

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CONSTITUTIONAL PETITION NO. E292 OF 2025**

**IN THE MATTER OF ARTICLES 22(1), 23(1), 23(3), 258(1) AND 259 OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLES 27, 46, AND 201 OF THE CONSTITUTION OF KENYA,  
2010**

**AND**

**IN THE MATTER OF PART I, OF THE FIRST SCHEDULE TO THE EXCISE DUTY ACT,  
2015 AS AMENDED BY THE FINANCE ACT, 2021**

**AND**

**IN THE MATTER OF ARTICLES 4(1), 5, 6, 45, 46(1), 48(1), 49(1), 55(1), 56(1), 57  
AND**

**64(1) OF THE TREATY ESTABLISHING THE COMMON MARKET FOR EASTERN AND  
SOUTHERN AFRICA**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS OF PERSONS ENGAGED IN BUSINESS IN KENYA**

**BETWEEN**

**MISR GLASS MANUFACTURING COMPANY S.A.E..... PETITIONER**

## VERSUS

THE NATIONAL ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT  
THE KENYA REVENUE AUTHORITY ..... 2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT

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## RULING

*(On Notice on Motion Applications dated 9<sup>th</sup> April, 2025 and 3<sup>rd</sup> September, 2025)*

### **Background**

1. The Petitioner/Applicant instituted this Petition dated 9<sup>th</sup> April 2025 challenging the constitutionality and regional legality of Kenya's excise duty regime on imported glass bottles as progressively amended, and in particular the differential fiscal treatment accorded to imports originating from East African Community (EAC) Partner States as against those originating from other Common Market for Eastern and Southern Africa (COMESA) Member States. At the heart of the Petition is the question whether the imposition of excise duty currently at the rate of thirty-five per cent on glass bottles imported from the Arab Republic of Egypt, a COMESA Member State, while exempting like products imported from EAC States, is compatible with the Constitution of Kenya, 2010 and Kenya's binding obligations under the Treaty Establishing COMESA and the Revised Investment Agreement for the COMESA Common Investment Area. The Petitioner contends that the selective exemption in favour of EAC-originating products undermines the COMESA Free Trade Area, offends the principles of trade liberalisation,

equality, non-discrimination and fair administrative treatment of investments, and impermissibly erects tariff barriers within a regional economic bloc to which both Kenya and Egypt belong.

2. The dispute is traced to amendments to Paragraph 1 of Part I of the First Schedule to the Excise Duty Act, 2015, beginning with the Business Laws (Amendment) Act, 2020, which introduced excise duty on imported glass bottles, and culminating in the Finance Act, 2021, which exempted glass bottles imported from EAC Partner States following the decision of the East African Court of Justice in *Kioo Limited v The Attorney General of the Republic of Kenya (EACJ Reference No. 3 of 2018) delivered on 27 November 2020*,. While that amendment was intended to align Kenya's law with its obligations under the EAC Treaty, the Petitioner asserts that it left intact a discriminatory tax burden on imports from other COMESA Member States, including Egypt, which burden was later escalated to thirty-five per cent by the Finance Act, 2023. According to the Petitioner, this legislative trajectory amounts to selective compliance with overlapping regional treaty obligations, unfairly discriminates against COMESA investors outside the EAC framework, and frustrates the objectives of regional economic integration envisaged under the COMESA Treaty and the CCIA.

### **The Petitioner/Applicant's case**

3. In furtherance of the substantive constitutional challenge, the Petitioner/Applicant has moved this Court through two interlocutory applications by way of Notices of Motion dated 9<sup>th</sup> April 2025 and 3<sup>rd</sup> September 2025 respectively.
4. By the Notice of Motion dated 9<sup>th</sup> April 2025, the Petitioner seeks, inter alia, conservatory orders and a preliminary reference to the COMESA Court of Justice. The gravamen of the application is that Paragraph 1 of Part I of the First Schedule to the Excise Duty Act, 2015, as amended by Section 32(a)(iii) of the Finance Act, 2021 and Section 47(a)(v) of the Finance Act, 2023, is discriminatory, unconstitutional and inconsistent with Kenya's regional treaty obligations. It is contended that the impugned provision violates Articles 10(2)(b), 27(1)-(5), 46(1)(a) and (c), and 201(a) and (b)(i) of the Constitution. Further, the Petitioner asserts that the provision is incompatible with Articles 4(1), 6, 45, 46(1), 49(1), 55(1), 57 and 65(1) of the COMESA Treaty, which, by virtue of Article 2(6) of the Constitution, forms part of the law of Kenya.
5. The Petitioner's case is that although the 2021 amendment was ostensibly enacted in response to the judgment of the East African Court of Justice in ***Kioo Limited v Attorney General of the Republic of Kenya (EACJ Reference No. 3 of 2018) delivered on 27 November 2020***, the legislative intervention merely reconfigured, rather than cured, the discriminatory architecture impugned in that decision. It is argued that the amendment perpetuated a

materially similar discriminatory regime against products originating from non-EAC COMESA Member States, thereby amounting to selective and partial compliance with Kenya's obligations under regional trade law.

