



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Revenue Authority & 3 others v Kinoti & 25 others; Sanga & 2 others
(Interested Parties) (Civil Application E187 & E188 of 2022 (Consolidated))
[2023] KECA 1568 (KLR) (22 June 2023) (Ruling) (with dissent - F Sichale, JA)**

Neutral citation: [2023] KECA 1568 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E187 & E188 OF 2022 (CONSOLIDATED)
DK MUSINGA, AK MURGOR & F SICHALE, JJA
JUNE 22, 2023**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

**GEOFFREY KAARIA KINOTI 1ST RESPONDENT
SIMON MAUNDU 2ND RESPONDENT
KEPHA GITHU GAKURE 3RD RESPONDENT
ROBERT THINJI MURITHI 4TH RESPONDENT
PETER NJENGA KURIA 5TH RESPONDENT
HUMPHREY KARIUKI NDEGWA 6TH RESPONDENT
AFRICA SPIRITS LIMITED 7TH RESPONDENT
WOW BEVERAGES LIMITED 8TH RESPONDENT
THE CHIEF MAGISTRATES' COURT MILIMANI LAW
COURTS 9TH RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTION 10TH RESPONDENT
THE DIRECTOR OF CRIMINAL INVESTIGATIONS 11TH RESPONDENT
THE ATTORNEY GENERAL 12TH RESPONDENT**

AND

**SHEILA SANGA INTERESTED PARTY
PETER MWENDA NTURIBI INTERESTED PARTY
IRENE MUTHEE INTERESTED PARTY**



**AS CONSOLIDATED WITH
CIVIL APPLICATION E188 OF 2022**

BETWEEN

INSPECTOR GENERAL OF POLICE 1ST APPLICANT
DIRECTOR CRIMINAL INVESTIGATIONS 2ND APPLICANT
ATTORNEY GENERAL 3RD APPLICANT

AND

GEOFREY KAARIA KINOTI 1ST APPLICANT
SIMON MAUNDU 2ND APPLICANT
KEPHA GITHU GAKURE 3RD APPLICANT
ROBERT THINJI MURITHI 4TH APPLICANT
PETER NJENGA KURIA 5TH APPLICANT
HUMPHREY KARIUKI NDEGWA 6TH APPLICANT
AFRICA SPIRITS LIMITED 7TH APPLICANT
WOW BEVERAGES LIMITED 8TH APPLICANT
**THE CHIEF MAGISTRATE’S COURT MILIMANI LAW
COURTS 9TH APPLICANT**
THE DIRECTOR OF PUBLIC PROSECUTION 10TH APPLICANT
THE KENYA REVENUE AUTHORITY 11TH APPLICANT
SHEILA SANGA 12TH APPLICANT
PETER MWENDA NTURIBI 13TH APPLICANT
IRENE MUTHEE 14TH APPLICANT

*(An application for stay of execution pending lodging, hearing and
determination of an intended appeal from the Judgment of the High
Court at Nairobi (A. C. Mrima, J.) delivered on 23rd May 2022 in)*

RULING

Ruling of D. K. Musinga, (P.)

1. Before this Court are two separate notice of motion applications both dated 2nd June 2022. One of the applications is by the Kenya Revenue Authority (hereinafter referred to as “the KRA”), and it is brought under the provisions of section 3A and 3B of the *Appellate Jurisdiction Act*, rule 5(2) (b) and 42 of the *Court of Appeal Rules*, 2010. The other application is by the Inspector General of Police (hereinafter referred to as “the IG”), the Director of Criminal Investigations (hereinafter referred to



as “the DCI”) and the Hon. Attorney General (hereinafter referred to as “the AG”) who invoke the provisions of Article 164(3) of the *Constitution of Kenya*, 2010, section 3, 3A and 3B of the *Appellate Jurisdiction Act* and rule 5(2)(b) of the *Court of Appeal Rules*, 2010. In both applications, the applicants seek stay of execution of the judgment and orders of the High Court at Nairobi (A. C. Mrima, J.) delivered on 23rd May 2022 in H. C. Petition No. E495 of 2021.

2. A brief background is that the 1st to 8th respondents in the two related applications were accused of being in possession of excise stamps acquired without the authority of the Commissioner General of KRA; being in possession of excisable goods affixed with counterfeit excise stamps; failing to pay taxes; fraud in relation to tax; and aiding in commission of a tax offence in violation of the *Tax Procedures Act* No.29 of 2015 and the *Excise Duty Act*, No.23 of 2015.
3. The National Police Service through the Officer-in-Charge, Muthaiga Police Station, instituted criminal charges at the Chief Magistrates’ Court, Milimani, viz, Chief Magistrates’ Court Criminal Case No.1333 of 2019.
4. Being aggrieved by the criminal charges levelled against them, the 1st to 8th respondents filed Constitutional Petition No. E495 of 2021 at the High Court at Nairobi. The Chief Magistrates’ Court Milimani Law Courts, KRA, the Director of Public Prosecution (hereinafter referred to as “the DPP”), the DCI and the AG were the named as respondents in the petition. Sheila Sanga, Peter Mwenda Nturibi and Irene Muthee appeared in the petition as interested parties.
5. The 1st to 8th respondents also filed a notice of motion dated 22nd November 2021 in which they sought interim conservatory orders to halt further proceedings in Criminal Case No.1333 of 2019 pending inter-partes hearing of the application and the petition. The court granted interim orders as prayed in the application and the application was subsumed in the petition.
6. The germane arguments by the 1st to 8th respondents in their application and the petition were as follows:
 - “a. The investigations leading to their prosecution were conducted by unauthorized and/or improper officers of the National Police Service. The investigations were carried out by the Directorate of Criminal Investigations officers who had not been seconded to KRA. The investigating officers had not been trained in tax related matters and had not become Revenue Protection Services Officers of the KRA. They alleged that all the evidence collected by the said DCI officers was illegally obtained in contravention with the provisions of Article 50 of the *Constitution of Kenya*, 2010.
 - b. The charge sheet commencing the criminal charges emanated from the DCI, whereas the *Constitution* requires all criminal prosecutions to originate from the DPP.
 - c. The DPP’S appointment of public prosecutors from KRA vide Gazette Notice No.3523 of 2021 pursuant to the provisions of section 85 of the *Criminal Procedure Code* was said to be in violation of Article 157 of the *Constitution* which mandates the DPP to objectively evaluate evidence gathered by investigators before taking prosecutorial decision. The DPP, by appointing the public prosecutors from KRA was said to have violated the 1st to 8th respondents’ rights to fair trial envisaged under Article 50 of the *Constitution* since the public prosecutors so appointed were from KRA, the



