



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)*

**PETITION NO. E031 OF 2024 AS CONSOLIDATED WITH PETITIONS  
NOS. E032 & E033 OF 2024**

– BETWEEN –

**THE CABINET SECRETARY FOR THE NATIONAL  
TREASURY AND PLANNING ..... 1<sup>ST</sup> APPELLANT/APPLICANT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> APPELLANT/APPLICANT**

**THE NATIONAL ASSEMBLY ..... 3<sup>RD</sup> APPELLANT/APPLICANT**

**THE SPEAKER OF THE  
NATIONAL ASSEMBLY ..... 4<sup>TH</sup> APPELLANT/APPLICANT**

**KENYA REVENUE AUTHORITY ..... 5<sup>TH</sup> APPELLANT/RESPONDENT**

– AND –

**OKIYA OMTATAH OKOITI ..... 1<sup>ST</sup> RESPONDENT**

**ELIUD KARANJA MATINDI ..... 2<sup>ND</sup> RESPONDENT**

**MICHAEL KOJO OTIENO ..... 3<sup>RD</sup> RESPONDENT**

**BENSON ODIWOUR OTIENO ..... 4<sup>TH</sup> RESPONDENT**

**BLAIR ANGIMA OIGORO ..... 5<sup>TH</sup> RESPONDENT**

**VICTOR OKUNA ..... 6<sup>TH</sup> RESPONDENT**

**FLORENCE KANYUA LICHORO ..... 7<sup>TH</sup> RESPONDENT**

**DANIEL OTIENO ILA ..... 8<sup>TH</sup> RESPONDENT**

<b>RONE ACHOKI HUSSEIN .....</b>	<b>9<sup>TH</sup> RESPONDENT</b>
<b>HON. SENATOR EDDY GICHERU OKETCH .....</b>	<b>10<sup>TH</sup> RESPONDENT</b>
<b>CLEMENT EDWARD ONYANGO .....</b>	<b>11<sup>TH</sup> RESPONDENT</b>
<b>PAUL SAOKE .....</b>	<b>12<sup>TH</sup> RESPONDENT</b>
<b>LAW SOCIETY OF KENYA .....</b>	<b>13<sup>TH</sup> RESPONDENT</b>
<b>AZIMIO LA UMOJA ONE</b>	
<b>KENYA COALITION PARTY .....</b>	<b>14<sup>TH</sup> RESPONDENT</b>
<b>KENYA HUMAN RIGHTS COMMISSION .....</b>	<b>15<sup>TH</sup> RESPONDENT</b>
<b>KATIBA INSTITUTE .....</b>	<b>16<sup>TH</sup> RESPONDENT</b>
<b>THE INSTITUTE FOR SOCIAL</b>	
<b>ACCOUNTABILITY (TISA) .....</b>	<b>17<sup>TH</sup> RESPONDENT</b>
<b>TRANSPARENCY INTERNATIONAL KENYA .....</b>	<b>18<sup>TH</sup> RESPONDENT</b>
<b>INTERNATIONAL COMMISSION OF</b>	
<b>JURISTS-KENYA (ICJ KENYA) .....</b>	<b>19<sup>TH</sup> RESPONDENT</b>
<b>SIASA PLACE .....</b>	<b>20<sup>TH</sup> RESPONDENT</b>
<b>TRIBELESS YOUTH .....</b>	<b>21<sup>ST</sup> RESPONDENT</b>
<b>AFRICA CENTER FOR OPEN GOVERNANCE .....</b>	<b>22<sup>ND</sup> RESPONDENT</b>
<b>ROBERT GATHOGO KAMWARA .....</b>	<b>23<sup>RD</sup> RESPONDENT</b>
<b>TRADE UNIONS CONGRESS OF KENYA .....</b>	<b>24<sup>TH</sup> RESPONDENT</b>
<b>KENYA MEDICAL PRACTITIONERS'</b>	
<b>PHARMACISTS AND DENTIST UNION .....</b>	<b>25<sup>TH</sup> RESPONDENT</b>
<b>KENYA NATIONAL UNION OF NURSES .....</b>	<b>26<sup>TH</sup> RESPONDENT</b>
<b>KENYA UNION OF CLINICAL OFFICERS .....</b>	<b>27<sup>TH</sup> RESPONDENT</b>
<b>FREDRICK ONYANGO OGOLA .....</b>	<b>28<sup>TH</sup> RESPONDENT</b>
<b>NICHOLAS KOMBE .....</b>	<b>29<sup>TH</sup> RESPONDENT</b>
<b>WHITNEY GACHERI MICHENI .....</b>	<b>30<sup>TH</sup> RESPONDENT</b>
<b>STANSLOUS ALUSIOLA .....</b>	<b>31<sup>ST</sup> RESPONDENT</b>
<b>HERIMA CHAO MWASHIGADI .....</b>	<b>32<sup>ND</sup> RESPONDENT</b>
<b>DENNIS WENDO .....</b>	<b>33<sup>RD</sup> RESPONDENT</b>
<b>MERCY NABWIRE .....</b>	<b>34<sup>TH</sup> RESPONDENT</b>

