



REPUBLIC OF KENYA



KENYA LAW
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**Okwama v Milestone Gaming Limited & 3 others (Petition
E016 of 2023) [2025] KEHC 579 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
PETITION E016 OF 2023
S MBUNGI, J
JANUARY 29, 2025**

BETWEEN

EDWARD OKWAMA PETITIONER

AND

MILESTONE GAMING LIMITED 1ST RESPONDENT

STANDARD GLOBAL EAST AFRICA LIMITED 2ND RESPONDENT

KENYA REVENUE AUTHORITY 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

Background

1. The Petitioner filed a Petition dated 21st August, 2023 seeking to declare Paragraph 4A of Part II of the First Schedule to the *Excise Duty Act*, 2015 unconstitutional. Together with the Petition, the Petitioner filed an application under Certificate of Urgency dated 21st August, 2023, during the High Court Recess, seeking conservatory orders pending the hearing and determination of the Application inter partes.
2. The Petitioner's Application dated 21st August 2023 for conservatory orders was placed before the Court which on the same date issued interim ex-parte conservatory orders:
 - (a) restraining the 1st and 2nd Respondents from deducting 12.5% excise duty from the Petitioner and other players as provided under Paragraph 4A of Part II of the First Schedule to the *Excise Duty Act*, 2015;
 - (b) restraining the 3rd Respondent from implementation of Paragraph 4A of Part II of the First Schedule to the *Excise Duty Act*, 2015 as against the 1st and 2nd Respondents.



3. The Application dated 21st August, 2023 came up on 21st September, 2023 wherein the 3rd Respondent opposed the extension of the ex-parte interim conservatory orders on the basis that the revenue loss occasioned by the Order was irreversible and neither the Petitioner nor the 1st and 2nd Respondent had demonstrated how the revenue would be recoverable in the event the Petition was not successful.
4. In order to protect revenue and therefore preserve the substratum of the Petition so that no party would suffer prejudice upon determination of the Petition, The Court after hearing the Parties varied the interim ex-parte conservatory Order issued on 21st August, 2023 as follows:

“That in order that the fears of the 3rd Respondent that there may be irreversible loss of revenue it is directed that the 1st and 2nd Respondent shall reveal the due revenues for the month of September going forward and never part with it pending further orders of the Court.”
5. The Court on 24th November, 2024 gave the following orders:
 - a. In the interest of justice and to preserve the substratum and the subject matter in the Petition, having disallowed the application for setting aside the interim conservatory orders granted by the court on the 21.8.2023, those orders are maintained pending the hearing and determination of the application or further orders by the court. For clarity purposes the orders so granted are as sought in the Petitioner’s Notice of Motion Application dated 21st August, 2023 in prayers No. 2,4 and 6.
 - b. Let all parties opposing the petitioner’s said application, who have not filed responses and submissions thereto, file and serve same within 14 days from today.
 - c. The two applications for Contempt of Court filed by the Petitioner in this case against the two 3rd Respondents’ officers shall be heard on priority basis. For that reason, let every party opposing or supporting the same, and who have not filed desired papers, file their appropriate paper in that regard within 14 days from today.
 - d. Any person keen to participate in these proceedings as an Interested Party, or as a principal party, and who may not have filed papers in that regard, shall file and serve the appropriate applications and submissions on the Principal parties, (the petitioner and the four respondents) within 14 Days from today, the 24th November, 2023.
 - e. Upon service, the Principal parties shall file and serve their responses and submissions within 21 days from date of service.
 - f. By their very nature, the applications for joinder and contempt ought to be heard before that for conservatory orders. It is directed that all applications save for that by the petitioner dated 21.8.2023, shall be heard together on the 21.01.2024 at 2.00pm.
 - g. For orderly conduct of the proceedings, the Petitioner’s Notice of Motion Application dated 21st August, 2023 shall be heard after the determination of the application by Interested parties.
6. The 3rd respondent/applicant filed a motion under Article 159(2) (d) of *the Constitution* of Kenya, Rule 3 (2), (3), (5) & (8) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules; Sections 1A, 1B, 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya; Order 51 Rule 1 of the Civil Procedure Rules; Sections 36, 47 and 47A of the *Tax Procedures Act* and Section 5 of the *Excise Duty Act* seeking the following orders:

SUBPARA i.