complainant in the criminal case. They were therefore partisan and conflicted as prosecutors.

- d. The prosecution of the 1st to 8th respondents was in contravention of Article 157(11) of the Constitution which requires prosecution to be conducted in public interest and in the interest of administration of justice.”
7. They contended in their petition that the purported enforcement and administration of tax laws by the DCI was arbitrary and ultra vires its powers since such mandate was reserved for KRA. It was reiterated that the investigations undertaken by the DCI were illegal and did not follow due process envisaged under Part VII of the Tax Procedures Act, 2015 and the East African Community Customs Management Act, 2004.
 8. The orders sought by in the petition and the application were,*inter alia*:
 - i. “A declaration that the role of a complainant, an investigator and a prosecutor cannot be combined into one hand in the criminal justice system designed by Article 50 and 157 of the Constitution.
 - ii. A declaration that a complainant cannot be appointed a private prosecutor because such prosecutors will lack essential and critical independence required by Article 157 (10) of the Constitution.
 - iii. A declaration that a charge sheet in criminal proceeding cannot be instituted by the Kenya Police and a charge sheet cannot be signed by Police Officers as to do so would violate Article 157 (6) (a) of the Constitution.
 - iv. A declaration that the Chief Magistrates’ Court, Milimani, the DPP and the DCI violated Articles 27, 50, 73 and 157 (11) as well as the provisions of Chapter Six of the Constitution.
 - v. A declaration that the DPP in making a decision to charge the 1st to 8th respondents abdicated his constitutional duty by failing to prevent and avoid abuse of the legal process in instituting Nairobi Chief Magistrates’ Court Criminal Case No.1333 of 2019.
 - vi. A declaration that the prosecution of the 1st to 8th respondents in Criminal Case No.1333 of 2019 in the manner proposed and so far undertaken was unfair, discriminatory, an abuse of court process, irrational, unreasonable, malicious, vexatious, and therefore for all intent and purpose unconstitutional.
 - vii. An order prohibiting the applicants in the two applications from sustaining proceeding, hearing, conducting or in any manner dealing with the charges laid or proceedings conducted in Criminal Case No.133 of 2019 or instituting any other charges in any other court or tribunal against the 1st to 8th respondents arising from the same investigations, facts or subject matter.
 - viii. An order prohibiting the Chief Magistrates’ Court Milimani Law Courts from presiding and/or conducting the trial of the 1st to 8th respondents in Criminal Case No.1333 of 2019.



- ix. A declaration that the charges and proceedings in Criminal Case No.1333 of 2019 are unconstitutional and an abuse of the legal process and therefore should be terminated forthwith, stopped and/or quashed.
 - x. A declaration that section 107 of the [Tax Procedure Act](#), 2015 is unconstitutional.
 - xi. A declaration that the Gazette Notice No.3523 published on 15th April,2021 is unconstitutional and that the appointments made thereunder are illegal.
 - xii. Damages for violation of the petitioners’ Bill of Rights.”
9. Opposing the application and the petition, KRA stated that under section 107 of the [Tax Procedures Act](#), it has authority to prosecute tax offences under the relevant tax laws, and that the said authority is exercised under the direction of the DPP. It further argued that the appointment of public prosecutors through Gazette Notice No.3523 of 2021 did not make it the complainant, investigator and prosecutor since its role in the criminal case against the 1st to 8th respondents was to provide witnesses. It further stated that the Republic was the complainant in the criminal case which was being prosecuted by the DPP, and that under section 29 of the [ODPP Act](#), the DPP may appoint any qualified person to prosecute on his or her behalf, who shall be known as a public prosecutor.
10. On his part, the DPP contended that the 1st to 8th respondents had failed to demonstrate that their fundamental rights under the [Constitution](#) had been violated, a requirement established in the famous decision of [Anarita Karimi Njeru v. The Republic](#) [1976-1980] KLR 1272. On the issue of the gazette of public prosecutors, it was stated that section 20 of the [ODPP Act](#) as read with section 85(1) of the [Criminal Procedure Code](#) permits the DPP to delegate his powers, and that the delegation of the powers in questions was done in accordance with the law.
11. The DCI on its part stated that section 28 and 35 of the [National Police Service Act](#) gives it the mandate to investigate and collect intelligence on all criminal matters. It stated that the evidence against the 1st to 8th respondents was not acquired illegally and was therefore admissible in court.
12. The Chief Magistrate’s Court Milimani Law Courts and the AG on their part argued, *inter alia*, that the participation of the Chief Magistrates’ Court in the proceedings would create an impression of bias, thus and prejudicing parties’ rights to a fair hearing as provided in the [Constitution](#).
13. In the impugned judgment, the learned judge granted a plethora of orders, which I reproduce as hereunder:
- “ a. A declaration hereby issues that in the criminal justice system in Kenya, a complainant may investigate its own complaint in instances free from prejudice, but such a complainant and/or an investigator cannot prosecute any offences arising from the complaint and the investigations.
 - b. A declaration hereby issues that prosecution of criminal offences in Kenya must only be undertaken by lawful prosecutors (being either the Director of Public Prosecutions or such other persons exercising the delegated powers of the Director of Public Prosecutions under Article 157(9) of the [Constitution](#), or the entities conferred with powers of prosecution pursuant of Article 157 (12) of the [Constitution](#), and as long as such prosecutions are in keeping with (a) above.



