

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION OF E228 OF 2023

1 of 37

KENYA HUMAN RIGHTS COMMISSION.....1ST PETITIONER
KATIBA INSTITUTE.....2ND PETITIONER
THE INSTITUTE FOR SOCIAL
ACCOUNTABILITY (TISA)..... 3RD PETITIONER
TRANSPARENCY INTERNATIONAL KENYA 4TH PETITIONER
INTERNATIONAL COMMISSION
OF JURIST – KENYA (ICJ KENYA 5TH PETITIONER
SIASA PLACE..... 6TH PETITIONER
TRIBELESS YOUTH 7TH PETITIONER

VERSUS

NATIONAL ASSEMBLY1ST RESPONDENT
ATTORNEY-GENERAL2ND RESPONDENT
LAW SOCIETY OF KENYA.....INTERESTED PARTY

CERTIFICATE OF URGENCY

We, Caroline Muneeni and Ochiel J Dudley, Advocates, certify this matter urgent because:

1. Petitioners challenge the Finance Act, 2023 for violating Articles 10 and 201 of the Constitution by imposing retrogressive tax measures which burden low-income earners excessively and threaten their right to life and livelihood under Articles 26 and 43 of the Constitution. And on 28 July 2023 in *Cabinet Secretary for the National Treasury and Planning v Okiya Omtata Okoiti Civil Application E304 of 2023* the Court of Appeal stated that “since the petitions challenge both the entire Act and specific provisions, the [High] Court can consider suspending the specific provisions whose implementation has an irreversible effect and cannot be refunded”.
2. Meanwhile, on 4th August 2023 the Respondents issued a public press notice giving the Housing Fund retrospective effect to **1st July 2023** to the Petitioner’s further prejudice.
3. Concerned and complying with the Court of Appeal ruling, Petitioners seek suspension of “specific provisions whose implementation has an irreversible effect and cannot be refunded”. The matter is urgent and requires an August recess hearing because of the intervening threat to lives and livelihoods and due to the retrospective date of 1st July 2023.

Dated 4th August 2023, Nairobi.


Ochiel Dudley

Advocate for the Petitioners

Drawn and filed by

Ochiel Dudley

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CHAMBER SUMMONS

(Under Article 159(2)(d) of the Constitution; section 10 (2) of the High Court (Organization and Administration) Act, 2015; and Rules 15 to 17 of the High Court (Organization and Administration) (General) Rules, 2016)

Let all parties attend the Honourable Recess Duty Judge in chambers/virtually on the... day of2023 at 9am or per the cause list for hearing of this application for orders:

- a) This application be and is certified urgent; and
- b) This matter be and is admitted for hearing during the August 2023 High Court recess.

WHICH APPLICATION is filed because:

1. Petitioners challenge the Finance Act, 2023 for violating Articles 10 and 201 of the Constitution by imposing retrogressive tax measures which burden low-income earners excessively and threaten their right to life and livelihood under Articles 26 and 43 of the Constitution.
2. And on 28 July 2023 in *Cabinet Secretary for the National Treasury and Planning v Okiya Omtata Okoiti Civil Application E304 of 2023* the Court of Appeal stated that “since the petitions challenge both the entire Act and specific provisions, the [High] Court can consider suspending the specific provisions whose implementation has an irreversible effect and cannot be refunded”.
3. Meanwhile, on 4th August 2023 the Respondents issued a public press notice giving the Housing Fund retrospective effect to **1st July 2023** to the Petitioner’s prejudice.

4. Concerned and complying with the Court of Appeal ruling, Petitioners seek suspension of “specific provisions whose implementation has an irreversible effect and cannot be refunded”. The urgently requires an August recess hearing because of the intervening threat to lives and livelihoods imposed by the retrospective date of 1st July 2023.

WHICH APPLICATION is supported by the affidavit of Lempaa Suyianka.

Dated at Nairobi this 4th of August 2023

OchielJD
OCHIEL DUDLEY

ADVOCATE FOR THE PETITIONERS

Jointly Drawn & Filed By:

Ochiel J Dudley, Advocates

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ATTORNEY-GENERAL 2ND RESPONDENT

LAW SOCIETY OF KENYA.....INTERESTED
PARTY

NOTICE OF MOTION

TAKE NOTICE that this court will be moved on ____ July 2023 at 9:00 am or per the cause list for the hearing of the Petitioners’ application for orders that:

- a. This application be and is certified urgent;
- b. Pending hearing and determination of this application, the court be pleased to issue conservatory orders suspending: section 5 of the Income Tax Act, Cap 470, amended by section 5 of the Finance Act, 2023; section 84 of the Finance Act, 2023 amending section 31B of the Employment Act, 2017; section 37(a)(iii) of the Finance Act, 2023 amending section A part I of the First Schedule to the Value Added Tax Act, 2013; sections 96, 92, 93, 94, and 95 of the Finance Act, 2023 amending section 5(1)(f), 5A, 5B, and 6 of the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015; Section 38 of the Finance Act, 2022 amending Part A of the Second Schedule to the Value Added Tax Act, 2013; and section 47(a)(v) of the Finance Act, 2023 amending Part I of the First Schedule to the Excise Duty Act, 2015. The court further does suspend the decision to give the Finance Act retrospective effect to 1st July 2023 as opposed to the date of Court of Appeal ruling lifting the conservatory orders.

