



REPUBLIC OF KENYA



KENYA LAW
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**Cabinet Secretary for the National Treasury and Planning & 4
others v Okoiti & 52 others (Petition E031, E032 & E033 of 2024
(Consolidated)) [2024] KESC 47 (KLR) (20 August 2024) (Ruling)**

Neutral citation: [2024] KESC 47 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION E031, E032 & E033 OF 2024 (CONSOLIDATED)

**MK KOOME, CJ, PM MWILU, DCJ & VP, MK IBRAHIM,
SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

AUGUST 20, 2024

BETWEEN

**THE CABINET SECRETARY FOR THE NATIONAL TREASURY AND
PLANNING 1ST APPELLANT**
THE ATTORNEY GENERAL 2ND APPELLANT
THE NATIONAL ASSEMBLY 3RD APPELLANT
THE SPEAKER OF THE NATIONAL ASSEMBLY 4TH APPELLANT
KENYA REVENUE AUTHORITY 5TH APPELLANT

AND

OKIYA OMTATAH OKOITI 1ST RESPONDENT
ELIUD KARANJA MATINDI 2ND RESPONDENT
MICHAEL KOJO OTIENO 3RD RESPONDENT
BENSON ODIWOUR 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	12 TH RESPONDENT
LAW SOCIETY OF KENYA	13 TH RESPONDENT
AZIMIO LA UMOJA ONE KENYA COALITION PARTY	14 TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION	15 TH RESPONDENT
KATIBA INSTITUTE	16 TH RESPONDENT
THE INSTITUTE FOR SOCIAL ACCOUNTABILITY (TISA)	17 TH RESPONDENT
TRANSPARENCY INTERNATIONAL KENYA	18 TH RESPONDENT
INTERNATIONAL COMMISSION OF JURISTS-KENYA (ICJ KENYA)	19 TH RESPONDENT
SIASA PLACE	20 TH RESPONDENT
TRIBELESS YOUTH	21 ST RESPONDENT
AFRICA CENTER FOR OPEN GOVERNANCE	22 ND RESPONDENT
ROBERT GATHOGO KAMWARA	23 RD RESPONDENT
TRADE UNIONS CONGRESS OF KENYA	24 TH RESPONDENT
KENYA MEDICAL PRACTITIONERS' PHARMACISTS AND DENTIST UNION	25 TH RESPONDENT
KENYA NATIONAL UNION OF NURSES	26 TH RESPONDENT
KENYA UNION OF CLINICAL OFFICERS	27 TH RESPONDENT
FREDRICK ONYANGO OGOLA FREDRICK ONYANGO OGOLA	28 TH RESPONDENT
NICHOLAS KOMBE	29 TH RESPONDENT
WHITNEY GACHERI MICHENI	30 TH RESPONDENT
STANLOUS ALUSIOLA	31 ST RESPONDENT
HERIMA CHAO MWASHIGADI	32 ND RESPONDENT
DENNIS WENDO	33 RD RESPONDENT
MERCY NABWIRE	34 TH RESPONDENT
BENARD OKELO	35 TH RESPONDENT
NANCY OTIENO	36 TH RESPONDENT
MOHAMED B. DUB	37 TH RESPONDENT
UNIVERSAL CORPORATION LIMITED	38 TH RESPONDENT
COSMOS LIMITED	39 TH RESPONDENT
ELYS CHEMICAL INDUSTRIES	40 TH RESPONDENT



REGAL PHARMACEUTICALS	41 ST RESPONDENT
BETA HEALTHCARE LIMITED	42 ND RESPONDENT
DAWA LIMITED	43 RD RESPONDENT
MEDISEL KENYA LIMITED	44 TH RESPONDENT
MEDIVET PRODUCTS LIMITED	45 TH RESPONDENT
LAB AND ALLIED LIMITED	46 TH RESPONDENT
BIOPPHARM LIMITED	47 TH RESPONDENT
BIODEAL LABORATORIES LIMITED	48 TH RESPONDENT
ZAIN PHARMA LIMITED	49 TH RESPONDENT
THE SPEAKER OF THE SENATE	50 TH RESPONDENT
CONSUMERS FEDERATION OF KENYA (COFEK)	51 ST RESPONDENT
KENYA EXPORT FLORICULTURE HORTICULTURE, AND ALLIED WORKERS UNION	52 ND RESPONDENT
DR. MAURICE JUMAH OKUMU	53 RD RESPONDENT