- c. A declaration hereby issues that since the Kenya Revenue Authority was the complainant in Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019 and that the investigations leading to the institution of the said criminal case were conducted by the National Police Service through the Director of Criminal Investigations, then no officers of Kenya Revenue Authority or the National Police Service could undertake the prosecution of the said criminal case, whether as Special or Private Prosecutors or at all.
- d. A declaration hereby issues that since the National Police Service conducted the investigations leading to the institution of the Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019, then the investigative role of the National Police Service ended once the investigations were completed, recommendations made, and matter referred to the Director of Public Prosecutions for further dealing.
- e. A declaration hereby issues that the National Police Service did not have the power and authority to make any decision to prefer and institute the charges in the Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019 and/or to prepare and sign the charge sheet.
- f. A declaration hereby issues that the Gazette Notice No 3523 published on 15th April 2021 is unconstitutional and that the appointments made therein are illegal.
- g. A declaration hereby issues that section 107 of the [Tax Procedures Act](#) is unconstitutional.
- h. An order of Certiorari hereby issues bringing into this Court and quashing the decision by the National Police Service to prefer the charges in Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019.
- i. An order of Certiorari hereby issues bringing into this Court and quashing the charge sheet in Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019.
- j. An order of Certiorari hereby issues bringing into this Court and quashing the Gazette Notice No.3523 published on 15th April 2021.
- k. An order of prohibition hereby issues prohibiting the respondents from sustaining, proceeding, hearing, conducting or in any manner dealing with the charges laid in Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019.
- l. An order of prohibition hereby issues prohibiting the 1st respondent from presiding and/or conducting the trial of the petitioners in Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019.
- m. Save for the charge sheets prepared and signed by the lawful Prosecutors (being either the Director of Public Prosecutions or such other persons exercising the delegated powers of the Director of Public Prosecutions under Article 157 (9) of the [Constitution](#) or the entities conferred with powers of prosecution pursuant to Article 157(12) of the [Constitution](#), no Court in



Kenya shall forthwith accept, register and in any manner whatsoever deal with any charge sheets not prepared and signed by any of the lawful Prosecutors. For avoidance of doubt, given the constitutional and legislative mandates in carrying out investigations, the National Police Service, the Ethics and Anti-Corruption Commission, the Kenya National Commission on Human Rights, the Commission on Administration of Justice, the Kenya Revenue Authority, the Anti-Counterfeit Agency or any other Government entity mandated with criminal investigation role under any written law, Cannot Draft, Sign And/Or Present any charge sheet in any criminal prosecution.

- n. Given the potential effect of this judgment in the criminal justice system in Kenya, this judgement shall not apply to previously instituted criminal proceedings.
 - o. The rest of the prayers sought in the petition and the Notice of Motion are hereby declined and dismissed.
 - p. The Honourable Deputy Registrar of this Division shall immediately transmit copies of this judgment to the Registrar of the High Court and the Registrar of Magistrates' Courts for implementation.
 - q. Each party shall bear its own costs.”
14. The KRA, the IG, the DCI and the AG, being dissatisfied with the decision of the High Court, intend to appeal to this Court. Notices of appeal by KRA, and jointly by the IG, DCI and the AG dated 24th May 2022 and 25th May 2022 respectively are on record.
15. The main prayer sought by the IG, DCI and the AG before this Court is an interim conservatory order to stay execution of the impugned judgement and the consequential orders. KRA on the other hand sought stay of execution of clause 238(g) of the impugned judgement declaring section 107 of the [Tax Procedures Act](#) as unconstitutional pending hearing and determination of its appeal.
16. The grounds in support of the application by KRA are evident from the face of the application and in the supporting affidavit of its advocate, Moses Ado. He stated, inter alia, that section 107 of the [Tax Procedures Act](#) grants KRA authority to prosecute persons accused of committing an offence under a tax law; that the learned judge failed to appreciate that the public prosecutor appointed under section 107 of the [Tax Procedures Act](#) is under the sole discretion of the DPP; and that various administrative firewalls have been placed within KRA's structure that ensure that public prosecutors and investigators do not report to the same person, or are under the control of the same person.
17. It is argued that Article 157(12) of the [Constitution](#) empowers other bodies/agencies to prosecute criminal cases, and that on this basis, the DPP had gazetted several officers from KRA to prosecute such cases. The learned judge was said to have erred when he quashed the Gazette Notice No.3523 of 2021 which had appointed the public prosecutors.
18. The learned judge was also faulted for failing to appreciate that tax evasion cases are very complex and require specialized set of skills and knowledge to prosecute, which the gazetted prosecutors from KRA possessed and which skills and knowledge were alleged to be lacking in the DPP's office, hence the DPP may not be able to prosecute tax related cases adequately.
19. It was further argued that KRA was dealing with over 147 tax evasion cases in various courts which had a revenue implication of close to Kshs. 11 billion, and that it was also investigating another 65 tax evasion cases with a revenue implication of about Kshs. 8 billion. With section 107 having been