6. The Petitioner further submits that the matter is not barred by the doctrine of sub judice. In this regard, it is contended that the Respondents' reliance on *National Assembly & 47 others v Okioti & 169 others [2024] KECA 39 (KLR)* is misconceived. The Petitioner maintains that the issues arising therein were conclusively settled by the Supreme Court in *Cabinet Secretary for the National Treasury and Planning & 4 others v Okioti & 52 others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR)*, and that, in any event, those proceedings turned on the question of public participation, rather than on treaty-based discrimination under the COMESA framework, which is the core issue in the present Petition.
7. On the question of interim relief, the Petitioner contends that it has established a prima facie case with a likelihood of success within the principles enunciated in *Munya v Kithinji & 2 others [2014] KESC 30 (KLR)*, *Muslims for Human Rights (MUHURI) & 2 others v Attorney General & 2 others [2011] KEHC 4291 (KLR)*, and *Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR)*. It is asserted that the continued enforcement of the impugned provision has occasioned, and continues to occasion, irreparable harm incapable of adequate compensation by damages. Such harm is said to include loss of market

positioning, disruption of established supply chains, erosion of brand credibility, diminished consumer confidence, and a chilling effect on legitimate intra-COMESA trade.

8. The Petitioner further avers that the impugned excise duty regime has erected a de facto intra-COMESA tariff wall, distorted competition within the common market, undermined investor confidence, and skewed Kenya's excise taxation framework against non-EAC COMESA producers. As a direct consequence, the Petitioner states that it has been constrained to pass on the increased tax burden to Kenyan consumers, thereby inflating retail prices, narrowing consumer choice, and imperiling product quality through diminished competition, in violation of constitutional guarantees relating to fair taxation and consumer protection.
9. It is further contended that absent conservatory relief, the Petition will be rendered nugatory. The Petitioner points out that taxes paid pursuant to the impugned provision are not refundable under either the Excise Duty Act or the Tax Procedures Act, and that any subsequent declaration of unconstitutionality would therefore yield only illusory relief. Reliance is placed on *Munene v King'ara & 2 others (Petition 7 of 2014) [2014] KESC 37 (KLR)*, *Ericsson Kenya Limited v Attorney General & 3 others [2014] KEHC 6291 (KLR)*, as well as the reasoning of the East African Court of Justice in *British American Tobacco (U) Ltd v The Attorney General of Uganda, Application No. 13 of 2017*, to the effect that reputational harm

and disruption to business operations are not readily quantifiable in damages.

10. The Petitioner also submits that the presumption of constitutionality does not operate as a bar to the grant of interim relief. In support of this proposition, reliance is placed on ***Njapit & 9 others v Cabinet Secretary Ministry of Interior and Coordination of National Government & 3 others [2025] KEHC 4770 (KLR)*** and ***Attorney General & another v Coalition for Reform and Democracy & 7 others [2015] KECA 994 (KLR)***. It is argued that both the balance of convenience and the public interest militate in favour of suspending the impugned provision, which is narrowly circumscribed in scope and whose temporary suspension would not occasion a fiscal vacuum.
11. By the subsequent Notice of Motion dated 3<sup>rd</sup> September 2025, the Petitioner similarly seeks conservatory orders staying the implementation, administration and enforcement of Paragraph 1 of Part I of the First Schedule to the Excise Duty Act, 2015 as further amended by Section 46(a)(x) of the Finance Act, 2025. It is contended that the revised regime, which imposes excise duty at the rate of thirty-five per cent or Kes 40 per kilogram, whichever is higher, while continuing to exempt EAC originating products, entrenches unequal and unfair taxation, undermines consumer rights, distorts market competition, and was enacted without meaningful public participation. The Petitioner asserts that the amendment violates Articles 10,

27, 46, 118 and 201 of the Constitution, as well as Articles 6 and 57 of the COMESA Treaty.

12. The Petitioner/Applicant invokes this Court's jurisdiction under Articles 22, 23(3)(c) and 165(3)(b) of the Constitution, as affirmed in ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR***. It is submitted that this Court is vested with the power, in appropriate cases, to suspend the operation of a statutory provision so as to prevent a constitutional challenge from being rendered illusory, as recognised in ***Association of Kenya Insurers (AKI) (suing through its Chairman Mr. Mathew Koech) v Kenya Revenue Authority & 2 others; Insurance Regulatory Authority (IRA) Interested Party [2020] eKLR***.
13. The Petitioner/Applicant urges that the issues raised herein concern the interpretation and application of the COMESA Treaty and meet the threshold set out under Article 30 thereof, thereby warranting a preliminary reference to the COMESA Court of Justice. It is contended that the application has been brought in good faith and in the public interest, with a view to vindicating constitutional supremacy, equality and non-discrimination, fair taxation, consumer protection, and Kenya's fidelity to its international and regional obligations.
14. In support of the applicable principles governing conservatory relief, the Petitioner/Applicant relies on the jurisprudence of the Supreme Court in

***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR***, wherein the Court held that:

***“Conservatory orders bear a more decided public-law connotation... [and] 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.”***

15. It is argued that these principles were restated and distilled by this court in ***Karani v Cheluget & 3 others; United Democratic Alliance Party & another (Interested Parties) [2025] KEHC 5579 (KLR)***, which identified the existence of an arguable prima facie case, the need to preserve the substratum of the Petition, the advancement of constitutional values, and the consideration of public interest as the relevant criteria.
16. The Petitioner/Applicant maintains that it has established an arguable prima facie case within the meaning articulated in ***Kevin K Mwiti & others v Kenya School of Law & others [2015] eKLR*** and ***Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] KLR***. It is further contended that the harm complained of is real, imminent and existential, thus satisfying the test set out in ***Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR***, that “the danger must be imminent and evident, true and actual and not fictitious.”