(Being applications for Conservatory Orders and Stay of Execution of the Judgment of the Court of Appeal (M’Inoti, Murgor & Mativo, JJ.A.) delivered on 31st July, 2024 in Civil Appeal No. E003 of 2024 as consolidated with Civil Appeals Nos. E106, E021, E049, E064, & E080 of 2024)

Supreme Court grants conservatory and stay orders suspending the Court of Appeal’s declarations invalidating the Finance Act, 2023

The Supreme Court granted conservatory and stay orders suspending the Court of Appeal’s declarations invalidating the entire Finance Act, 2023. The court found that the appeals raised arguable questions regarding public participation and legislative procedure, and that the judgment posed grave risks of fiscal disruption and a constitutional crisis. It held that denying interim relief could render the appeals nugatory and destabilize revenue collection and government operations. Balancing the competing interests, the court determined that public interest warranted preservation of the Finance Act’s effect pending the hearing of the appeals. Each party was ordered to bear its own costs.

Reported by John Ribia

***Civil Practice and Procedure** – conservatory orders – stay of execution - what were the principles that courts should consider before granting an order of stay of execution - what did courts consider to determine if an appeal was arguable - whether public interest superseded all the other elements when it came to granting stay and conservatory orders - whether a conservatory order could issue suspending the order of invalidity of the Finance Act, 2023 issued by the Court of Appeal, pending an appeal before the Supreme Court.*

Brief facts

Following the enactment of the Finance Act, 2023, several petitioners filed suits in the High Court challenging its constitutionality, alleging violations of public participation requirements and procedural irregularities in its passage. The High Court, by judgment delivered on November 28, 2023, invalidated certain provisions but upheld the rest of the Act. Dissatisfied parties appealed to the Court of Appeal, which, on July 31, 2024, declared the entire Finance Act unconstitutional, citing fundamental breaches of legislative procedure and constitutional principles. The Cabinet Secretary for the National Treasury, the Attorney General, the National



Assembly, and the Speaker of the National Assembly filed consolidated appeals before the Supreme Court. They subsequently applied for conservatory and stay orders, arguing that the decision would cause severe fiscal disruption, undermine revenue collection, and create a constitutional crisis. Various respondents opposed the applications, contending that no justification existed to suspend the declarations of invalidity.

Issues

- i. What were the principles that courts should consider before granting an order of stay of execution?
- ii. What did courts consider to determine if an appeal was arguable?
- iii. Whether public interest superseded all the other elements when granting stay and conservatory orders.
- iv. Whether a conservatory order could issue suspending the order of invalidity of the Finance Act, 2023 issued by the Court of Appeal, pending an appeal before the Supreme Court.

Held

1. Before a court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the court that:
 1. the appeal or intended appeal was arguable and not frivolous; and that
 2. unless the order of stay sought was granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory;
 3. that it was in the public interest that the order of stay be granted.
2. There was a misconception that the element of public interest superseded all the other elements when it came to granting stay and conservatory orders. The element of an arguable appeal and the nugatory aspect should be established conjunctively and not disjunctively in an application for stay and conservatory orders. The reason for such a position was that stay or conservatory orders denied a successful litigant the fruits of his judgment albeit temporarily and so the applicant had to satisfy both limbs in order to succeed. However, it was only in specific circumstances, such as in the instant case, where public interest arose that the said element should be met. It was also common ground that not all cases would have a public interest element in them.
3. Whether an appeal was arguable did not call for the interrogation of the merit of the appeal. It need not necessarily succeed, but it ought to warrant consideration by the court. Even one arguable point was sufficient to meet the test. The place and extent of public participation in the legislative process, and whether Parliament could amend bills after they had been subjected to public participation were some of the issues which warranted the Supreme Court's consideration. Similarly, the parameters and considerations of a declaration of the unconstitutionality of a statute required the Supreme Court's input as would the questions on the orders to be issued upon such a declaration being issued including whether to allow or disallow suspension or otherwise of the declarations to enable remedial action by the offending party.
4. The High Court judgment had not declared the entire Finance Act, 2023 unconstitutional like the Court of Appeal Judgment did. The circumstances obtaining were different for that reason alone. In any event, the fact that the superior courts below declined to issue stay of execution or conservatory orders by itself did not bar the Supreme Court from issuing interlocutory orders on a case-by-case basis.
5. Taking into account the uncertainty regarding the revenue raising measures and difficulty that may arise in the operations of the two levels of governments, coupled with the far-reaching implications of the declaration of the entire Finance Act, 2023 as unconstitutional, the consolidated appeal could be rendered nugatory. *Prima facie*, the Supreme Court was not convinced that the consequences of such a declaration would be reversible should the consolidated appeal be successful.
6. Balancing the loss and uncertainty which would be occasioned to the applicants as against the loss by the respondents and public, public interest tilted in favour of granting conservatory and stay orders to preserve the substratum of the consolidated appeal and maintain stability in the budget and appropriation process pending the determination of this appeal. The consolidated appeal was to be set down for hearing within the shortest time possible after the delivery of the instant ruling.



