National Assembly & 47 others v Okoiti & 169 others (Civil Application E577, E581, E585 & E596 of 2023 (Consolidated)) [2024] KECA 39 (KLR) (26 January 2024) (Ruling)

Neutral citation: [2024] KECA 39 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E577, E581, E585 & E596 OF 2023 (CONSOLIDATED)

LA ACHODE, JM MATIVO & PM GACHOKA, JJA

JANUARY 26, 2024

BETWEEN

THE NATIONAL ASSEMBLY ..... 1ST APPLICANT

THE SPEAKER OF THE NATIONAL ASSEMBLY ..... 2ND APPLICANT

AND

OKIYA OMTATAH OKOITI ..... 1ST RESPONDENT

ELIUD KARANJA MATINDI ..... 2ND RESPONDENT

MICHAEL KOJO OTIENO ..... 3RD RESPONDENT

BENSON ODUWUOR OTIENO ..... 4TH RESPONDENT

BLAIR ANGIMA OIGORO ..... 5TH RESPONDENT

VICTOR OKUNA ..... 6TH RESPONDENT

FLORENCE KANYUA LICHORO ..... 7TH RESPONDENT

DANIEL OTIENO ILA ..... 8TH RESPONDENT

RONE ACHOKI HUSSEIN ..... 9TH RESPONDENT

HON SENATOR EDDY GICHERU OKETCH ..... 10TH RESPONDENT

CLEMENT EDWARD ONYANGO ..... 11TH RESPONDENT

PAUL SAOKE ..... 12TH RESPONDENT

LAW SOCIETY OF KENYA ..... 13TH RESPONDENT

AZIMIO LA UMOJA ONE KENYA COALITION PARTY ..... 14TH RESPONDENT

KENYA HUMAN RIGHTS COMMISSION ..... 15TH RESPONDENT

KATIBA INSTITUTE ..... 16TH RESPONDENT

THE INSTITUTE OF SOCIAL ACCOUNTABILITY (TISA) 17TH RESPONDENT

TRANSPARENCY INTERNATIONAL KENYA ..... 18TH RESPONDENT

INTERNATIONAL COMMISSION OF JURIST - KENYA .... 19TH RESPONDENT

SIASA PLACE ..... 20TH RESPONDENT

TRIBELESS YOUTH ..... 21ST RESPONDENT

AFRICA CENTER FOR OPEN GOVERNANCE ..... 22ND RESPONDENT

ROBERT GATHOGO KAMWARA. ..... 23RD RESPONDENT

TRADE UNIONS CONGRESS OF KENYA. ..... 24TH RESPONDENT

KENYA MEDICAL PRACTIONERS PHARMACIST UNION .... 25TH RESPONDENT

KENYA NATIONAL UNION OF NURSES ..... 26TH RESPONDENT

KENYA UNION OF CLINICAL OFFICERS ..... 27TH RESPONDENT

FREDRICK ONGYANGO OGOLA ..... 28TH RESPONDENT

NICHOLAS KOMBE ..... 29TH RESPONDENT

WHITNEY GACHERI MICHENI. ..... 30TH RESPONDENT

STANSLOUS ALUSIOLA ..... 31ST RESPONDENT

HERIMA CHAO MWASHIGADI ..... 32ND RESPONDENT

DENNIS WENDO ..... 33RD RESPONDENT

MERCY NABWIRE ..... 34TH RESPONDENT

BENARD OKELO ..... 35TH RESPONDENT

NANCY OTIENO ..... 36TH RESPONDENT

MOHAMED B DUB ..... 37TH RESPONDENT

UNIVERSAL CORPORATION LIMITED ..... 38TH RESPONDENT

COSMOS LIMITED ..... 39TH RESPONDENT

ELYS CHEMICAL INDUSTRIES ..... 40TH RESPONDENT

REGAL PHARMACEUTICALS ..... 41ST RESPONDENT

BETA HEALTHCARE LTD ..... 42ND RESPONDENT

DAWA LIMITED ..... 43RD RESPONDENT

MEDISEL KENYA LIMITED ..... 44TH RESPONDENT

MEDIVET PRODUCTS LIMITED ..... 45TH RESPONDENT

LAB AND ALLIED LIMITED ..... 46TH RESPONDENT

BIOPHARM LIMITED ..... 47TH RESPONDENT

BIODEAL LABORATORIES LIMITED ..... 48TH RESPONDENT

ZAIN PHARMA LIMITED ..... 49TH RESPONDENT

THE CABINET SECRETARY FOR NATIONAL TREASURY.. .... 50TH RESPONDENT

THE HON ATTORNEY GENERAL ..... 51ST RESPONDENT

THE NATIONAL ASSEMBLY ..... 52ND RESPONDENT

THE SPEAKER OF THE NATIONAL ASSEMBLY. ..... 53RD RESPONDENT

THE SPEAKER OF THE SENATE ..... 54TH RESPONDENT

KENYA EXPORT FLORICULTURE, HORTICULTURE AND ALLED WORKERS UNION ..... 55TH RESPONDENT

COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY .... 56TH RESPONDENT

DR MAURICE JUMAH OKUMU ..... 57TH RESPONDENT

DR MAXWEL MIYAWA ..... 58TH RESPONDENT

CONSUMER FEDERATION OF KENYA ..... 59TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPLICATION E581 OF 2023

BETWEEN

THE CABINET SECRETARY FOR NATIONAL TREASURY ..... 1ST APPLICANT

THE HON ATTORNEY GENERAL ..... 2ND APPLICANT

AND

OKIYA OMTATAH OKOITI ..... 1ST RESPONDENT

ELIUD KARANJA MATINDI ..... 2ND RESPONDENT

MICHAEL KOJO OTIENO ..... 3RD RESPONDENT

BENSON ODUWUOR OTIENO ..... 4TH RESPONDENT

BLAIR ANGIMA OIGORO ..... 5TH RESPONDENT

VICTOR OKUNA ..... 6TH RESPONDENT

FLORENCE KANYUA LICHORO.. ..... 7TH RESPONDENT

DANIEL OTIENO ILA ..... 8TH RESPONDENT

RONE ACHOKI HUSSEIN ..... 9TH RESPONDENT

RESPONDENT HON SENATOR EDDY GICHERU OKETCH .... 10TH RESPONDENT

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KENYA EXPORT FLORICULTURE, HORTICULTURE AND ALLED WORKERS UNION ..... 57TH RESPONDENT

DR MAURICE JUMAH OKUMU ..... 58TH RESPONDENT

DR MAXWEL MIYAWA ..... 59TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPLICATION E585 OF 2023

BETWEEN

OKIYA OMTATAH OKOITI ..... 1ST APPLICANT

ELIUD KARANJA MATINDI ..... 2ND APPLICANT

BENSON ODUWUOR OTIENO ..... 3RD APPLICANT

BLAIR ANGIMA OIGORO ..... 4TH APPLICANT

AND

THE CABINET SECRETARY FOR NATIONAL TREASURY & 66 OTHERS & 66 OTHERS & 66 OTHERS ..... RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPLICATION E596 OF 2023

BETWEEN

KATIBU INSTITUTE & 40 OTHERS & 40 OTHERS & 40 OTHERS ..... APPLICANT

AND

CABINET SECRETARY FOR THE NATIONAL TREASURY AND PLANNING & 9 OTHERS & 9 OTHERS & 9 OTHERS ..... RESPONDENT

(Being an application for stay of execution and/or conservatory orders pending the hearing and determination of the appeal against part of the judgement and decree of the High Court of Kenya at Nairobi (Majanja, Meoli & Mugambi JJ) delivered at Nairobi on 28th November 2022 in Nairobi High Court Constitutional Petition No. E181 of 2023 consolidated with Petitions Nos.E211, E217, E219, E221, E227, E228, E232, E234, E237 and E254 all of 2023)

Court of Appeal declines to grant conservatory orders against the provisions of the Finance Act, 2023 that were declared unconstitutional.