BENARD OKELO .....	35 <sup>TH</sup> RESPONDENT
NANCY OTIENO .....	36 <sup>TH</sup> RESPONDENT
MOHAMED B. DUB .....	37 <sup>TH</sup> RESPONDENT
UNIVERSAL CORPORATION LIMITED .....	38 <sup>TH</sup> RESPONDENT
COSMOS LIMITED .....	39 <sup>TH</sup> RESPONDENT
ELYS CHEMICAL INDUSTRIES .....	40 <sup>TH</sup> RESPONDENT
REGAL PHARMACEUTICALS .....	41 <sup>ST</sup> RESPONDENT
BETA HEALTHCARE LIMITED .....	42 <sup>ND</sup> RESPONDENT
DAWA LIMITED .....	43 <sup>RD</sup> RESPONDENT
MEDISEL KENYA LIMITED .....	44 <sup>TH</sup> RESPONDENT
MEDIVET PRODUCTS LIMITED .....	45 <sup>TH</sup> RESPONDENT
LAB AND ALLIED LIMITED .....	46 <sup>TH</sup> RESPONDENT
BIOPPHARM LIMITED .....	47 <sup>TH</sup> RESPONDENT
BIODEAL LABORATORIES LIMITED .....	48 <sup>TH</sup> RESPONDENT
ZAIN PHARMA LIMITED .....	49 <sup>TH</sup> RESPONDENT
THE SPEAKER OF THE SENATE .....	50 <sup>TH</sup> RESPONDENT
CONSUMERS FEDERATION OF KENYA (COFEK) ....	51 <sup>ST</sup> RESPONDENT
KENYA EXPORT FLORICULTURE HORTICULTURE, AND ALLIED WORKERS UNION .....	52 <sup>ND</sup> RESPONDENT
DR. MAURICE JUMAH OKUMU .....	53 <sup>RD</sup> RESPONDENT

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

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## **RULING OF THE COURT**

**[1]** The enactment of the Finance Act, 2023 precipitated a total of 11 petitions being filed in the High Court, that is, ***Okoiti & 6 Others vs. Cabinet Secretary for***

***The National Treasury and Planning & 3 Others; Commissioner-General, Kenya Revenue Authority & 3 Others (Interested Parties)*** (Petitions Nos. E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of [2023] (Consolidated)) [2023] KEHC 25872 (KLR). The gist of the said petitions was a challenge to the constitutionality of not only the legislative process that culminated in the said Act but also some of the provisions therein. The High Court (*Majanja, Meoli & Mugambi, JJ.*) by a judgment dated 28<sup>th</sup> November, 2023 only declared some of the provisions in the Finance Act, 2023 as unconstitutional and not the whole Act as some parties had prayed.

[2] Subsequently, six appeals and three cross-appeals were lodged at the Court of Appeal, that is, ***The National Assembly & Another vs. Okiya Omtatah Okoiti & 55 Others***, Civil Appeals Nos. E003, E016, E021, E049, E064 & E080 of 2024 (Consolidated) against the judgment of the High Court aforesaid. Apart from finding some of the provisions of the Act as unconstitutional, the Court of Appeal (*M'Inoti, Murgor & Mativo, J.J.A.*), unlike the High Court, by a judgment dated 31<sup>st</sup> July 2024, declared the entire Finance Act, 2023 unconstitutional. In particular, the court issued Orders *inter alia* that –