Application allowed.

Orders

- i. *A conservatory order was issued suspending and staying the declarations in Orders iii, iv, vi, vii and ix(i) issued in the Court of Appeal judgment dated July 31, 2024 in Civil Appeals Nos. E003, E016, E021, E049, E064 & E080 of 2024 (Consolidated) pending the hearing and determination of the consolidated appeal before the Supreme Court.*
- ii. *The consolidated appeal was set down for mention before the Deputy Registrar of the Court for purposes of ensuring compliance with earlier directions on filings.*
- iii. *The consolidated appeals shall be set for hearing virtually- on and September 10 and 11, 2024 at 9 am each day.*
- iv. *Each party was to bear its costs of the motions.*

Citations

Cases

Kenya

1. *Board of Governors, Moi High School, Kabarak & another v Bell & 2 others* Petition 6 & 7 of 2013 & Civil Application 12 & 13 of 2012 (Consolidated); [2013] KESC 12 (KLR) - (Applied)
2. *Dock Workers Union & another v Portside Freight Terminals Limited & 10 others* Petition (Application) E010 of 2024; [2024] KESC 35 (KLR) - (Mentioned)
3. *Gatirau, Peter Munya v Dickson Mwenda & 2 others* Petition 2 of 2014; [2014] KESC 49 (KLR) - (Applied)
4. *National Assembly & 47 others v Okiiti & 169 others* Civil Application E577, E581, E585 & E596 of 2023 (Consolidated); [2024] KECA 39 (KLR) - (Explained)
5. *National Assembly & another v Okiya Omtatah Okiiti & 55 others* Civil Appeals Nos E003, E016, Ea21, E049, E064 & E080 of 2024 (Consolidated) - (Mentioned)
6. *Okiiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties)* Constitutional Petition E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated); [2023] KEHC 25873 (KLR) - (Mentioned)
7. *Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others* Petition 353 & 505 of 2017; [2017] KEHC 9684 (KLR) - (Explained)
8. *Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* Civil Application 307 of 2003; [2007] KECA 132 (KLR) - (Explained)
9. *Suleiman Said Shahbal v Independent Electoral and Boundaries Commission & 3 others* Petition 21 of 2014; [2014] KESC 1 (KLR) - (Applied)

Canada

Ontario (Attorney General) v G 2020] SCC 38; [2020] 3 SCR 629 - (Applied)

Statutes

Kenya

1. Alcoholic Drinks Control Act (cap 121) In general - (Cited)
2. Constitution of Kenya articles 1, 2(3)(4); 3(1); 10(1)(2); 22; 43; 47; 73; 75; 114; 118; 129; 153(4(a)); 159; 163(4)(a)(b); 165(3); 201(d); 208; 210(1); 226(5); 227(1); 259 - (Interpreted)
3. Excise Duty Act (cap 472) In general - (Cited)
4. Export Processing Zones Act (cap 517) In general - (Cited)
5. Finance Act, 2023 (Act No 4 of 2023) sections 24 (c); 44 ; 47 (a) (v); 100 ;101 - (Interpreted)
6. Income Tax Act (cap 470) In general - (Cited)
7. Kenya Revenue Authority Act (cap 469) In general - (Cited)
8. Kenya Roads Act (cap 408) section 7- (Interpreted)