Reported by John Ribia

Civil Practice and Procedure *– conservatory orders – stay of execution – where the High Court had declared provisions of the Finance Act, 2024 to be unconstitutional – appeal that sought stay orders against the decision of the High Court pending the determination of the appeal – principles courts should consider in granting conservatory orders - what factors should appellate courts consider when deciding whether or not to grant conservatory/stay of execution orders - whether on grounds of public interest the Court of Appeal could issue stay of execution orders whose effect would be to allow a statute that had been found to be constitutionally infirm to continue being in the law books pending the hearing of an appeal - Court of Appeal Rules, 2022 (cap 9 Sub leg), rule 5 (2) (b); 29.*

Statutes *– constitutionality of statutes – presumption of constitutionality – application of presumption of constitutionality in an appeal against a decision that declared provisions of the law to be unconstitutional - whether the presumption of constitutional validity of statutes applied in appeals against provisions of a statute that had been declared unconstitutional*

Brief facts

The appeal arose from a decision of the High Court that declared sections 76, 77, 78, 84, 87, 88 and 89 of the Finance Act, 2023 (impugned provisions) unconstitutional. The appellants sought stay of execution/ conservatory orders against the suspension of the impugned provisions pending the determination of the appeal. The appellants contended that it was in public interest to issue the conservatory orders as some government projects could shut down if the tax was not collected. It was contended that the government was likely to lose revenue, and that the government risked litigation in the event it was unable to honour contractual obligations. Further, the litigation costs would be borne by the taxpayers. The applicants contended that the government would not be able to construct the affordable houses and that jobs would be lost. In addition, it was argued that 1000 statutory instruments would lapse leaving a lacuna which would endanger operations of various state entities.

In opposition, the respondents maintained that the appeals did not satisfy the public interest threshold. It was argued that no irremediable harm would accrue to the government.

Issues

i. What factors should appellate courts consider when deciding whether or not to grant conservatory/ stay of execution orders?

ii. Whether on grounds of public interest the Court of Appeal could issue stay of execution orders whose effect would be to allow a statute that had been found to be constitutionally infirm to continue being in the law books pending the hearing of an appeal.

iii. Whether the presumption of constitutional validity of statutes applied in appeals against provisions of a statute that had been declared unconstitutional.

Held

1. An applicant who would succeed upon such an application for stay of execution must persuade the court on two limbs, that the appeal or intended appeal was arguable and not frivolous. Secondly, that if the application was not granted, the success of the appeal, were it to succeed, would be rendered nugatory. Those two limbs must both be demonstrated and it would not be enough that only one was demonstrated.
2. Rule 5(2)(b) of the Court of Appeal Rules, 2022, granted the Court of Appeal unfettered discretion to order a stay of execution of an order pending appeal. The only qualification was that the wide discretion must be exercised judicially and not capriciously. That jurisdiction was original.
3. An applicant needed to only demonstrate one arguable ground and not a multiplicity of them, and further that an arguable appeal was not necessarily one that would succeed. All the applicants had satisfied the court that they had an arguable appeal.
4. When determining whether an appeal would be rendered nugatory, the court had to consider the conflicting claims of both parties and each case had to be considered on its merits. The court had to balance preserving the *status quo* pending the hearing of the intended appeal and the consequences of suspending the declarations made by the trial court.
5. In Civil Application No E585 of 2023, the applicants urged the instant court to, pending the hearing and determination of their appeal, suspend the order granted on November 28, 2023. The order was granted pending filing of an application for stay before the court. Two applications for stay, were filed. A natural and ordinary interpretation of the order showed that it lapsed the moment the applications were filed in the instant court. The instant court declined the invitation to stay a non- existent order. Civil Application No E585 of 2023 was moot.
6. A matter was moot if further legal proceedings with regard to it could have no effect, or events had placed it beyond the reach of the law. Courts loathed making pronouncements on academic or hypothetical issues as it did not serve any useful purpose. The applicants' intended appeal in E585 of 2023 was premised on the question whether the High Court had jurisdiction to stay the orders. Such an appeal could not be rendered nugatory if the stay was refused. Civil application No 585 of 2023 collapsed on two fronts: for being moot and for failing both tests.
7. The applicants invited the Court of Appeal to suspend the operation of sections of the Finance Act on an application without hearing the appeal on merits. In principle, there was a general presumption that statutes enacted by Parliament were constitutional, until the contrary was proved. Such a drastic order could not be issued on an application. No court of law properly directing its mind to the law could grant such an order.
8. Applying the general presumption that a statute was constitutional until declared unconstitutional, the applicants had not demonstrated how the intended appeal which would determine whether the court's determination on the sections would stand or not would be rendered nugatory. Should the appeal succeed, the sections would be annulled. If it failed, the law would stand as it was. Civil Application No 596 of 2023 did not meet the nugatory test.
9. Article 163(7) of the Constitution provided that courts were bound by authoritative pronouncements of the Supreme Court. However, a case was only an authority for what it decided. Each case depended on its own facts and a close similarity between one case and another was not enough because even a single significant detail could alter the entire aspect. When deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide

therefore, on which side of the line a case fell, the broad resemblance to another case was not at all decisive.

10. The ratio of the Supreme Court decision in *Communications Commission of Kenya & 5 others v Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR. It was distinguishable from the facts in the instant case. The case dealt with the correct interpretation to be accorded to article 34(3) of the Constitution. That was totally different from the issues at hand. Civil Application E304 of 2023 involved interim conservatory orders suspending implementation of a statute as opposed to a final judgment declaring a statute to be constitutionally infirm. It was of no relevance to the instant case.
11. Conservatory orders were remedies available under the Constitution. However, the remedies must be merited. Public interest was also a consideration in conservatory order applications. However, an applicant must satisfy the first two tests.
12. Public interest was expressed by legislative enactments, constitutional constraints, or judicial pronouncements. Public interest was a legal principle founded on the concept of public good. Even though a decision could disturb only one part of community, the court should weigh the whole of the community while applying public interest considerations. Public interest was represented by constitutional values. Application of public interest must conform with the Constitution. Article 2 (4) of the Constitution affirmed the supremacy of the Constitution relative to ordinary statutes. The invalidation of any law found to be *ultra vires* the Constitution should be immediate. However, the appellate court could suspend declarations of invalidity under limited circumstances.
13. The purpose of the suspension was to enable the legislature to respond directly to a holding of invalidity. Although an unconstitutional law was maintained in force for a short time, the Constitution was respected, because if no new law was enacted by the time the period of suspension ended, the declaration of invalidity took effect. The operation of the invalidity was suspended so as to allow parliament to cure the defect. The jurisdiction to suspend declarations of invalidity was narrow and was only exercised in limited cases. The question narrowed to whether the applicants had established a case for the suspension sought in public interest.
14. The presumption of constitutional validity in respect of the impugned sections was extinguished the moment the trial court issued the declaration. It would not be in public interest to grant a stay whose effect was to allow a statute that had been found to be constitutionally infirm to continue being in the law books pending the hearing of an appeal. Should the court hearing the appeal affirm the constitutional invalidity of the impugned laws, then all actions that would have been undertaken under the impugned sections of the law during the intervening period would be legally frail.
15. The trial court held that the housing levy was introduced without a legal framework. It also held that the levy was targeting a section of Kenyans. Public interest lay in awaiting the determination of the appeal. If stay sought was granted at the instant stage, then some far-reaching decisions that would have been undertaken pursuant to the impugned laws could not be reversible. Public interest tilted in favour of not granting the stay or the suspension sought. Public interest tilted in favour of awaiting the determination of the issues raised in the intended appeals.