- c. Pending hearing and determination of the petitions the court be pleased to issue conservatory orders suspending implementation or further implementation of: section 5 of the Finance Act, 2023 (amending section 5 of the Income Tax Act, Cap 470); section 84 of the Finance Act, 2023 (amending section 31B of the Employment Act, 2017); section 37(a)(iii) of the Finance Act, 2023 (amending section A part I of the First Schedule to the Value Added Tax Act, 2013); sections 96, 92, 93, 94, and 95 of the Finance Act, 2023 (amending section 5(1)(f), 5A, 5B, and 6 of the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015); section 38 of the Finance Act, 2023 (amending Part A of the Second Schedule to the Value Added Tax Act, 2013); and section 47(a)(v) of the Finance Act, 2023 (amending Part I of the First Schedule to the Excise Duty Act, 2015). The court further does suspend the decision to give the Finance Act retrospective effect to 1st July 2023 as opposed to the date of Court of Appeal ruling lifting the conservatory orders.

WHICH APPLICATION is made on the grounds that:

1. Petitioners challenge the Finance Act, 2023 for violating Articles 10 and 201 of the Constitution by imposing retrogressive tax measures which burden low-income earners excessively and threaten their right to life and livelihood under Articles 26 and 43 of the Constitution. Petitioners further contend that the Finance Act, 2023 concerns county government in functions like housing but was never passed by the Senate. Besides, petitioners challenge other levies having an impact on the right to life and health and on climate change.
2. On 28 July 2023 in *Cabinet Secretary for the National Treasury and Planning v Okiya Omtata Okoiti Civil Application E304 of 2023* the Court of Appeal stated that “since the petitions challenge both the entire Act and specific provisions, the [High] Court can consider suspending the specific provisions whose implementation has an irreversible effect and cannot be refunded”.
3. Meanwhile, on 4th August 2023 the Respondents issued a public press notice giving the Housing Fund retrospective effect to **1st July 2023** to the Petitioner’s further prejudice.

4. Concerned and complying with the Court of Appeal ruling, Petitioners seek suspension of “specific provisions whose implementation has an irreversible effect and cannot be refunded”. The matter is urgent and requires an August recess hearing because of the intervening threat to lives and livelihoods and due to the retrospective date of 1st July 2023.
5. Accordingly, Petitioners seek a conservatory order suspending the following “specific provisions whose implementation has an irreversible effect and cannot be refunded”:
 - a) Section 5 of the Income Tax Act, Cap 470, amended by section 5 of the Finance Act, 2023 (exempting mileage from taxation). The exemption is challenged for violating Articles 210(3)(a) and (b), which forbid any law from excluding or authorising the exclusion of State officers from paying tax because of the office or the nature of their work. Moreover, since other employees are not exempted from taxation on their travelling allowance, the exemption of mileage from tax violates Article 201(b)(i) in failing to distribute tax burdens fairly and Article 27 for disproportionately benefiting those likely to be paid mileage. The implementation of this amendment has an irreversible effect and cannot be refunded because there is no guarantee of recovery;
 - b) Section 84 of the Finance Act, 2023 amending section 31B of the Employment Act, (to create a mandatory affordable housing fund). First, the amendment is challenged for violating Article 10 on the rule of law for defying subsisting court orders. Second, imposing a blanket housing levy of 1.5 per cent from each employee’s income is directly discriminatory and violates Articles 27 and 201 because non-employment income is left untouched so that the burden of taxation is not shared fairly. Third, contrary to Article 27, imposing a mandatory uniform deduction indirectly discriminates against those already owning homes, paying mortgages, the uninterested, and low-income earners. Fourth, the mandatory contribution to a housing scheme violates the right to property under Article 40 by compelling choice and by forcing people to contribute a benefit to others. Fifth, the amendment is vague and overbroad as to the meaning of employee; it would compel remote or foreign employees with no interest in housing in Kenya to contribute to the scheme. Sixth, the amendment usurps county functions and was, at any rate, not passed by the Senate though county housing

is a county government function. Seventh, the amendment, although substantive, was contained in a miscellaneous amendment without sufficient capacity for public participation. The implementation of this amendment has an irreversible effect and cannot be refunded because foreign employees who contribute to the Housing Fund will never be refunded.

- c) Section 37(a)(iii) of the Finance Act, 2023 amending section A part I of the First Schedule to the Value Added Tax Act, 2013 by (deleting vaccines for human medicine 3002.20.00 and vaccines for veterinary medicine tariff number 3002.30.00) threatens the right to health and life under Article 26 and 43 of the Constitution. The removal of the exemption on VAT on vaccines for veterinary medicine tariff number 3002.30.00 further threatens the right to life and livelihoods both from livestock losses to disease and from the consumption of diseased animals or cross-infection of humans with zoological diseases. The measure further violates the State's obligations under Article 21(3) to address the needs of vulnerable groups within society, including the marginalised pastoralist communities. The implementation of this amendment has an irreversible effect and cannot be refunded;
- d) The implementation of the following amendments has an irreversible effect and cannot be refunded: Sections 96, 92, 93, 94, and 95 of the Finance Act, 2023 amending section 5(1)(f), 5A, 5B, and 6 of the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015 by (extending the medical cover for retired Speakers of Parliament, Chief Justice, Deputy Chief Justice, Prime Minister from their 'spouse' to their 'spouse, children below eighteen years or are under twenty-five years of age and are undergoing a course of full-time education, and in the case of female children are not married or cohabiting with any person') is unconstitutional. These amendments were not part of the Bill and therefore did not form part of the public participation package despite Articles 10 and 201(1)(a) demanding public participation in financial matters.
- Section 7 of the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015 5(1) as amended by section 96 of the Finance Act, 2023 (extending the medical cover for a retired Deputy President and their 'spouse' to a retired Deputy

President’s ‘spouse, child who is below eighteen years or is under twenty-five years of age and is undergoing a course of full-time education, and in the case of a female child is not married or is not cohabiting with any person’) is unconstitutional.

