Ochoiki v Cabinet Secretary, Ministry of Health & 3 others (Petition E350 of 2024) [2025] KEHC 12484 (KLR) (Constitutional and Human Rights) (13 August 2025) (Ruling)

Neutral citation: [2025] KEHC 12484 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E350 OF 2024

AB MWAMUYE, J

AUGUST 13, 2025

IN THE MATTERS OF ARTICLES 2(4), 3, 10(2)(B), 19, 20, 22(1)(3), 22, 23, 24, 26, 28, 35, 42, 46, 50(1), 55, 70, 165(3)(D) AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION AND VIOLATION OF ARTICLES 2(4), 26, 28, 31, 35, 42, 43, 46 AND 70 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE VIOLATION & IMPLEMENTATION OF ARTICLES 8, 11 & 13 OF THE FRAMEWORK CONVENTION ON TOBACCO CONTROL (FCTC)

AND

IN THE MATTER OF THE CONSTITUION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE CONSTITUTIONALITY AND INTERPRETATION OF SECTIONS 21, 32, 33(2) AND 35 OF THE TOACCO CONTROL ACT, 2007

AND

IN THE MATTER OF INTERPRETATION AND CONSTITUTIONALITY OF RULES 3, 5, 7(1) AND 15 OF THE TOBACCO CONTROL REGULATIONS, 2014

AND

IN THE MATTER OF THE KENYA INFORMATION COMMUNICATION ACT, 1998

AND

IN THE MATTER OF PLAIN PACKAGING OF ALL TOBACCO AND NICOTINE – DERIVED PRODUCTS SOLD AND DISTRIBUTED OR ACCESSIBLE IN KENYA

AND

IN THE MATTER OF THE ARBITRARY RELAXATION AND WITHDRAWAL OF THE REGULATION OF NICOTINE POUCHES BY THE MINISTRY OF HEALTH CONTRARY TO SECTION 21 OF THE TOACCO CONTROL ACT, 2007

AND

IN THE MATTER OF A BAN ON ALL ONLINE, INTERNET SALES OF TOBACCO & NICOTINE DERIVED PRODUCTS

AND

IN THE MATTER OF ADAPTATION AND ALTERATION OF SECTIONS 22 AND 25 OF THE TOBACCO CONTROL ACT, 2007 TO REGULATE THE PROMOTION AND ADVERTISEMENT OF TOBACCO PRODUCTS ON SOCIAL MEDIA IN KENYA.

AND

IN THE MATTER OF A STRACTURED INTERDICT TO INTRODUCE AMENDMENTS TO THE TOBACCO CONTROL ACT, 2007 AND THE TOBACCO CONTROL REGULATIONS, 2014 TO REGULATE NICOTINE POUCHES AND OTHER NICOTINE AND TOBACCO DERIVATIVES.

AND

IN THE MATTER OF REGULATION AND CONTROL OF 'SHISHA' SALES, ADVERTISING, PACKAGING AS PER THE PROVISIONS OF THE TOBACCO CONTROL ACT REGULATIONS, 2014

BETWEEN

FREDRICK BIKERI OCHOIKI ..... PETITIONER

AND

CABINET SECRETARY, MINISTRY OF HEALTH ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

THE TOBACCO CONTROL BOARD ..... 3RD RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA (CA) ..... 4TH RESPONDENT

RULING

1. The Petitioner/Applicant, Fredrick Bikeri Ochoiki, has filed the present Application together with a substantive Petition challenging the constitutionality and legality of the use of websites, blogs and social media posts to run tobacco related contents without the publication of the health warning labels on the adverse effects of tobacco and second-hand smoking, thus in violation of Article 35 of *the Constitution* of Kenya.

2. In the Notice of Motion dated 18th July, 2024 and supporting affidavit of even date sworn by Fredrick Bikeri Ochoiki, the Petitioner/ Applicant herein contends that there is a gap in the Law governing tobacco products which widens with the proliferation of internet use, and the introduction of new and innovative products derived from tobacco and nicotine.

3. The Petitioner/Applicant avers that Section 21 of the *Tobacco Control Act*, 2007 has served to ensure that health warning labels are prominently affixed on all tobacco derived products sold or distributed within Kenya. However, the use of social media especially amongst the youth, and the use of websites, blogs and social media posts to run tobacco related content means that the publication of the health warning labels on the adverse effects of tobacco and second-hand smoking ought to feature prominently on these online platforms as well.

