



**National Assembly, Republic of Kenya & another v Matindi & 3 others (Civil Appeal (Application) E176 of 2023) [2023] KECA 1566 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1566 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E176 OF 2023  
DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA  
DECEMBER 19, 2023**

**BETWEEN**

**NATIONAL ASSEMBLY, REPUBLIC OF KENYA ..... 1<sup>ST</sup> APPLICANT**

**THE SPEAKER, NATIONAL ASSEMBLY OF KENYA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ELIUD KARAJA MATINDI ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**CS, NATIONAL TREASURY & PLANNING ..... 3<sup>RD</sup> RESPONDENT**

**COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY .... 4<sup>TH</sup>  
RESPONDENT**

*(Being an application for stay of execution and /or conservatory orders pending the hearing and determination of the appeal against the entire judgment and decree of the High Court at Nairobi (D. K. Magare J.) dated 17th February, 2023 in Pet. No. E280 of 2021)*

**Court of Appeal temporarily suspends High Court order declaring Legal Notice No. 15 of 2021 and section 13 of the Income Tax Act unconstitutional.**

*The National Assembly and the Speaker challenged a High Court ruling that declared Legal Notice No. 15 of 2021, which granted tax exemptions to Japanese entities, unconstitutional. The court also found Section 13(2) of the Income Tax Act unconstitutional, ruling that tax waivers must be enacted through Parliament. The applicants sought a stay of execution, arguing the ruling disrupted tax waiver processes and international agreements. The Court of Appeal temporarily suspended the High Court's declarations for six months, pending the outcome of the appeal, recognizing the significant implications for public interest.*

Reported by John Ribia

**Constitutional Law** – unconstitutional provision – stay of an unconstitutional provision pending appeal - whether an order declaring a statute or provision of statute as unconstitutional could be stayed.



**Taxation Law** – income tax – provision allowing Cabinet Secretary to issue tax waivers via a gazette notice - section 13(2) of the Income Tax Act - whether the trial court erred in quashing in declaring section 13(2) of the Income Tax Act unconstitutional to the extent that it authorized income tax waiver through a notice in the Gazette instead of through legislation - whether the revocation of tax exemptions could be applied retroactively, thus affecting entities that had previously been granted exemptions - Constitution of Kenya, 2010 article 210; Income Tax Act (cap 470) section 13.

### **Brief facts**

The 1<sup>st</sup> respondent filed a petition at the High Court, challenging the legality of tax exemptions granted to Japanese companies and consultants involved in projects under the Financing Agreements between Kenya and Japan. The High Court declared the Legal Notice unconstitutional and quashed it. The court also declared section 13(2) of the Income Tax Act unconstitutional, ruling that tax exemptions must be passed by Parliament as a money bill.

The applicants sought a stay of execution of the High Court's judgment pending the hearing of their appeal. They contended that the judgment had far-reaching implications, requiring tax exemptions to be processed as money bills, which would disrupt ongoing tax waiver processes and international agreements. The applicants argued that their appeal was arguable and that failure to grant a stay would render the appeal nugatory as KRA would be forced to collect taxes, affecting existing exemptions.

### **Issues**

- i. Whether the trial court erred in quashing in declaring section 13(2) of the Income Tax Act unconstitutional to the extent that it authorized income tax waiver through a notice in the Gazette instead of through legislation.
- ii. Whether the revocation of tax exemptions could be applied retroactively, thus affecting entities that had previously been granted exemptions.
- iii. Whether an order declaring a statute or provision of statute as unconstitutional could be stayed.

### **Held**

1. The exercise of the Court of Appeal's jurisdiction under rule 5(2)(b) of the Court of Appeal Rules was discretionary and would be exercised in favour of an applicant who satisfied the court with respect to two limbs: that the intended appeal was arguable, and that if the orders sought were not granted and the appeal ultimately succeeded, the appeal would be rendered nugatory.
2. The question whether or not an appeal would be rendered nugatory must be determined on a case by case basis, depending on the peculiar circumstances of the case. The court, however, granted orders of stay under rule 5(2)(b) of the Court of Appeal Rules if what was apprehended could not be undone once it happened, or could not be undone without undue hardship or expense, or could not be adequately compensated by an award in damages. The court considered public interest in appropriate circumstances.
3. The applicants expressed their apprehension that in the absence of the orders sought, the 4<sup>th</sup> respondent will proceed to collect taxes that had been waived as a result of the impugned Legal Notice quashed by the trial court.
4. Great hardship and inconvenience would be occasioned to the applicants, against the public interest, should the orders sought not be granted. The 4<sup>th</sup> respondent would be required to put in place mechanisms for recovery of taxes exempted, over a period in excess of ten years- noting that the exemptions to Japanese companies commenced in August 2010, under bilateral country-country arrangements with the Government of Kenya.
5. With the order declaring section 13(1) of the Income Tax Act unconstitutional in place, every application for tax exemption, permitted under article 210 of the Constitution, would have to be placed before the applicants for consideration as a money bill, with all the attendant constitutional requirements, including public participation. The applicants did not have the capacity to process every