THAT the 1st and 2nd Respondents and any other party joined in the current proceedings implementing the impugned Paragraph 4A of Part II of the First Schedule of the Excise Duty Act as amended by the Finance Act 2023 be and are hereby directed to collect Excise Duty at the rate of 12.5% but account for the same as advance payment pending the hearing and determination of the Petition.

ii. That costs of this Application be provided for.

7. The application is premised on the following grounds:

a. That on 21st August, 2023 this Honourable Court issued temporary conservatory orders restraining the 1st and 2nd Respondents from deducting 12.5% Excise Duty from the Petitioner and other wagers as provided for under paragraph 4A, Part II of the First Schedule of the Excise Duty Act, 2015.

b. That on 21st September, 2023 this Honourable Court issued a further Order directing the 1st and 2nd Respondents to collect and reveal the due revenues for the month of September going forward and never part with it pending further orders of the Court.

c. That on 24th November, 2023 this Honourable Court issued a Ruling dismissing the 4th Respondent's Preliminary Objection dated 14th September, 2023 and the 3rd Respondent's Application dated 24th August, 2023.

d. That the first direction issued by the Court which is direction (a) under paragraph 75 of the Ruling read as follows:

“In the interest of justice and to preserve the substratum and the subject matter in the Petition, having disallowed the application for setting aside the interim conservatory orders granted by the court on the 21.8.2023, those orders are maintained pending the hearing and determination of the application or further orders by the court. For clarity purposes the orders so granted are as sought in the Petitioner's Notice of Motion Application dated 21st August, 2023 in prayers No. 2, 4 and 6.”

e. That the aforesaid direction confirmed the interim conservatory orders of the Court granted by the Court on 21st of August, 2023 in the Petitioner's Application for conservatory orders dated 21st August, 2023 but failed to protect revenue as it had done in the orders of the Court issued on 21st September, 2023.

f. That the conservatory orders granted by the Court on 21st of August, 2023 were varied by the same Court on 21st September, 2023 wherein the Court added another order that read as follows;

That in order that the fears of the 3rd Respondent that there may be irreversible loss of revenue it is directed that the 1st and 2nd Respondent shall reveal the due revenues for the month of September going forward and never part with it pending further orders of the Court.

g. That the protection of revenue by the order of 21st September, 2023 was not based on the outcome of the 3rd Respondent's Application dated 24th August, 2023 but was to protect the fear that the loss of revenue would be irreversible in the event that the Petition was dismissed.

h. That the danger of irreversible loss of revenue is still very eminent as the Petitioner and the 1st and 2nd Respondents together with any other party interested in joining the Petition



and implement the impugned section have not demonstrated how the Excise Duty will be recovered by the 3rd Respondent in the event that Petition is not successful.

- i. That the projected Excise Duty loss from the orders amounts to approximately Kshs. 210,000,000 per month from the 1st and 2nd Respondents and approximately Kshs. 1,000,000,000 per month if the entire sector is enjoined to the proceedings. This loss may be unrecoverable at the end of the proceedings which have taken unduly long as all the other Finance Act 2023 cases filed almost at the same time with the current proceedings have now been determined and issues closed or appeals preferred before the Court of Appeal. The Court of Appeal has also heard the same and they are pending judgment.
- j. That no security for the taxes has been issued by either the Petitioner or the actual beneficiaries of the Orders who are the 1st and 2nd Respondent and other parties who are interested to join the proceedings who implement the impugned section at the prejudice of the Government of Kenya and the general public whose interest it serves.
- k. That the failure to protect revenue and at the same time acknowledging that there is unrecoverable/irreversible revenue loss is frustrating government projects and service delivery to the public and contravenes Article 210 (1) of *the Constitution* which provides that tax can only be imposed, waived or varied by legislation.
- l. That the Court's mandate extends not only to serve the commercial interests of the litigants but to balance the weights of justice to ensure that its orders serve the interest of the public and not a few persons only.
- m. That the stay orders of this Court have caused unfairness and imbalance in the Betting Sector and the same can only be restored by securing the taxes and ensuring that all platforms levy the Excise Duty.
- n. That the interests of justice dictates that this Honourable Court not only requires to protect the interests of the Petitioner, the 1st and 2nd Respondent and any other party enjoined in the proceedings who is implementing the impugned section but also requires to protect the interests of the 3rd Respondent and the Government of Kenya as a whole by safeguarding revenue to avoid irreversible loss of revenue which will be a loss to the Kenyan public.
- o. That the Honourable Court also requires to protect the doctrine of presumption of Constitutionality of all statutes by ensuring that the interests of all parties are safeguarded pending the hearing and determination of the Application for conservatory orders and the Petition on merit.
- p. That the 1st Respondent has been deducting and remitting Excise Duty at the rate of 12.5% under the impugned section to the 3rd Respondent with effect from 5th December 2023 and accounting for the same as self- assessment of Excise Duty.
- q. That the 2nd Respondent has been deducting and remitting Excise Duty at the rate of 12.5% under the impugned section to the 3rd Respondent with effect from 25th March, 2024 and accounting for the same as advance payment.
- r. That by deducting and remitting the Excise Duty at the rate of 12.5% and accounting for the same as advance payment, it means that the Excise Duty will be utilized for outstanding current and future liabilities or a refund of the same can be claimed as provided for under section 47 of the *Tax Procedures Act*.