Appeals dismissed, no orders as to costs.

Citations

Cases

Kenya

1. *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 others* Petition 15 of 2020; [2023] KESC 14 (KLR) - (Followed)
2. *Bichage, Chris Munga N v Richard Nyagaka Tongi & 2 others* Civil Application 39 of 2013; [2013] KECA 141 (KLR) - (Applied)

3. *Cabinet Secretary for the National Treasury and Planning & another v Okoiti & 12 others* Civil Application E304 of 2023; [2023] KECA 1375 (KLR) - (Explained)
4. *Cabinet Secretary Ministry of Health v Aura & 13 others* Civil Application E583 of 2023; [2024] KECA 2 (KLR) - (Explained)
5. *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union (Kenya)* Civil Application 133 of 2015; [2015] KECA 353 (KLR) - (Explained)
6. *Communications Commission of Kenya & 3 others v Royal Media Servies Ltd & 7 others; Nature Foundation Ltd (Proposed Interested Party)* Petition 14 of 2014; [2014] KESC 52 (KLR) - (Distinguished)
7. *Ethics and Anti-Corruption Commission v Tom Ojienda, SC t/a Prof Tom Ojienda & Associates, Chief Magistrate & Kiberia Law Courts; Law Society of Kenya (Amicus curiae)* Civil Application 21 of 2019; [2020] KESC 56 (KLR) - (Applied)
8. *Kinyanjui, Stanley Kangethe v Tony Ketter & 5 others* Civil Application 31 of 2013; [2013] KECA 378 (KLR) - (Applied)
9. *Law Society of Kenya v Kenya Revenue Authority & another* Petition 39 of 2017; [2017] KEHC 8539 (KLR) - (Explained)
10. *Mbaabu, John & another v Kenya Revenue Authority* Petition 6 of 2019; [2020] KEHC 3755 (KLR) - (Explained)
11. *National Assembly, Republic of Kenya & another v Matindi & 3 others* Civil Appeal (Application) E176 of 2023; [2023] KECA 1566 (KLR) - (Mentioned)
12. *Okoiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties)* Petitions E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated); [2023] KEHC 25872 (KLR) - (Explained)

South Africa

1. *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* (CCT 385/21) [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) - (Mentioned)
2. *Minister of Transport and another v Mvumvu and others* [2012] ZACC 20 (27 September 2012) - (Mentioned)

United Kingdom

Quinn v Leathem [1901] AC 495; [1901] UKHL 2 - (Explained)

India

1. *Behram Khurshid Pesikaka v State of Bombay* [1955] 1 SCR 613 - (Explained)
2. *State of Orissa v Sudhansu Sekhar Misra Manu* AIR 1968 SC 647 - (Explained)

United States

Norton v Shelby County 118 US 425 (1886) - (Explained)

Canada

1. *Canada (Attorney General) v Hislop* [2007] SCC 10; [2007] 1 SCR 429 - (Explained)
2. *Re Manitoba Language Rights* [1985] 1 SCR 721 - (Explained)
3. *Schachter v Canada* [1992] 2 SCR 679 - (Explained)

Regional Court

Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd [2002] 1 EA 227 - (Mentioned)

Statutes

Kenya

1. Betting, Lotteries and Gaming Act (cap 131) In general - (Cited)
2. Constitution of Kenya articles 2(1)(2)(3)(4); 34(3); 40(2); 163(7) - (Interpreted)

3. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) rule 32 - (Interpreted)
4. Court of Appeal Rules, 2022 (cap 9 Sub Leg) rule 5(2)(b); 29 - (Interpreted)
5. Employment Act (cap 226) In general - (Cited)
6. Excise Duty Act (cap 442) schedule 1, part I - (Interpreted)
7. Finance Act, 2023 (Act No 4 of 2023) sections 30, 31, 32, 33, 34, 35, 36, 37, 38, 47, 76, 77, 78, 84, 87, 88, 89 - (Interpreted)
8. Kenya Revenue Authority Act (cap 469) In general - (Cited)
9. Kenya Roads Act (cap 408) In general - (Cited)
10. Miscellaneous Fees and Levies Act (cap 469C) In general - (Cited)
11. Public Procurement and Asset Disposal Act (cap 412C) section 53(8) - (Interpreted)
12. Retirement Benefits (Deputy President and Designated State Officers) Act (cap 197B) In general - (Cited)
13. Social Health Insurance Act, 2023 (Act No 16 of 2023) In general - (Cited)
14. Statutory Instruments Act (cap 2A) In general - (Cited)
15. Tax Procedures Act (cap 469B) In general - (Cited)
16. Unclaimed Financial Assets Act (cap 494) In general - (Cited)
17. Value Added Tax Act (cap 476) sections 5, 8, 12, 17, 31, 34, 43; schedule 1, 2 - (Interpreted)

Advocates

None mentioned

RULING

1. This ruling determines four consolidated applications, namely, Nos E577 of 2023, E581 of 2023, E585 of 2023 and E596 of 2023 all arising from the judgment and Decree of the High Court of Kenya at Nairobi delivered on November 28, 2023 in Constitutional Petition Nos E181 of 2023 consolidated with Petition Nos 211 of 2023, E217 of 2023, E219 of 2023, E221 of 2023, E227 of 2023, E228 of 2023, E232 of 2023, E234 of 2023, E237 of 2023 and E254 of 2023 - *Okiya Omtata and others v the Cabinet Secretary for the National Treasury and Planning and others*. In the impugned judgment, the trial court declared sections 76, 77, 78, 84, 87, 88 and 89 of the *Finance Act, 2023* unconstitutional. However, the court held that sections 30 to 38 and 47 of the *Act* are constitutional.

2. In Civil Application No E577 of 2023, the applicants, The National Assembly and the Speaker of the National Assembly are seeking stay of execution and/or conservatory orders suspending the effect of part of the aforesaid judgment declaring sections 76, 78, 84, 87, 88 and 89 of the *Finance Act, 2023* as unconstitutional, null and void pending hearing and determination of their intended appeal. They are also seeking an order suspending the declaration of constitutional invalidity of the above provisions pending appeal. The application is premised on the grounds enumerated on the face of the application and the supporting affidavit of the Clerk to the National Assembly, Samuel Njoroge sworn on December 6, 2023 and the supplementary affidavits sworn by the Deputy Clerks of the National Assembly Jeremiah Ndombi dated December 18, 2023 and Serah Kioko dated December 28, 2023.