- declared unconstitutional, KRA argued that it did not have any legal framework which would allow it to undertake or proceed with prosecution of the tax evaders, hence putting enforcement of tax laws in relation to tax evasion at jeopardy, which would contribute to loss of revenue, unless the orders sought are granted.
20. The 1st, 2nd, 3rd, 4th, 6th, 7th and 8th respondents opposed the application vide a replying affidavit sworn by Geoffrey Kaaria Kinoti, the 1st respondent. He argued that in declaring section 107 of the Tax Procedure Act unconstitutional, the learned judge properly addressed his mind and appreciated that the said section infringes on the non-derogable right to a fair trial enshrined under Article 50(2) of the Constitution, as the effect of the said section was to place KRA as the complainant, investigator and prosecutor on tax related offences.
 21. It was averred that KRA had not adduced evidence to show that the DPP, the entity empowered under the Constitution to undertake criminal prosecutions, was unable and/or did not have the requisite capacity to prosecute tax evasion cases. In this connection, it was posited that the DPP, vide an affidavit sworn by Victor Mule on 7th June 2022 in Civil Application No. E188 of 2022, had capacity to prosecute the 147 tax evasion cases which were before various court and any other tax related cases. According to the 1st to 8th respondents, KRA had the onus of demonstrating the special skills its officers had over those of the DPP in prosecution of tax evasion cases, but had failed to do so.
 22. The 1st, 2nd, 3rd, 4th, 6th, 7th and 8th respondents rebuffed the argument by KRA that there existed a firewall that ensured that the investigators and public prosecutors are not directed by the same person. They contended that KRA was one institution headed by the Commissioner General under whom all KRA's personnel fall.
 23. The alleged potential loss of revenue in the tune of Kshs 11 billion was denied by the respondents. They stated that the figure was quoted so as to portray an inexistent public crisis.
 24. The DPP opposed the application by KRA vide a replying affidavit sworn by Victor Mule, Acting Deputy Director of Public Prosecutions on 15th June 2022. He deponed that the ODPP has the requisite human resource capacity covering all the 47 counties and over 130 court stations spread across the country; that prosecution counsel in the ODPP are highly trained on specialized thematic areas including tax laws, economic crimes, money laundering, banking and related financial crimes; that the ODPP undertakes continuous training of its prosecutors in order to improve on their prosecutorial capacity; that prosecution of all tax related offences pending before various courts is currently being undertaken by prosecutors from his office; that their prosecution was unlikely to be prejudiced; that adequate preparations for prosecuting all new tax related offences had been made; and that since the delivery of the impugned judgement the ODPP had not experienced any delays or disruptions in the prosecution of cases.
 25. The application by the IG, DCI and the AG is supported by the grounds appearing on the face thereof, and in a supporting affidavit sworn by Hillary Mutyambai, the then IG on 2nd June 2022. The learned judge was faulted for usurping the function of the trial court by determining who the complainant and investigator was, and whether the same was done by one and the same person.
 26. It was stated that the learned judge erred by failing to appreciate that the prosecution of the 1st to 8th respondents was authorized by the DPP, who had gazetted the prosecutors.
 27. The applicants posited that upon delivery of the impugned judgement, the conduct and determination of numerous criminal cases had been thrown into legal uncertainty, which adversely affected the entire criminal justice system. Additionally, that the impugned judgement was a threat to national security in that people who have committed criminal offences cannot be urgently charged in court and therefore



- the general public would suffer prejudice if the orders sought are not granted, as the same had been sought in public interest.
28. The application was opposed by the 1st, 2nd, 3rd, 4th, 6th, 7th and 8th respondents through a replying affidavit sworn by Geoffrey Kaari Kinoti, the 1st respondent on 9th June 2022. He deponed that following the delivery of the impugned judgement, the ODPP had confirmed by way of an affidavit that it has been drafting, signing and instituting criminal proceedings in accordance with the Constitution and in compliance with the High Court orders. There was therefore nothing outstanding which could be stayed as prayed, Mr. Kinoti stated.
 29. According to the 1st, 2nd, 3rd, 4th, 6th, 7th and 8th respondents, the DPP had endorsed the impugned judgment and had undertaken to collaborate and consult the office of the IG before undertaking any measures which might have far reaching implications on the administration of justice.
 30. The DPP also opposed the application by the IG, DCI and the AG through a replying affidavit sworn by Victor Mule on 7th June 2022. He averred that following delivery of impugned judgement, the ODPP had made adequate preparations towards transiting from the previous process of preparation and registration of charge sheets to a new process in compliance with the orders of the court, and in accordance with the law. He further deponed that the ODPP has the requisite human resource capacity covering all the 47 counties and over 130 court stations spread across the country.
 31. At the hearing of the related applications, learned counsel Mr. Ochieng Gaya appeared for KRA, while learned counsel Ms. Betty Mwasao appeared for the IG, DCI and the AG. Mr. Paul Muite SC, Mr. Kioko Kilukumi SC and Mr. Mwangi, learned counsel, appeared on behalf of the 1st, 2nd, 3rd, 4th, 6th, 7th and 8th respondents. The Court was informed that the 5th respondent was deceased. Mr. Mule, Mr. Muteti and Ms. Sigei appeared for the DPP.
 32. The parties highlighted their respective written submissions. The written and oral submissions were a reiteration of the grounds appearing either in the separate applications or in the various replying affidavits. It shall serve little or no use rehashing the arguments by the parties. It is however necessary to point out that KRA was in support of the application by the IG, DCI and the AG. The latter also supported the application by KRA.
 33. The principles that guide this Court in determination of an application under rule 5(2) (b) of this Court's Rules are well settled and have been set out in numerous decisions of this Court. They have been well summarised in Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR. The twin test is that an applicant must demonstrate that the appeal or intended appeal is arguable; and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.
 34. I have considered the two separate applications, the replying affidavits, the written and oral submissions by all the parties herein. I have also perused the draft memorandum of appeal that is annexed to each of the applications. With regards to the application by the KRA, I note that the main dispute revolves around the interpretation of the provisions of section 107 of the Tax Procedures Act, and whether the said section contravenes the provisions of Article 50 and 157 of the Constitution.
 35. Regarding the application by the IG, DCI and the Attorney General, the germane question that is highly contested is whether it is only the DPP who has constitutional mandate to commence criminal investigations. That was the finding of the learned judge.
 36. In determining whether each of the applications herein is arguable or not, I am cognizant of the fact that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. See Joseph Gitabi Gachau & Another v Pioneer Holdings



(A) Ltd. & 2 others, [2008] eKLR. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, [2004] eKLR.