- application for tax exemption or waiver as a money bill, even assuming that the trial court was correct in finding that such processing should be the case, a matter that fell for consideration before the Court of Appeal in the intended appeal.
6. Given the far-reaching nature and enormity of the declarations and orders issued by the trial court, an order staying the coming into effect of the declarations of invalidity of the impugned Legal Notice and unconstitutionality of section 13 of the Income Tax Act was merited.
  7. Once a statute was declared unconstitutional, such declaration could not be stayed. Suspended declarations engaged real consequences for individual litigants and others affected by judicial decisions, as laws found to violate the Constitution were permitted to have a continued, temporary effect. A suspended declaration occurred when courts choose to delay the effect of invalidating a law. A court may declare a law to be invalid, but “suspend” the effect of the declaration until a future date. During the interim period, the law continued to apply. At the expiry of the period, the court’s declaration took full effect: unless the law had been replaced or amended to comply with the Constitution, it was rendered null. 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.
  8. The circumstances of the case warranted the grant of an order which temporarily suspended the coming into effect of the declarations made by the trial court with respect to Legal Notice No. 15 of 2021 and section 13 of the Income Tax Act. The suspension of the said declarations shall remain in force for a period of six (6) months from the date hereof, pending hearing and determination of the applicants’ appeal.

*Application for stay allowed, execution of the High Court’s judgment temporarily suspended.*

#### **Orders**

*Costs of the application to abide by the outcome of the appeal.*

#### **Citations**

##### **Cases**

##### **Kenya**

1. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Petition 2 of 2014; [2014] KESC 49 (KLR) - (Followed)
2. *Kinyanjui, Stanley Kangethe v Tony Ketter, Salim Suleiman, Mawji Patel, Innocent Maisiba Toyo, Deputy Registrar High Court of Kenya at Eldoret, Paul Gicheru Of Gicheru & Co. Advs & Commissioner of Land* Civil Application 31 of 2013; [2013] KECA 378 (KLR) - (Mentioned)
3. *Law Society of Kenya v Kenya Revenue Authority & Attorney General* Petition 39 of 2017; [2017] KEHC 8539 (KLR) - (Explained)
4. *Nation Media Group Limited & 2 others v John Joseph Kamotho & 3 others* Civil Application 108 of 2006; [2006] KECA 203 (KLR) - (Mentioned)
5. *Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees, Central Bank of Kenya, Deposit Protection Fund Board Liquidators of Euro Bank Ltd (In Liquidation) & Southern Bell Limited* Civil Application 211 of 2016; [2018] KECA 865 (KLR) - (Mentioned)
6. *Trust Bank Ltd & another v Investech Bank Ltd & 3 others* Civil Application 258 & 315 of 1999; [2000] KECA 38 (KLR) - (Followed)

##### **Regional Court**

*Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA 227 - (Applied)

##### **Statutes**

##### **Kenya**

1. Constitution of Kenya articles 1(1)(3)(c); 114(3); 210 - (Interpreted)



2. Court of Appeal Rules (cap 9 Sub Leg) rule 5(2)(b) - (Interpreted)
3. Income Tax Act (cap 470) section 13(2) - (Unconstitutional)
4. Statutory Instrument Act (cap 2A) In general- (Cited)