- s. That it is also in the interest of the Petitioner, the Respondents and any party joining the proceedings to have the Excise Duty in dispute remitted as an advance payment as if the Excise Duty is found due and payable, the 1st and 2nd Respondents and other parties joined in the proceedings who are implementing the impugned section will not suffer penalties and interest payable for late payment of taxes.
 - t. That no prejudice will be suffered by the Petitioner, 1st and 2nd Respondents and any other party joined in the proceedings who is implementing the impugned section if the taxes are deducted and remitted as advance payment since the payment can be refunded if the Court finds that the taxes were not due and payable and the same can be utilized as actual payment of Excise Duty if the Court finds that the taxes were due and payable.
 - u. That if the revenue is protected, parties can dispense with the hearing of the Application for conservatory orders and proceed to the hearing of the Petition which can be fast-tracked so that a final determination of whether the Excise Duty under the impugned section is payable or not.
8. The application was supported by an affidavit sworn by Mr. Weldon Ng'eno, an employee for the 3rd respondent, which reiterated the grounds in support of the application.

Grounds of opposition filed by the Petitioner.

- 9. Vide grounds of opposition dated 03.07.2024, the petitioner stated that the application was bad in law, misconceived and defective.
- 10. He stated that the application sought to review and/or set aside the court orders issued on 24.11.2023 to which a notice of appeal had been filed by the same party (3rd respondent) and hence the 3rd respondent cannot purport to enjoy the right to appeal and exercise right to review under the same subject matter at the same time.
- 11. He further stated that the 3rd respondent's application did not fall within the framework of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.
- 12. The petitioner told the court that the applicant had not demonstrated sufficient grounds to warrant setting aside of orders issued on 24.11.2023 as canvassed in *Okiya Omtatah Okiiti v Commissioner General, Kenya Revenue Authority & 2 others* [2017] eKLR, and that setting aside the orders would be contrary to Rule 25 of the Mutunga rules.
- 13. The petitioner further stated that the application was aimed at derailing the hearing and determination of the application and petition dated 21.08.2023 and prayed that it be dismissed in limine.

Grounds of opposition filed by the 1st Respondent.

- 14. The 1st respondent stated that the application was vexatious and brought in bad faith and that the application by the 3rd respondent seeks to vary, set aside or review the orders issued on 24.11.2023 but had not complied with the conditions provided under Order 45 of the Civil Procedure Rules.
- 15. The 1st respondent further stated that the application sought to have the court sit on its own appeal which is an abuse of the court process and the same should be dismissed.

Grounds of opposition filed by the 2nd Respondent.

- 16. Vide grounds of opposition dated 05.07.2024, the 2nd respondent stated that the 3rd Respondent sought similar orders in the Application dated 24th August, 2023 seeking to set aside the conservatory



orders and on 21.09.2023, the 3rd Respondent made an oral Application for what it termed as the preservation of revenue on account of the Petition being res judicata and which Orders were granted pending the hearing of the 3rd Respondent's Application dated 24th August, 2023 and the 4th Respondent's Notice of Preliminary Objection dated 14th September, 2023. 26. The 2nd respondent stated that the Ruling of 24.11.2023 vacated the Orders issued on 21.09.2023 and re-affirmed the Conservatory Orders issued on 21.08.2023. The 2nd respondent further stated that there is no provision in the law known as 'preservation of revenue' and which is a creation of the 3rd Respondent.