37. Looking at the intended grounds of appeal in each of the applications, I am satisfied that the intended appeals are arguable. I need not say much on arguability at this stage, lest I embarrass the bench that shall eventually hear the appeals.
38. Turning to the nugatory aspect, I am not satisfied that the two intended appeals would be rendered nugatory if the orders sought are not granted. I shall state my reasons for each of the applications separately. With regard to the application by KRA, it was stated that the prosecution of over 147 tax related cases is currently pending before various courts, and which have an estimated revenue of about Kshs. 11 million are in a limbo. The same position was averred in respect of the ongoing investigations on tax evasion cases. The ODPP vide a replying affidavit sworn by Victor Mule on 15th June 2022 stated that it had already taken over all the tax related cases which were pending before various courts before the impugned judgment was delivered. The ODPP also stated it had made necessary preparations in respect of the prosecution of new tax related cases; and that following the delivery of the impugned decision it had not experienced any delays and/or disruptions in the prosecution of these cases. The ODPP further deponed as to the human resource capacity of its prosecutors, whom it stated were in every county of the Republic and had undergone necessary trainings, including those on tax related matters and therefore had the requisite knowledge and capacity to prosecute such matters. The averments by the DPP were not denied or disproved by KRA at the hearing hereof. The potential loses to the economy appear so grave, but in light of the averments by the ODPP that it has already taken over the prosecution of tax related cases, I am unconvinced that the country stands to lose any revenue as alleged by KRA. In the scheme of things, KRA can continue with investigations on tax related matters, whereas the ODPP continues to institute new charges against tax evaders, and in any case, nothing bars the ODPP from seeking or obtaining advice from KRA and other governmental agencies and/or experts while undertaking its prosecutorial duties. I am not convinced that failure to grant the orders sought by KRA will render its appeal/intended appeal nugatory.
39. Turning to the application by the IG, DCI and the AG, the conduct and determination of various criminal cases was said to have been thrown into legal uncertainty following the delivery of the impugned judgment, which situation was said to be negatively affecting the criminal justice system in the country. It was also averred that the impugned judgment had created a stalemate in the criminal justice system which posed a threat to national security. Again, Mr. Victor Mule in his replying affidavit sworn on behalf of the DPP on 7th June 2022 stated that the ODPP had already began implementing the decision of the High Court, and that the ODPP had made necessary preparations towards transiting from the old system on the preparation and registration of charge sheets towards the new system, which was in compliance with the orders of the High Court and the law. The ODPP further deponed as to its human resource capacity spread across the country, and that following the delivery of the impugned judgment, it had not experienced any delays in the preparation and presentation of charge sheets.
40. I understand the ODPP to be saying that there is no lacuna or crisis in the criminal justice system following the implementation of the impugned judgment as the applicant would have the Court believe. I associate myself fully with these views. The human resource capacity of the ODPP was not denied, nor was its argument that it had taken over the task of preparation and presentation of charge sheets from the National Police Service. There is therefore no gridlock in the criminal justice system. The threat to justice as alleged, is, in my view, abstract and not perceived and/or real. I am therefore not persuaded that the appeal/intended appeal by the IG, DCI and the AG will be rendered nugatory if the



Court does not grant orders staying the implementation of the impugned judgment and consequential orders.

41. In the upshot, I find that the applicants in the two applications have only satisfied the limb on arguability. As the applicants have not satisfied the second limb for grant of an order under rule 5(2) (b) of this *Court's Rules*, I would dismiss the notice of motion by KRA which is dated 2nd June 2022 and the notice of motion by the IG, DCI and the AG also dated 2nd June 2022. The costs of the applications shall be in the appeal/intended appeals.

As Murgor, J.A. agrees, these shall be the final orders of the Court

Ruling of Murgor, J.A.

1. I have had the advantage of reading in draft the ruling of Musinga, J.A. I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

Ruling of Sichale, J.A

1. This Court is called upon to determine two separate motions both dated 2nd June, 2022. In Civil Application No. Nai. E187 of 2022, the applicant is Kenya Revenue Authority who sought in the main, the following orders:

- “1. Spent
2. That, there be a suspension of execution of the clause 238 (g) of the Judgment delivered on 23rd May, 2021 in Nairobi High Court Petition No. E495 of 2021 declaring section 107 of the *Tax Procedures Act*, and orders flowing there from, pending the hearing and determination of this Application.
3. That there be a suspension of execution of the clause 238 (g) of the Judgment delivered on 23rd May, 2021 in Nairobi High Court Petition No. E495 of 2021 declaring section 107 of the *Tax Procedures Act*, and orders flowing there from, pending the hearing and determination of the Applicant's intended appeal.
4. That the costs incidental to this application do abide the result of the said intended Appeal.”

2. The motion was supported by the affidavit of Moses Ado, an Advocate in the applicant's organization. In the supporting affidavit, Mr. Ado depones that Article 157(12) of the *Constitution* mandates Parliament to enact legislation conferring prosecutorial powers on entities other than the Director of Public Prosecutions, that this is in recognition that specialized skills and expertise is required in certain cases; that in exercise of powers conferred by Article 157(12) of the *Constitution*, Parliament enacted Section 107 of the *Tax Procedures Act* vesting prosecutorial powers of tax infringements on the applicant; that at the time the impugned judgment was delivered (on 23rd My, 2022), the applicant had registered in court over 147 tax evasion cases holding close to Kshs 11 billion; that it had completed investigations in respect of 56 other tax evasion matters whose anticipated revenue is Kshs 8 billion and that the impugned orders have had the effect of paralyzing the prosecution of tax evaders.