17. Further reliance is placed on ***Attorney General & another v Coalition for Reform and Democracy (CORD) & 7 others [2015] eKLR*** for the proposition that where grave and weighty constitutional questions are raised against a statute, the Court may, in an appropriate case, suspend its operation unless the State demonstrates that such suspension would occasion grave prejudice. Additional reliance is placed on ***Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others [2011] KLR and Patrick Musimba v National Land Commission & 4 others [2015] eKLR*** for the settled principle that conservatory relief ought to operate in furtherance of, and not in derogation from, the Constitution, and must therefore advance the foundational constitutional values of human dignity, equality, equity and freedom.
18. It is also contended that the impugned amendments offend the constitutional imperative of public participation under Article 118(1)(b) of the Constitution, as read together with Section 5 of the Statutory Instruments Act, 2013, as expounded in ***Keroche Breweries Limited & 6 others v Attorney General & 10 others [2016] eKLR***.
19. On prejudice, the Petitioner reiterates that absent interim relief the Petition will be rendered nugatory, noting that constitutional declarations are ordinarily prospective in effect, a concern articulated in ***Martin Nyaga Wambora v Speaker County Assembly of Embu & 5 others [2014] eKLR*** and ***Munene v King'ara & 2 others [2014] KESC 37 (KLR)***. The Petitioner further

submits that reliance on post facto tax refunds is illusory, as observed in ***Ericsson Kenya Limited v Attorney General & 3 others [2014] eKLR***.

20. Ultimately, the Petitioner urges that the balance of convenience and the dictates of public interest favour the preservation of the status quo. It is contended that the State will suffer no comparable prejudice, as recognised in ***Association of Kenya Insurers (AKI) v KRA & 2 others [2020] eKLR***, whereas the denial of interim relief would precipitate irreversible commercial harm and potential collapse, contrary to the reasoning in ***Waweru & 3 others v National Assembly & 2 others [2021]***.
21. On the foregoing premises, the Petitioner prays that conservatory orders do issue as sought, pending the hearing and final determination of the Petition.

## **The Responses**

### **The 1<sup>st</sup> Respondent's case**

22. The 1<sup>st</sup> Respondent, the National Assembly, opposes the Petition dated 9<sup>th</sup> April 2025 as well as the interlocutory applications dated 9<sup>th</sup> April 2025 and 3<sup>rd</sup> September 2025. Its position is that the impugned provisions of the Excise Duty Act, 2015, as amended, are clothed with a rebuttable presumption of constitutionality, which the Petitioner has failed to displace at the interlocutory stage. It is contended that this presumption, which is anchored in the doctrine of separation of powers and institutional deference to Parliament, can only be rebutted upon a full substantive hearing of the

Petition. In this regard, reliance is placed on *Ndyanabo v Attorney General of Tanzania [2001] EA 495*.

23. The 1<sup>st</sup> Respondent further submits that the Petitioner has not satisfied the threshold for the grant of conservatory orders as articulated by the Supreme Court in *Munya v Kithinji & 2 others (Application 5 of 2014) [2014] KESC 30 (KLR)*. It is argued that the Petitioner has failed to establish a prima facie case with a likelihood of success and has not demonstrated any real, imminent or irreparable prejudice warranting the extraordinary intervention of this Court at an interlocutory stage.
24. It is the National Assembly's case that the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) are distinct regional economic blocs, each operating under separate treaties, legal regimes and institutional frameworks. On that basis, it is contended that Egypt, not being a Partner State of the EAC, cannot properly found a claim of discrimination by comparison with EAC Partner States.
25. The 1<sup>st</sup> Respondent further asserts that the impugned excise duty provision applies uniformly to all non-EAC States and that the Petitioner has failed to demonstrate any unfair distinction, exclusion or preference directed specifically against Egypt, as would be required to establish a violation of Article 27 of the Constitution or Article 56 of the COMESA Treaty.