- First, contrary to Article 27 of the Constitution, these amendments are challenged for discriminating against the children of other state officers to whom no similar benefit extends. Second, the amendments expand the burden on taxpayers to provide medical cover to the retired state officer’s children for that retired State officer’s lifetime, constituting an insensitive, imprudent, and irresponsible use of public money under Article 10 and Article 201(1)(d) of the Constitution. The amendments are also challenged for being inconsistent with the national values of good governance for expanding the public wage bill during an economic recession. Then, these amendments are not money Bill amendments but are contained in a money Bill and are therefore unconstitutional under Article 114(1).
- e) Section 38 of the Finance Act, 2022 amending Part A of the Second Schedule to the Value Added Tax Act, 2013 by:
- i. deleting from zero rated supplies under paragraph 20 the “supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent in weight”. This section disproportionately impacts the poor by increasing the cost of food supply the impact of the tax is therefore irreversible and irrefundable being a consumption tax.
- f) Section 47(a)(v) of the Finance Act, 2023 amending Part I of the First Schedule to the Excise Duty Act, 2015 by increasing the excise duty from 25% to 35% on imported glass bottles (excluding imported glass bottles for packaging of pharmaceutical products) is unconstitutional for threatening the right to a clean and healthy environment through plastic pollution. The effect of implementing this tax is irreversible and would defeat the precautionary principle.
6. Petitioners have an arguable case against these amendments and contend that the adverse impact on health, lives, and livelihoods is immediate and irreversible without a conservatory orders.

Consequently, the public interest favours a conservatory order suspending these amendments pending hearing and determination of the petition: section 5 of the Finance Act, 2023 (amending section 5 of the Income Tax Act, Cap 470); section 84 of the Finance Act, 2023 (amending section 31B of the Employment Act, 2017); section 37(a)(iii) of the Finance Act, 2023 (amending section A part I of the First Schedule to the Value Added Tax Act, 2013); sections 96, 92, 93, 94, and 95 of the Finance Act, 2023 (amending section 5(1)(f), 5A, 5B, and 6 of the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015); section 38 of the Finance Act, 2023 (amending Part A of the Second Schedule to the Value Added Tax Act, 2013); and section 47(a)(v) of the Finance Act, 2023 (amending Part I of the First Schedule to the Excise Duty Act, 2015).

7. Giving the Act retrospective effect to 1st July 2023 as opposed to the date of Court of Appeal ruling lifting the conservatory orders is akin to punishing the Petitioners for daring to question the measure in court and should be suspended.

Dated 4th of August, 2023, Nairobi

OchielJD
Ochiel Dudley

Advocate for the Petitioners

Drawn and filed by

Ochiel Dudley

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LAW SOCIETY OF KENYA.....	INTERESTED PARTY

SUPPORTING AFFIDAVIT

I, Lempaa Suyianka of P. O. Box 26586-00100, Nairobi, make oath and state as follows:

1. I am on the 2nd Interested Party’s Senior Litigation Counsel, familiar with the facts and duly authorised to swear this affidavit on behalf of the other Petitioners in this matter.
2. Petitioners challenge the Finance Act, 2023 for violating Articles 10 and 201 of the Constitution by imposing retrogressive tax measures which burden low-income earners excessively and threaten their right to life and livelihood under Articles 26 and 43 of the Constitution. Petitioners further contend that the Finance Act, 2023 concerns county government in functions like housing but was never passed by the Senate. Besides, petitioners challenge other levies having an impact on the right to life and health and on climate change.
3. On 28 July 2023 in *Cabinet Secretary for the National Treasury and Planning v Okiya Omtata Okiiti Civil Application E304 of 2023* the Court of Appeal stated:

since the petitions challenge both the entire

Act and specific provisions, the [High] Court can consider suspending the specific provisions whose implementation has an irreversible effect and cannot be refunded

I annex a copy of the Court of Appeal ruling of 28 July 2023 marked as “LS-1”.

4. Meanwhile, on 4 August 2023 the Respondents issued a public press notice giving the Housing Fund retrospective effect to **1 July 2023** to the Petitioners’ prejudice.

I annex a copy of the public notice of 3 August 2023 marked as “LS-2”.

5. Concerned and complying with the Court of Appeal ruling, Petitioners seek suspension of “specific provisions whose implementation has an irreversible effect and cannot be refunded”.
6. The matter is urgent and requires an August recess hearing because of the intervening threat to lives and livelihoods and due to the retrospective date of 1st July 2023.
7. Giving the Act retrospective effect to 1st July 2023 as opposed to the date of Court of Appeal ruling lifting the conservatory orders is akin to punishing the Petitioners for daring to question the measure in court and should be suspended.
8. I therefore believe that the public interest in this case tilts toward a conservatory order suspending the implementation or further implementation of: section 5 of the Finance Act, 2023 (amending section 5 of the Income Tax Act, Cap 470); section 84 of the Finance Act, 2023 (amending section 31B of the Employment Act, 2017); section 37(a)(iii) of the Finance Act, 2023 (amending section A part I of the First Schedule to the Value Added Tax Act, 2013); sections 96, 92, 93, 94, and 95 of the Finance Act, 2023 (amending section 5(1)(f), 5A, 5B, and 6 of the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015); section 38 of the Finance Act, 2023 (amending Part A of the Second Schedule to the Value Added Tax Act, 2013); and section 47(a)(v) of the Finance Act, 2023 (amending Part I of the First Schedule to the Excise Duty Act, 2015).

9. Without a stay, the court would face a *fait accompli* and its orders would neither reverse the *status quo* nor compensate the threatened violation of the Constitution.
10. I swear this affidavit from facts within my knowledge, believing it to be true to the best of my knowledge unless I have otherwise disclosed the source of the information.

Sworn at Nairobi by Lempaa Suyianka on 04 August 2023.