17. The 2nd respondent told the court that the Application as filed does not meet the conditions for review set under Order 45 of the Civil Procedure Rules.
18. Further, the 2nd respondent stated that neither *the Constitution* of Kenya, 2010 nor the legal Notice No. 17 of 2013, *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides for setting aside and that the court does not possess the necessary Jurisdiction to sit on its own Orders.
19. The 2nd respondent also stated that the 3rd Respondent had already invoked the Jurisdiction of the Court of Appeal under Rule 75 of the Appellate with regard to the preservation of revenue and therefore has no locus before the Honourable Court.
20. It was stated that the application was unmerited and sought to further delay the determination of the main petition contrary to Article 159(2)(b) of *the Constitution* and as held in *Bloggers Association of Kenya (Bake) v Attorney General & 5 others* [2018] eKLR.
21. Further, to set aside the Orders will be contrary to Rule 25 of the Mutunga rules and which courts have held that this power must be exercised with great caution and is ordinarily only exercised to correct an error or oversight or to effect a review of the proposed order so that the orders may be able to deal more appropriately with the issues as litigated by the parties as held by the Court of Appeal in *Benjoh Amalgamated Ltd vs Kenya Commercial Bank Ltd* [2014] Eklr and prayed that it be dismissed with costs.
22. The parties agreed to dispose off the application by way of written submissions. At the time of writing this ruling, no submissions by the 1st, 2nd and 4th respondents are in the court record.

3rd Respondent's/Applicant's Submissions.

23. In rebuttal to the grounds of opposition, the applicant submitted that the application did not seek review/setting aside of the orders of 24.11.2023 but for the protection of revenue which the court is empowered and has jurisdiction to do under Article 159(2)(d) of *the Constitution* of Kenya and Rule 3(2), (3), (5) and (8) of the Mutunga Rules.
24. It was the applicant's submission that the revenue loss is irreversible since excise duty is a consumption tax and therefore if the taxes are not preserved, it would be unrecoverable after the determination of the petition if found due and payable.
25. Further, the applicant submitted that neither the 1st or 2nd respondent have demonstrated how the revenue will be recovered hence it is in the interest of the public to preserve the revenue pending the determination of the petition.
26. On whether there is prejudice being suffered by the 3rd respondent and by extension the public for whom the 3rd respondent collects taxes on behalf of warranting the protection of revenue, the 3rd respondent submitted positively since there is irreversible loss of revenue in the event the petition is determined and the law is found to be constitutional.



27. The applicant further submitted that there is no real danger or prejudice against the petitioner, 1st or 2nd respondents, but there is a real danger of revenue loss which is unrecoverable.
28. It was the applicant's submission that all laws are considered constitutional until a final determination is made, declaring the law unconstitutional. The 3rd respondent prayed that the court protect the provision of the law being challenged, and preserve the revenue, until it hears all parties and makes a final determination of the dispute on merit, citing the cases of *Isaiah Onyango & another v Natinal Assembly & others* and *Susan Wambui Kaguru & others v Attorney General* [2021] eKLR.

Petitioner's/Respondent Submissions.

29. The petitioner submitted that the *civil procedure Act* as read with rules under section 80 provides that a party moving the court for review on the grounds that either there has been discovery of new and important evidence that was not in the knowledge of the party during the matter, or that the ruling contains a manifest error on the face of the record, or any other sufficient reason.
30. On whether there was discovery of new and important evidence, the petitioner submitted negatively, stating that the 3rd respondent was simply ignorant of the court's ruling dated 24.11.2023 which vacated the orders issued on 21.09.2023 and re-affirmed the conservatory orders issued on 21.08.2023.
31. The petitioner submitted that by virtue of the 3rd respondent invoking its right to appeal pursuant to Rule 75 of the Court of Appeal rules, they automatically lost the right to invoke the discretionary jurisdiction under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. He referred the court to the holding by the Court of Appeal in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR.
32. It was the petitioner's submission that a litigant moving the court for review must point with particularity the particular paragraph, page and/or portion of the decision or order containing the error to be review is situated, and it is not enough for the applicant to cast a general allegation of the existence of an error. Further, he submitted that an erroneous order/decision cannot be corrected in the guise of exercise of power of review as sought by the 3rd respondent. He cited the case of *National Bank of Kenya v Ndungu Njau* (1997) eKLR.
33. The petitioner submitted that the application was filed in court after a period of seven (7) months, with no cogent reason provided for the delay which is sufficient cause to warrant for its dismissal as was held in *Martin Kabaya v David Mungania Kiambi Nyeri Civil Application No. 12 of 2015*.

Analysis.