“

- i. ***The appellants' appeals in Civil Appeals Nos. E003 of 2024 and E080 of 2024, against the findings that section 84 (the Affordable Housing Levy) and sections 88 and 89 (the Statutory Instruments Act) are unconstitutional, are hereby dismissed on grounds that the said issues have been caught up by the doctrine of mootness, therefore, they present no live controversies.***
- ii. ***The notices of cross-appeal by the 15<sup>th</sup> to 22<sup>nd</sup> and 38<sup>th</sup> to 49<sup>th</sup> respondents and Civil Appeal No. E064 of 2024 are devoid of merit and the same are hereby dismissed, save***

*that we find that the High Court misconstrued its mandate under Article 165 (3) by holding that it had no jurisdiction to intervene in policy matters.*

- iii. The notice of cross-appeal by the 13<sup>th</sup> respondent (LSK) is hereby allowed in the following terms: (a) a declaration be and is hereby issued decreeing that sections 24 (c), 44, 47 (a) (v), 100 and 101 of the Finance Act, 2023, introduced post-public participation, are unconstitutional and void for having been enacted in a manner that by-passed the laid down legislative stages including publication, First Reading, Second Reading and contrary to Articles 10 (1) & (2) and 118 of the Constitution and Standing Orders.*
- iv. Civil Appeal No. E016 of 2024 is allowed to the extent that a declaration be and is hereby issued that sections 18, 21, 23, 24, 26, 32, 34, 38, 44, 47, 69, 72, 79, 80, 81, 82, 83, 85, 86, 100, 101, and 102 of the Finance Act No. 4 2023, introduced post-public participation to amend the Income tax Act, Value Added Tax Act, Excise Duty Act and Miscellaneous Fees and Levies Act, Kenya Revenue Authority Act, Retirement Benefits Act, Alcoholic Drinks Control Act of 2010, Special Economic Zones Act and Export Processing Zones Act, are unconstitutional, null and void for not having been subjected to fresh public participation and having been enacted in total violation of the constitutionally laid down legislative path.*

...

- vi. Civil Appeal No. E021 of 2021 is merited. Accordingly, we hereby issue a declaration that the enactment of the Finance Act, 2023 violated Articles 220 (1) (a) and 221 of the Constitution as read with sections 37, 39A, and 40 of the PFMA which prescribes the budget making process, thereby rendering the ensuing Finance Act, 2023 fundamentally flawed and therefore void ab initio and consequently unconstitutional.**
- vii. Civil Appeal No. E049 of 2024 partially succeeds in terms of the following orders:- (a) a declaration be and is hereby issued that in conformity with Article 10 (1) & (2) (c), Parliament is obligated to provide reasons for adopting or rejecting any proposals received from members of the public during (the) public participation process; (b) a further declaration is hereby issued that the failure to comply with this constitutional dictate renders the entire Finance Act, 2023 unconstitutional.**
- viii. We affirm the finding by the High Court that sections 76 and 78 of the Finance Act, 2023 amending section 7 of the Kenya Roads Act, 1999 are all unconstitutional, null and void.**
- ix. We uphold the finding by the High Court that concurrence of both houses in the enactment of the Finance Act, 2023 was not a requirement under Article 114.**
- (i) Having found that the process leading to the enactment of the Finance Act, 2023 was fundamentally flawed and in violation of the**

***Constitution, sections 30 to 38, 52 to 63 and 23 to 59 of the Finance Act, 2023 stand equally vitiated and therefore unconstitutional...***

[3] The foregoing decision(s) led to three appeals, **SC Petitions Nos. 31, 32 & 33 of 2024**, being filed before this Court, which petitions have since been consolidated by an order of this Court dated 15<sup>th</sup> August, 2024. Prior to the said consolidation, the 1<sup>st</sup> and 2<sup>nd</sup> appellants had lodged a Notice of Motion dated 1<sup>st</sup> August, 2024 in **SC Petition No. E031 of 2024** while the 3<sup>rd</sup> and 4<sup>th</sup> appellants had lodged another Notice of Motion dated 2<sup>nd</sup> August, 2024 in **SC Petition No. E032 of 2024**. Appreciating the correlation between the two Motions, this Court, on 5<sup>th</sup> August, 2024, directed that they would be disposed of by a single ruling. The said Motions are therefore the subject of this composite ruling.

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

“ ...

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

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

“ ...