9. Miscellaneous Fees and Levies Act (cap 469C) In general - (Cited)
10. Public Finance Management Act (cap 412A) sections 37, 39A, 40 - (Interpreted)
11. Retirement Benefits Act (cap 197) In general - (Cited)
12. Special Economic Zones Act (cap 517A) In general - (Cited)
13. Statutory Instruments Act (cap 2A) sections 88, 89 - (Unconstitutional)
14. Supreme Court Act (cap 9B) sections 23, 23A, 24 - (Interpreted)
15. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 3, 31, 32 - (Interpreted)
16. Value Added Tax Act (cap 476) In general - (Cited)

Advocates

None mentioned

RULING

1. The enactment of the Finance Act, 2023 precipitated a total of 11 petitions being filed in the High Court, that is, *Okoiti & 6 others v Cabinet Secretary for The National Treasury and Planning & 3 Others; Commissioner General, Kenya Revenue Authority & 3 Others (Interested Parties)* (Petitions Nos E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of [2023] (Consolidated)) [2023] KEHC 25872 (KLR). The gist of the said petitions was a challenge to the constitutionality of not only the legislative process that culminated in the said Act but also some of the provisions therein. The High Court (Majanja, Meoli & Mugambi, JJ) by a judgment dated November 28, 2023 only declared some of the provisions in the Finance Act, 2023 as unconstitutional and not the whole Act as some parties had prayed.
2. Subsequently, six appeals and three cross-appeals were lodged at the Court of Appeal, that is, *The National Assembly & another v Okiya Omtatah Okoiti & 55 Others*, Civil Appeals Nos. E003, E016, E021, E049, E064 & E080 of 2024 (Consolidated) against the judgment of the High Court aforesaid. Apart from finding some of the provisions of the Act as unconstitutional, the Court of Appeal (M’Inoti, Murgor & Mativo, JJ.A.), unlike the High Court, by a judgment dated July 31, 2024, declared the entire Finance Act, 2023 unconstitutional. In particular, the court issued Orders *inter alia* that –
 - i. The appellants’ appeals in Civil Appeals Nos E003 of 2024 and E080 of 2024, against the findings that section 84 (the *Affordable Housing Levy*) and sections 88 and 89 (the *Statutory Instruments Act*) are unconstitutional, are hereby dismissed on grounds that the said issues have been caught up by the doctrine of mootness, therefore, they present no live controversies.
 - ii. The notices of cross-appeal by the 15th to 22nd and 38th to 49th respondents and Civil Appeal No E064 of 2024 are devoid of merit and the same are hereby dismissed, save that we find that the High Court misconstrued its mandate under Article 165 (3) by holding that it had no jurisdiction to intervene in policy matters.
 - iii. The notice of cross-appeal by the 13th respondent (LSK) is hereby allowed in the following terms: (a) a declaration be and is hereby issued decreeing that sections 24(c), 44, 47(a)(v), 100 and 101 of the Finance Act, 2023, introduced post-public participation, are unconstitutional and void for having been enacted in a manner that by-passed the laid down legislative stages



including publication, first reading, second reading and contrary to articles 10(1) & (2) and 118 of the Constitution and Standing Orders.

- iv. Civil Appeal No E016 of 2024 is allowed to the extent that a declaration be and is hereby issued that sections 18, 21, 23, 24, 26, 32, 34, 38, 44, 47, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 of the Finance Act No. 4 2023, introduced post-public participation to amend the Income tax Act, Value Added Tax Act, Excise Duty Act and Miscellaneous Fees and Levies Act, Kenya Revenue Authority Act, Retirement Benefits Act, Alcoholic Drinks Control Act of 2010, Special Economic Zones Act and Export Processing Zones Act, are unconstitutional, null and void for not having been subjected to fresh public participation and having been enacted in total violation of the constitutionally laid down legislative path.

...