34. I have looked at the application, the supporting affidavit, the grounds of opposition, submissions, the authorities and annexures filed by parties.
35. To me the issues for determination are:
 - i. Whether this application is for review/setting aside of the court orders issued on 21.09.2023 affirming the orders issued on 21.08.2023.
 - ii. Whether this court has jurisdiction to entertain the application.
 - iii. Whether the application has merit.



Determination

Issue 1: Whether this application is for review/setting aside of the court orders issued on 21.09.2023 affirming the orders issued on 21.08.2023.

36. The application dated 21.08.2023 sought the following orders:
- a. That this application be Certified Urgent, service of the same be dispensed with and the Application be heard and determined ex-parte in the first instance.
 - b. That pending hearing and determination of this application inter parties, there be and is hereby issued a temporary Conservatory Order restraining the 1st and 2nd Respondent from deducting 12.5 % excise duty tax from the Petitioner and other players/wagers as provided for under paragraph 4A of Part II of the First Schedule of the [Excise Duty Act](#) of 2015.
 - c. That pending hearing and determination of this Petition, there be and is hereby issued a Conservatory Order restraining the 1 and 2nd Respondents from deducting 12.5 % excise duty tax from the Petitioner and other players/wagers as provided for under paragraph 4A of Part II of the First Schedule of the [Excise Duty Act](#) of 2015.
 - d. That pending the hearing and determination of this application inter parties, there be and is hereby issued a temporary Conservatory Order restraining and or prohibiting the 3rd Respondent from demanding from the 1st and 2nd Respondents or from levying 12,5% excise duty against the 1st and 2nd Respondent as provided for under Paragraph 4A of Part II of the First Schedule of the [Excise Duty Act](#) of 2015.
 - e. That pending the hearing and determination of this Petition, there be and is hereby issued a Conservatory Order restraining and or prohibiting the 3rd Respondent from demanding from the 1st and 2nd Respondents or from levying 12,5% excise duty against the 1st and 2nd Respondent as provided for under Paragraph 4A of Part II of the First Schedule of the [Excise Duty Act](#) of 2015.
 - f. That pending the hearing and determination of this application inter parties, there be and is hereby issued temporary Conservatory Order prohibiting the 3rd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation of Paragraph 4A of Part II of the First Schedule of the [Excise Duty Act](#) of 2015 as against the 1st and 2nd Respondents.
 - g. That pending the hearing and determination of this Petition, there be and is hereby issued a Conservatory Order prohibiting the 3rd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation of Paragraph 4A of Part II of the First Schedule of the [Excise Duty Act](#) of 2015 as against the 1st and 2nd Respondents.
 - h. any other orders that the Court may deem fit and just to grant in the circumstances.
 - i. That the costs of this Application be borne by the Respondents.
37. On 21.08.2023, the court issued the following orders:
- i. That leave to be heard during the vacation granted.



- ii. That pending hearing and determination of this application inter-parties, there be and is hereby issued a temporary conservatory order restraining the 1st and 2nd Respondents from deducting 12.5% excise duty from the petitioner and other players/wagers as provided for under paragraph 4A of Part 11 of the First Schedule of the [Excise Duty Act](#) of 2015.
 - iii. That, pending hearing and determination of this application inter-parties there be and is hereby issued a temporary conservatory order restraining the 3rd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation of Paragraph 4A of Part 11 of the First Schedule of the [Excise Duty Act](#) of 2015 as against the 1st and 2nd Respondents.
 - iv. That prayers granted in 2 and 3 above shall operate for a period of 30 days and on terms that, the application be served forthwith upon all respondents to enable them respond thereto within 14 days from today.
 - v. That thereafter parties shall have a period of 20 days to file and exchange submissions.
 - vi. That mention on 21.09.2023.
38. The applicant's application dated 24.08.2023 was initiated by the 3rd Respondent and sought that the ex parte orders granted by this court on 21st August, 2023 be set aside and that this petition be transferred to Nairobi-Milimani Law Courts for consolidation with eleven other matters listed for hearing before a three-Judge bench constituted by the Chief Justice.
39. On 21.09.2023, when the application dated 21.08.2023 came up for mention, the judge Hon. Justice P.J.O Otieno after considering oral submissions from the counsels gave the following orders:
- a. That before the application for conservatory orders, and those for joinder are argued, the Court shall hear the application and Preliminary Objection challenging jurisdiction of the Court together with the two applications for contempt.
 - b. That the 3rd and 4th Respondents do file and serve Submissions on the Preliminary Objection application for setting aside at the same time with any responses and Submissions on the applications for contempt. That shall be done within five (5) days from today.
 - c. That Upon service, let the Petitioner and the 1st and 2nd Respondents also file composite Submissions on the Preliminary Objection application to set aside and the two applications for contempt. That shall be done within five (5) days after service.
 - d. That parties shall attend Court on the 11.10.2023 for purposes of highlighting the Submissions.
 - e. That in order that there remains a substratum upon which to litigate, the interim orders are extended pending the determination of whether or not the Court has jurisdiction in the matter.
 - f. That leave to appeal is granted. For the Court to stay its interim orders let that be pursued by a final application preferably before the Court of Appeal.
 - g. That in order that the fears of the 3rd Respondent that there may be irreversible loss of revenue, it is directed that the 1st and 2nd Respondents shall reveal the due revenue for the month of September going forward and never to part with it pending further orders of the Court.