#### **Advocates**

Mr Soire h/b for Mr Mbarak for the applicants

Ms Kiramana for the 3<sup>rd</sup> respondent

### **RULING**

1. Eliud Karanja Matindi, the 1<sup>st</sup> respondent, filed a petition dated July 16, 2021 before the High Court in which he alleged violation of the Constitution by the grant of exemption from income tax of Japanese companies, Japanese consultants and Japanese employees pursuant to Financing Agreements between the Government of Kenya and Japan on various dates between August 16, 2010 and September 18, 2020.
2. He further alleged that the National Assembly's Committee on Delegated Legislation and, subsequently, the National Assembly itself, had no powers to declare that Legal Notice No 15 of 2021, which provided for these exemptions, was not a Legal Notice for the purposes of the Statutory Instrument Act, 2013; that the said Committee breached the provisions of the Constitution including those on, *inter alia*, good governance, integrity and transparency, and that the National Assembly, by adopting its Committee's report on the Consideration of Legal Notice No 15 of 2021 on the Exemption from Income Tax for Japanese Companies, Japanese Consultants and Japanese Employees dated May 2021, violated the said provisions of the Constitution. The 1<sup>st</sup> respondent further alleged that the said Notice was unconstitutional and, therefore, null, void and of no legal effect, and he sought declarations with respect to these allegations.
3. The 1<sup>st</sup> respondent asked the court, upon issuing the declarations that he sought, to issue orders, *inter alia*, quashing the said Legal Notice; permanently prohibiting any and all the respondents, their agents and any persons, howsoever acting, from giving effect to the provisions of the impugned Legal Notice; and compelling the 4<sup>th</sup> respondent to immediately commence collecting all the income tax due from the income which accrued in or was derived from Kenya by Japanese companies, consultants and employees involved in the projects specified in the impugned Legal Notice in strict compliance with the provisions of the Income Tax Act.
4. Upon hearing the parties to the petition, the High Court (DK Magare J) in the judgment dated February 17, 2023, issued orders: declaring unconstitutional and quashing the Legal Notice aforesaid, declaring section 13(2) of the Income Tax Act unconstitutional to the extent that the Cabinet Secretary, National Treasury and Planning, authorises Income Tax waivers thus breaching the doctrine of separation of powers; declared that waiver of income tax can only be granted by the National Assembly through national legislation after the same passes as a money bill as provided for under article 114(3) of the Constitution; and further ordered immediate collection of all income tax covered under the said Legal Notice.
5. It is these declarations that have precipitated the present application. Aggrieved by the declarations, the applicants filed notices of appeal and, thereafter, they filed the application dated April 12, 2023 praying that this Court issues conservatory orders and /or stay of execution of the entire judgment and decree pending hearing and determination of their intended appeal. The application is based on the grounds, among others, that in the impugned judgment, the learned judge, in allowing the 1<sup>st</sup> respondent's



petition, made far-reaching and drastic orders which the applicants intend to appeal against; and that it determined issues that had not been pleaded by the parties before it.

6. The applicants contend that the impugned judgment has the effect of treating every application for tax exemption to the 4<sup>th</sup> respondent as a money bill to be submitted to the National Assembly for consideration and public participation, thereby plunging the 4<sup>th</sup> respondent into a crisis of monumental proportions, considering the number of applications of a similar nature that are made in a day. They further contend that they have an arguable appeal with high chances of success, and it is in the public interest to grant the orders sought. They state that they have filed a Notice of Appeal and letter bespeaking the proceedings and decree, both dated February 20, 2023.
7. The application is supported by an affidavit sworn on May 4, 2023 by Mr. Samuel Njoroge, the Clerk of the 1<sup>st</sup> applicant, in which he avers that the applicants had filed an elaborate affidavit in opposition to the petition. He deposes that the orders issued by the High Court infringed the country-to-country agreements that led to the enactment of the impugned Legal Notice as a form of reciprocity and tax neutrality. He further reiterates the grounds in support of the application with respect to the implications of the judgment to the functioning of the 4<sup>th</sup> respondent if applications for tax exemption were to be treated as money bills. He asserts that the applicants have an arguable appeal with good chances of success, and that they meet the criteria set for grant of stay and/or conservatory orders.
8. The applicants, represented before us by learned counsel, Mr. Soire, holding brief for Mr Mbarak, filed submissions dated August 30, 2023. They reiterate the averment that they have an arguable appeal; and that an arguable appeal is not one that must succeed, but is one which is not frivolous. They cite the decision in

George Mike Wanjohi v Steven Kariuki & 2 others Sup. Civil Application No 6 of 2014 in which the Supreme Court defined an arguable appeal as ‘one that elicits cognizable controversies that purely bear constitutional dimensions and effect’.