3. In Civil Application No E581 of 2023, The Cabinet Secretary for the National Treasury and Planning and the Hon Attorney General, (the applicants) are seeking similar orders as in 577 of 2023. The application is premised on grounds listed on the face of the application and the affidavit of the Cabinet Secretary, Prof Njuguna Ndung'u sworn on December 11, 2023.

4. In Civil Application No E585 of 2023, Okiya Omtatah Okoiti, Eliud Karanja Matindi, Benson Odiwuor Otieno & Blair Angima Oigoro (the applicants) are seeking an order suspending the order staying the effects of the impugned judgment, which was issued by the trial Court. The application is premised on the grounds enumerated on the face of the application and the affidavit of Okiya Omtatah Okoiti sworn on December 11, 2023.

5. In Civil Application No E596 of 2023, Katiba Institute and 43 others, (the applicants), seek a conservatory order suspending sections 30 to 38 of the *Finance Act* (amending sections 5, 8, 12, 17, 31, 34, 43, First Schedule and the Second Schedule of the *VAT Act*); section 47 of the *Finance Act, 2023* 30 (amending the First Schedule to the *Excise Duty Act, 2015*); and section 47(a)(v) of the *Finance Act, 2023* (amending part i of the first schedule to the *Excise Duty Act, 2015*) pending the hearing and determination of the intended appeal. The application is premised on grounds listed on the face of the application and the supporting affidavit of the applicant's litigation manager one Chris Kerkering, sworn on December 18, 2023.

6. Briefly, the Finance Bill, 2023 was published on April 28, 2023 in Kenya Gazette No 56 (National Assembly Bill No 14 of 2023). It was tabled before the National Assembly on May 4, 2023 for the first reading. A public notice inviting members of the public and relevant stakeholders for public participation was published in the print media on 7th and May 8, 2023 inviting public comments on the Bill to be presented to the Departmental Committee on Finance and National Planning. The Departmental Committee on Finance and National Planning presented its report on the Bill to the National Assembly on June 13, 2023.

7. The Bill was presented to the National Assembly on June 14, 2023 for the Second Reading. On June 20, 2023 it came up for the Third Reading. The National Assembly passed the Bill on June 23, 2023 with some amendments. It received presidential assent on June 26, 2023. It became the *Finance Act, 2023*. The *Finance Act, 2023* was to come into operation or be deemed to have come into operation as follows-

   (a) On the 1st of September, 2023, sections 10, 26 (b)(xiii), 52, 56, 63, 64 and 74;

   (b) On the January 1, 2024, sections 5(c), 6, 12, 14, 20, 25, 26(a), 26(b)(iii), 26(b)(v), 26(b)(vii), 26(b)(ix), 26(b)(x), 26(b)(xii), and 27; and

   (c) All other sections, on the July 1, 2023.

8. The *Finance Act, 2023* amended 12 Acts, namely;

   (a). *Income Tax Act*, cap 470;

   (b). *Value Added Tax Act, 2013*;

   (c) *Excise Duty Act, 2015*;

   (d) *Tax Procedures Act, 2015*;

   (e). *Miscellaneous Fees and Levies Act, 2016*;

   (f). *Betting, Gaming and Lotteries Act, 1991*

   (g) *Kenya Roads Board Act, 1999*;

   (h) *Kenya Revenue Authority Act, 1995*;

   (i) *Employment Act, 2007*;

(j) *Unclaimed Financial Assets Act, 2011*;

(k) *Statutory Instruments Act, 2013*; and

(j) *Retirement Benefits (Deputy President and Designated State Officers) Act, 2015*.

9. The *Act* attracted eleven constitutional petitions which were filed in the High Court challenging the process leading to its enactment and the constitutionality of several provisions of the Act. The Petitions were Nos E181 of 2023, E211 of 2023, E217 of 2023, E219 of 2023, E221 of 2023, E227 of 2023, E228 of 2023, E232 of 2023, E234 of 2023, E237 of 2023 and E254 of 2023. On August 7, 2023, the petitions were consolidated and No E181 of 2023-*Okiya Omtata Okoiti and 6 others v the Cabinet Secretary for the National Treasury and Planning and others* was designated as the lead file.

10. The National Assembly and The Speaker of the National Assembly (the applicants in Civil Application Nos E577) & the Cabinet Secretary for National Treasury and Economic Planning and the Attorney General (the applicants in E581 of 2023) opposed the consolidated petitions maintaining that the challenged provisions and the legislative process leading to their enactment met the constitutional threshold. In the impugned judgment dated November 28, 2023, the learned justices of the High Court declared sections 76, 77, 78, 84, 87, 88 and 89 of the *Finance Act 2023* unconstitutional. However, the Court upheld the constitutional validity of sections 30 to 38 and 47 of the impugned Act.

11. Immediately after the delivery of the judgment, counsel for the applicants in Nos 577 of 2023 applied for a temporary stay of the judgment pending filing a formal application for stay/conservatory orders in this court. In its ruling dated November 28, 2023, the trial court granted the stay sought and stayed the effects of its judgment. The stay was to lapse January 10, 2024.

12. At the hearing of these consolidated applications, learned counsel Mr Murugara, Mr Mwendwa and Mr Kuiyoni appeared for the applicants in Civil Application No E577 of 2023. Learned counsel Prof Githu Muigai SC, Mr Kimani Kiragu, SC and Mr Mahat appeared for the 50th & 51st respondents. Mr Muhoro and Mr Gaya appeared for the 53rd respondent. Mr Miller and Wena appeared for the 54th respondent. Mr Omulama appeared for the 55th respondent.

13. In Civil Application No E581 of 2023, learned counsel Prof Muigai SC, Mr Kiragu SC, and Mr Mahat appeared for the applicants. Mr Murugara, Mr Mwendwa and Mr Kuiyoni appeared for the 50th and 51st respondents.

14. In Civil Application No E585 of 2023, the 1st, 2nd and 4th respondents respectively appeared in person. Learned counsel Mr Ometto appeared for the 3rd applicant.

15. In Civil Application No E596 of 2023, Mr Ochiel Dudley appeared for the 1st, 16th to 19th and the 22nd applicants. Mr Omtatah, Mr Matindi and Mr Otieno, (the 2nd, 3rd and 4th applicants appeared in person). Mr Ometto appeared for the 5th applicant. Learned counsel Mr Cherongis appeared for the 12th respondent. Mr Eric Theuri and Ms. Ludia appeared for the 14th applicant. Mr Oginga appeared for the 15th applicant. Mr Ogada appeared for the 20 and 21st applicants. Prof Ogola appeared for the 28th to 37th applicants.

16. The parties not specifically mentioned above did not attended court despite having been duly served nor did they file any pleadings. Hearing of the applications proceeded, their absence notwithstanding.