40. On 24.11.2023, the court issued a ruling and dismissed the 4th respondent's preliminary objection dated 14.09.2023 and the 3rd respondent's application dated 24.08.2023 and issued the following orders:
- a. In the interest of justice and to preserve the substratum and the subject matter in the Petition, having disallowed the application for setting aside the interim conservatory orders granted by the court on the 21.8.2023, those orders are maintained pending the hearing and determination of the application or further orders by the court. For clarity purposes the orders so granted are as sought in the Petitioner's Notice of Motion Application dated 21st August, 2023 in prayers No. 2,4 and 6.
 - b. Let all parties opposing the petitioner's said application, who have not filed responses and submissions thereto, file and serve same within 14 days from today.
 - c. The two applications for Contempt of Court filed by the Petitioner in this case against the two 3rd Respondents' officers shall be heard on priority basis. For that reason, let every party opposing or supporting the same, and who have not filed desired papers, file their appropriate paper in that regard within 14 days from today.
 - d. Any person keen to participate in these proceedings as an Interested Party, or as a principal party, and who may not have filed papers in that regard, shall file and serve the appropriate applications and submissions on the Principal parties, (the petitioner and the four respondents) within 14 Days from today, the 24th November, 2023.
 - e. Upon service, the Principal parties shall file and serve their responses and submissions within 21 days from date of service.
 - f. By their very nature, the applications for joinder and contempt ought to be heard before that for conservatory orders. It is directed that all applications save for that by the petitioner dated 21.8.2023, shall be heard together on the 21.01.2024 at 2.00pm.
 - g. For orderly conduct of the proceedings, the Petitioner's Notice of Motion Application dated 21st August, 2023 shall be heard after the determination of the application by Interested parties.
41. I have looked at the present application by the 3rd respondent. It is seeking an order that the 1st and 2nd respondents or any other party joined in the current proceedings implementing the impugned Paragraph 4A of Part II of the First Schedule of the [Excise Duty Act](#) as amended by the Finance Act 2023 be directed to collect Excise Duty at the rate of 12.5% but account for the same as advance payment pending the hearing and determination of the Petition.
42. It is clear from its wording, it is not seeking for a review of the orders issued by the court on 21.08.2023 and affirmed on 24.11.2023. I therefore find the submissions by the petitioner and the 1st and 2nd respondents (in the petition) on this aspect missed the point. Further, the notice of motion is brought under Article 159(2) (d) of [the Constitution](#) of Kenya, Rule 3 (2), (3), (5) & (8) of [the Constitution](#) of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules; Sections 1A, 1B, 3A of the [Civil Procedure Act](#), Cap 21 Laws of Kenya; Order 51 Rule 1 of the Civil Procedure Rules; Sections 36, 47 and 47A of the [Tax Procedures Act](#) and Section 5 of the [Excise Duty Act](#). It is not brought under section 80 of the [Civil Procedure Act](#), and Order 45 of the Civil Procedure Rules which provides for review of court orders.



Issue 2: Whether this court has jurisdiction.

43. In the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] Eklr, it was held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

44. The petitioner, 1st and 2nd respondents submitted that the court has no jurisdiction to review the orders of 21.08.2023 which were affirmed on 24.11.2023 for the applicant has already given notice of appeal with intent to appeal against the said orders.

45. The petitioner referred the court to the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR where the Court of Appeal Held:

“is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of Karani & 47 Others v Kijana & 2 Others [1987] KLR 557 the court held that...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.”