- v. Civil Appeal No E021 of 2021 is merited. Accordingly, we hereby issue a declaration that the enactment of the Finance Act, 2023 violated articles 220(1)(a) and 221 of the Constitution as read with sections 37, 39A, and 40 of the PFMA which prescribes the budget making process, thereby rendering the ensuing Finance Act, 2023 fundamentally flawed and therefore void ab initio and consequently unconstitutional.

- vi. Civil Appeal No. E049 of 2024 partially succeeds in terms of the following orders:-

(a) a declaration be and is hereby issued that in conformity with article 10(1) & (2)(c), Parliament is obligated to provide reasons for adopting or rejecting any proposals received from members of the public during (the) public participation process;

(b) a further declaration is hereby issued that the failure to comply with this constitutional dictate renders the entire Finance Act, 2023 unconstitutional.

- viii. We affirm the finding by the High Court that sections 76 and 78 of the Finance Act, 2023 amending section 7 of the Kenya Roads Act, 1999 are all unconstitutional, null and void.

- ix. We uphold the finding by the High Court that concurrence of both houses in the enactment of the Finance Act, 2023 was not a requirement under article 114

(i) Having found that the process leading to the enactment of the Finance Act, 2023 was fundamentally flawed and in violation of the Constitution, sections 30 to 38, 52 to 63 and 23 to 59 of the Finance Act, 2023 stand equally vitiated and therefore unconstitutional..”

3. The foregoing decision(s) led to three appeals, SC Petitions Nos 31, 32 & 33 of 2024, being filed before this court, which petitions have since been consolidated by an order of this Court dated August 15, 2024. Prior to the said consolidation, the 1st and 2nd appellants had lodged a notice of motion dated August 1, 2024 in SC Petition No E031 of 2024 while the 3rd and 4th appellants had lodged another



notice of motion dated August 2, 2024 in SC Petition No E032 of 2024. Appreciating the correlation between the two Motions, this Court, on August 5, 2024, directed that they would be disposed of by a single ruling. The said Motions are therefore the subject of this composite ruling.

4. The 1st and 2nd appellants/applicants' motion which is premised on articles 1, 2, 3(1), 22, 43, 47, 73, 75, 129, 153(4)(a), 159, 163(4)(a) & (b), 201(d), 210(1), 226(5), 227(1) & 259 of the Constitution; sections 3, 15A, 21, 23, 23A and 24 of the Supreme Court Act (cap 9B Laws of Kenya); and Rules 3, 31 and 32 of the Supreme Court Rules, 2020 seeks *inter alia* orders that-

“ ...

5. Pending the hearing and determination of the appeal filed before this court, there be a stay of the impugned judgment of the Court of Appeal delivered on July 31, 2024 and in particular, the declarations in orders iii, iv, vi, vii, viii and ix(i).
6. The costs of the application be provided for.”

As for the 3rd and 4th appellants/applicants' motion, it is premised on more or less similar provisions and seeks *inter alia* orders that-

“ ...

4. Pending the hearing and determination of the appeal filed before this court, there be issued conservatory orders staying declarations in Orders i, ii, iii, iv, vi, vii, viii and ix(i) of the impugned judgment of the Court of Appeal delivered on July 31, 2024, and the effects thereof from July 31, 2024. ...”
5. In totality, the grounds in support of the motions are firstly that, the consolidated appeal is arguable to wit, that the Court of Appeal erred by, misapprehending the enactment procedure of a Money Bill under article 114 of the Constitution and the Public Finance Management Act; contradicting its own decision in Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing Board & 7 Others, Civil Appeal No 11 of 2018; [2018] eKLR with regard to the threshold of public participation required in enacting statutes and whether Parliament can amend bills after they have been subjected to public participation; and conflating the purpose/function of an Appropriation Act and a Finance Act. Further, that the impugned decision creates an untenable situation where the government has to revert to the Finance Act, 2022 for revenue collection for a subsequent fiscal year since the Finance Bill, 2024 has since been rescinded.
6. Secondly, the applicants urge that, unless the orders sought are granted, the substratum of the consolidated appeal will be defeated and/or rendered nugatory. In that regard, argued the applicants, the nullification of the Finance Act, 2023 will cause a revenue shortfall of approximately Kshs 214 billion which cannot be recovered unless stay orders are issued urgently. It would also require the government to update all its online platforms, revenue collection systems and software to reflect the relevant tax rates, tax brackets and tax treatment of various items to the legal regime that existed in 2022, which will take time and calls for engagement of various software and platform providers. The applicants also contend that, following the rejection/recession of the Finance Bill 2024, a similar bill cannot be re-introduced in the National Assembly until the expiry of 6 months from the date of such rejection/recession. Further, that the impugned judgment poses an immediate, real and immense challenge for the monetary and fiscal policy of the country, the legislative underpinnings of various sectors of the economy whose subsidiary legislation are set to lapse, and threatens the economic stability of the country.