BEFORE ME



L. Suyianka

Lempaa Suyianka

Drawn and filed by

Ochiel Dudley

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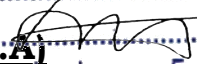
REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, M'NOTI & OMONDI, JJ.A)

CIVIL APPLICATION NO. E304 OF 2023

This is the Exhibit Marked "13 of 37"
Referred to in the Annexed Affidavit Declaration
of Lempaa Suyianka
Sworn / declared before me
this 4th day of August 2023
at Nairobi

Commissioner For Oaths

BETWEEN

**CABINET SECRETARY FOR THE
NATIONAL TREASURY AND PLANNING.....1ST APPLICANT**

THE HON. ATTORNEY GENERAL.....2ND APPLICANT

AND

OKIYA OMTATAH OKOITI.....1ST RESPONDENT

ELIUD KARANJA MATINDI.....2ND RESPONDENT

MICHAEL KOJO OTIENO.....3RD RESPONDENT

BENSON ODIWUOR OTIENO.....4TH RESPONDENT

BLAIR ANGIMA OIGORO.....5TH RESPONDENT

VICTOR OKUNA.....6TH RESPONDENT

FLORENCE KANYUA LICHORO.....7TH RESPONDENT

THE NATIONAL ASSEMBLY.....8TH RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY.....9TH RESPONDENT

KENYA REVENUE AUTHORITY.....10TH RESPONDENT

THE SENATE.....11TH RESPONDENT

CONSUMER FEDERATION OF KENYA.....12TH RESPONDENT

KENYA EXPORT FLORICULTURE

(Being an application for stay of conservatory orders pending from the ruling and order of the High Court of Kenya at Nairobi (Thande, J.) dated 10th July, 2023

in

Nairobi High Court Petition E181 of 2023)

RULING OF THE COURT

1. The advent of the new Constitution of Kenya, 2010 ushered in a new dawn in Kenya. The Constitution not only altered the structure of government by affirming the place of independent offices and institutions, but also enhanced accountability by expanding the scope of the Bill of Rights including public participation and public interest. The enactment of this Constitution by way of a referendum followed a democratic and participatory process which demonstrated the overwhelming resolve by the people of Kenya.
2. Despite the constitutional change, certain core principles of democracy and governance remained unchanged. For instance, the legislative power of the people still, resides in Parliament which now has two chambers - the National Assembly and Senate. Similarly, the budgets, spending and appropriation of public finances continue on annual basis. Thus, under Article 221 of the Constitution, the Cabinet Secretary in charge of Finance submits to the National Assembly for approval, the estimates of revenue and expenditure of the national government for the next financial year. Upon approval, the estimates are included in an Appropriation Bill

which is then introduced into the National Assembly to ~~15 of 37~~ ^{15 of 37} the withdrawal from the Consolidated Fund of the money needed for the expenditure and for the appropriation of that money. The Public Finance Management (PFM) Act contains provisions that operationalize the Constitutional provisions by setting out certain timelines that culminate into the Appropriation Bill.

3. The annual budgeting cycle had, till now, not attracted so much public attention. What started as a routine budgetary process culminated into a full contest that has now found itself before the courts. According to the 1st applicant, the Cabinet Secretary for the National Treasury and Planning, at paragraph 13 of his affidavit in support of the application before us, a total of nine petitions have been filed challenging the constitutional validity of the Finance Act 2023 before the High Court.

4. The gravamen of those petitions is that the Finance Act 2023 is unconstitutional for violating various provisions of the Constitution and the PFM Act. Specifically, that it was not subjected to the concurrence of the two Speakers under Article 110 of the Constitution; that there were no revenue estimates in the Appropriation Act as required under the PFM Act and Article 220 of the Constitution; that, the Finance Act was to be passed 90 days after enactment but it was passed without estimates; that various sections of the Act that were not in the Finance Bill were sneaked into the Act without public participation; and that section 84 of the Act on the Housing Levy cannot be included in the Act, as the

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Finance Act must only contain measures to collect revenue to finance budget expenditure estimates, yet there are no estimates to be financed by the levy. The applicant in his supporting affidavit lists the identified items of complainant as six captured aptly in paragraph 6 of the affidavit.

5. With the petitions filed at different stages of the enactment of the Finance Act, applications for conservatory orders were filed in the High Court. The High Court was called upon to determine three applications. The first application dated 26th June 2023 was filed by the 1st to 7th respondents, as petitioners before the High Court, seeking in effect, conservatory orders be issued suspending the Finance Act 2023 and the clauses of the Act that were ‘sneaked’ in, not having been in the Bill and those that required but did not obtain input by the Senate. On 30th June 2023, Thande, J., issued the conservatory orders. The second application was filed on 30th June 2023 by the National Assembly and the Speaker of the National Assembly seeking to suspend the orders made on 30th June 2023 suspending the entire Finance Act. A third application was made on 1st July 2023 by the applicants herein also seeking to vary or set aside the orders issued on 30th June 2023 by Thande, J.
6. The High Court summarized the issues arising out of the applications into three – whether the orders of 30th June 2023 should be set aside, whether the test of conservatory orders had

been met and whether the matter should be certified as raising a substantial question of law under Article 165(4) of the Constitution. 17 of 37

7. On 10th July 2023, the High Court in its ruling, suspended the implementation of the Finance Act 2023. On the first issue, the court found that the petitioners had satisfied the tests for grant of conservatory orders and that it was necessary to issue such orders to preserve the substratum of the petition pending the hearing and determination of the same. The court observed that it has a constitutional mandate to protect the supremacy of the Constitution by ensuring that all laws conform to the Constitution. The Court was also satisfied of the existence of a prima facie case with probability of success and imminent danger of rendering the petition nugatory in the absence of the conservatory orders. This, it observed, would militate against public interest as there was a real risk of the public being subjected to unconstitutional law, should the petition succeed. On the final issue, the judge certified the matter as involving a substantial question of law and transmitted the same to the Chief Justice to constitute a bench of not less than three judges to determine the matter. In the end, the application dated 26th June 2023 was allowed with the concurrent dismissal of the applications dated 30th June 2023 and 1st July 2023.
8. On 11th July 2023, the applicants moved this Court under Rule 5(2)(b) of the Court of Appeal Rules in quest for stay of the conservatory orders issued on 10th July 2023 pending the hearing and determination of the application *inter partes* and the intended