9. With respect to the question whether the appeal will be rendered nugatory, the applicants rely on the decisions in *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 EA 227, cited with approval in *Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others*, Civil Application No. 211 of 2016 for the proposition that whether an appeal would be rendered nugatory depends on whether what was sought to be stayed, if allowed to happen, was reversible; or if it was not reversible, whether damages would reasonably compensate the aggrieved party. It is their submission that their appeal would be rendered nugatory in the absence of the orders sought since the 4<sup>th</sup> respondent will proceed to collect taxes that had been waived as a result of the subject Legal Notice. Further, that the 1<sup>st</sup> respondent will not suffer any prejudice if the stay orders are granted.
10. The applicants further submit that in deciding whether or not to grant the reliefs sought, the court ought to consider public interest.  
  
They cite article 1(1) and 1(3)(c) with respect to the exercise of sovereign power under the [Constitution](#) and submit that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said constitutional provisions. It is their submission that staying the decision of the High Court will, inter alia, be upholding the general presumption of constitutionality of statutes and the legislative sovereignty which affect government taxation measures, government’s international commitments, reforms and policy decisions taken pursuant to the said Legal Notice and to that extent, public interest is in favour of granting orders of stay of execution.
11. The 3<sup>rd</sup> respondent, represented by learned counsel, Ms Kiramana, supported the position and submissions of the applicants. There was no appearance for the 4<sup>th</sup> respondent.



12. The 1<sup>st</sup> respondent, who appeared in person at the hearing, opposed the application. He filed grounds of opposition dated September 11, 2023 and submissions of the same date. It is his contention, among other things, that the applicants' Memorandum of Appeal does not disclose any arguable points with a prospect of success; that in the event that the appeal is successful, the absence of an order staying the judgment will not have rendered the appeal nugatory; that the 4<sup>th</sup> respondent, the legal agency charged with the responsibility of collecting the taxes in question, has not recorded any difficulties in complying with the judgment of the High Court; that in the event the impugned Legal Notice is declared to have been lawful, the taxes collected from that date will be refundable to the affected named and known Japanese companies, consultants, and individuals.
13. At the hearing of the application before us, counsel for the parties tacitly agreed that there was no dispute regarding the arguability of the applicants' appeal. Accordingly, the court directed the parties to address it on the nugatory aspect only.
14. In his submissions, Mr Soire stated that the totality of the judgment by the trial court was that tax exemptions must be processed like a money bill through the National Assembly. The effect of this holding, according to Mr Soire, is that persons who are deserving of exemptions and have made applications to the Commissioner- General of the 4<sup>th</sup> respondent are not able to get such exemptions or waivers because of the judgment. Should their appeal succeed, it would not be possible to back-date and re-issue those exemptions.
15. Tasked by the Court to explain why such persons could not have the tax paid refunded should the appeal succeed, Mr. Soire submitted that this would not be possible because of (lack of) data of persons who have applied, while some would not even apply because of the judgment. Further, that there is no mechanism through which the exemptions can be backdated; that it would cause a floodgate of applications; and that those who have not applied will have no remedy at all.
16. Counsel submitted that according to the judgment, it would no longer be the Minister who will grant tax waivers, but the National Assembly. He submitted, however, that waivers are administrative issues that are normally managed through the 4<sup>th</sup> respondent, and there is already a law that stipulates the threshold upon which such waivers are granted. For waivers to be processed like a money bill through the National Assembly, there would be no tax exemption for the period the process was underway as a money bill has to be processed in the National Assembly through public participation. Such a process, according to Mr Soire, would simply mean that Kenyans have no tax exemptions for the period the judgment would be in force.
17. With regard to how the judgment would affect the applicants specifically, Mr. Soire submitted that the National Assembly would be affected as they were the representative of the people, but also that it does not have the capacity to process each and every application for a tax waiver or exemption because of the manner in which a money bill is processed through the National Assembly.
18. On the question whether the appeal would be rendered nugatory, Ms. Kiramana submitted that following the judgment declaring section 13 of the *Income Tax Act* unconstitutional, a prayer that had not been sought in the petition, there is no legal framework for tax exemption. She submitted that article 210 of the *Constitution* envisages a scenario where one may be exempted from paying taxes, which was done through legislation, such legislation being section 13 of the *Income Tax Act*. Should a stay not be granted, and without a legal framework for exemption from taxes, there is bound to be a level of apathy, especially among investors such as those under the 'JAICA Program,' who ventured into the investment in the country following the waiver (for Japanese companies).