17. We have read the grounds and the affidavits in support of the applications. We have also read the grounds of opposition and the affidavits filed in opposition to the applications. We have also read the

written submissions filed by the parties, which they all highlighted orally in court. We commend all the parties for their industry and diligence in articulating their respective positions. We note that the submissions by all the parties are essentially a replication of the grounds in support or in opposition to the applications. We therefore find that it will add no value for us to rehash the parties' pleadings. Instead, we shall highlight the parties' submissions and the key grounds as stressed by the parties before us.

18. On behalf of the applicants in Civil Application No 577 of 2023, Mr Murugara submitted that the applicants have already filed Civil Appeal No E003 of 2024 in which they have raised arguable grounds. Therefore, the applicants have satisfied the first limb of the tests under rule 5(2)(b), which is, they have an arguable appeal.

19. On the nugatory aspect, Mr Murugara submitted that tax is a continuous annual mechanism. Therefore, the uncollected housing levy for the period of the declared invalidity will not be recovered should the appeal succeed. He argued that the public has a remedy of getting tax rebates for overpaid taxes if this court agrees with the High Court. He maintained that the contracts already entered into by the government on the basis of the *Finance Act, 2023* are binding on the government and if the contracts are breached, the government will be required to pay damages for breach of contract.

20. Mr Murugara also submitted that sections 88 and 89 of the *Finance Act, 2023* affected over 1,000 statutory instruments in that it granted them a one-year lifeline. Further, all the statutory instruments touching on the three arms of the government and some of the statutory instruments relate to collection of revenue from statutory tribunals. He argued that if the instruments are not kept alive, the affected institutions risk dissolution to the detriment of the public. In addition, it would be impossible to reconstitute those bodies because new statutory instruments will have to be enacted.

21. Mr Murugara submitted that public interest favours a stay pending appeal and or pending enactment of an appropriate legislation to address the issues detailed in the judgment. Mr Murugara implored this court to consider public interest and grant conservatory orders to prevent the appeal from being rendered nugatory. To buttress his submissions, counsel cited Nairobi Civil Application E304 of 2023 *Cabinet Secretary for the National Treasury & Planning & another v Okiya Omtatah Okoiti & others* in which this court stayed a conservatory order.

22. Prof Muigai, agreeing with Mr Murugara reiterated that the intended appeals are arguable and urged the court to bear in mind that before this court is not an ordinary suit, but a matter of grave public interest.

23. Mr Kiragu also stressed that the applicants' intended appeal is arguable. On the nugatory aspect, Mr Kiragu argued that if the stay is refused, the projects commenced under the affordable housing project would stall, the anticipated revenue of 73 Billion will not be collected, and jobs would be lost. He agreed with Mr Murugara that there is a mechanism to offer rebates for over taxation in the event the appeal is unsuccessful.

24. Regarding public interest, counsel cited Nairobi Civil Application No E304 of 2023 (*supra*) and maintained that a party exercising its right of appeal is entitled to maintain the *status quo* pending the determination of the appeal.

25. Mr Mahat, submitted that the stay granted by the High Court was discretionary in nature issued pursuant to rule 32 of the *Mutunga Rules*. Further, the stay granted by the High Court is a negative order not capable of being stayed as prayed in Civil Application No 585 of 2023. Mr Mahat also submitted that the only remedy available to the applicant's is to pursue their appeals because the process of rectifying the issues raised by the High Court has been challenged in Kisumu High Court Petition

No E013 of 2023 in which a conservatory order was issued stopping public participation. Counsel cited *National assembly and another v Eliud Karanja Matindu & others* Civil Application No E176 of 2023 in which this Court granted stay pending appeal as sought by the applicants.

26. Mr Omulama appearing for the 55th respondent, Mr Miller and Mr Wena appearing for the 54th respondent and Mr Gaya representing the 53rd respondent supported Civil Application Nos E577 & E581 of 2023.

27. Mr Omtatah in support of Civil Application No E585 of 2023 submitted that unlike the South African Constitution, our Constitution does not grant any court the power to suspend its finding of unconstitutionality of a statute. He cited article 2(4) of the *Constitution*, which provides that any law that is inconsistent with the *Constitution* is null and void. He distinguished the finding of this court in Civil Application No E176 of 2023 (*supra*) from the facts of this case arguing that the import of Article 2(4) was never determined in the said case. Regarding the argument that the government had signed binding contracts and it may be sued if it does not honour its part, Mr Omtatah submitted that section 53(8) of the *Public Procurement and Assets Disposal Act* prohibits public entities from procuring anything without a budget/expenditure. Consequently, if at all any contracts existed; the same are illegal and a nullity.

28. Mr Omtatah identified what he termed as glaring contradictions in the applicants' affidavit since the Cabinet Secretary for the National Treasury in his affidavit stated that the government has no capacity to refund the money yet counsel for the applicant submits that the government is capable of refunding the money. He asserted that the government can recover unpaid taxes by backdating the tax obligations as it has done in the past.

29. Regarding the introduction of the Affordable Housing Bill in Parliament, Mr Omtatah argued that the applicants have already conceded to the impugned judgment and therefore, the issue of housing levy is moot. Furthermore, the applicants ought to choose whether to pursue the appeal or implement the issues raised by the High Court. Further, the fact the Affordable Housing Bill has been challenged before and an order of stay issued, cannot be a basis for granting the say sought.

30. The 2nd respondent in E577 of 2023 Mr Eliud Matindi submitted that the submissions by the applicants in Civil Application No E577 of 2023 & E581 of 2023 speak to the appeal and not to the application. He stated that the Finance Bill, 2023 was challenged before it became law and everyone knew that the constitutional validity of its provisions were under judicial scrutiny. Therefore, any diligent person could not have entered in to a contract based on provisions of a law that was under judicial scrutiny.

31. Mr Matindi wondered why Kenya Revenue Authority would submit that they risk being cited for contempt if orders of stay are not granted yet it is their submission that they are capable of refunding the money in the event their appeal is not successful.

32. Regarding this court's ruling in Civil Application No E176 of 2023, (*supra*), Mr Matindi submitted that the suspension of the invalidity for six months was to enable the appellants appeal and it was not for the purposes of allowing the appellant to regularize the defects in the law that was declared unconstitutional.

33. Mr Ometto for the 3rd respondent submitted that there was material misrepresentation of facts by the applicants in Civil Application No E577 of 2023 and E581 of 2023 since no application for contempt or refunds was ever made before the High Court. Mr Ometto implored this court to depart from its decision in Civil Application No E176 of 2023 (*supra*) since article 2(1) and 2(3) outlaws borrowing doctrines from other jurisdictions that contradict the Kenya *Constitution*.

34. The 4th respondent, Mr Benson Odiwuor Otieno argued that public interest militates against the applicants since laws are presumed to be constitutional until proven otherwise. Furthermore, no outcomes derived from actions or laws declared unconstitutional can be justified in the public interest. He maintained that the supremacy of the *Constitution* enshrined in article 2 of the *Constitution* supersedes all considerations. He added that public interest cannot lie in transient benefits or results of an unconstitutional action. It lies first in the fidelity of the executive to constitutional principles and the hope that the fabric of society remains woven with the threads of justice, equality, and the inviolable rule of law. He cited *Norton v Shelby County* 118 US 425 (1886), where the US Supreme Court held that

> "an unconstitutional act is not law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed".