3. Geoffrey Kaaria Kinoti Mbobua, in an affidavit sworn on 10th June, 2022 on behalf of himself as the 1st respondent and on behalf of the 2nd, 3rd, 4th, 6th, 7th & 8th respondents opposed the motion. He deponed that Section 107 of the *Tax Procedures Act* infringes the right to a fair hearing; that contrary to the applicant's averments, the 10th respondent has the capacity and skills to undertake prosecutions on behalf of the applicant; that the 10th respondent has not been unable to discharge its



- constitutional mandate and that Section 107 of the [Tax Procedure Act](#) cannot override the supremacy of the [Constitution](#).
4. In respect of the 10th respondent, the affidavit in opposition of the motion was sworn on 15th June, 2022 by Victor Mule, the Acting Deputy Director of Public Prosecutions at the office of the 10th Respondent. He deponed that the 10th respondent has the requisite human resource capacity spanning all the 47 counties and over 130 court stations and that they are also possessed of specialized skills in the various thematic areas including tax evasion.
 5. In respect of Civil Application No. *Nai. E188 of 2022, the applicant was The Inspector General of Police. He sought the following orders:
 - a. Spent
 - b. That upon hearing the parties, this Honourable Court be pleased to grant such interim relief as it deems necessary pending the determination of this Application.
 - c. That pending the hearing and determination of this application, the Honourable Court be pleased to grant an interim conservatory order staying the execution of the judgment and orders of High Court in Nairobi Petition No. E495 of 2021 (Hon. Justice A. C. Mrima) dated and on 23 May 2022 in Nairobi Petition No. E495 of 2021; [Geoffrey Kaaria Kinoti v. the Chief Magistrate Court Milimani Law Courts and others](#).
 - d. That pending hearing and determination of the appeal this Honourable Court be pleased to grant a conservatory order staying the execution of the judgment and orders of High Court in Nairobi Petition No. E495 of 2021; [Geoffrey Kaaria Kinoti v the Chief Magistrate Court Milimani Law Courts and others](#).”
 6. The motion was supported by the affidavit of Hillary N. Mutyambai, the then Inspector General of Police sworn on the same day, 2nd June, 2022. He deponed, inter alia, that following the impugned judgment, the determination of numerous criminal cases have been thrown into disarray; that the stalemate caused by the impugned judgment has led to uncertainty and is a threat to national security and that it was in the interest of the public that the impugned judgment be stayed.
 7. The motion was opposed vide an affidavit sworn on 9th June, 2022 by Geoffrey Kaaria Kinoti Mbobua on his own behalf and on behalf of the 2nd, 3rd, 4th, 6th, 7th and 8th respondents therein. He deponed, *inter alia*, that the judgment sought to be stayed had since been executed by the discharge of all the accused persons; that the office of the ODPP has in compliance with the judgment been drafting, signing and instituting criminal cases in compliance with the impugned judgment and the [Constitution](#); that the fears of the applicant, if any are unfounded and that contrary to the contention of Mr. Hillary Mutyambai, there is no legal uncertainty.
 8. In its opposition, Victor Mule, the Ag. Director of Public Prosecutions swore an affidavit dated 7th June, 2022. He deponed that following the impugned ruling, the ODPP has put in place administrative measures to ensure that there are no disruptions in the process of filing of criminal cases in court and that they have the requisite human resource capacity covering all the 47 counties and over 130 court stations.
 9. A brief background will give context to the two motions. The 1st to 8th respondents were accused of being in violation of the [Tax Procedures Act](#) No. 29 of 2019 and the [Excise Duty Act](#) No. 23



of 2015. Consequently, the 8 were charged with Criminal Case No. 1333 of 2019 at Milimani Chief Magistrate's Court. The 1st to 8th respondents challenged their prosecution by instituting Constitutional Petition No. E495 of 2021. Their complaint was that the investigations leading to their prosecution were conducted by unauthorized officers of the National Police Service; that the charge sheet commencing the criminal charges emerged from the DCI as opposed to it emanating from the DPP; that the KRA officers who presented the charges lacked objectivity as they were in effect the complainant; and finally that their prosecution was in contravention of Article 157(II) of the [Constitution](#) and the prosecution was in violation and not in the interest of administration of justice.

10. The Petition was opposed. In its opposition, KRA maintained that under Sec. 107 of the [Tax Procedures Act](#), it had authority to prosecute Tax offenders.
11. On its part, the DPP asserted that it had power under Sec. 20 of the [ODPP Act](#) as read with Sec. 85(1) of the [Criminal Procedure Code](#) to appoint public prosecutors to exercise delegated power.
12. On the other hand, the DCI maintained that under Sec. 28 and 35 of the [National Police Service Act](#), it was their mandate to investigate criminal matters. The learned judge in his judgment determined the dispute by ordering as follows:
 - “ r. A declaration hereby issues that in the criminal justice system in Kenya, a complainant may investigate its own complaint in instances free from prejudice, but such a complainant and/or an investigator cannot prosecute any offences arising from the complaint and the investigations.
 - s. A declaration hereby issues that prosecution of criminal offences in Kenya must only be undertaken by lawful prosecutors (being either the Director of Public Prosecutions or such other persons exercising the delegated powers of the Director of Public Prosecutions under Article 157(9) of the [Constitution](#), or the entities conferred with powers of prosecution pursuant of Article 157 (12) of the [Constitution](#), and as long as such prosecutions are in keeping with (a) above.
 - t. A declaration hereby issues that since the Kenya Revenue Authority was the complainant in Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019 and that the investigations leading to the institution of the said criminal case were conducted by the National Police Service through the Director of Criminal Investigations, then no officers of Kenya Revenue Authority or the National Police Service could undertake the prosecution of the said criminal case, whether as Special or Private Prosecutors or at all.
 - u. A declaration hereby issues that since the National Police Service conducted the investigations leading to the institution of the Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019, then the investigative role of the National Police Service ended once the investigations were completed, recommendations made, and matter referred to the Director of Public Prosecutions for further dealing.
 - v. A declaration hereby issues that the National Police Service did not have the power and authority to make any decision to prefer and institute the charges in the Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019 and/or to prepare and sign the charge sheet.