19. Ms. Kiramana further submitted that there is apprehension by the said investors on whether the 4<sup>th</sup> respondent would be collecting taxes from the date of the judgment. Ms. Kiramana noted that the affected investors were those who had, prior to the judgment, been granted exemption since, as ordered in the judgment, the 4<sup>th</sup> respondent was required to start collecting taxes from the date of the judgment, which did not give clarity on whether the taxes should be levied on grants and loans; and there was confusion on the part of the National Treasury as to how to manage grants and loans as it was not clarified in the judgment on which of the two the taxes would be levied from.
20. Ms Kiramana further submitted that the exemptions at issue were pursuant to a contract between the Kenyan and Japanese governments, and revising the terms and imposing taxes after they have already started the projects in Kenya would be changing the substantial terms of the contract between the two countries without negotiations, leading to stalling of ongoing projects.
21. According to Ms Kiramana, the primary contest in the High Court was not a question of Kenyan nationals being exempted; it was a question of foreign investors being exempted from payment of income tax for monies drawn from a specific pool, which was loans and grants issued by the Japanese Government. The trial court, in agreeing with the petitioner, declared that section 13, which allowed the Cabinet Secretary to offer such exemptions, was unconstitutional, which was initially not a question of contention during the proceedings in the trial court.
22. In addressing the Court on the question whether the appeal, if successful, would be rendered nugatory, the 1<sup>st</sup> respondent first submitted that the application should be dismissed as an abuse of the court process. He referred to the position taken by the applicants in Civil Application Nos 301 and 304 of 2023 in which, he submitted, the applicants were urging the Court to lift the orders suspending the commencement of the Finance Act 2023 pending the hearing and determination of a challenge to the legislation before the High Court. He submitted that in those applications, the applicants were adamant that Kenyans needed to be taxed; that without taxation, the government of Kenya would collapse, and the Court was persuaded to lift the stay orders. He observed that in this application, the applicants were now taking a contrary position: that they should be granted powers to exempt persons from being taxed through administrative means. We observe that the said applications were not before us and, we believe, are unrelated to the present matter, and we will say no more about them.
23. We have considered the judgment and decree of the High Court, the application and the grounds in support thereof, as well as the grounds of opposition filed by the 1<sup>st</sup> respondent. We have also considered the respective submissions of the parties and the oral highlights before us at the hearing of the application.
24. The principles to be considered by this court on an application under rule 5(2)(b) of the *Court's Rules* are well settled. The exercise of the court's jurisdiction is discretionary and will be exercised in favour of an applicant who satisfies the court with respect to two limbs: that the intended appeal is arguable, and that if the orders sought are not granted and the appeal ultimately succeeds, the appeal will be rendered nugatory-see *Trust Bank Limited & Another v Investech Bank Limited and 3 Others* [2000] eKLR and *Stanley Kangethe Kinyanjui v Tony Ketter & others* [2013] eKLR.
25. The question whether or not an appeal will be rendered nugatory must be determined on a case by case basis, depending on the peculiar circumstances of the case, as was held in *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA 227. The court, however, will grant orders of stay under rule 5(2) (b) if what is apprehended cannot be undone once it happens, or cannot be undone without undue hardship or expense, or cannot be adequately compensated by an award in damages. Finally, the



court will consider the public interest in appropriate circumstances, as was determined by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR.