35. Mr Otieno also cited the Supreme Court of India in *Behram Khurshid Pesikaka v State of Bombay* [1955] 1 SCR 613 that:

> "the law-making power of the State is restricted by a written fundamental law and any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus, a nullity. A declaration of unconstitutionality brought about by lack of legislative power as well as a declaration of unconstitutionality brought about by reason of abridgement of fundamental rights goes to the root of the power itself, making the law void in its inception."

36. On behalf of the 11th respondent, Mr Cherongis submitted that a stay of execution does not transform illegalities into constitutional compliance and that there cannot be any irreparable damages since most Kenyans do not suffer from a housing crisis. He argued that the applicants are entitled to a right to appeal but not to a right to seek extension of illegalities through interim application. Furthermore, the substratum of the appeal has already been declared unconstitutional as a result, there is nothing to be rendered nugatory.

37. On behalf of the 13th respondent (The Law Society of Kenya), Mr Theuri submitted that the applicants have failed to demonstrate how the judgment has prejudiced the government's ability to conduct its business. Furthermore, there has been no attempt whatsoever to prove the alleged contracts. To the contrary, the effect of a declaration of unconstitutionality of section 84 of the *Finance Act, 2023* was that the levy was illegal and unlawful; therefore, allowing the application is akin to condemning innocent Kenyans to an illegal tax regime.

38. Counsel also submitted that this being a novel tax, no prejudice will be occasioned to the government if the orders are refused. Counsel cited *John Mbaabu & another v Kenya Revenue Authority* [2020] eKLR in support of the proposition that should the appeal succeed, the applicants would simply go back and continue implementing the law as it is.

39. Counsel cited the classic saying that "if you are in a hole, stop digging" and argued that if the applicants find themselves in a situation where they cannot refund the taxpayers' money, the reasonable thing would be not to seek orders to continue collecting funds with no refund mechanism. In conclusion, Mr Theuri cited *Canada (AG) v Hislop* [2007] 1 30 SCR 429 in support of the position that suspensions should only be used where striking down the legislation without enacting something in its place would pose a danger to the public, threaten the rule of law or where it would result in deprivation of benefits from deserving persons.

40. On behalf of the 14th respondent, Mr Oginga submitted that this court cannot sanction the violation of article 40(2) of the *Constitution* by granting stay orders.

41. On behalf of the 15-19 and 22nd respondent, Mr Ochiel urged this court to suspend section 30-38 and 47 of the *Finance Act, 2023*, which were found to be constitutional by the trial court. He submitted that their intended appeal is arguable considering that the impugned judgment has manifest legal and factual defects as highlighted earlier.

42. On the nugatory aspect, counsel submitted that irreparable harm will occur if the order is not granted because allowing collection of taxes which may be nullified by the court would render the appeal nugatory. He also urged that the effect of implementing the increased excise duty on paper packaging and glass bottles tax is irreversible. Further, a successful appeal would never undo the environmental harm and climate change impacts. Likewise, the doubled VAT from 8% to 16% is a regressive tax that burdens low-income earners excessively, thus threatening their right to life and livelihood.

43. Mr Ochiel submitted that public interest favours suspending the doubled VAT on fuel and increased excise duty on glass bottles and imported paper packaging pending appeal since the precautionary principle requires courts to forestall any threat to the environment.

44. Regarding Civil Applications No E577 of 2023 & E581 of 2023, Mr Ochiel submitted that the introduction of Affordable Housing Bill has dramatically altered the circumstances, and urged this court to decline jurisdiction to hear the applications since the issues are now moot.

45. On behalf of the 20th and 21st respondent, Mr Ogada cited the South African case of *Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31 and submitted that the declaration of unconstitutionality merely declares an existing fact and the inconsistency subsists from the date of the declaration.

46. On behalf of the 28th-37th respondents, Prof Ogola submitted that a declaratory order is akin to a negative order since it does not direct the applicants to do anything and therefore it cannot be stayed. Further, no contract has been placed before the court to demonstrate that the government stands to suffer litigation for breach of contract, and therefore the alleged irreversible harm has not been proved.

47. Mr Kiragu in his rejoinder reiterated his clients' right to appeal even as they seek to rectify the law in Parliament. He argued that the Supreme Court settled the question of suspension of invalidity of a statute in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR and underscored the binding nature of Supreme Court decisions under article 163(7) of the *Constitution*. Regarding public interest, Mr Kiragu submitted that there are hundreds of statutory instruments whose lifespan end on January 26, 2024 unless some lifeline is breathed into them, therefore, it is in public interest that the stay sought be granted. Lastly, Mr Kiragu cited Rule 29 of the *Court of Appeal Rules, 2022* and stated that the introduction of additional new evidence that was not available before the High Court is not an issue to be decided at this forum, but in the appeal.

48. In his rejoinder, Mr Omtatah distinguished the Supreme Court dictum in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (*supra*) from the facts of this case.

49. In his rejoinder, Mr Matindi reiterated that service delivered outside the law is not public service.

50. Lastly, Mr Ochiel in his rejoinder recalled that the jurisdiction of this court under rule 5(2) (b) is equitable and that the court must balance the scales of justice while granting or refusing to grant orders.

51. We have considered the judgment, the order that temporarily stayed the effects of the judgment, the applications before us, together with the rival affidavits and written submissions by all the parties. We have also considered the law and the authorities cited before us. The law on the grant of orders under rule 5(2)(b) of the *Court of Appeal Rules, 2022* (including injunctions) is well settled. This court in *Chris Mungga N Bichage v Richard Nyagaka Tongi & 2 others* [2013] eKLR succinctly set out the law as follows: -

> "The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated."

52. The Supreme Court in *Ethics and Anti-Corruption Commission v Prof Tom Ojienda & Associates & 2 others* CA No 21 of 2019 re-stated the principles that guide the Court to include the two principles stated above as well as a further consideration of whether it is in the public interest that an order of stay should be granted. The learned justices stated as follows:

> " In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, this court enunciated three principles for consideration in determining applications for stay of execution. They are: "whether the appeal or intended appeal is arguable and not frivolous; that unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory; and that it is in the public interest that the order of stay be granted. Has the applicant met this criteria."

53. Rule 5(2)(b) of the *Court of Appeal Rules, 2022*, grants this court unfettered discretion to order a stay of execution of an order pending appeal. The only qualification is that this wide discretion must be exercised judicially and not capriciously. That jurisdiction is original. (See *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR).

54. On the first limb, that is whether or not the 4 applications before us have demonstrated that their intended appeals are arguable, this court in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR described an arguable appeal in the following terms:

> "vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
>
> viii). In considering an application brought under rule 5(2)(b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal."

55. We have looked at the 13 grounds raised in the draft memorandum of appeal in Civil Application No E577 of 2023. We have also considered the 5 grounds of appeal elaborated at paragraph 7 of the affidavit in support of Civil Application E581 of 2023. Whether or not the trial court was correct in concluding that the impugned sections are unconstitutional is not an idle ground. It is a ground worth consideration by the appellate court.