4. *Pending the hearing and determination of the appeal filed before this Court, **there be issued conservatory orders staying declarations** in Orders i, ii, iii, iv, vi, vii, viii and ix(i) of the impugned judgment of the Court of Appeal delivered on 31<sup>st</sup> July, 2024, and the effects thereof from 31<sup>st</sup> July, 2024.*  
...”

[5] In totality, the grounds in support of the Motions are firstly that, the consolidated appeal is arguable *to wit*, that the Court of Appeal erred by, misapprehending the enactment procedure of a Money Bill under Article 114 of the Constitution and the Public Finance Management Act; contradicting its own decision in *Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing Board & 7 Others*, Civil Appeal No. 11 of 2018; [2018] eKLR with regard to the threshold of public participation required in enacting statutes and whether Parliament can amend bills after they have been subjected to public participation; and conflating the purpose/function of an Appropriation Act and a Finance Act. Further, that the impugned decision creates an untenable situation where the government has to revert to the Finance Act, 2022 for revenue collection for a subsequent fiscal year since the Finance Bill, 2024 has since been rescinded.

[6] Secondly, the applicants urge that, unless the orders sought are granted, the substratum of the consolidated appeal will be defeated and/or rendered nugatory. In that regard, argued the applicants, the nullification of the Finance Act, 2023 will cause a revenue shortfall of approximately Kshs. 214 billion which cannot be recovered unless stay orders are issued urgently. It would also require the government to update all its online platforms, revenue collection systems and software to reflect the relevant tax rates, tax brackets and tax treatment of various items to the legal regime that existed in 2022, which will take time and calls for engagement of various software and platform providers. The applicants also



contend that, following the rejection/recession of the Finance Bill 2024, a similar bill cannot be re-introduced in the National Assembly until the expiry of 6 months from the date of such rejection/recession. Further, that the impugned judgment poses an immediate, real and immense challenge for the monetary and fiscal policy of the country, the legislative underpinnings of various sectors of the economy whose subsidiary legislation are set to lapse, and threatens the economic stability of the country.

[7] What is more, the applicants assert that the impugned decision, as it stands, will give rise to a constitutional crisis by obstructing the government's ability to lawfully collect and allocate funds. The ripple effect of which, in their view, would lead to disruption or cessation of essential public services, and the worst-case scenario being a total shutdown of the government. It was the applicants' other position that the government may be forced to borrow funds so as to bridge the fiscal deficit, which would significantly increase the public debt and inflation in the country. They also averred that the impugned judgment exposes the government to a plethora of legal challenges including litigation from various stakeholders affected by the disruption in statutory financial operations. As far as the applicants are concerned, the Court of Appeal had furthermore departed from the practice of suspending a declaration of invalidity of a statute to safeguard public interest while affording an opportunity for the offensive provisions to be addressed within the law. They contended that, in this case, suspension of the declaration of invalidity is necessary as the immediate application of the impugned judgment would endanger public interest and the rule of law. To buttress that line of argument, reference was made to the decisions in ***Suleiman Said Shahbal vs. Independent Electoral and Boundaries Commission & 3 Others***, SC Petition No. 21 of 2014; [2014] eKLR, and ***Ontario (Attorney General) vs. G*** [2020] SCC 38.

[8] Thirdly, that the public interest nature of the consolidated appeal warrants the issuance of the orders sought. More so, since the impugned judgment affects the

entire Kenyan population and the ability of both levels of government to meet their duties/responsibilities. In summing up, the applicants submitted that the Motions have met the parameters for stay of execution and/or conservatory orders as set out in ***Gatirau Peter Munya vs. Dickson Mwenda & 2 Others***, SC Applic. No. 5 of 2014; [2014] eKLR (***Gatirau Munya Case***), and urged this Court to grant the same.

### ***In support of the Motions***

[9] The 5<sup>th</sup> appellant, in supporting the Motions aforesaid, reiterated that the consolidated appeal is not frivolous and would be rendered nugatory if the orders sought are not granted. In addition, it was urged that the Finance Act, 2023 contained provisions whose objective was to streamline the tax regime and make it user friendly. Towards that end, the 5<sup>th</sup> appellant contends that technical equipment like the Integrated Tax Invoice Management System was procured and installed. Therefore, uninstalling such equipment and reinstalling the old system would be costly and inconvenient. Besides, the 5<sup>th</sup> appellant claimed that it may end up being required to refund taxes collected under the impugned Act yet no allocation for such refund has been made. In any event, the 5<sup>th</sup> appellant maintained that it would be in the interest of justice to grant the stay sought until this Court renders its decision in light of the principle of predictability and simplicity of tax regimes.