7. What is more, the applicants assert that the impugned decision, as it stands, will give rise to a constitutional crisis by obstructing the government's ability to lawfully collect and allocate funds. The ripple effect of which, in their view, would lead to disruption or cessation of essential public services, and the worst-case scenario being a total shutdown of the government. It was the applicants' other position that the government may be forced to borrow funds so as to bridge the fiscal deficit, which would significantly increase the public debt and inflation in the country. They also averred that the impugned judgment exposes the government to a plethora of legal challenges including litigation from various stakeholders affected by the disruption in statutory financial operations. As far as the applicants are concerned, the Court of Appeal had furthermore departed from the practice of suspending a declaration of invalidity of a statute to safeguard public interest while affording an opportunity for the offensive provisions to be addressed within the law. They contended that, in this case, suspension of the declaration of invalidity is necessary as the immediate application of the impugned judgment would endanger public interest and the rule of law. To buttress that line of argument, reference was made to the decisions in *Suleiman Said Shabbal v Independent Electoral and Boundaries Commission & 3 others*, SC Petition No 21 of 2014; [2014] eKLR, and *Ontario (Attorney General) v G* [2020] SCC 38.
8. Thirdly, that the public interest nature of the consolidated appeal warrants the issuance of the orders sought. More so, since the impugned judgment affects the entire Kenyan population and the ability of both levels of government to meet their duties/responsibilities. In summing up, the applicants submitted that the motions have met the parameters for stay of execution and/or conservatory orders as set out in *Gatirau Peter Munya vs. Dickson Mwenda & 2 others*, SC Applic No 5 of 2014; [2014] eKLR (*Gatirau Munya Case*), and urged this court to grant the same.

In support of the Motions

9. The 5th appellant, in supporting the Motions aforesaid, reiterated that the consolidated appeal is not frivolous and would be rendered nugatory if the orders sought are not granted. In addition, it was urged that the Finance Act, 2023 contained provisions whose objective was to streamline the tax regime and make it user friendly. Towards that end, the 5th appellant contends that technical equipment like the Integrated Tax Invoice Management System was procured and installed. Therefore, uninstalling such equipment and reinstalling the old system would be costly and inconvenient. Besides, the 5th appellant claimed that it may end up being required to refund taxes collected under the impugned Act yet no allocation for such refund has been made. In any event, the 5th appellant maintained that it would be in the interest of justice to grant the stay sought until this Court renders its decision in light of the principle of predictability and simplicity of tax regimes.
10. Likewise, the 52nd respondent submitted that the Motions have met the test for granting the orders sought. The said respondent added that workers have a legitimate expectation to continue benefiting from the tax measures which were prescribed under the Finance Act, 2023 until this court renders its decision in the consolidated appeal. Further, the 52nd respondent claims that more than 100,000 employees who are directly employed within the ongoing housing projects anchored on the Finance Act, 2023 are at risk of losing employment.

In opposition to the Motions

11. On his part, the 2nd respondent opposed the motions and deposed that the National Assembly acceded to the President's reservation with regard to all the clauses of the Finance Act, 2024 and rejected the said Act in its entirety. The Supplementary Appropriation (No 2) Bill, 2024 (National Assembly Bill No. 39) intended to authorise the expenditure cuts amounting to Kshs. 344.3 billion owing to the rejection of the Finance Act, 2024 was however passed by the National Assembly. Thereafter, that the said Bill



was signed into law by the President on August 5, 2024 resulting in the Supplementary Appropriation Act, 2024. In the 2nd respondent's view, the foregoing actions demonstrate that the government can adjust the expenditure of public funds to accommodate any financial gap. Consequently, the above respondent maintains that it would not be in the public interest to grant the orders sought, and that in the event the consolidated appeal is unsuccessful, it would mean that Kenyans would have been subjected to unconstitutional taxes for an even longer period. Moreover, it was urged that there was no prospect of any person seeking to recover taxes paid under the Finance Act, 2023.