56. We have also considered the 22 grounds of appeal enumerated in the memorandum of appeal in respect of Civil Application No E585 of 2023 and the 8 grounds contained in the applicant's affidavit in support of Civil Application No E596 of 2023. Whether or not the trial court had jurisdiction to stay

a declaration on constitutional invalidity is an arguable ground. Lastly, whether or not the trial court was correct in upholding the constitutional validity of some of the challenged provisions is also an arguable ground.

57. Cognizant of the fact that an applicant needs only to demonstrate one arguable ground and not a multiplicity of them, and further that an arguable appeal is not necessarily one that will succeed, we have no hesitation in finding that all the applicants have satisfied us that they have an arguable appeal.

58. We now examine the question whether the consolidated applications surmount the nugatory aspect. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (*supra*) this court stated that:

> " (ix). The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
>
> (x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

59. In determining whether an appeal will be rendered nugatory, the court has to consider the conflicting claims of both parties and each case has to be considered on its merits. (See *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd* [2002] 1 EA 227). What commends itself to us is the balance between preserving the *status quo* pending the hearing of the intended appeal and the consequences of suspending the declarations made by the trial court.

60. The applicants in E577 of 2023 and E581 of 2023 argued that should their appeals succeed; the government will not be able to collect the uncollected taxes. It was also argued that there is a mechanism for rebates should the appeals fail. The counter argument advanced in opposition to this line of reasoning was that tax collection can be backdated and collected. We note that the applicants did not deny that after the Court of Appeal (differently constituted) stayed the High Court decision in Civil Application No 304 of 2023, the Government backdated the taxes and continued to collect the same even during pendency of the proceedings in the High Court. Accordingly, the argument that the appeal will be rendered nugatory premised on the ground that it is not possible to backdate the taxes in the event the appeal succeeds collapses.

61. The other argument proffered by the applicants was that the government risks being sued for breach of contracts signed in its effort to implement the Affordable Housing Project. However, not even a single contract was placed before us to support this assertion. In absence of cogent evidence to support such a grave assertion, the argument that the appeals will be rendered nugatory on this ground fails.

62. It has also been argued that some government departments may shut down and jobs will be lost. However, details of the alleged jobs were not provided. The applicants left it to the court to fill the gaps. We cannot do so without appearing to descend into the arena of the dispute. We decline the invitation to do so. It was also argued that over 1000 statutory instruments would lapse come January 2024. In opposition to this argument, the respondents argued that Parliament knew the life span of these statutory instruments, but it only extended their life span for one year in 2022. We have carefully addressed our minds to this ground guided by the judicial definition of what amount to nugatory. We are not persuaded that the substratum of the appeal will be destroyed. In any event, nothing stops Parliament from re-enacting the statutory instruments.

63. We now address Civil Application No E585 of 2023 in which the applicants urge this Court to, pending the hearing and determination of their appeal, suspend the order granted on November 28, 2023. We note that the applicants have reproduced the order they are inviting this court to stay. A

reading of the said order shows that it was granted "pending filing of an application for stay before this court." Two applications for stay, namely Civil Applications Nos 577 of 2023 and 581 of 2023 were filed in this court. A natural and ordinary interpretation of the said order shows that it lapsed the moment the applications were filed in this court. We are now being invited to stay a non- existent order. We decline the invitation to do so. Evidently, Civil Application No E585 of 2023 is moot.

64. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose.

65. Notwithstanding our above finding, for whatever it is worth, we will examine the nugatory aspect. We note that the applicants' intended appeal in E585 of 2023 is premised on the question whether the High Court had jurisdiction to stay the orders. We fail to understand how such an appeal can be rendered nugatory if the stay is refused. The upshot is that Civil Application No 585 of 2023 collapses on two fronts. One, for being moot. Two, for failing both tests.

66. Lastly, we now address Civil Application number 596 of 2023. The applicants, (Katiba Institute and 48 others), are urging this court to issue a conservatory order suspending sections 30 to 38 of the *Finance Act* (amending sections 5, 8, 12, 17, 31, 34, 43, First Schedule and the Second Schedule of the *VAT Act*); section 47 of the *Finance Act, 2023* 30 (amending the First Schedule to the *Excise Duty Act, 2015*); and section 47(a)(v) of the *Finance Act, 2023* (amending Part I of the First Schedule to the *Excise Duty Act, 2015*) pending the hearing of the appeal.

67. A reading of the said prayer leaves us with no doubt that the applicants are essentially inviting this court to suspend the operation of sections of the law on an application without hearing the appeal on merits. In principle, there is a general presumption that statutes enacted by parliament are constitutional, until the contrary is proved. Such a drastic order cannot be issued on an application. No court of law properly directing its mind to the law can grant such an order.

68. In summation, applying the general presumption that a statue is constitutional until declared unconstitutional, we find that the applicants have not demonstrated how the intended appeal which will determine whether the court's determination on the said sections will stand or not will be rendered nugatory. Should the appeal succeed, the sections will be annulled. If it fails, the law will stand as it is. For the foregoing reasons we, find and hold that Civil Application No 596 of 2023 does not meet the nugatory test.

69. We now address the question whether it is in public interest that we can grant the stay sought in applicants Nos E577 of 2023 and E581 of 2023. The applicants in the said applications made a spirited argument in their bid to persuade the court that it is in public interest that the prayers sought be granted. Counsel buttressed their plea by citing the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (*supra*) and *National assembly & another v Eliud Karanja Matindu & others* Civil Application No E176 of 2023. Lastly, the applicants cited E304 of 2023, in which this court (differently constituted) granted a stay lifting conservatory orders, which had stayed the operation of the *Finance Act, 2023* at the interlocutory stage.

70. We are alive to the edict in article 163(7) of the *Constitution* addressed to all the courts in Kenya decreeing to them that they are bound by authoritative pronouncements of the apex court. However,

it is settled law that a case is only an authority for what it decides. As was observed by the Supreme Court of India in *State of Orissa v Sudhansu Sekhar Misra Manu*/SC/0047/1967:

> "A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it."

71. As was held by the Earl of Halsbury, LC in *Quinn v Leathem*, 1901 AC 495 stated:

> " ...every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..."

72. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

73. We have carefully read the ratio of the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (*supra*). A reading of this decision leaves no doubt that it is distinguishable from the facts in the case before us. The said case dealt with the correct interpretation to be accorded to article 34(3) of the *Constitution*. This is totally different from the issues before us.

74. In Civil Application No E176 of 2023 (*supra*), this court cited an excerpt from the judgment of the High Court in *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR and proceeded to suspended a declaration of constitutional invalidity for 6 months citing the peculiar circumstances of the case. The framing of the order leaves no doubt that it was not meant to be an order of general application.

75. Civil Application number E304 of 2023 involved interim conservatory orders suspending implementation of a statute as opposed to a final judgment declaring a statute to be constitutionally infirm. It is therefore of no relevance to this case.

76. We are also aware of a recent decision of this court (differently constituted) in Civil Application No E583 of 2023, *The Cabinet Secretary, Ministry of Health v Joseph Enock Aura & 13 others* in which this court stayed a High Court order suspending the implementation of the *Social Health Insurance Act* pending hearing of a constitutional petition. However, unlike in this case where by the intended appeal is challenging a final judgment; the impugned order in the said case was issued at the *ex-parte* stage before hearing the case on merit. Here lies the difference.