- w. A declaration hereby issues that the Gazette Notice No 3523 published on 15th April 2021 is unconstitutional and that the appointments made therein are illegal.
- x. A declaration hereby issues that section 107 of the [Tax Procedures Act](#) is unconstitutional.
- y. An order of Certiorari hereby issues bringing into this Court and quashing the decision by the National Police Service to prefer the charges in Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019.
- z. An order of Certiorari hereby issues bringing into this Court and quashing the charge sheet in Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019.
- aa) An order of Certiorari hereby issues bringing into this Court and quashing the Gazette Notice No.3523 published on 15th April 2021.
- bb) An order of prohibition hereby issues prohibiting the respondents from sustaining, proceeding, hearing, conducting or in any manner dealing with the charges laid in Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019.
- cc) An order of prohibition hereby issues prohibiting the 1st respondent from presiding and/or conducting the trial of the petitioners in Nairobi Chief Magistrates' Court Criminal Case No.1333 of 2019.
- dd) Save for the charge sheets prepared and signed by the lawful Prosecutors (being either the Director of Public Prosecutions or such other persons exercising the delegated powers of the Director of Public Prosecutions under Article 157 (9) of the [Constitution](#) or the entities conferred with powers of prosecution pursuant to Article 157(12) of the [Constitution](#), no Court in Kenya shall forthwith accept, register and in any manner whatsoever deal with any charge sheets not prepared and signed by any of the lawful Prosecutors. For avoidance of doubt, given the constitutional and legislative mandates in carrying out investigations, the National Police Service, the Ethics and Anti-Corruption Commission, the Kenya National Commission on Human Rights, the Commission on Administration of Justice, the Kenya Revenue Authority, the Anti- Counterfeit Agency or any other Government entity mandated with criminal investigation role under any written law, Cannot Draft, Sign and/Or Present any charge sheet in any criminal prosecution.
- ee) Given the potential effect of this judgment in the criminal justice system in Kenya, this judgement shall not apply to previously instituted criminal proceedings.
- ff) The rest of the prayers sought in the petition and the Notice of Motion are hereby declined and dismissed.
- gg) The Honourable Deputy Registrar of this Division shall immediately transmit copies of this judgment to the Registrar of the High Court and the Registrar of Magistrates' Courts for implementation.



hh) Each party shall bear its own costs.”

13. It is the said orders that provoked the filing of Notices of Appeal by KRA, the IG, the DCI and the AG, thus providing the prerequisite of the motion before us.
14. On 22nd June, 2022, the two motions came up before us for hearing. In respect of C.A. No. 187 of 2022, learned counsel, Ochieng Gaya appeared for the applicant, Kenya Revenue Authority. Hon. Paul Muite, Senior Counsel together with learned counsel Mr. Kilukumi and Miss Mwangi, appeared for the 1st, 2nd, 3rd, 4th, 6th, 7th and 8th respondents whilst the 10th respondent was represented by learned counsel, Mr. Victor Mule, Mr. Muteti and Carol Sigei. The 13th (Sheila Sanga), 14th (Peter Mwenda Nturibi) and 15th (Irene Muthee) respondents were represented by Miss Irene Muthee. We were informed that the 5th respondent had since passed on.
15. In urging the motion, Mr. Gaya faulted the learned judge for finding that Section 107 of the *Tax Procedures Act* that mandates KRA to prosecute tax related cases to be unconstitutional; that Parliament enacted Section 107 of the *Tax Procedure Act* as provided in Article 157(12) of the *Constitution*. He relied on the decision of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR for the proposition that it is in the public interest that the orders of stay be granted as there is likelihood of loss of revenue, absent stay of the impugned judgment.
16. In response, Mr. Kilukumi in highlighting the submissions dated 12th June, 2022 maintained that the applicant had attempted to create an artificial crisis as the court did specify that its orders were not to affect pending cases (Par.238(a); that the 56 cases of tax evasion worth Kshs 8 billion should be forwarded to the Director of Public Prosecutions (DPP) for prosecution as the latter are possessed of expertise in prosecutions; that the applicant’s employees can be called as expert witness; that there was no evidence tabled that showed that the cases prosecuted by DPP would lead to losses; that it is in the public interest that we observe constitutional tenets and finally, that one cannot be a complainant, an investigator and a prosecutor as is the case in relation to the cases being investigated and prosecuted by the applicant (KRA) who is at the same time a complainant in tax evasion matters.
17. Mr. Mule was equally opposed to the motion. He argued that the office of the DPP has a conviction rate of 93.5% and that in a bid to improve its lot, the office of the DPP in its current strategic plan has emphasized on the need for lifelong learning.
18. Miss Betty Mwasao for the 1st, 2nd and 3rd applicants in Civil Application No. Nai. E188 of 2022 supported the motion and associated herself with the submissions of Mr. Gaya for the applicant (KRA).
19. In a brief response, Mr. Gaya, maintained that the applicant had satisfied the two principles for consideration in a motion such as the one before us.
20. In urging Civil Application No. 188 of 2022, Miss Betty Mwasao informed the court that the order being sought is to stay the judgment of Mrima, J.of 23rd May, 2022. More specifically, the order that they sought to stay is the one that directed that the National Police Service to stop henceforth from drafting, preparing or signing charge sheets. She urged us to find that the learned judge erred in not giving a harmonious and purposive interpretation of Article 166(b) of the *Constitution*. It was her view that the DPP’s role is not absolute. On the nugatory aspect, counsel submitted that following the impugned judgment, 1,595 criminal cases had since stalled; that the impugned judgment has the potential to create national insecurity and that it is in the public interest that the orders sought be granted.