26. The National Assembly additionally submits that although treaties ratified by Kenya form part of Kenyan law pursuant to Article 2(6) of the Constitution, such incorporation is not absolute but is subject to consistency with the Constitution, Acts of Parliament and binding judicial pronouncements. Reliance is placed on ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] KESC 34 (KLR)***. In that context, it is argued that the Excise Duty Act, being a statute duly enacted by Parliament in the exercise of its legislative mandate, occupies a superior hierarchical position within the domestic legal order in the event of any inconsistency with treaty provisions. It is further contended that matters of taxation, including the structure, incidence and rate of taxes, fall squarely within the policy-making domain of the Executive and the Legislature.
27. It is submitted that such fiscal policy choices are not amenable to judicial substitution or interrogation, absent a clear constitutional violation, as the judiciary lacks the institutional competence to second-guess legislative economic policy. Reliance is placed on ***Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR)*** and ***Isaiah Onyango Okello & Another v The National Assembly and Others, Constitutional Petition No. E010 of 2021***.
28. With respect to the Notice of Motion dated 3<sup>rd</sup> September 2025, the National Assembly argues that the application is incompetent in law as it introduces a

new cause of action and raises issues that were neither pleaded nor contemplated in the Petition. This, it is submitted, offends the settled principle that parties are bound by their pleadings. In support of this position, reliance is placed on *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] KEHC 5465 (KLR)* and *NCBA Bank Group PLC v Mose & another (Civil Appeal 158 of 2021) [2023] KEHC 26377 (KLR)*.

29. The 1<sup>st</sup> Respondent opposes the prayer for a preliminary reference to the COMESA Court of Justice. It is submitted that the Petitioner has failed to satisfy the threshold set out under Article 30(2) of the COMESA Treaty, particularly the requirement to demonstrate the absence of an effective domestic judicial remedy. The National Assembly maintains that this Court is fully seized of jurisdiction under Articles 165 and 23(3) of the Constitution to hear and determine the constitutional and statutory questions raised in the Petition, rendering any referral to the COMESA Court premature, unnecessary and unwarranted.

#### **The 2<sup>nd</sup> Respondent's case**

30. The 2<sup>nd</sup> Respondent, the Kenya Revenue Authority, opposes the Petitioner's interlocutory applications dated 3<sup>rd</sup> September 2025 through the affidavit and submissions of Pius Nyaga. It is the Respondent's position that the applications seek, in substance, to suspend provisions of the Finance Act, 2025 which are unrelated to the substantive Petition filed on 3<sup>rd</sup> April 2025

and therefore amount to a fresh cause of action camouflaged as interlocutory relief. On that basis, it is contended that the applications are incompetent and an abuse of the Court process.

31. The 2<sup>nd</sup> Respondent acknowledges that the Petition raises arguable constitutional questions concerning alleged preferential treatment within the COMESA framework and the differential application of obligations under the EAC Treaty. However, it is emphatically denied that any illegality, unconstitutionality or treaty violation has been established. The impugned provision Paragraph 1 of Part I of the First Schedule to the Excise Duty Act, 2015, as amended was lawfully enacted by Parliament. Its procedural validity has not been impugned, and its implementation, it is contended, is fully aligned with Kenya's obligations under the EAC Treaty. The Respondent maintains that all COMESA Member States have been treated equally and that allegations of discrimination against Egypt, a non-member of the EAC, are legally untenable and misconceived.

32. The 2<sup>nd</sup> Respondent further submits that the Petitioner/Applicant, being a foreign entity, has no constitutional entitlement to participate in Kenya's legislative process. In any event, it is contended that public participation in respect of the Finance Act, 2025 was duly undertaken by Parliament in accordance with constitutional and statutory requirements. The Respondent

asserts that any alleged commercial prejudice suffered by the Petitioner is quantifiable and remediable through the statutory refund mechanisms provided under sections 47A and 47B of the Tax Procedures Act. In this regard, reliance is placed on ***Republic v Kenya Revenue Authority & another ex parte Rayan Logistics [2020] eKLR***. It is argued that such prejudice does not rise to the level of irreparable harm, consistent with the principles in ***Giella v Cassman Brown (1973) EA 258 and American Cyanamid Company v Ethicon Limited (1975) AC 396***.

33. It is further contended that the grant of the interim relief sought would occasion grave prejudice to the public interest by disrupting revenue collection, undermining statutory and treaty obligations, and conferring an undue and disproportionate advantage upon a single private commercial entity. Such an outcome, it is argued, would be contrary to Articles 27, 201(b) (i), 209(1) and 210(1) of the Constitution. Reliance is placed on ***Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR, Mark Obuya & 5 others v Commissioner of Domestic Taxes & 2 Others [2013] eKLR***, and ***KUDHEIHA Union v Kenya Revenue Authority [2014] eKLR*** to underscore the proposition that the doctrine of public interest cannot be invoked to shield or advance private commercial interests.

34. On the applicable threshold for the grant of conservatory orders, the 2<sup>nd</sup> Respondent submits, placing reliance on several cases among them ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, CREAM & 7***

*Others v Attorney General [2011] eKLR, Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR, and Kenya Association of Manufacturers & 2 others v Cabinet Secretary, Ministry of Environment & 3 others [2017] eKLR*, that the Petitioner has failed to demonstrate the existence of a prima facie case, real or irreparable prejudice, or that the denial of interim relief would occasion substantial injustice. It is further emphasized that conservatory orders must correspond to and flow from the relief sought in the substantive Petition, which is not the case here. The Respondent reiterates that the impugned statutory provisions enjoy a presumption of constitutionality, as recognised in *Council of County Governors v Attorney General & another [2017] eKLR* and *Hamdard Khana v Union of India AIR*.