12. The 3rd and 4th respondents' position on the Motions was that they were made in bad faith and meant to ridicule the substantive determinations of the superior courts below. According to them, since the two superior courts found the Finance Act, 2023 unconstitutional, the applicants cannot obtain the interim reliefs sought. They posit that to hold otherwise would be akin to violating article 2(3) & (4) of the Constitution, and rewarding the applicants for violation of the Constitution. It was their other contention that this court, in the Gatirau Munya Case, underscored the fact that the essence of public interest lies in prioritising constitutional values above all other considerations. The said respondents thus maintain that, public interest in this case militates against any positive orders being granted in favour of the applicants. Besides, the 3rd respondent specifically urged that the public interest element of any dispute takes precedence over the other two elements, that is, the arguability of an appeal and the nugatory aspect of the three-tier test for granting stay and/or conservatory orders. The 3rd respondent added that, should this court grant the orders sought, the same would be tantamount to determining the consolidated appeal at an interlocutory stage. As far as the 3rd respondent was concerned, the applicants did resort to fear mongering as a strategy of obtaining stay orders before the Court of Appeal. However, that the said strategy failed as the said court declined to issue stay orders and as such, the myth that the government and the revenue collection process would collapse in the absence of such orders was debunked. Be that as it may, the 3rd respondent posited that revenue collection is not dependent on the Finance Act but the substantive tax legislation currently in force.
13. Equally, the 11th, 13th, 14th, 15th, 16th, 17th, 18th 19th, 20th, 21st, 22nd and the 38th to 49th respondents opposed the Motions on more or less similar grounds as the 2nd, 3rd and 4th respondents save that the 11th 14th, 15th, 16th, 17th, 18th 19th, 20th, 21st and 22nd respondents conceded that the consolidated appeal is arguable. Nonetheless, the 14th, 15th, 16th, 17th, 18th 19th and 22nd respondents submitted that the three-tier test for granting conservatory orders was conjunctive, and therefore, the applicants were required to establish all the three elements but have not. As for the 20th and 21st respondents, they assert that the applicants have not demonstrated the existence of any legal vacuum or justification to warrant the suspension of the declaration of invalidity of the Finance Act. In any event, the said respondents argued that article 208 of the Constitution establishes a Contingency Fund for emergencies or unforeseen eventualities and therefore the government is not handicapped in meeting its fiscal obligations.

Analysis and Determination

14. We have considered the motions and the parties' rival submissions. The applicants herein seek interlocutory orders in the nature of stay of execution and conservatory orders pending the hearing and determination of the consolidated appeal by this court. It is common ground in that context that, this court is vested with jurisdiction to issue such interlocutory orders as provided for under section 23A of the Supreme Court Act. As also appreciated in Board of Governors, Moi High School, Kabarak & another v Bell & 2 Others (Petition 6 & 7 of 2013 & Civil Application 12 & 13 of 2012 (Consolidated)) [2013] KESC 12 (KLR), the essence of such interlocutory orders is to safeguard the character and integrity of the subject-matter of an appeal, pending the resolution of all contested issues.



15. The parameters within which stay of execution and conservatory orders may be issued by this court were aptly set out in the [Gatirau Munya Case](#) as follows:

“The principles to be considered before a court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the court that:

- i. the appeal or intended appeal is arguable and not frivolous; and that
- ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower courts, but in this court as well. However, in the context of the [Constitution](#) of Kenya, 2010, a third condition may be added, namely:

- iii. that it is in the public interest that the order of stay be granted.”

