

LEGAL ALERT
SUPREME COURT OF KENYA

Planning & 4 others v Okoiti & 52 others (Petition E031, E032 & E033 of 2024 (Consolidated)) [2024] KESC 47 (KLR) (20 August 2024) (Ruling)

The Court of Appeal judgment delivered on 31st July 2024 declaring the Finance Act unconstitutional, triggered the filing of three appeals at the Supreme Court of Kenya namely; SC Petitions Nos. 31, 32 & 33 of 2024. This ruling arose from two separate Notice of Motion applications filed by the Appellants as follows: the 1st and 2nd Appellants' application dated 1st August, 2024 in SC Petition No. E031 of 2024 while the 3rd and 4th Appellants' application dated 2nd August, 2024 in SC Petition No. E032 of 2024. The court deemed it fit to dispense with both applications vide a single ruling.

Grounds for Stay

The gist of both applications is that they sought orders to stay the Court of Appeal judgment specifically orders i, ii, iii, iv, vi, vii, viii and ix(i) pending the hearing and determination of the appeals therein. It was the Appellants' argument that the impugned Court of Appeal decision should be stayed for reasons that the Court of Appeal misdirected itself on the procedure of passing a Money Bill under Article 114 of the Constitution, controverting 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 on the issue of public participation required in enacting statutes and whether Parliament can amend bills post public participation and

that the government is now forced to refer to Finance Act 2022 for the current revenue collection in view of the fact that the Finance Bill 2024 was withdrawn. It was also contended that it was in the public interest that the stay orders be granted as the issues raised concern the general population and it affects how both levels of government function and operate. The applications were supported by the 5th and 52nd Respondent on matters relating to the tax measures and regime proposed by the Finance Act and opposed by the 2nd, 3rd, 4th, 11th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd and the 38th to 49th Respondents stating that it was possible for the government to adjust the expenditure of public funds to accommodate any financial gaps using the Contingency Fund under Article 208 of the Constitution, revenue collection is premised on the substantive tax legislation currently in force and not the Finance Act and that public interest is meant to uphold constitutional values first, however, public interest in this case argues against granting any favorable orders to the Applicants.

The apex court considered all the arguments and advanced submissions by parties in considering whether to grant stay of execution and conservatory orders pending the hearing and determination of the consolidated appeal as follows:

Principles of Stay

It is now trite that the principles under which the Supreme Court may grant stay orders are significantly different from those that the other subordinate courts. The landmark case responsible for this jurisprudence is **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** where the court found that; -

“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.”***

Supreme Court’s determination

The apex court proceeded to interrogate whether the applications met the requirements above. On an arguable appeal, the court found that it need not examine the merits of the appeal and only one arguable point is sufficient to warrant deliberation by this court. As such, the issue of declaration of the unconstitutionality of a statute and orders ensuing thereof is a subject that requires the deliberations of this court thus, arguable appeal passes.



On the appeal being rendered nugatory, the court considered the uncertainty on revenue collection coupled with challenges that the two levels of government may experience in terms of functionality and the effects of declaring the Finance Act unconstitutional, the apex court found that these reasons may indeed render the appeals useless. Further, the court was not satisfied that from the face of it, the consequences of such a declaration, could be altered if the appeals succeeded.

Lastly, on public interest, the court found that granting stay of execution and conservatory orders, would be in the best interest of the public in view of the fact that the orders maintain stability in the budget and appropriation process.

In light of the above analysis, the Supreme Court issued conservatory orders suspending and staying the declarations in Orders iii, iv, vi, vii & ix(i) of the Court of Appeal judgment.

What are the implications of such an order, one might ask?

The above order allows the Finance Act 2023 to operate on an interim basis with regards to revenue collection and taxing measures thereto. Indeed, to this extent, the Finance Act 2023 remains valid.

The appeals are now fixed for hearing on 10th and 11th September 2024. We will keenly follow the developments of the consolidated appeals.

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Authors

Elizabeth D. A. Olao

Advocate of the High Court of Kenya

Ramadhan Abubakar

Advocate of the High Court of Kenya