35. With respect to the Petitioner's invocation of Article 30 of the COMESA Treaty and the request for a preliminary ruling, the 2<sup>nd</sup> Respondent submits that such a referral is premature. It is argued that domestic remedies must first be exhausted before recourse may be had to an international tribunal, in accordance with established principles of international law and comparative jurisprudence. Reliance is placed on *Interhandel (Switzerland v United States of America) Preliminary Objections, 1959 I.C.J. 6, Agiliss Ltd v Republic of Mauritius and Others [2023], Eberhard v Slovenia, and Article 19 v State of Eritrea [Communication No. 275/2003]*. The Respondent maintains that the Petitioner has not demonstrated a prima facie case, imminent or real

prejudice, or any compelling public interest justification warranting the suspension of duly enacted legislation.

36. The 2<sup>nd</sup> Respondent urges that the interlocutory applications dated 9<sup>th</sup> April, 2025 and 3<sup>rd</sup> September 2025 be dismissed with costs, to pave the way for the substantive Petition to be heard and determined on its merits. It is emphasized that the issues raised touching on Kenya's obligations under the EAC and COMESA Treaties, the constitutionality of the impugned excise duty provision, and the broader implications for revenue mobilisation and regional trade are weighty matters of public importance which can only be properly and conclusively resolved at the full hearing of the Petition.

#### **The 3<sup>rd</sup> Respondent's case**

37. The 3<sup>rd</sup> Respondent, the Attorney General, opposes the Petitioner/Applicant's interlocutory applications seeking conservatory orders to stay the operation of Part I of the First Schedule to the Excise Duty Act, 2015, as amended by the Finance Acts of 2021 and 2023. The Respondent submits that the impugned statutory provisions are clothed with a presumption of constitutionality and that, absent a clear demonstration that the legislation poses an immediate threat to life or limb, the Petitioner has failed to establish prima facie unconstitutionality warranting interlocutory intervention.
38. The Respondent further contends that the issues raised by the Petitioner/Applicant are sub judice, having been previously canvassed in Civil

Application No. 596 of 2023, wherein Katiba Institute and other applicants sought conservatory orders suspending sections of the Finance Act 2023, including amendments to the Excise Duty Act, pending appeal. It is argued that the present applications substantially mirror issues already placed before a competent court and are therefore barred by the doctrine of sub judice.

39. It is additionally submitted that the Petitioner/Applicant has not invoked or exhausted the institutional mechanisms provided under the COMESA framework, having failed to raise the matter before the Secretary-General of COMESA or the Council to establish that the impugned excise duties constitute trade barriers within the meaning of the COMESA Safeguard Regulations. The 3<sup>rd</sup> Respondent asserts that these regional mechanisms operate alongside domestic law within member states and ought to be engaged before judicial intervention is sought.
40. The Respondent maintains that reliance on Article 27 of the Constitution is misplaced. It is argued that the alleged discrimination pertains to Egypt and other COMESA Member States that are not members of the East African Community, and that trade and tariff arrangements between EAC Partner States are governed by the East African Community Customs Management Act (EACCMA) and relevant EAC Protocols. The tariffs imposed on imported glass are said to be lawful, non-arbitrary and grounded in statute. In this regard, reliance is placed on ***Polytol Paints & Adhesives Manufacturers Co.***

*Ltd v Republic of Mauritius, Case No. 1 of 2012 (COMESA Court of Justice)*, wherein it was held that member states may not impose new tariffs except as provided for by law.

41. On the applicable threshold for the grant of conservatory orders, the Respondent relies on *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR*, as reaffirmed in *Usikimye CBO & 4 others v Chebochok & 4 others; Law Society of Kenya & 9 others [2024] KEHC 10121 (KLR)*, for the principle that an applicant must demonstrate an arguable prima facie case with a likelihood of success and show that denial of interim relief would occasion real prejudice. It is contended that the Petitioner has failed to establish any apparent infringement of a constitutional right, the excise duties imposed on imported glass, including those arising from the Finance Acts of 2021 and 2023, being consistent with both domestic law and Kenya's regional trade obligations.
42. It is further submitted that mere differentiation does not amount to unconstitutional discrimination, provided there exists a rational connection to a legitimate governmental purpose. Reliance is placed on *Odhiambo v Attorney General & 2 others; Nyanchoga (Petition E400 of 2021) [2024] KEHC 354 (KLR)*, where it was held that differentiation grounded in legitimate policy objectives does not offend Article 27 of the Constitution. It is argued that such a rational nexus exists in the present case, the impugned measures

being informed by fiscal policy considerations within Parliament's constitutional mandate.