[10] Likewise, the 52<sup>nd</sup> respondent submitted that the Motions have met the test for granting the orders sought. The said respondent added that workers have a legitimate expectation to continue benefiting from the tax measures which were prescribed under the Finance Act, 2023 until this Court renders its decision in the consolidated appeal. Further, the 52<sup>nd</sup> respondent claims that more than 100,000 employees who are directly employed within the ongoing housing projects anchored on the Finance Act, 2023 are at risk of losing employment.

### ***In opposition to the Motions***

[11] On his part, the 2<sup>nd</sup> respondent opposed the Motions and deposed that the National Assembly acceded to the President's reservation with regard to all the clauses of the Finance Act, 2024 and rejected the said Act in its entirety. The Supplementary Appropriation (No. 2) Bill, 2024 (National Assembly Bill No. 39) intended to authorise the expenditure cuts amounting to Kshs. 344.3 billion owing to the rejection of the Finance Act, 2024 was however passed by the National Assembly. Thereafter, that the said Bill was signed into law by the President on 5<sup>th</sup> August, 2024 resulting in the Supplementary Appropriation Act, 2024. In the 2<sup>nd</sup> respondent's view, the foregoing actions demonstrate that the government can adjust the expenditure of public funds to accommodate any financial gap. Consequently, the above respondent maintains that it would not be in the public interest to grant the orders sought, and that in the event the consolidated appeal is unsuccessful, it would mean that Kenyans would have been subjected to unconstitutional taxes for an even longer period. Moreover, it was urged that there was no prospect of any person seeking to recover taxes paid under the Finance Act, 2023.

[12] The 3<sup>rd</sup> and 4<sup>th</sup> respondents' position on the Motions was that they were made in bad faith and meant to ridicule the substantive determinations of the superior courts below. According to them, since the two superior courts found the Finance Act, 2023 unconstitutional, the applicants cannot obtain the interim reliefs sought. They posit that to hold otherwise would be akin to violating Article 2(3) & (4) of the Constitution, and rewarding the applicants for violation of the Constitution. It was their other contention that this Court, in the *Gatirau Munya Case*, underscored the fact that the essence of public interest lies in prioritising constitutional values above all other considerations. The said respondents thus maintain that, public interest in this case militates against any positive orders being granted in favour of the applicants. Besides, the 3<sup>rd</sup> respondent specifically urged that the public interest element of any dispute takes precedence over the other two elements, that is, the

arguability of an appeal and the nugatory aspect of the three-tier test for granting stay and/or conservatory orders. The 3<sup>rd</sup> respondent added that, should this Court grant the orders sought, the same would be tantamount to determining the consolidated appeal at an interlocutory stage. As far as the 3<sup>rd</sup> respondent was concerned, the applicants did resort to fear mongering as a strategy of obtaining stay orders before the Court of Appeal. However, that the said strategy failed as the said court declined to issue stay orders and as such, the myth that the government and the revenue collection process would collapse in the absence of such orders was debunked. Be that as it may, the 3<sup>rd</sup> respondent posited that revenue collection is not dependent on the Finance Act but the substantive tax legislation currently in force.

**[13]** Equally, the 11<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup> and the 38<sup>th</sup> to 49<sup>th</sup> respondents opposed the Motions on more or less similar grounds as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents save that the 11<sup>th</sup> 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> respondents conceded that the consolidated appeal is arguable. Nonetheless, the 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> 19<sup>th</sup> and 22<sup>nd</sup> respondents submitted that the three-tier test for granting conservatory orders was conjunctive, and therefore, the applicants were required to establish all the three elements but have not. As for the 20<sup>th</sup> and 21<sup>st</sup> respondents, they assert that the applicants have not demonstrated the existence of any legal vacuum or justification to warrant the suspension of the declaration of invalidity of the Finance Act. In any event, the said respondents argued that Article 208 of the Constitution establishes a Contingency Fund for emergencies or unforeseen eventualities and therefore the government is not handicapped in meeting its fiscal obligations.

