



LAW SOCIETY OF KENYA

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CONSTITUTIONAL PETITION 39 OF 2017 LSK VERSUS KENYA REVENUE AUTHORITY & ATTORNEY GENERAL

On or about the 30th January, 2017, the Kenya Revenue Authority begun implementing Paragraph 11A of the Eighth Schedule of the Income Tax Act which requires that Capital Gains Tax be paid prior to transfer of property; Whereas the KRA had previously required that Capital Gains tax be assessed and paid not later than the 20th day of the month in which the transfer occurred, it now requires that the Capital Gains tax be assessed and paid, through its *iTax* portal, as a condition precedent to assessment and payment of Stamp Duty and before an application for transfer can be made. The above action by the KRA now obliges the seller of a property to assess and pay Capital Gains tax at a time when it is not due and is not capable of being ascertained thereby prejudicing property rights by fettering free alienability of property. The above action has accordingly caused sale of land transactions to stall thereby causing extreme prejudice, not only to the vendors and purchasers of property, but to the Kenyan economy.

The Law Society of Kenya of Kenya moved to Court by way of a Constitutional Petition to challenge the said requirement on the ground, inter alia, that the same is in breach of the provisions of Article 40(2)(a) of the

Constitution, and is therefore unconstitutional, by limiting the enjoyment of the right to property.

On the 10th February 2017, Hon Mr. Justice Mativo upon hearing the application by the Law Society of Kenya under certificate of urgency made the following orders:

- 1) That the application dated 8th February 2017 be and is hereby certified as urgent and the same be admitted for hearing on a priority basis.
- 2) THAT a conservatory order be and is hereby issued restraining the 1st Respondent by itself, agents, servants or employees from implementing the provisions of Paragraph 11A of the Eighth Schedule to the Income Tax pending hearing and determination of the application inter parties.
- 3) THAT the petitioner/Applicant be and is hereby directed to serve the said application and all the suit papers for inter parties hearing on 22nd February 2017.

The order can be obtained through the link [CGT Conservatory Order](#)

The Law Society of Kenya took the decision to litigate the matter after unsuccessful attempts by the Society to engage in constructive dialogue with the Kenya Revenue Authority on the lawful assessment and remittance of Capital Gains Tax.

The Council of the Law Society of Kenya wishes to appreciate and thank the **Land, Environment and Conveyancing Committee** of the LSK for assisting in analysing the issues as well as the firm of **Walker Kontos Advocates** for representing the Society in the matter on *Pro Bono* basis.

MERCY K.WAMBUA
SECRETARY/CEO