16. Based on the foregoing, we wish to disabuse the misconception that the element of public interest supersedes all the other elements when it comes to granting stay and conservatory orders. As the aforementioned decision clearly states, the element of an arguable appeal and the nugatory aspect should be established conjunctively and not disjunctively in an application for stay and conservatory orders. The reason for such a position is obvious-that stay or conservatory orders deny a successful litigant the fruits of his judgment albeit temporarily and so the applicant has to satisfy both limbs above in order to succeed in his prayers. However, it is only in specific circumstances, such as in this case, where public interest arises that the said element should be met. It is also common ground that not all cases will have a public interest element in them. Do the motions in question meet the aforementioned parameters?

17. To begin with, whether an appeal is arguable does not call for the interrogation of the merit of the appeal. It need not necessarily succeed, but it ought to warrant consideration by this court. Further, even one arguable point is sufficient to meet the test. See [Dock Workers Union & another v Portside Freight Terminals Limited & 10 Others](#), SC Petition (Applic) No E010 & E011 of 2024 (consolidated). Being mindful not to make definitive findings at this stage, we find that the place and extent of public participation in the legislative process, and whether Parliament can amend bills after they have been subjected to public participation are some of the issues which warrant this court’s consideration. Similarly, the parameters and considerations of a declaration of the unconstitutionality of a statute requires our input as would the questions on the orders to be issued upon such a declaration being issued including whether to allow or disallow suspension or otherwise of the declarations to enable remedial action by the offending party.

18. On the nugatory aspect, we understood some of the respondents to argue that the Court of Appeal declined to issue stay orders following the High Court judgment and opted to hear the consolidated appeal before it on merit. Therefore, in their view, the same was indicative that the appeal before us would not be rendered nugatory. In that regard, it is not in dispute that the Court of Appeal *vide* [National Assembly & 47 others v Okiiti & 169 others](#) (Civil Application E577, E581, E585 & E596 of 2023 (Consolidated)) [2024] KECA 39 (KLR) declined to stay the execution of the High Court judgment pending the hearing and determination of the appeal before it. However, we are cognisant that the High Court judgment had not declared the entire Finance Act, 2023 unconstitutional like the Court of Appeal Judgment did. The circumstances now obtaining are different for that reason alone.



In any event, the fact that the superior courts below declined to issue stay of execution or conservatory orders by itself does not bar this court from issuing interlocutory orders on a case-by-case basis.

19. On our part therefore, taking into account the uncertainty regarding the revenue raising measures and difficulty that may arise in the operations of the two levels of governments as posited by the applicants, coupled with the far-reaching implications of the declaration of the entire Finance Act, 2023 as unconstitutional, we are persuaded that the consolidated appeal may be rendered nugatory. Besides, prima facie, we are not convinced that the consequences of such a declaration would be reversible should the consolidated appeal be successful.
20. Furthermore, balancing the loss and uncertainty which would be occasioned to the applicants as against the loss by the respondents and public, we find that public interest tilts in favour of granting conservatory and stay orders to preserve the substratum of the consolidated appeal and maintain stability in the budget and appropriation process pending the determination of this appeal. In addition, in view of the public interest in the matter, we direct that the consolidated appeal herein be set down for hearing within the shortest time possible after the delivery of this ruling.
21. Taking into account the public interest nature of the matter and this court's decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others*, SC Petition No 4 of 2012; [2014] eKLR, we deem it just to order that each party bears its own costs.
22. Consequently and for the reasons afore-stated, we make the following orders:
 - i. The 1st, 2nd, 3rd and 4th appellants/applicants' notice of motions dated 1st and August 2, 2024 and filed on 1st and 5th August respectively are hereby allowed in the following terms:
 - a) A conservatory order is hereby issued suspending and staying the declarations in orders iii, iv, vi, vii & ix(i) issued in the Court of Appeal judgment dated July 31, 2024 in Civil Appeals Nos E003, E016, E021, E049, E064 & E080 of 2024 (Consolidated) pending the hearing and determination of the consolidated appeal before this court.
 - ii. The consolidated appeal be set down for mention before the Deputy Registrar of the court for purposes of ensuring compliance with earlier directions on filings. iii. The consolidated appeals shall be set for hearing virtually- on 10th and September 11, 2024 at 9 am each day.
 - iv. Each party shall bear its costs of the motions.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF AUGUST, 2024.

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M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF KENYA

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P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT



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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the Original

REGISTRAR

SUPREME COURT OF KENYA