21. In opposing the motion, learned Senior Counsel, Hon. Paul Muite submitted that there were four (4) previous decisions that are in tandem with the impugned judgment, and which were not challenged by the applicant. He opined that the DPP has sufficient and qualified staff. On the nugatory aspect, Senior Counsel maintained that there was nothing to be stayed as in the impugned judgment, the accused person had since been discharged.
22. On his part, Mr. Victor Mule, in opposing the motion maintained that the DPP, unlike the police, is clothed with constitutional and legal mandate of prosecution. On the nugatory aspect, it was its view that the applicant has through craft created an imagined crisis.
23. Mr. Muteti was equally of the same view as Mr. Mule as regards the applicant's contention of a crisis being created by the impugned judgment.
24. Mr. Gaya, whilst placing reliance on his submissions filed on 9th June, 2022 supported the motion. He submitted that the declaratory orders being sought can be the subject of suspension; that in the 4 decisions referred to by SC Muite as not having been challenged on appeal, it was his position that the applicant was not a party and hence, he could not have challenged them by way of an appeal. He contended that there is a public interest in the applicant's motion as set out in the decision of *Gitarau Peter Munya* (*supra*) warranting an order of stay.
25. In a brief response, Miss Betty Mwasao maintained that whereas police officers draft the charge sheets, the ODPP prosecutes.
26. We have considered the motion and the supporting affidavits, the affidavits in opposition to the motions, the written and oral highlights made before us, the authorities cited and the law.
27. The Notices of motion dated 2nd June, 2022 are made pursuant to Rule 5(2)(b) of this *Court's Rules*. The principles to be considered in a 5(2)(b) application are whether an applicant has made out an arguable appeal. In so doing, an arguable appeal need not be one that will necessarily succeed but suffice to state that one that is not frivolous. The 2nd principle to be established is that that the appeal will be rendered nugatory, absent stay. Those 2 principles were well enunciated in this Court's decision of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR as follows:
 - i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 others v Nderitu & Another* [1989] KLR 459.
 - ii. The discretion of this court under Rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
 - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
 - iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
 - v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.



- 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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No.124 of 2008.
 - 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.
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
 - 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.
 - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.
28. The genesis to the two motions (in C.A. No. 187 and C.A. 188 of 2022) is the judgment of Mrima, J. in E495 of 2022 delivered on 23rd May, 2022. The learned judge declared Sec.107 of the [Tax Procedure Act](#) unconstitutional and prohibited the KRA from prosecuting tax evasion cases.
29. For a start, the applicant is mandated by the [Kenya Revenue Authority Act](#) to investigate cases of tax evasion. The applicant has contended that the prosecution of tax evasion cases require specialized skills and that its officers are possessed of such skills. It further submitted that it has one hundred forty-seven (147) cases with a revenue implication of about Kshs 11 billion and which are likely to be prejudiced by the orders of Mrima, J, absent stay. Further, that it had concluded investigations in respect of fifty-six (56) tax evasion cases with a revenue implication of eight (8) billion which it intends to prosecute with the direction of the DPP in exercise of the powers conferred by Article 157(12) of the [Constitution](#). Further that Parliament enacted Section 107 of the [Tax Procedures Act](#) in furtherance to Article 147(2) of the [Constitution](#) vesting prosecutorial powers of offences relating to tax laws on the applicant. In my view, it is arguable whether Section 107 of the [Tax Procedures Act](#) is unconstitutional. It is also arguable whether the enactment of Sec.107 of the [Tax Procedure Act](#) has overridden the [Constitution](#). In addition, the applicant's prayer in essence is of a conservatory order, to continue doing what it has always done. It is my conclusion that the applicant has demonstrated arguability of the intended appeal.
30. In considering the nugatory aspect, this Court in [Multimedia University & Another v Professor Gitile N. Naituli](#) [2014] eKLR stated:
- “Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid.”
31. On the nugatory aspect, the non- collection of taxes will have an impact on the economy and the country is likely to lose revenue through tax evaders.
32. In its submission in (E188 of 2022) dated 8th June, 2022, the applicant faulted the learned judge for making adverse orders against several bodies that were not party to the proceedings.



33. Indeed, in the decision of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014 eKLR), the Supreme Court held that conservatory orders

“should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, the relevance caused”

34. In the written submission of 1st, 2nd, 3rd, 4th, 6th, 7th and 8th respondents in E 188 of 2022, it was submitted that on 25th May, 2022, the Chief Magistrate had implemented the impugned judgment by discharging all the accused persons charged in Criminal Case No. 1333 of 2019 and a refund of all securities deposited in court made, hence there was nothing to stay. That may well be the case and the orders herein may not apply to a situation where the horse has bolted.

35. But, it is also clear that there are numerous other cases to be investigated and others pending in court. These will be greatly impacted if the order of stay was not issued. I am equally satisfied that the second limb has been satisfied. However, as my views are that of a minority, the orders of the court shall be as proposed by Musinga, PCA.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

D.K.MUSINGA (P)

.....

JUDGE OF APPEAL

A.K.MURGOR

.....

JUDGE OF APPEAL

F.SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