43. The 3<sup>rd</sup> Respondent also contends that the grant of conservatory orders in the terms sought would have the impermissible effect of predetermining the question of constitutionality, thereby rendering the Petition nugatory and depriving the State of its right to be heard on the merits. This position it is argued is supported by ***Makumi & 4 others v Speaker County Assembly of Kitui & another [2024] KEHC 2812 (KLR)*** and ***Law Society of Kenya v Attorney General & another [2020] eKLR***. It is further submitted that the Petitioner's application, being premised on alleged unconstitutionality of the Finance Acts, fails to meet the stringent standard articulated in ***Coalition for Reforms and Democracy v Attorney General, Kizito Mark Ngaywa v Minister of State for Internal Security & Provincial Administration [2011] eKLR***, and ***Susan Wambui Kaguru & others v Attorney General [2012] eKLR***, which underscore that conservatory orders suspending legislation are granted sparingly and only in exceptional circumstances, such as where there is a demonstrable threat to life or limb.
44. The 3<sup>rd</sup> Respondent, the Attorney General underscores the overarching public interest in sustaining lawful taxation measures, which underpin economic policy, broaden the tax base, and incentivise local investment. Reliance is placed on ***National Assembly of Kenya v Njiru & 41 others [2025] KECA 494 (KLR)*** and ***Kenya Anti-Corruption Commission v Deepak Chamanlal Kamni &***

**4 others [2014] eKLR.** The Respondent further notes that the Supreme Court, in *The Cabinet Secretary for the National Treasury & 4 others v Okiya Omtatah Okiiti & 52 others, SC Petition Nos. E031, E032 & E033 of 2024*, upheld the constitutionality of the Finance Act 2023, save for discrete provisions, a determination which binds this Court by virtue of Article 163(7) of the Constitution.

45. On the foregoing grounds, the 3<sup>rd</sup> Respondent urges that the Petitioner's interlocutory applications be dismissed with costs, the Petitioner having failed to satisfy any of the settled thresholds for the grant of conservatory relief.
46. In rebuttal to the 2<sup>nd</sup> Respondent's Replying Affidavit, the Petitioner/Applicant filed a Further Affidavit sworn by Yasser Ader Aly Ezzat on 13<sup>th</sup> October 2025 at Cairo and commissioned by Ondati Mogaka at Nairobi, together with a Supplementary Affidavit sworn by Cindy Salim on 5<sup>th</sup> June 2025 in response to the 3<sup>rd</sup> Respondent's Grounds of Opposition. In the said affidavit, by Cindy Salim, the Petitioner/Applicant asserts that the Respondents failed to comply with this Honourable Court's directions issued on 19<sup>th</sup> May 2025 regarding the timely filing and service of documents, having lodged their oppositions belatedly and without proper service. It is contended that such conduct amounts to bad faith, is prejudicial to the Petitioner, and undermines the orderly conduct of these proceedings.

47. The Petitioner accordingly submits that the 3<sup>rd</sup> Respondent's Grounds of Opposition are devoid of merit and ought to be struck out for non-compliance with the timelines and directions set by the Court. On substance, the Petitioner reiterates that the impugned provision of the Excise Duty Act, which imposes an excise duty of thirty-five per cent on imported glass bottles while exempting products originating from EAC Partner States, is patently discriminatory. It is contended that the provision violates the constitutional guarantees of equality and non-discrimination, undermines consumer protection, distorts market competition, and is inconsistent with Kenya's obligations under the COMESA Treaty relating to regional integration and non-tariff barriers.
48. The Petitioner further denies that the matter is *sub judice*. It is asserted that the decision of the Supreme Court in ***Cabinet Secretary for the National Treasury & 4 others v Okoiti & 5 others ([2024] KESC 63)*** concerned different legislative amendments, different parties, and distinct questions, and did not address the treaty-based discrimination and COMESA obligations now squarely raised before this Court. As such, the Petitioner maintains that the present proceedings are neither barred nor precluded by that determination.
49. The Petitioner asserts that the Petition is properly before this Honourable Court as part of the exhaustion of available domestic remedies under the COMESA Treaty. In this regard, it is deponed that a complaint has been lodged through the COMESA Mechanism for Reporting, Monitoring and

Eliminating Non-Tariff Barriers, thereby demonstrating good faith engagement with regional dispute-resolution processes while invoking this Court's constitutional jurisdiction.

50. It is urged that this honorable Court grants the reliefs sought in order to arrest the continuing and irreparable harm occasioned by the impugned statutory regime, preserve the integrity and efficacy of the Petition, and uphold both Kenya's constitutional obligations and its binding commitments under regional and international law.

### **Analysis and Determination**

51. Having considered the two Notices of Motion dated 9<sup>th</sup> April 2025 and 3<sup>rd</sup> September 2025, the affidavits on record, the rival submissions of counsel, and the authorities cited, this Court is tasked with determining whether the Petitioner has met the constitutional threshold for the grant of conservatory orders.
52. The issues raised in these applications can be distilled into four key allegations:

- (i) **That the impugned provisions of the Excise Duty Act, 2015, as amended, discriminate against imports from non-EAC COMESA Member States;**

- (ii) That the Petitioner faces irreparable commercial harm from the enforcement of excise duties;
- (iii) That the matter engages public interest considerations warranting interlocutory intervention; and
- (iv) That there exists a basis for a preliminary reference under Article 30 of the COMESA Treaty for the interpretation and application of its provisions.

53. The Petitioner/Applicant also seeks to introduce, via the Notice of Motion dated 3<sup>rd</sup> September 2025, fresh challenges concerning amendments effected by the Finance Act, 2025, which were neither pleaded nor contemplated in the Petition.