4. He contends further that the pre-2010 *Tobacco Control Act*, 2007 is not able to adequately regulate marketing of these tobacco and nicotine derived products online, in online stores and especially on social media platforms. The Petitioner asserts that the Kenyan youth and members of the public find the tobacco and nicotine derive products in increasing danger of false promotion and advertising with no sort of regulation.

5. He asserts that without the health warnings on social media, websites, online stores and other public sites, Kenyans right to information under Article 35 of *the Constitution* especially, the dangerous effects of tobacco – derived products have on their health is being breached. According to the Applicant, the regulations under Section 21 of the *Tobacco Control Act*, 2007 do not envision social media or online platforms in their regulations as the publication of educative and informative health warnings are limited to the packaging.

6. In light of these concerns, the Petitioner prays for Interim Conservatory orders to effect the following:

    a. Suspending all websites, blogs, social media accounts of manufacturers, distributors, vendors of tobacco and tobacco related products including 'shisha' products that do not possess health warning labels and graphics.

    b. Suspending the sale, distribution of all tobacco- derived products online, including 'shisha' or over the internet.

    c. Suspending all smoking in designated smoking areas that do not possess notices on the designated smoking areas that have health warnings and graphics.

    d. Suspending all smoking of tobacco and tobacco related products in public vehicles/ taxis under Section 33(2) of the *Tobacco Control Act*, 2007.

    e. Communications Authority of Kenya to direct all internet Service Providers in Kenya to suspend, block and or remove all tobacco – derived products promoting websites, socials media pages, online stores in Kenya.

    f. Communications Authority of Kenya to suspend the licenses/ permits of all tobacco promoting websites, social media pages, online stores in Kenya.

    g. Suspending the sale of 'velo' Nicotine pouches (formerly labelled as 'LYFT') in the Kenyan market and all other nicotine pouches that do not conform to the packaging regulations in Section 21 of the *Tobacco Control Act*, 2007.

    h. Suspending the sale of 'shisha' tobacco and shisha pipes in Kenya that do not conform to the packaging requirements set in Section 21 of the *Tobacco Control Act*, 2007.

7. In opposition to the Petitioner's Application, the 1st, 2nd and 3rd Respondents filed grounds of opposition dated 18th December 2024 based on the grounds that the *Tobacco Control Act* 2007 enjoys the presumption of Constitutionality and does not lose that presumption merely because

the Constitution precedes it. Further, that the Petitioner/ Applicant has not demonstrated how the impugned Act is in breach of the cited Constitutional provisions.

8. They assert that contrary to the Petitioner's assertions, the letter and the spirit of the impugned Act under Section 25 prohibits online advertisement of tobacco and that any form of advertising that is prohibited by the Act if indeed true is a criminal offence not to be canvassed by way of constitutional petition.

9. According to them, the nicotine pouches and other tobacco containing products comply with the provisions of the impugned Act and Tobacco Control Regulations 2014, effective from 1st July 2023. It is also in line with international standards in particular, the Framework Convention on Tobacco Control Articles 8, 11 and 13.

10. The 4th Respondent on the other hand filed a Replying affidavit dated 8th October, 2024 and sworn by David Mugonyi, the Director General of the Communications Authority of Kenya, the 4th Respondent herein and avers that the Notice of Motion and Petition herein, have been erroneously drawn to give the impression that the 4th Respondent issues licenses or permits to websites, social media pages and online stores in Kenya which it does not.

11. According to him, the 4th Respondent does not license and therefore does not regulate the use of the generic top-level domains such as the prominent domains; com, info, net, edu and org as they are not based in Kenya and that the only domain based in Kenya is .ke however the same is still not regulated by the 4th Respondent but is regulated by the Kenya Network Information Centre (KENIC).

12. He further asserts that the 4th Respondent does not license social media platforms operators and therefore does not regulate social media since the social media platforms operators aforesaid, are largely based outside Kenya and social media platforms are accessible within Kenya by anyone with access to the internet. They contend that the orders prayed for by the Petitioner will be impossible to effect because the 4th Respondent has no means whatsoever to enforce those orders.

13. The Application was canvassed by way of written submissions, and in compliance only the Petitioner and the 4th Respondents filed and served their submissions.

Petitioner's Submissions

14. The Petitioner filed submissions dated 18th November 2024 and submitted that the new age products: nicotine pouches and smokeless electronic cigarettes do not conform to the stringent requirements in existing Tobacco Laws but by the representation of the former Cabinet Secretary, Mutahi Kagwe, he allowed nicotine pouches to be sold in Kenya with reduced regulations. They further submit that the Former Cabinet Secretary had no authority to relax provisions of the law applicable on the product.