26. In considering the twin principles set out above, we bear in mind that to benefit from the discretion of this Court, the applicants must satisfy the court with respect to the existence of both principles in their favour. At the hearing of this application, it was common ground that the intended appeal, as demonstrated in the memorandum of appeal annexed thereto, did raise several arguable grounds of appeal, *inter alia*, the question whether the trial court erred in quashing the Legal Notice, and in declaring section 13(2) of the *Income Tax Act* unconstitutional to the extent that it authorized income tax waiver through a notice in the Gazette instead of through legislation.
27. Accordingly, the question for determination, which the parties were asked to address us on, is whether the appeal would be rendered nugatory should the orders sought not be granted and the intended appeal succeeds.
28. The applicants express their apprehension that in the absence of the orders sought, the 4<sup>th</sup> respondent will proceed to collect taxes that had been waived as a result of the impugned Legal Notice quashed by the trial court. The court also declared section 13(2) of the Income Tax unconstitutional. It found that tax cannot be waived unless it is enacted through Parliament as a money bill, after being subjected to public participation. It directed the commencement of collection of all the income tax due from the income which accrued in or was derived from Kenya pursuant to the by Japanese companies, consultants and Japanese employees involved in the projects specified in the impugned Legal Notice.
29. An additional consideration in determining whether or not to grant orders of stay is the hardship that grant or refusal of relief is likely to occasion to a party, as was held in *Nation Media Group Limited & 2 others v John Joseph Kamotho & 3 others* [2006] eKLR.
30. When addressing us on the nugatory aspect, Mr. Soire contended that the applicants, as representatives of the people, should be concerned that as a result of the judgment, it would be difficult for persons to obtain tax waivers, and that some would not be able to apply at all. He further submitted that the 1<sup>st</sup> applicant would not have the capacity to process every tax waiver, as the court ruled, as a money bill that required, among other things, public participation.
31. Ms. Kiramana zeroed in very eloquently on the crux of the issue before the trial court: the tax exemptions that had been granted to Japanese companies, consultants and employees pursuant to country-country financing agreements that were the subject of the impugned Legal Notice. She further observed, correctly, that under article 210 of the *Constitution*, there is provision for imposition or waiver of tax by legislation, such legislation, she submitted, being section 13 of the *Income Tax Act*, which the trial court had declared unconstitutional.
32. On his part, the 1<sup>st</sup> respondent submitted that the companies, individuals and consultancies that were exempt from tax under the impugned Legal Notice No. 15 were known, and that should the appeal succeed, refunds could be made to them.
33. Having considered the respective positions of the parties on the nugatory aspect, we take the view that in this case, great hardship and inconvenience would be occasioned to the applicants, against the public interest, should the orders sought not be granted. The 4<sup>th</sup> respondent would be required to put in place mechanisms for recovery of taxes exempted, over a period in excess of ten years- noting that the exemptions to Japanese companies commenced in August 2010, under bilateral country-country arrangements with the government of Kenya.



34. With the order declaring section 13(1) of the *Income Tax Act* unconstitutional in place, every application for tax exemption, permitted under article 210 of the *Constitution*, would have to be placed before the applicants for consideration as a money bill, with all the attendant constitutional requirements, including public participation. We note the candid admission by Mr. Soire, learned counsel for the applicants, that the applicants do not have the capacity to process every application for tax exemption or waiver as a money bill, even assuming that the trial court was correct in finding that this should be the case, a matter that will fall for consideration before this court in the intended appeal.
35. In the circumstances, it seems to us that given the far-reaching nature and enormity of the declarations and orders issued by the trial court, an order staying the coming into effect of the declarations of invalidity of the impugned Legal Notice and unconstitutionality of section 13 of the *Income Tax Act* is merited.
36. The question, however, is the form that such order should take. The 1<sup>st</sup> respondent submitted at the hearing before us, and we believe correctly so, that once a statute is declared unconstitutional, such declaration cannot be stayed. We note, however, the comparative jurisprudence from Canada and South Africa analysed so succinctly by Mativo, J. (as he then was) in *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR with regard to the discretion of the court to grant an order suspending a declaration of unconstitutionality of legislation pending requisite action by the legislature or, as in the present case, pending hearing of an appeal on the issue.
37. While the court did not, in *Law Society of Kenya v Kenya Revenue Authority* [*supra*], ultimately grant the order suspending the declaration of invalidity in light of the circumstances of the case, it did observe as follows:
21. “Suspended declarations engage real consequences for individual litigants and others affected by judicial decisions, as laws found to violate the Constitution are permitted to have continued, temporary effect.[...] A suspended declaration occurs when courts choose to delay the effect of invalidating a law. A court may declare a law to be invalid, but “suspend” the effect of the declaration until a future date. During the interim period, the law continues to apply. At the expiry of the period, the court’s declaration takes full effect: unless the law has been replaced or amended to comply with the constitution, it is rendered null.
- ...
32. It must also be born[e] 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.” (Emphasis added)
38. We believe that the circumstances of this case warrant the grant of an order, which we hereby grant, temporarily suspending the coming into effect of the declarations made by the trial court with respect to Legal Notice No. 15 of 2021 and section 13 of the *Income Tax Act*. The suspension of the said declarations shall remain in force for a period of six (6) months from the date hereof, pending hearing and determination of the applicants’ appeal, which counsel for the applicants and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents informed the court had already been filed.
39. The costs of the application shall abide the outcome of the appeal.
40. Orders accordingly.



DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