54. It is well established that parties are bound by their pleadings, and an interlocutory application cannot be used to inject new causes of action. As held in *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR* and reaffirmed in *NCBA Bank Group PLC v Mose & another [2023] KEHC 26377 (KLR)*, courts will not entertain applications that materially extend or vary the substantive petition. The court held thus:

**“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all**

**the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.”**

55. To allow otherwise would offend the principles of procedural fairness and due process (*nemo debet bis vexari pro eadem causa*). Accordingly, this court finds that the application dated 3<sup>rd</sup> September, 2025 is incompetent.
56. Conservatory orders are an extraordinary public law remedy. As the Supreme Court stated in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR*, their grant is not automatic but governed by four interrelated considerations: the existence of an arguable prima facie case; the risk of real, imminent, and irreparable prejudice; the public interest; and whether judicial intervention at the interlocutory stage is warranted, taking into account constitutional values, proportionality, and institutional competence.
57. On the first limb, the Court considers whether the Petitioner/Applicant has demonstrated an arguable prima facie case. The challenge to the differential excise duties imposed on imports from non-EAC COMESA Member States raises substantive constitutional questions under Articles 27 and 56 of the Constitution, as well as treaty-based issues under the COMESA framework. A prima facie case is established where the pleadings disclose arguable issues requiring determination at a full hearing, and not one that necessarily

guarantees success as was held in ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR***. On this limited basis, the Court finds that the Petitioner/Applicant has indeed demonstrated an arguable prima facie case.

58. The second limb, irreparable harm, requires demonstration that the prejudice alleged cannot be remedied by damages or statutory remedies. In the instant matter, the alleged harm is predominantly commercial, arising from the imposition of excise duty. Kenyan courts have consistently held that pecuniary or commercial loss, even if substantial, is not irreparable where statutory mechanisms exist to redress it. Sections 47A and 47B of the Tax Procedures Act provide for post facto refunds, which are clear, effective, and enforceable. In ***Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR***, the Court stated:

***“Where losses occasioned by tax collection are quantifiable and remediable through statutory mechanisms, they do not constitute irreparable harm justifying interlocutory relief.”***

59. Similarly, in ***Republic v Kenya Revenue Authority & another ex parte Rayan Logistics [2020] eKLR***, it was affirmed that statutory refund procedures preclude claims of irreparable prejudice. The Petitioner has not demonstrated that these remedies are illusory, inaccessible, or incapable of providing full redress. Accordingly, the second limb fails.

60. The third test concerns whether the grant of conservatory orders would serve the public interest. Conservatory relief is not designed to protect private commercial convenience; rather, it is intended to safeguard constitutional rights and to uphold the broader public good. In ***Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR***, the Court observed:

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

61. Applying the Court’s reasoning to the present matter, it is evident that conservatory relief possesses a special character: it is designed to preserve the constitutional status quo and to protect public order, rather than to serve private interests or commercial convenience. This principle underscores the inherently public law nature of conservatory orders, which must be carefully considered when evaluating whether the grant of such relief aligns with the public interest.

62. Suspending taxation statutes carries profound consequences for public finance, revenue collection, and the State's ability to fulfill its constitutional obligations. Courts must exercise caution before interfering with fiscal legislation at an interlocutory stage, lest national budgetary stability be undermined. The Petitioner/Applicant has failed to demonstrate how the public interest would be advanced by the suspension of the impugned provisions, rather, the relief sought would serve only its private commercial advantage. This limb is therefore not satisfied.
63. The fourth consideration engages the principles of judicial restraint, proportionality, and institutional competence, all of which are closely intertwined with the presumption of constitutionality and the doctrine of separation of powers.
64. Judicial restraint reflects the fundamental recognition that courts must exercise caution before intruding into the domains constitutionally assigned to the other arms of government. It requires judges to defer to the legislative and executive branches in areas where they are empowered to act, particularly in policy-laden matters such as fiscal, economic, or administrative decisions, unless it is established that there has been a clear violation of the Constitution or the law. Judicial restraint thus ensures that the courts does not usurp functions assigned to Parliament or the Executive.

65. Proportionality guides the court in balancing competing interests and in assessing whether the relief sought is appropriate in light of the rights and obligations engaged. Any judicial intervention must be measured, justified, and no more extensive than necessary to remedy the alleged violation. In the context of conservatory or interlocutory relief, proportionality ensures that the public interest, constitutional objectives, and private rights are appropriately weighed.
66. Institutional competence denotes the court's recognition of its own limitations in areas requiring specialized technical, economic, or policy expertise. Courts are not designed to replace the Executive or Parliament in making policy decisions; rather, their role is to adjudicate questions of law and ensure that constitutional and legal boundaries are respected. This doctrine prevents the courts from intervening in matters where it lacks the requisite expertise, and where such intervention may produce unintended social, economic, or administrative consequences.
67. Presumption of constitutionality on the other hand operates as a corollary to these principles. Legislative and Executive acts are presumed to be constitutionally valid and lawful unless convincingly shown otherwise. This presumption reflects respect for the separation of powers, acknowledging that elected representatives and specialized institutions are entrusted with governance and policy-making responsibilities.