15. The Petitioner argues that from Section 21 of the Tobacco Act, the rule requires health warning messages to comprise not less than 30% of the front of the tobacco product and not less than 50% of the rear of the product. Further Section 21(3) requires health warning texts to be randomly displayed in each twelve-month period on every successive fifty packages of each brand of the product. The specific health warnings are captured on the products. According to the Petitioner, the Minister reduced the sizes of the health warning texts, and also removed the requirement of regularly changing the health warnings every 12 months at random as required in the Schedule of the *Tobacco Control Act*. He avers that the Respondent equally removed the requirement of publishing picture warnings on the nicotine pouches in breach of the 2014 regulations.

16. The Petitioner asserts that the Minister in Charge has no authority to alter the rules but can only do so if the adjustment would promote greater understanding of the risks associated with the use of any tobacco products, and in no way does the rules pertaining to velo nicotine pouches promote greater understanding of risks associated with nicotine pouches. The Cabinet Secretary's actions therefore went against the Principle of Legality and were ultra-vires. Reliance was placed on the case of Republic v Betting Control and Licensing Board and another Ex parte Outdoor Advertising Association of Kenya [2019] eKLR, Republic v Ministry of Planning & Kenya Institute For Public Policy and Research Analysis Ex parte Mwangi S Kimenyi (Miscellaneous Civil Application 1769 of 2004) [2008] KEHC 2765 (KLR) (Judicial Review) (25 April 2008) (Judgment)

17. The Petitioner asserts that these new school tobacco products have been marketed aggressively in breach of the marketing provisions of the *Tobacco Control Act* in breach of Section 24 & 25. According to the Petitioner, tobacco derived products are not supposed to be promoted, advertised on print or electric media in Kenya under Section 24 and 25 of the *Tobacco Control Act*.

18. The Petitioner further argues that the 'shisha' regulations may be invalid, nevertheless, because it is a tobacco product, it falls under the strict jurisdiction of the Tobacco Act and its 2014 regulations. It is therefore not an unregulated product and the fact that its continued sale, distribution, marketing and use is contrary to the provision of these rules means the product ought to be banned, until the orders sought in the main petition are upheld.

19. The Petitioner further argues that the *Traffic Act* and other existing rules do not make it clear that there is no smoking or use of tobacco derived products that is allowed in public. It therefore follows that that the *Tobacco Control Act* and its 2014 regulations injure Kenyans by not being unequivocal or unambiguous enough with policing smoking in public to curb second hand smoking. They relied on Republic v Kenya School of Law & another Ex parte Kithinji Maseka Semo & another [2019] eKLR.

20. The Petitioner contends that the grant of orders sought herein will enhance the Constitutional values and objects of Article 43 of *the Constitution* on the highest attainable standards of healthcare since the Conservatory orders are meant to stop any advertisement or sale of certain tobacco products both on and off the internet until the irregularities of Tobacco Regulations cited are addressed.

21. He further contends that issuing the orders sought will also realize the objectives and purposes of Article 47 of *the Constitution* on Fair Administrative Action, since as submitted, these new age tobacco derived products were allowed into the country by the Respondents arbitrarily. Not only did they exercise powers they did not have, but they also allowed in relaxing the regulations on these products contrary to the dictates of Fair Administrative Action. They relied on the case of Republic v National Hospital Insurance Fund Board of Management & Another ex parte Law Society of Kenya [2019] eKLR

4Th Respondent's Submissions

22. The 4th Respondent filed submissions dated 12th November 2024 and argued that the first three prayers of the instant application are already spent and therefore the only prayer left for determination is the fourth and last prayer being that the costs of this application be provided for. They further submit that the Petitioner/ Applicant did not apply in the instant application for conservatory orders pending the hearing and determination of the main petition and as such, such orders cannot issue by this Honourable Court. Reliance was placed on Section 27 of the *Civil Procedure Act* and the case of Republic v Rosemary Wairimu Munene, ex parte Applicant v Ihururu Dairy Farmers Cooperative Society Ltd [Judicial Review application no. 6 of 2014].

23. They state that noting that this application ought to fail, costs should be awarded to the 4th Respondent for successfully defending the application. They equally submitted that such conservatory orders cannot issue as against the 4th Respondent as the Notice of Motion and Petition herein have been erroneously drawn to give the impression that the 4th Respondent issues licenses or permits to websites, social media pages and online stores in Kenya. They reiterated contents in their Replying Affidavit sworn on 8th October, 2024, by David Mugoyi and relied on the cases of B v Attorney General [2004] 1 KLR 431 and Nzulu v County Land Registrar Machakos (Miscellaneous Application No. E054 of 2021) [2023] KEELC 18603 (KLR). According to the 4th Respondent enforcement of the orders against the 4th Respondent would be next to impossible to effect and this court should therefore restrain from effecting such orders against the 4th Respondent thus the instant application is devoid of merit and should be dismissed with costs.