46. I have looked at the authorities cited. As I have indicated in paragraph 41 above that this application is not seeking to review any orders issued on 21.08.2023 and affirmed on 24.11.2023 but seeks for an order to order the 1st and 2nd respondents and any other person collecting excise duty under the impugned provision of law to collect but account for the same as advance payment pending the hearing and determination of the Petition.

47. The application is anchored on Article 159 (2) (d) of *the Constitution* which empowers courts to exercise judicial authority by administering justice without undue regard to procedural technicalities and Rules 3 (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which provides that their overriding objective is to facilitate access to justice for all persons as required under Article 48 of *the Constitution* and Rule 3(3) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules) which provides that the Rules shall be interpreted in accordance with Article 259(1) of *the Constitution* and shall be applied with a view to advancing and realizing the

- (a) rights and fundamental freedoms enshrined in the Bill of Rights;
- (b) values and principles of *the Constitution*.

Further on Rule 3(5) of the Mutunga Rules states that for purposes of furthering the overriding objective, the Court shall handle matters presented before it to achieve the:

- (a) just determination of the proceedings;
- (b) efficient use of the available and administrative resources;
- (c) timely disposal of proceedings at a cost affordable by the respective parties; (d) use of appropriate technology,



and Rule 3 (8) of the Mutunga Rules which states that:

"Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the Court."

48. Section 36 of the [Tax Procedures Act](#) provides as follows:

"Security for payment of tax

36. The Commissioner may, for the purposes of securing the payment of any tax due or which shall become due, require a person to furnish a security in such manner and in such amount as the Commissioner may prescribe."

Further Section 47A of the [Tax Procedures Act](#) which states:

"Refund of tax paid in error

47A. Where tax has been paid in error, the Commissioner
(1) shall, except as otherwise provided in this Act or the relevant tax law, refund such tax."

49. This court under the above cited articles of [the constitution](#) and statutes has the jurisdiction to hear and determine an application like this.

Issue 3: Whether the application has merit.

50. The applicant's case is that if the orders are not granted as prayed, the public shall suffer irreparably in terms of loss of revenue which revenue is used to finance government operations which impact on day to day lives of Kenyans.

51. Secondly, the petitioner and the 1st and 2nd respondents have not demonstrated how they will refund the due taxes which runs to billions of shillings in case the petition does not succeed and cited the case of Kenya Revenue Authority v Judith Karigu Kiragu [Nbi Civil Application No. Nai E047 of 2023] where The Court of Appeal held as follows:

"the nugatory aspect, the applicant states that the impugned judgment has impacted adversely on its revenue collection. It is also contended that the 1st to 3rd respondents have not offered to provide security or demonstrated that they will be able to pay the uncollected tax if the intended appeal is successful. The uncollected tax may therefore be unrecoverable should the intended appeal be successful. It is further contended that failure to grant the orders sought will have irreversible effects on the collection of revenue, which will affect the public at large and hence the argument that there is great public interest to be protected by granting the orders sought.

This Court in *University of Nairobi vs. Ricatti Business of East Africa* [2020] eKLR stated thus:

"Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged "

The 1st to 3rd respondents did not provide any proof of their ability to pay the uncollected taxes in the event that the intended appeal is successful. That



obligation lay squarely on them, but they did not discharge it. We are of the view that if we do not grant the orders of stay as prayed by the applicant, the intended appeal shall be rendered nugatory, and the applicant may never be able to recover the uncollected tax if the intended appeal is successful. It is the citizens who stand to lose revenue if the 1st to 3rd respondents are not able to remit the uncollected tax to the applicant. On the other hand, if we grant the orders sought and the applicant starts to collect the additional taxes, if the appeal fails the applicant has financial ability to refund the extra taxes it may have collected. We also think that public interest gravitates towards grant of the orders sought."

52. The applicant further contends that the petitioner, 1st and 2nd respondents will suffer no prejudice in view of provisions of section 47 of the [Tax Procedures Act](#). If the petition succeeds, the taxes found to have been collected by error will be refunded. Further, if the sought orders are granted, and the petition succeeds, the tax collected can be treated as advanced payment.
53. The applicant also submitted that all statutes are presumed to be constitutional until a declaration is made that they are unconstitutional. Therefore, paragraph 4A part II of the first schedule of the [Excise Duty Act](#) as amended by the Finance Act 2023 should be presumed to be constitutional until the hearing and determination of the petition and cited cases of *Isaiah Onyango Okello & anor v National Assembly & Other's* [Machakos Constitutional Petition No. E010 of 2021] where Odunga, J (as he then was) held as follows:

"114. In Mombasa High Court Petition No 669 of 2009 - *Bishop Joseph Kimani & others v Attorney General & others*, Ibrahim, J (as he then was) pronounced himself as follows:

'It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment...It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain...I am still of the view that "there is no place for conservatory or interim order



in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void.’