77. Lastly, we are aware of the Supreme Court decision in *Bia Tosha Distributors Ltd v Kenya Breweries & 6 others* [2023] eKLR in which the apex court underscored that conservatory orders are remedies available under the *Constitution*. We agree with this reasoning. However, the remedies must be merited. The Supreme Court did not suggest otherwise.

78. As authorities suggest, public interest is also a consideration in applications of this nature. However, an applicant must satisfy the first two tests. The assertion that the court grants the stay in public interest was backed by several reasons. It argued that some government projects may shut down if the tax is

not collected. It was claimed that the government is likely to lose revenue, and that the government risks litigation in the event it is unable to honour contractual obligations. Further, the litigation costs will be borne by the taxpayers. We were also told that the government will not be able to construct the affordable houses and that jobs will be lost. In addition, it was argued that 1000 statutory instruments will lapse leaving a lacuna which will endanger operations of various state entities.

79. In opposition to this ground, the respondents maintained that the two applications do not satisfy the public interest threshold. It was argued that no irremediable harm will accrue to the government as opposed to the public.

80. The ultimate question is whether on a conspectus of all the relevant facts and considerations, public interest favours staying the impugned decision and or suspending the declaration of invalidity. Public interest is expressed by legislative enactments, constitutional constraints, or judicial pronouncements. Hence, public interest is a legal principle founded on the concept of public good. Even though a decision may disturb only one part of community, the court should weigh the whole of the community while applying public interest considerations.

81. The other important point to bear in mind is that public interest is represented by constitutional values. Therefore, application of public interest must conform with the *Constitution*. Article 2(4) of the *Constitution* affirms the supremacy of the *Constitution* relative to ordinary statutes. It provides as follows:

Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

82. A plain reading of the above article leaves no doubt that the invalidation of any law found to be *ultra vires* the *Constitution* should be immediate. The High Court in *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR which was cited by the parties before us opined as follows:

> "It's trite that an unconstitutional law is not law and actions or decisions taken pursuant to the an unconstitutional law would out rightly be illegal. It follows that once a law has been declared unconstitutional it has no business remaining in the law books. The fundamental issue that follows is under what circumstances if at all a court can suspend an order declaring a legislation to be invalid."

83. However, the court can suspend declarations of invalidity under limited circumstances. The most classic judicial pronouncement fashioning suspended declarations was aptly pronounced by the Canadian Supreme Court 1985 in the case reported as the *Manitoba Language Reference* [1985] 1 SCR 721 in which it held:

> "The *Constitution* will not suffer a province without laws. Thus, the *Constitution* requires that temporary validity and force and effect be given to the current Acts of the Manitoba Legislature from the date of this judgment, and that rights, obligations and other effects which have arisen under these laws and the repealed and spent laws prior to the date of this judgment, which are not saved by the de facto or some other doctrine, are deemed temporarily to have been and continue to be effective and beyond challenge. It is only in this way that legal chaos can be avoided and the rule of law preserved.
>
> To summarize, the legal situation in the Province of Manitoba is as follows. All unilingually enacted Acts of the Manitoba Legislature are, and always have been, invalid and of no force or effect.

All Acts of the Manitoba Legislature which would currently be valid and of force and effect, were it not for their constitutional defect, are deemed temporarily valid and effective from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing [in both official languages]."

84. In *Schachter v Canada* [1992] 2 SCR 679, (Cited in *Law Society of Kenya v Kenya Revenue Authority & another* (*supra*)), Lamer CJ held that temporarily suspending the declaration of invalidity to give Parliament an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted when:

A. Striking down the legislation without enacting something in its place would pose a danger to the public;

B. Striking down the legislation without enacting something in its place would threaten the rule of law; or,

C. The legislation was deemed unconstitutional because of under inclusiveness rather than over breadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

85. The High Court in *Law Society of Kenya v Kenya Revenue Authority & another*(*supra*) after analyzing decided cases while discussing the circumstances under which suspension of invalidity can be granted stated:

"...in determining whether or not to issue a suspended declaration, a court should ask:-

(i) Would issuance of a suspended declaration of invalidity serve a pressing and substantial purpose?

(ii) Is there a rational connection between the purpose and a suspended declaration;?

(iii) What impact on constitutional rights will arise from the issuance of a suspended declaration,

(iv) is a suspended declaration the most minimally impairing measure that can be employed to achieve its objective;?

(v) Will the specific benefits achieved by the suspended declaration outweigh any adversity it inflicts on constitutional rights bearing in mind the supremacy of the *Constitution*?

32. It must also be born in mind that a delay or suspension of the declaration of invalidity would be warranted where striking down legislation with nothing in its place would threaten the rule of law or pose a danger to the public or it's imperative to avoid a legal vacuum – in order to deem the legislation valid for the time required to translate and re-enact the statute.

33. There are important reasons of constitutional principle underlying the conclusion that a court is not empowered to resuscitate legislation that has been declared invalid. To do so, a court would, in effect, legislate. Such an exercise would offend both the separation of powers principle, in terms of which lawmaking powers are reserved for the Legislature, and the principle of constitutional supremacy, which renders law that is inconsistent with the Constitution invalid."

86. As decided cases suggest, the purpose of the suspension is to enable the legislature to respond directly to a holding of invalidity. Although an unconstitutional law is maintained in force for a short time, the *Constitution* is still respected, because if no new law is enacted by the time the period of suspension ends, the declaration of invalidity takes effect. It is evident that the operation of the invalidity is suspended so as to allow parliament to cure the defect. (See South African Constitutional Court in *Minister for Transport & another Anele Mvumvu & others* {2-12} ZACC 20 and the Canadian Supreme Court *Schachter v Canada* (*supra*).

87. As authorities suggest, the jurisdiction to suspend declarations of invalidity is narrow and is only exercised in limited cases. The question narrows to whether the applicants have established a case for the suspension sought in public interest.

88. The presumption of constitutional validity in respect of the impugned sections was extinguished the moment the trial court issued the declaration. The question that begs an answer is whether in the circumstances of this case it would be in public interest to grant a stay whose effect is to allow a statute that has been found to be constitutionally infirm to continue being in the law books pending the hearing of an appeal. We do not think so. This is because should the court hearing the appeal affirm the constitutional invalidity of the impugned laws, then all actions that will have been undertaken under the impugned sections of the law during the intervening period will be legally frail.

89. The trial court held that the Housing Levy was introduced without a legal framework. It also held that the levy was targeting a section of Kenyans. In our view, public interest lies in awaiting the determination of the appeal. This is because if the stay sought is granted at this stage, should the appellate court affirm the impugned decision, then some far-reaching decisions that will have been undertaken pursuant to the impugned laws may not be reversible. Public interest in our view tilts favour of in not granting the stay or the suspension sought. Public interest tilts in favour awaiting the determination of the issues raised in the intended appeals.

90. In conclusion, we find and hold that none of the 4 consolidated applications satisfies both limps. Accordingly, Civil Applications Nos E577 of 2023, E581 of 2023, E585 of 2023 and E596 of 2023 are hereby dismissed. We make no orders as to costs. However, we direct that the appeals be heard expeditiously so that the issues raised in the appeals can be resolved with finality.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2024.

L. ACHODE

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

L. GACHOKA, CIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original.

Signed

DEPUTY REGISTRAR