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appeal. The grounds in support of the application are that: there is sufficient cause for the grant of stay as public interest would be best served by allowing the prayer; the applicants have an arguable appeal; the suspension of the Finance Act has the effect of halting the core operations of the Government and the government stands to suffer great financial loss in reduced revenue collection; the suspension of the Finance Act will make the government incapable of meeting its financial commitments and discharging its executive authority; the revenue lost by the government is irrecoverable yet the appeal has high probability of success; it will take weeks before the Chief Justice constitutes a bench of not less than three judges to the applicant's detriment if the conservatory orders are still in force; there is real risk of the appeal being rendered nugatory as the effects of the suspension will be irreversible.

9. The application is further supported by the affidavit of the 1st applicant which explains and elaborated the grounds set out on the face of the application. The applicants also filed their submissions dated 18th July 2023.

10. At the hearing of the application, the applicants were represented by Prof Githu Muigai, SC, Kimani Kiragu, SC, Mahat Somane, Advocate and Charles Mutinda, Advocate. Prof Muigai, SC emphasized that there are two main grounds which the Court needed to be persuaded on to issue the order of stay. First, that the appeal is arguable and second, that the appeal will be rendered nugatory. Counsel indicated that the applicants have a watertight appeal and took issue with what he termed as judicial overreach in

the manner in which the orders were issued ex parte, yet the matter was pending before another Judge and the applicants had not been served. In summing up the narration of what transpired before the conservatory orders were issued, Prof Muigai, SC submitted that the basis of the appeal is the manner in which the matter was conducted, with the petitions being determined in an interlocutory manner. Further, that this amounted to an error of law and fact in determining the scope of public interest.

11. Kiragu Kimani, SC, submitted that the learned Judge caused confusion in considering the consequences of the conservatory order in terms of tax collection. He pointed out the seven different effects of the conservatory orders spelt out in paragraph 3 of the supporting affidavit of the 1st applicant. These include loss of about Shs. 211 Billion, the fact that the government has to borrow to bridge the gap, that there are no saving provisions in the Finance Act in total disregard to the annual budgets, and that the Finance and Appropriation Acts are interdependent with one seeking to raise revenue and the other providing the mode of expenditure without recourse to earlier Acts. In essence, the government would be unable to borrow, there is a likelihood of an increase in debt as the revenue collection will be adversely affected, it being limited because of debt ceiling. Counsel also pointed to the positive side of the Act such as reduction in some taxes some of which kicked in on 1st July 2023 and with no provision for refund, with for instance, employers not being able to deduct taxes on the payroll. The gist of

his submission was that the consequences of the suspension of the Finance Act were dire and irreversible. 20 of 37

12. In support of the application, Hon. Murugara Gitonga, Advocate for the 8th and 9th respondents associated himself with the position adopted by the applicants.
13. Mr. Muliro, Advocate for the 10th respondent also supported the application. He submitted that the appeal raises an arguable point on presumption of constitutionality of a statute, and faults the High Court for suspending the entire Act. On the appeal being rendered nugatory, he submitted that the Finance Act seeks to raise Shs. 211 Billion and a sum of Shs. 500 million was being lost per day which sum is not recoverable with the loss now going beyond 20 days of the month. He pointed the Court to the provisions of section 47(a)(b) and 48 and Section 30 of the Value Added Tax whose mechanisms can be employed to make refunds if necessary. He added that it is in public interest to allow the application.
14. Mr. Miller for the 11th respondent relied on the submissions filed. He highlighted two issues, being the role of the Senate in passing legislation that is not a money Bill. He also reiterated the principle of presumption of constitutionality of a statute and urged that an Act is legal upon enactment and can be enforced unless declared unconstitutional after a full hearing.
15. Mr. Omulama, counsel for the 13th respondent, also supported the application.

16. The application was opposed. Mr. Ometo, learned counsel for the 3rd respondent, who highlighted three issues. He set out the position regarding the filing of applications by stating that on 31st May 2023 when the petition was filed, the Finance Act had not been enacted and the court did not pronounce itself on the orders sought. Several preliminary objections were filed on the propriety of the petitions. By 26th June 2023, the Bill had been enacted as an Act and the Judge issued orders to amend the petition. Having amended the petition, the Bill had become an Act and on 29th June 2023 they sought to suspend the Finance Act, which application was certified urgent and heard by Thande, J.
17. On his second issue, Mr. Ometo addressed the principle of presumption of constitutionality and argued that transformative constitutionalism, as found in several commentaries favoured grant of conservatory orders where there is manifest unconstitutionality. To him, the Finance Act was *prima facie* illegal and the Court could not turn away the petitioners. Lastly, on the refund of taxes, he submitted that the suspension of the conservatory orders will lead to accruals by the government as it is not possible to refund for instance the increase in fuel price attributed to the Finance Act in the event that the Act is found unconstitutional.
18. The 2nd respondent, appeared in person. He relied on his replying affidavit and submissions filed in opposition to the application. On the presumption of constitutionality of a statute, he argued that it is a rebuttable presumption which would be based on the evidence

and material. He added that the applicants have not met the requirements for the grant of the orders sought and the fact that a different judge would have arrived at a different decision is not a ground for setting aside a discretionary power exercised by a judge. He faults the applicants for seeking to exclude the Finance Act 2023 from constitutional interpretation, submitting that his challenge on the Act is both on the content and process. He submitted that if the process is found to have been unconstitutional, the content will also be nullified. Lastly, he contended that the Finance Act contains Money Bills or sections that require deliberation and determination by Senate. He concludes that the application does not meet the test for grant of the orders sought, it is premature and that public interest ought to be preserved because there will be nothing to argue in petition, the affect of the orders sought being to dispose of the petition.