It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first.”

115. Majanja, J on his part in *Susan Wambui Kaguru & others v Attorney General* another [2012] KLR expressed himself inter alia as follows:

“I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of *the Constitution*. No doubt serious legal arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so.”

116. What clearly comes out is that the power to suspend legislation during peace time ought to be exercised with care, prudence and judicious wisdom where it is shown that the operation of the legislative provision are a danger to life and limb at that very moment and where the national interest demand and the situation is certain.



122. Whereas I agree that there is a presumption of Constitutionality of Statute that is a rebuttable principle. This was clearly appreciated in *Ndyanabo u Attorney General* [2001] 2 EA 485 where it was by the Constitutional Court in Tanzania as follows:-

‘...Thirdly; until the contrary is proved, a legislation is presumed to be Constitutional. It is a sound privilege of Constitutional construction that if possible, a legislation should receive such a construction as will make it operative and not inoperative. Fourthly, since, as stated, a short while ago, there is a presumption of Constitutionality of legislation, the onus is upon those who challenge the Constitutionality of the legislation, they have to rebut the presumption. Fifthly where those supporting a restriction on a fundamental right rely on a claw back or exclusion clause in doing so, the onus is on them, they have to justify the restriction.’

123. It is therefore clear that that in interpreting *the Constitution*, the Court should be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation's status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction."

54. The petitioner, 1st and 2nd respondents did not address the above issues as raised by the applicant. Their submissions zeroed on whether the court had jurisdiction or not.
55. The petitioner also submitted that the application was brought after seven months and no explanation was given for the delay. I find this submission also misses the point for ready I have held that the



application is not premised on provisions of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

56. Given the nature of the application, the applicant was at liberty to approach the court at its own time and matters revolving around public interest can be lodged at any time.
57. I find all the points raised by the applicant pertinent and the grounds raised in support of the application are sound.
- I. It is undisputable that collection of revenue is a matter of great public importance for the government relies on the collected revenues to run its programs which impact on the day to day lives of the citizens.
 - II. The petitioner, 1st and 2nd respondent or any other person/entity collecting excise duty under the impugned provision will not suffer any prejudice for section 47 of the Tax Procedures Act cushions such people/entities in case the petition succeeds.
58. The doctrine of presumption of constitutionality of any legislation is a cardinal constitutional principle when weighed against the doctrine of separation of powers as provided for in our constitution. The courts should exercise restraint when called upon to restrict the operations of a legislation without proof of its unconstitutionality. The three arms of the government (The judiciary, legislature and executive) are independent of each other, but work interdependently so there is need for each organ to be cautious when called upon to oversight each other. Each organ should guard against being perceived to be encroaching the mandate of the other unnecessarily.
59. The courts should strike a balance between the interests of those calling for restriction, the purpose why such legislation was enacted, reasons for calling the restriction, impact of such restriction to the parties and especially to the wider public, the reality of ameliorating the impact of restriction to the parties and the wider public if the impact is in the negative and the possibility that the legislation at the end might be found constitutional.
60. From the foregoing, I find that the application has merit and I do allow it in the following terms:
- I. That the 1st and 2nd Respondents and any other party joined in the current proceedings implementing the impugned Paragraph 4A of Part II of the First Schedule of the Excise Duty Act as amended by the Finance Act 2023 be and are hereby directed to collect Excise Duty at the rate of 12.5% but account for the same as advance payment pending the hearing and determination of the Petition.
 - II. Costs of the application to abide to the outcome of the petition.
 - III. Directions on application dated 21.08.2023 be taken today as well as directions on how to dispose off the petition.
61. Right of appeal 30 day explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF JANUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of:

Petitioner present online



Mr. Ndolo for the 1st Respondent present online.

Mr. Mola for the 2nd Respondent present online.

Mr. Ochieng holding brief for Nyaga, Ms. Kithinji and Mr. Ombasu for the 3rd respondent present

Mr. Anambi holding brief for Mr. Kiilu for the 5th Respondent present online.

Court Assistant – Elizabeth Angong'a

