairobi petition. Consequently, the substratum of this suit is sufficiently distinct to justify this court's exercise of jurisdiction. The court determines that the petition offends not the res sub judice rule.
32. On geographical jurisdiction, the High Court of Kenya is a court of unlimited original jurisdiction under Article 165(3). While it is common for national matters to be litigated in Nairobi, *the Constitution* in its command for access to justice does not limit a citizen's choice of forum, wherever the High Court station exists.
33. The court views the impact of higher rates of excise duties and prevalence of illicit alcohol to be a national concern and anybody in any corner of the nation is entitled to approach the court at any of its stations for redress. The court takes notice that Turkana County with its unique attributes on basic parameters of social amenities is no exception but may be one of the worst hit counties when consumption of illicit brew was to be isolated as a social ill. The court discerns no evidence of improper motive, bad faith or abuse of process in filing the matter in Lodwar.
34. There is a further objection by the Respondents that the issues raised in this Petition were conclusively determined in *Odando & another vs Kenya Revenue Authority & 6 others*. Res judicata is a fundamental principle aimed at bringing litigation to finality and preventing parties from being vexed twice or multiple times on the same cause. Under Section 7 of the *Civil Procedure Act*, a court is barred from trying any suit or issue that has been directly and substantially in issue in a former suit between the same parties or their privies.
35. The court in the case of *Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case)* held as follows regarding the doctrine of res judicata:

“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights...The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action.....Whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both



suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision...”

36. This Court has on own motion scrutinized the judgment in Odando case. That case concerned a challenge to the 2021 excise duty adjustment on petroleum products. While the legal questions surrounding public participation and the mechanism of inflation adjustment were discussed, the factual matrix was and remain significantly different in that the current Petition focuses on the excise regime for alcoholic beverages only.
37. The court retains the learning that for res judicata to apply, the former suit must have determined the same rights based on the same facts. A challenge to one tax instrument does not forever bar a challenge to subsequent instruments, especially where the grounds include new statutory and constitutional breaches. Therefore, the Preliminary Objection is found to be without merit and is dismissed.
38. Having come to the conclusion that the petition is properly before the court; it is now time to delve into the merits of the application seeking the grant of conservatory orders. The nature of and principles governing grant of conservatory orders in Kenya were settled by the Supreme Court in Civil Application No 5 of 2014 Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, where the court said;
- “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay.”
39. Equally, in Board of Management of Uhuru Secondary School -vs- City County Director of Education and 2 Others (2015) eKLR the court summarized three main conditions to be fulfilled for the grant of conservatory orders as follows:
- “(i) The needs for the applicant to demonstrate an arguable prima facie case with likely hood of success and to show that in the absence of the conservatory orders he is likely to suffer prejudice;
  - (ii) The secondary principal in whether the denial of the conservatory order will enhance the constitutional values and objects of the specific right or freedom in the bill of rights;
  - (iii) The court should consider whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory;
  - (iv) Whether the public interest would be prejudiced by a decision to exercise discretion to grant or deny conservatory order.”
40. On prima facie requirement, the court notes that a prima facie case is one in which, on the material presented, a tribunal would conclude there exists a legal right that has apparently been infringed. The Applicant cites Section 8(1) of the Excise Duty Act to limit increase in the rate of tax to no more than 10 % of the prevailing rate. While the respondents do not deny there were increases beyond that ceiling, they contend that the increase anticipated is mere for inflation adjustment. The court reads the provision to be clear and not limited to target inflationary trends only and therefore that there is a prima facie case presented. This being an interlocutory determination, the court must refrain from making a



determinative finding on the petition yet to be considered on the merits. The task at this juncture is limited to establishing if the petition presents an arguable case with prospects of success, not necessarily a case that must succeed.

41. Furthermore, the challenge regarding the lack of Regulatory Impact Statements for Legal Notices is substantial and not sufficiently controverted. Section 6 of the *Statutory Instruments Act* makes the RIS mandatory for instruments with significant public costs. The claim by the 5<sup>th</sup> respondent of an exemption under Section 9(d) SIA is unconvincing for reasons that it can only be delved into in the determination of the petition. In coming to this conclusion, the court has taken guidance from the decision in *British American Tobacco Kenya Ltd vs CS Health (2016) eKLR*,
42. On whether the petition will be rendered nugatory, the Applicant contends that the price escalation has directly led to a structural market collapse and a surge in illicit, lethal alcohol and brandished some data which the court will only consider conclusively in light of the rival contention by the respondents. The court takes the position that while revenue loss is quantifiable, human life and health are not. The allegations of multiple fatalities from toxic brews linked to the unaffordability of legal products satisfy the threshold of irreparable harm. Moreover, the nugatory aspect is relevant to the complexity of the remedy. If the taxes are later found unconstitutional, the task of refunding millions of consumers who paid excessive prices is administratively tenuous. Preserving the status quo, or preventing further unlawful increments, is necessary to ensure the final judgment of the Court is effective.
43. Lastly, on the public interest, the Respondents argue that the public interest favours the continued implementation of revenue measures to fund the national budget. They highlight that the excise taxes have already been factored into the current financial year's appropriation. The court is cognizant of the fact that the Supreme Court has previously prioritized budgetary stability in Finance Act 2023 cases. However, public interest is not synonymous with state revenue as was held in *Kenya Association of Manufacturers v CS Ministry of Environment (2017) eKLR* where the court prioritized environmental protection over economic loss.
44. The court adopts the guidance of the apex court in the cited *Munya* case and reaffirms that conservatory orders should be granted based on the inherent merits of the case, taking into account the relative priority of the issues involved. The protection of public health, the right to life from the dangers of exposure to bootleg alcohol, and the integrity of the tax framework are matters of rule of law and constitutionalism, and they must take precedence over short-term revenue collection. Where a tax is potentially unconstitutional, its immediate collection could cause irreparable harm to the legal industry and result in irreversible losses for consumers.
45. That public health and wellbeing is a matter of concern for all is underscored by the Respondents' own public acknowledgment of the illicit brew crisis as a threat to national security. When considered alongside the Petitioner's data on methanol-related deaths, this evidence is central to the Court's analysis of the right to health under Article 43(1) of *the Constitution*.
46. The court is therefore satisfied that the threshold for granting conservatory orders to prevent further violations has been met. It is, however, evident that some of the prayers in the motion cannot be granted at this stage, prior to a conclusive determination of the merits of the petition. Accordingly, the court makes the following orders:
  - a. A conservatory order is hereby issued suspending the implementation and enforcement of any excise duty rate adjustments for alcoholic beverages introduced by the Finance Act, 2025, contrary to *Excise Duty Act*, and exceeding a ten percent (10%) ceiling, over the rate in force immediately preceding the said Act, pending the hearing and determination of this Petition.



- b. The Petition shall be heard on a priority basis. The respondents are directed to file and serve their respective substantive responses to the petition within seven (7) days from today.
- c. Upon service of the responses, all the parties shall file and exchange submissions within 14 days after the last response shall have been served.
- d. Costs of this application shall abide the outcome of the main Petition.

**DATED, SIGNED AND DELIVERED AT LODWAR THIS 26<sup>TH</sup> DAY OF JANUARY, 2026.**

**PATRICK J O OTIENO**

**JUDGE**