19. The 4th respondent, Benson Otieno appeared in person. His submissions were four-fold. First, that procedural justice is as important as substantive justice and that the procedure in this dispute was flawed. Secondly, that the biggest issue for consideration is whether the government can or cannot function in the current situation. Noting that the Finance Act has no deadline as it repealed the earlier Act, he contended that the suspension of the Act could potentially strain the government but not stop its operations. The Act only brings a new revenue scheme. Thirdly, he asserted that there is no arguable appeal as it relates to exercise of discretion. His last argument is that the enactment of the Act was marred by several procedural lapses and this question will be dealt

with by the bench to be constituted by the Chief Justice to determine the matter in which there are pending prayers seeking to cross-examine persons such as the Speaker of the National Assembly. He concluded by arguing that the trial judge addressed her mind to public interest in the grant of the conservatory orders, and that there is neither an arguable appeal nor one that can be rendered nugatory.

20. Mr. Angima the 5th respondent, argued that the application should be dismissed as the substratum of the petitions were preserved and there was no *prima facie* case before the Court.
21. Mr. Kimani for the 7th respondent faulted the applicants' argument that the trial judge overreached herself and submitted that the judge was only protecting the supremacy of the Constitution. He submitted that the Finance Act was enacted under Articles 109 and 110 and that the process followed in filing the petitions is sanctioned by law, the Act going against the will of the people. He prayed for the dismissal of the application.
22. Senator Okiya Omtata, the 1st respondent agreed with his co-petitioners and filed a replying affidavit and submissions in opposition to the application. He started by averring that the Attorney General had not filed a memorandum of appeal. He proceeded to argue that the suspension of the Finance Act did not vary the tax regime as the Act was an amendment Act to vary existing laws. He reiterated that the first two applications targeted proceedings before parliament and that their petition targeted both

the Bill and the Acts. He contended that the appeal is not arguable and the figure of Shs. 211 Billion referred to by the applicants lacks a legal basis as they are mere estimates founded under Article 220 of the Constitution without knowledge of how much will actually be raised.

23. He further urged us to view the Appropriations Act in terms of what affects Article 249(3) of the Constitution in which Parliament should allocate funds for each office. He added that under Article 93(1) the Senate has the mandate to participate in the budget making process. He did not consider the appeal to be arguable because the issues set out are matters for trial while the conservatory orders are only in the interim, and can be upset. He submitted that nothing will be rendered nugatory because the Finance Act does not allow the Government to collect money not authorized in the Appropriation Act. In his view, public interest tilts in favour of the respondents and therefore the conservatory orders should not be lifted. He urged us to dismiss the application with costs.
24. In reply, Kimani Kiragu SC appreciated the integral nature of the court under the Constitution. He referred us the decision of the Supreme Court in **Communications Commission of Kenya v Royal Media Services & 10 Others [2014] eKLR** where the Court lifted orders issued by this Court. On the draft memorandum of appeal, which are clearly identified in the 1st applicant's affidavit in support of the application.

25. On his part, Mahat Somane, Advocate argued that refunds and rebates made and rebates allowed if the appeal does not succeed.. He raised the contradiction by the 1st respondent in arguing that on the one hand the Appropriation Act is unconstitutional, and on the other hand that the same can be used. He referred us to the decision of this Court in ***Itumbi v Law Society of Kenya & 55 others [2023] KECA 593 (KLR)*** on ripeness under rule 5(2)(b) and submitted that that decision was easily distinguishable from the present one.
26. Prof. Githu SC concluded the reply by submitting that there is a strong arguable appeal and that the people of Kenya will be greatly prejudiced if the conservatory orders continue in force. He cautioned that this is a political dispute, and the courts have no role entertaining a political battlefield.
27. Having extensively set out the background and the case by the parties, the Court is being called upon to lift the conservatory orders issued on 10th July 2023. This Court derives its appellate jurisdiction from **Article 164(3)** of the Constitution and **section 3(1)** of the Appellate Jurisdiction Act to hear appeals from the High Court and any other Court of Tribunal prescribed by an Act of Parliament in cases in which the appeal lies to the Court of Appeal under law.
28. Rule 5(2)(b) of the Court of Appeal Rules as invoked by the applicants provides that:

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may –

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just”

This is an original jurisdiction on this Court to preserve the substratum of the appeal pending before it and is not necessarily aimed at correcting exercise of discretion by the trial court.

29. At the onset, we wish to disabuse the submission by the 1st respondent that an application of this nature is predicated upon the filing of a memorandum of appeal. As expressly stated in the said provision and as we have affirmed time and again, it is sufficient for the applicant to only file a Notice of Appeal against the impugned decision. It is uncontroverted that the applicants filed their Notice of Appeal in this matter as contemplated under Rule 75 of the Court’s Rules. Having done so, the application is properly before the Court for disposal. It is also evidently clear that for the purposes of determining whether the intended appeal is arguable, the grounds upon which the applicants impugn the orders and ruling of the High Court are elaborately set out in the 1st applicant’s affidavit in support of the application.

30. Turning to the nucleus of the application, it is common ground amongst all the parties that the applicants must satisfy the twin principles – the appeal should be arguable and not frivolous and

that if the stay is not granted, the appeal will be rendered nugatory. The principles surrounding the Court's jurisdiction under Rule 5(2)(b) of the Court of Appeal Rules are now settled. The jurisdiction under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.

31. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants that is worth of ventilation before this Court. In **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR** this Court described an arguable appeal as one which must not necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at this stage because so may embarrass the bench that ultimately hears the appeal. This is more so, considering that the intended appeal arises out of a conservatory order, with the substantive dispute still pending before the High Court for hearing and determination
32. In **Reliance Bank Limited v Norlake Investments Ltd [2002] 1 E.A. 227**, we held that ***the term- 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.*** Whether or not an appeal will be rendered

nugatory depends on whether or not what is sought to be stayed or
injunctioned, if allowed to happen, is reversible; or if it is not reversible
whether damages will reasonably compensate the party aggrieved.
See **County Secretary of Kajiado & 47 others v Salaries &
Remuneration Commission & Another [2021] Eklr.**

33. Turning to the first limb, is the appeal arguable? Arguments have been proffered on both sides of the divide. The proponents of the arguability argument have put forth several issues. Counsel for the applicants indicated that their draft memorandum of appeal raised six grounds of appeal. Key among them is whether an Act of Parliament which is presumed to be constitutional, should be suspended before the petition challenging its constitutionality has been heard and the Act found to be actually unconstitutional. Another issue raised is whether the impugned ruling violates the doctrine of separation of powers, stopping the Executive from discharging its executive authority under Article 129 of the Constitution, and the legislature as well as the County Assemblies from continuing to enact legislation that flows from the Act. The applicants also fault the High Court for suspending the entire Act when the amended petition upon which the application for conservatory order was hinged only challenged certain provisions of the Act. Counsel for the applicants also took issue with the conduct of the proceedings culminating to the issuance of the conservatory orders in what they termed as judicial overreach.
34. The opponents of the application were for the upholding of the conservatory order. This is because to them, there was no exercise

of judicial overreach as the Judge was merely acting in accordance with the law. In addition, the presumption of constitutionality of the statute is rebuttable especially in instances which, in their perception, like the present case, there was what appeared as *prima facie* illegality of the statute. They invoke public interest as favouring the orders as issued by the High Court, adding that the substantive dispute is pending determination and interrogation by the High Court after which a final decision on the merits will be taken.

35. It is worth noting that when the challenge at the High Court was initiated, the Bill was yet to be enacted but at the time the impugned ruling was made, the Bill had not only been enacted, but had also been assented to by the President. From our consideration of the competing positions, it is clear that there are many issues that remain contested, which need serious evaluation and determination, upon hearing the appeal.
36. The fact that we had at least five members of Parliament both in National Assembly and at the Senate appearing and taking divergent positions only shows the heat that the conservatory orders have generated. This is because, the Members of Parliament are the very ones involved in the legislative exercise, the result of which is now before courts. For them not to agree and push their disagreement before the courts, the courts in exercise of their constitutional mandate to interpret and apply the constitution must be allowed to play its role.

37. The doctrine of presumption of constitutionality of a statute and the limitations as they apply to the present scenario is something that can only be ventilated in full at the opportune time. It is not lost to us that a serious allegation on judicial overreach has been raised and while we cannot make a definitive conclusion at this point, this is one that must be argued in the appeal. This also applies to the applicability of the doctrine of separation of powers. Besides, the very nature of the petitions having been certified under Article 165(4) of the Constitution and the public interest angle raised by the parties, albeit diametrically opposed, we are persuaded that indeed there exists arguable points in the intended appeal. As earlier pointed out the existence of only one arguable point is enough under this limb and the court cannot at this moment interrogate the likelihood of success of each of the grounds.

38. As for the second limb on the nugatory aspect, this is even more contested. The applicants contend that we are in a unique situation where the irreparable loss is continuous with effect from 1st July 2023 with the suspension of revenue collection under the Act. That in addition, the government will be unable to implement its projects and may resort to borrowing to bridge the deficit, which borrowing may not be easily accessible in view of the prevailing economic conditions and the national debt ceiling. They also argue that the suspension of the Finance Act collaterally suspends the Appropriation Act in both National and County governments. This inhibits the 1st applicant from accessing the Consolidated Fund

with a view to paying debts and remunerating members of independent commissions which pursuant to Article 214(1) and 250 (7) of the Constitution are a first charge to the Consolidated Fund.

39. Accordingly, the peculiar circumstances of the case are that there will be serious irreversible economic consequences if the stay of the conservatory orders is not granted and the intended appeal succeeds. Award of damages would not compensate the applicants and in any event, the respondents have not showed that they are capable of paying damages.
40. The applicants' version on nugatory aspect is countered by the respondents who oppose the application. They disagree that the suspension of the Act has a crippling effect on the government since the existing revenue collection mechanism still operates, and that the harm is more to the public, who cannot be refunded for tax already paid once the Act is operationalized. They also argue that lifting the suspension of the Act will also render the petition pending before the High Court nugatory because they will lose their substratum. Sight is not lost to the fact that the application relates to conservatory orders issued by the High Court with the substantive dispute yet to be heard.
41. One of the things that come out clearly is the place of public interest. This matter has generated enormous interest. The litigants hinge their respective positions on public interest making it a bone of contention. In deciding whether the applicants have met the

threshold on the nugatory aspect, we have to look at the ~~32 of 37~~ ^{32 of 37} of the dispute. This is the first time that the provisions of the Finance Act have been challenged both in terms of the procedure of enactment and in the contents. It is also the first time that orders of these nature were issued suspending the Finance Act in its entirety.