Analysis And Determination

24. I have considered the Application, the responses, the affidavits, the arguments by parties and the decisions relied on. The issue that arises for determination is –

Whether the threshold for the grant of conservatory orders has been met.

25. At this interlocutory stage, the Court is not required to make final determinations on constitutionality. The question is whether there is an arguable case that this court should suspend the sale, manufacture and distribution of all nicotine pouches, e-cigarettes and other tobacco derived products and whether all websites, blogs, social media accounts of manufacturers, distributors and vendors of tobacco related products that do not possess health warning labels and graphics ought to be suspended.

26. In Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR the Court expressed itself as follows:

> " Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

27. A conservatory order is in its very nature, a temporary relief issued by a court of law to stop a certain act from happening or continuing to happen pending issuance of a substantive order or declaration. In the case of Invesco Assurance Co. Ltd vs MW (minor suing thro' next friend and mother (HW) (2016) eKLR, the court held as follows: -

> " A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter".

28. The threshold for grant of conservatory orders was established by the Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [supra] where the apex court held that; -

> " (86) Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest.

> Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes." (Emphasis added).

29. In the case of Wilson Kaberia Nkunja –vs- The Magistrates and Judges Vetting Board & Others, Nairobi High Court Constitutional Petition No.154 of 2016 [2016] eKLR, the court set out three main principles for consideration on whether or not to grant conservatory orders as follows: -

    a. An Applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.

    b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

    c. The public interests must be considered before grant of a conservatory order.

30. From this authoritative statement, the Petitioner must demonstrate (a) a prima facie case disclosing arguable issues of constitutional violation, (b) the likelihood of prejudice or threat to constitutional values, and (c) that the public interest and balance of convenience support such interim relief.

Existence of a Prima Facie Case

31. The first discernible principle is that the applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory order, he is likely to suffer prejudice. This position was well articulated in the case of Centre for rights education and awareness (CREAW) and 7 others vs Attorney General (2011) eKLR.

32. A prima facie case in the context of constitutional litigation means that the allegations presented are not frivolous and raise a genuinely arguable case of constitutional infringement. In Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR, the Court of Appeal defined a prima facie case as one that, on the face of it, raises serious questions of law or fact capable of judicial consideration, and is not frivolous. The court stated thus:

> " A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

33. Similarly in Kevin K. Mwiti Others v Kenya School of Law & Others [2017] eKLR, it was held that:

> " A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case which discloses arguable issues and, in this case, arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success."

34. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis. In these respects, I would quickly make reference to M. Ibrahim J (as he then was) in the case of Muslims for Human Rights [MUHURI] & Others –v- Attorney General & Others CP No. 7 of 2011, who whilst agreeing with Musinga J's statement in Centre for Rights Education and Awareness [CREAW] and 7 Others –v- The Attorney General stated as follows: -

> "I would agree with my brother that an applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a prima facie case with a likelihood of success" (emphasis).

35. It is trite that when a court is called upon to determine whether a prima facie case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the applicant has put forward a case that is arguable and not frivolous.

36. Accordingly, the use of websites, blogs and social media posts to run tobacco related contents without the publication of the health warning labels on the adverse effects of tobacco and second-hand smoking are not trivial or peripheral questions as they go to the root of the legislative process. On the face of these allegations, this Court is satisfied that the Petitioner has presented a cogent case raising serious constitutional and statutory questions. The Petitioner's claim is neither trivial nor spurious, thus constituting a prima facie case that warrants judicial scrutiny.

Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory

37. The second principle is that the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights. The critical consideration is the question whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

38. This limb requires the Petitioner to show the prejudice that he and other citizens are likely to suffer which cannot be compensated by damages or other ordinary legal redress if interim relief is not granted with respect to the alleged constitutional violations. In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal affirmed that if the Applicant fails to show a likelihood of irreparable harm, an interlocutory injunction or conservatory order should generally not issue. The court thus stated that:

> " If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

39. In Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR irreparable harm was defined as:

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

40. Since statutes enjoy the presumption of constitutionality, it has to be a very strong case in which the Court would intervene by way of issuing a conservatory order. Hence, I subscribe to the view expressed in Mombasa High Court Petition No. 669 of 2009 Bishop Joseph Kimani & others v Attorney General & others that: -

> "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 is 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."