68. The interplay of these principles establishes the framework for judicial moderation. Judicial restraint ensures courts do not encroach upon the domains of the legislature or Executive; proportionality ensures any interference is measured and justified; institutional competence guards against intervention in technically complex or policy-driven matters; and the presumption of constitutionality reinforces deference to the lawfully enacted acts of government. Together, these principles preserve the separation of powers, maintain institutional integrity, and guide courts in exercising their constitutional mandate without overreaching into the functions of co-equal arms of government.
69. Acts of Parliament are presumed constitutionally valid, a principle articulated in *Ndyanabo v Attorney General of Tanzania [2001] EA 495* and reaffirmed in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others [2021] KESC 34 (KLR)*. The rationale, grounded in the separation of powers, is that courts must respect Parliament's competence to legislate and the Executive's discretion to formulate and implement policy. Taxation policy, including the rate and structure of excise duties, lies at the heart of legislative and executive competence. Courts are not economic policy-making bodies. In *Cabinet Secretary for the National Treasury & 4 others v Okioti & 52 others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR)*, the Court held:

***“A court ought not to intervene in matters of policy where the relevant State organ acts within the law.”***

70. In the present case, the Petitioner has not demonstrated that the impugned differentiation is arbitrary, capricious, or devoid of legitimate purpose. Mere differentiation, without more, does not constitute unconstitutional discrimination, as was observed in ***Odhiambo v Attorney General & 2 others; Nyanchoga [2024] KEHC 354 (KLR)***. The excise duty exemptions granted to products originating from EAC Member States reflect Kenya's obligations under the EAC Treaty and compliance with COMESA trade frameworks, matters that fall squarely within the policy discretion of Parliament and the Executive. In these circumstances, judicial intervention at this interlocutory stage would be unwarranted.

71. The Court further considers the Petitioner's claim under Article 30 of the COMESA Treaty, seeking a preliminary reference. While the Petitioner invokes obligations arising under the Treaty, the threshold for such a referral requires that domestic remedies be exhausted, as established in ***Interhandel (Switzerland v United States of America), Preliminary Objections, 1959 I.C.J. 6***. The present Petition, including the interlocutory applications, forms part of the process of exhausting domestic remedies. The Court is of the view that any preliminary reference at this stage would be premature, and that questions of treaty interpretation are more appropriately addressed in the context of the substantive Petition.

72. With respect to the Petitioner's broader claims under Articles 27 and 56 of the Constitution and the COMESA Treaty, including the request for a preliminary reference under Article 30 of the Treaty, the Court finds that the Petitioner has not satisfied the required threshold. There is no evidence that domestic remedies have been exhausted, nor that a clear treaty-based barrier exists. The allegations of discrimination are unsupported by evidence demonstrating unfair exclusion, preferential treatment, or arbitrariness by the State. The differential treatment alleged is rationally connected to legitimate policy objectives, including compliance with EAC obligations, and therefore does not constitute unlawful discrimination.
73. Finally, the Court notes the procedural defect in the Further Affidavit sworn by Yasser Ader Aly Ezzat, sworn in Cairo but commissioned in Nairobi. This affidavit fails to comply with the Oaths and Statutory Declarations Act and is fatally defective, as consistently held in *Microsoft Corporation v Mitsumi Computer Garage Ltd [2001] eKLR* and *Kinyanjui v Gichuru [1988] KLR 25*, and is hereby struck out.
74. In light of the foregoing, while the Petitioner/Applicant has succeeded in establishing an arguable prima facie case, it has failed to satisfy the remaining tests required for the grant of conservatory orders. The Petitioner has not demonstrated irreparable harm, has not shown that the relief sought would serve the public interest, and has not overcome the rebuttable presumption of constitutionality or the limitations imposed by the doctrine of separation

of powers. The balance of convenience clearly favours the Respondents. Further, the Notice of Motion dated 3<sup>rd</sup> September 2025 improperly introduces a new cause of action that was neither pleaded nor contemplated in the Petition and is therefore incompetent. For these reasons, the Court finds that the two applications dated 9<sup>th</sup> April 2025 and 3<sup>rd</sup> September 2025 are without merit and fail.

### **Orders**

- a) The Notice of Motion dated 9<sup>th</sup> April 2025 is hereby dismissed.
- b) The Notice of Motion dated 3<sup>rd</sup> September 2025 is hereby dismissed.
- c) The Further Affidavit sworn by Yasser Ader Aly Ezzat on 13<sup>th</sup> October 2025 is hereby struck out.
- d) Costs of the interlocutory applications shall be in the cause.
- e) Directions on case management and the hearing of the substantive Petition shall be issued separately.

Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF JANUARY 2026.**

**BAHATI MWAMUYE MBS**  
**JUDGE**

In the presence of: -

Counsel for the Petitioner/Applicant - Ms. Salim

Counsel for the 1<sup>st</sup> Respondent - Mr. Thande Kuria

Counsel for the 2<sup>nd</sup> Respondent - Ms. Otieno

Counsel for the 3<sup>rd</sup> Respondent - Ms. Nganyi

Court Assistant - Ms. Lwambia