42. The Finance Act is a unique statute in the sense that it is enacted annually in respect of the estimates for expenditure for the financial year in which it relates to. Article 260 of the Constitution defines a “financial year” to mean the period of twelve months ending on the thirtieth day of June or other day prescribed by national legislation, but the initial financial year of any entity is the period of time from its coming into existence until the immediately following thirtieth day of June, or other day prescribed by national legislation.
43. The enactment of the Finance Act as stated in the long title amends the laws relating to various taxes and duties and for matters incidental thereto. This means that its enactment automatically repeals, varies and amends other provisions of the previous Act. By its very nature, the Act has no transition or saving clause, and arises out of the Budget Policy Statement of the national government revenues and expenditure. It remains instrumental into defining the government policy for the period in question as it is used to raise revenue for the said period.
44. Section 35 of the PFM Act sets out the different stages in the budget process as follows:

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(1) *The budget process for the national government in any financial year shall comprise the following stages—*

- a. integrated development planning process which shall include both long term and medium term planning;*
- b. planning and determining financial and economic policies and priorities at the national level over the medium term*
- c. preparing overall estimates in the form of the Budget Policy Statement of national government revenues and expenditures*
- d. adoption of Budget Policy Statement by Parliament as a basis for future deliberations;*
- e. preparing budget estimates for the national government;*
- f. submitting those estimates to the National Assembly for approval;*
- g. enacting the appropriation Bill and any other Bills required to implement the National government's budgetary proposals;*
- h. implementing the approved budget.*

These stages are carried out under timelines provided for under the law on an annual basis. The present constitutional challenges emanated between the third and fourth last stages which come at the tail end of the process and remain critical for any government operations.

45. The Finance Act has a life span of 90 days beyond which the next budgetary cycle is set in motion. We have no doubt in our mind that the Finance Act and the Appropriation Act are interdependent. While the former provides for generation of the funds, the latter

provides for the expenditure. There can be no expenditure where the mode of generation of the funds has not been provided for. The 1st applicant estimated the generation of revenue in the tune of Shs.211 Billion with an average daily rate of Shs.500 million. Despite the actual figures being contested, it is certain that revenue was to be collected with the operationalization of the Act.

46. A perusal of the Finance Act 2023 reveals that out of the 102 provisions in it, only 21 of them had a different commencement date of 1st September 2023 and 1st January 2024. That means that the bulk of the revenue collection measures contained in the Act took effect on 1st July 2023, but for the conservatory orders issued by the High Court. The Members of Parliament both Senators and members of National Assembly who appeared before us did not make it any easier as they took divergent views.
47. The applicants on one hand argue that the damage is irreversible if the conservatory orders are not suspended giving an example of the taxes that can be implemented for employees at the payroll while the respondents in opposition argue that reimbursement of the tax is impossible, giving an example of the fuel levy. This is not an easy position to balance, with each side invoking public interest.
48. However, in exercising our discretion, we are mindful of certain peculiar and unique circumstances of the Act. First, tax is a continuous and annual mechanism and the members of the public can get a rebate for overpaid taxes and levies when making subsequent tax payments. Secondly, since the petitions challenge

both the entire Act and the specific provisions, the court can consider suspending the specific provisions whose implementation has an irreversible effect and cannot be refunded. This is in contradistinction with a blanket suspension of the Act. Thirdly, the Appropriation Act which was enacted on the backdrop of the Finance Act is in place and is not under constitutional challenge. Lastly, had the trial Judge considered the substantial and irreversible public interest in this matter, the court would have been hesitant to suspend the whole Act.

49. In conclusion, we are persuaded that the applicants have satisfied the twin principles for the grant of the orders sought, and that, public interest tilts in favour of setting aside the conservatory orders by the trial Judge.
50. The upshot of our decision is that the application has merit and the same is allowed as prayed with the effect that the order made on 10th July 2023 suspending the Finance Act 2023, and the order prohibiting the implementation of the Finance Act 2023, be and is hereby lifted pending the hearing and determination of the appeal. Costs shall abide the outcome of the appeal.
51. The orders in this matter shall apply *mutatis mutandis* in Civil Application No. E310/2023.
52. We further direct as follows:
 1. We direct the applicants to file the appeals within the next 14 days.

2. That parties to file and serve their submissions within the next 30 days.
3. Both appeals be heard and determined within 60 days from the date of this Ruling.

Dated and delivered at Nairobi this 28th day of July, 2023.

M. WARSAME

.....
JUDGE OF APPEAL

KATHURIMA M'INOTI

.....
JUDGE OF APPEAL

H. OMONDI

.....
JUDGE OF APPEAL

*I certify that this is a
true copy of the original
signed*
DEPUTY REGISTRAR



**MINISTRY OF LANDS, PUBLIC WORKS, HOUSING
AND URBAN DEVELOPMENT**

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**STATE DEPARTMENT FOR HOUSING AND URBAN
DEVELOPMENT**

PUBLIC NOTICE

The State Department for Housing and Urban Development would like to inform the members of the public that the Affordable Housing Levy is now in effect from **1 July 2023**.

The levy is payable by the employee and employer at a rate of one point five per centum of the employee's gross monthly salary by the employee, and one point five per centum of the employee's monthly gross salary by the employer, as outlined in the Finance Act 2023. This shall be remitted by the employer not later than nine working days after the end of the month in which the payments are due.

This is the Exhibit Marked "LS-2"
Referred to in the Annexed Affidavit Declaration
of..... Lempea Suyianka.....
Sworn / declared before me
this....4.....day of..August...20..23.....
at.....
Nairobi

The Cabinet Secretary, Ministry of Lands, Public Works, Housing and Urban Development has appointed the Kenya Revenue Authority (KRA) as the collection agent. KRA will issue a communication advising on the mode of collection.

Commissioner For Oaths

**Please channel any inquiries to State Department for Housing
and Urban Development P. O. Box 30119-00100, Nairobi,
or by email to lpdu@housingandurban.go.ke**