41. The Petitioner/Applicant's case here is that the Respondents are already enforcing the impugned *Tobacco Control Act*, 2007 and the Tobacco Control Regulations 2014. It is apparent that at interlocutory stage, the Applicant ought to show that there is a harm that cannot be compensated by refunds, credits or any other remedies under the law if interim orders are not issued and the Petition eventually succeeds.

42. While the Petitioner has shown arguably serious questions about the legislation's compliance with certain constitutional and statutory provisions, there is insufficient demonstration of harm so imminent and irreparable that it merits halting all operations of the *Tobacco Control Act*, 2007 together with the Tobacco Control Regulations 2014 at this interlocutory stage. I am also of the view and in agreement with my brother, that there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void.

Balancing the Public Interest and Convenience of the Parties

43. The final consideration is the balance of convenience and public interest. The Court must consider the competing claims of the Petitioner and the Respondents, as well as the public interest. Conservatory orders have a strong public-law connotation and must align with public interest considerations.

44. As was noted by the Court of Appeal in Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR, courts are called upon to strike a delicate balance where the public stands to be greatly affected by the orders sought. This Court must therefore be astute to the potential adverse impact on the public if the impugned Act and Regulation, are suspended outright.

45. Nothing presented so far demonstrates that the immediate and total suspension of the Respondents' framework is indispensable or proportionate to any threatened harm. Instead, the public interest, at this juncture, appears to weigh against issuing such sweeping interim orders before a full hearing on the

merits. Should the Petitioner ultimately succeed in proving unconstitutionality, appropriate remedies including nullification of specific sections, structured refunds, or orders for policy compliance can be fashioned at the final determination.

46. In Susan Wambui Kaguru & 4 others v Attorney General & another [2012] eKLR the view taken was as hereunder: -

> " The question for the court is to consider whether these laws are within the four corners of *the Constitution*. No doubt serious and weighty 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."

47. The public interest here, therefore, tilts in favour of not granting interlocutory orders sought in order to preserve the status quo until the constitutionality of the impugned *Tobacco Control Act* and Tobacco Control Regulations is ascertained thereby preserving constitutional governance and protecting the citizens from having shortage or lack of effective service delivery from the Respondent.

48. It should be noted that not granting the said conservatory orders should not be taken to mean that the Petitioner's concerns as raised in the Petition will not be addressed. If the Petition succeeds, the court reserves the liberty to issue appropriate reliefs to remedy any constitutional violations, including compensatory measures. Therefore, the Court finds that the Petitioner and the public are unlikely to suffer irreparable harm that cannot be addressed through a substantive hearing and appropriate and or deserving remedy provided.

49. This perspective is armored by the principle that where lesser measures such as expedited hearing of the main Petition can safeguard constitutional values, the Court ought not to impose the most disruptive remedy, especially when the alleged harm can be compensated or accounted for if the Petition eventually succeeds.

50. In reaching this conclusion, this Court is influenced by the decision in the case of Judicial Service Commission –vs- Speaker of the National Assembly & Another [2013] eKLR (supra), in which the Court determined that temporary relief should not hinder government operations unless there is a significant justification for doing so. In the current situation, the public interest and welfare necessitate not granting of the conservatory orders to allow the County Government to operate efficiently.

51. Taking into account the above analysis, the Court is satisfied that the Petitioner raises serious justiciable issues regarding the constitutionality of the *Tobacco Control Act*, 2007 and the Tobacco Control Regulations, 2014.

52. However, the Petitioner has not demonstrated irreparable injury that cannot be remedied if these laws were to be invalidated at the final stage. The Court is satisfied that any potential violations can be addressed through other legal remedies should the Petition ultimately succeed.

53. The public interest at this interlocutory stage favors the continuation of online-marketing services since a blanket suspension could lead to a void, adversely affecting the public more severely in the interim.

54. In the upshot, and for the reasons stated herein above, this court makes the following orders: -

    a. The prayers sought in the Notice of Motion dated 18th July 2024 are hereby declined and the Petitioner's Notice of Motion Application dated 28th January, 2025 for interim conservatory orders is found to be without merit and the same is hereby dismissed with costs in the cause;

b. The Petition shall proceed to full hearing on a priority basis for a final determination on the merits;

c. Directions on the Petition to be issued separately.

It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH DAY OF AUGUST, 2025.

BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Petitioner – No apearanace

Counsel for the 1st, 2nd, 3rd Respondents – No appearance

Counsel for the 4th Respondent – Mr. Mbudi

Court Assistant – Ms. Lwambia