### ***Analysis and Determination***

**[14]** We have considered the Motions and the parties' rival submissions. The applicants herein seek interlocutory orders in the nature of stay of execution and

conservatory orders pending the hearing and determination of the consolidated appeal by this Court. It is common ground in that context that, this Court is vested with jurisdiction to issue such interlocutory orders as provided for under Section 23A of the Supreme Court Act. As also appreciated in ***Board of Governors, Moi High School, Kabarak & another vs. Bell & 2 Others*** (Petition 6 & 7 of 2013 & Civil Application 12 & 13 of 2012 (Consolidated)) [2013] KESC 12 (KLR), the essence of such interlocutory orders is to safeguard the character and integrity of the subject-matter of an appeal, pending the resolution of all contested issues.

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

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

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

***These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:***

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

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

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

[18] On the nugatory aspect, we understood some of the respondents to argue that the Court of Appeal declined to issue stay orders following the High Court judgment

and opted to hear the consolidated appeal before it on merit. Therefore, in their view, the same was indicative that the appeal before us would not be rendered nugatory. In that regard, it is not in dispute that the Court of Appeal vide ***National Assembly & 47 Others vs. Okoiti & 169 Others*** (Civil Application E577, E581, E585 & E596 of 2023 (Consolidated)) [2024] KECA 39 (KLR) declined to stay the execution of the High Court judgment pending the hearing and determination of the appeal before it. However, we are cognisant that the High Court judgment had not declared the entire Finance Act, 2023 unconstitutional like the Court of Appeal Judgment did. The circumstances now obtaining are different for that reason alone. In any event, the fact that the superior courts below declined to issue stay of execution or conservatory orders by itself does not bar this Court from issuing interlocutory orders on a case-by-case basis.

**[19]** On our part therefore, taking into account the uncertainty regarding the revenue raising measures and difficulty that may arise in the operations of the two levels of governments as posited by the applicants, coupled with the far-reaching implications of the declaration of the entire Finance Act, 2023 as unconstitutional, we are persuaded that the consolidated appeal may be rendered nugatory. Besides, *prima facie*, we are not convinced that the consequences of such a declaration would be reversible should the consolidated appeal be successful.

**[20]** Furthermore, balancing the loss and uncertainty which would be occasioned to the applicants as against the loss by the respondents and public, we find that public interest tilts in favour of granting conservatory and stay orders to preserve the substratum of the consolidated appeal and maintain stability in the budget and appropriation process pending the determination of this appeal. In addition, in view of the public interest in the matter, we direct that the consolidated appeal herein be set down for hearing within the shortest time possible after the delivery of this ruling.

**[21]** Taking into account the public interest nature of the matter and this Court's decision in *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others*, SC Petition No. 4 of 2012; [2014] eKLR, we deem it just to order that each party bears its own costs.

**[22] CONSEQUENTLY** and for the reasons afore-stated, we make the following Orders:

- i. *The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants/applicants' Notice of Motions dated 1<sup>st</sup> and 2<sup>nd</sup> August, 2024 and filed on 1<sup>st</sup> and 5<sup>th</sup> August respectively are hereby allowed in the following terms:***
  - a) *A conservatory order is hereby issued suspending and staying the declarations in Orders iii, iv, vi, vii & ix(i) issued in the Court of Appeal judgment dated 31<sup>st</sup> July, 2024 in Civil Appeals Nos. E003, E016, E021, E049, E064 & E080 of 2024 (Consolidated) pending the hearing and determination of the consolidated appeal before this Court.***
- ii. *The consolidated appeal be set down for mention before the Deputy Registrar of the Court for purposes of ensuring compliance with earlier directions on filings.***
- iii. *The consolidated appeals shall be set for hearing-virtually- on 10<sup>th</sup> and 11<sup>th</sup> September 2024 at 9 am each day.***
- iv. *Each party shall bear its costs of the Motions.***



It is so ordered.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of August, 2024.**

.....  
**M. K. KOOME**  
**CHIEF JUSTICE & PRESIDENT OF**  
**THE SUPREME COURT OF KENYA**

.....  
**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE &**  
**VICE PRESIDENT OF THE**  
**SUPREME COURT**

.....  
**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy of the Original**

**REGISTRAR**  
**SUPREME COURT OF KENYA**