

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E443 OF 2025

IN THE MATTER OF THE PREAMBLE AND ARTICLES 1, 2(1), 3, 10, 19, 20, 21, 22,
23, 24(1), 25, 27, 28, 40, 50(2), 73, 153(4), 156, 159, 165, 258 AND 259 OF THE
CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF LEGAL NOTICE NO. 292 OF 2017 UNDER KENYA GAZETTE
SUPPLEMENT NO. 188

AND

IN THE MATTER OF THE PRESS RELEASE BY THE MINISTRY OF HEALTH DATED 3RD
FEBRUARY 2025

AND

IN THE MATTER OF THE PRESS RELEASE BY THE MINISTRY OF HEALTH DATED
14TH APRIL 2025

AND

IN THE MATTER OF THE DIRECTIVE BY THE HEALTH CABINET SECRETARY DATED
31ST MAY 2025

AND

IN THE MATTER OF THE PUBLIC HEALTH ACT, CHAPTER 242 LAWS OF KENYA

AND

IN THE MATTER OF THE PUBLIC HEALTH (CONTROL OF SHISHA SMOKING) RULES,
2017

AND

IN THE MATTER OF THE TOBACCO CONTROL ACT NO. 4 OF 2007 (NOW ACT NO. 4
OF 2017)

AND

IN THE MATTER OF THE TOBACCO CONTROL REGULATIONS, 2014

AND

IN THE MATTER OF SECTIONS 5 AND 11 OF THE STATUTORY INSTRUMENTS ACT,
2013

AND

IN THE MATTER OF THE DECLARATION THAT PUBLIC HEALTH (CONTROL OF
SHISHA SMOKING) RULES, 2017 IS UNCONSTITUTIONAL

BETWEEN

NOVEL TOBACCO PRODUCTS
ASSOCIATION PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF HEALTH 1ST
RESPONDENT

THE PRINCIPAL SECRETARY, PUBLIC HEALTH 2ND
RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INTERIOR
AND NATIONAL ADMINISTRATION 3RD RESPONDENT

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE 4TH
RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The dispute before this Court concerns the legality and constitutionality of the continued enforcement of a ban on the manufacture, importation, sale, and use of shisha in Kenya. The impugned ban was originally effected through the Public Health (Control of Shisha Smoking) Rules, 2017, published vide Legal Notice No. 292 of 2017 (hereinafter “the Shisha Rules”). The Petitioner, an association representing manufacturers, traders, sellers, and consumers of novel tobacco products including shisha, contends that the Shisha Rules ceased to have legal effect following the failure by the Cabinet Secretary for Health to regularize them within nine months as ordered by the High Court in 2018. Consequently, the Petitioner challenges subsequent press releases by the Ministry of Health dated 3rd February 2025 and 14th April 2025, and a directive by the Cabinet Secretary dated 31st May 2025, which it argues purport to enforce a non-existent ban, thereby violating its members’ constitutional rights to equality, non-discrimination, property, fair administrative action, and fair hearing.
2. The Respondents, led by the Cabinet Secretary and the Principal Secretary for Public Health, defend the continued enforcement of the ban. They argue that the Shisha Rules remain valid and enforceable, having been upheld by the High Court and the Court of Appeal on the

merits of public health, and that the directive for regularization was procedural and not a nullification of the ban. They contend that the State has an overriding constitutional and international obligation to protect the right to the highest attainable standard of health under Article 43 of the Constitution and the World Health Organization Framework Convention on Tobacco Control (WHO FCTC), which Kenya ratified. The Respondents further argue that the decision of the Chief Magistrate's Court at Shanzu in ***Republic v Chaka (Criminal case E061, E062, E063 & E064 of 2024 (Consolidated) (2024) KENIC 6 (KLR) 2024***, which declared the Shisha Rules to have lapsed, is not binding on this Court, being a decision of a subordinate court that cannot overturn the binding precedent of the High Court and the Court of Appeal.

BACKGROUND

3. The history of the legal challenge to the Shisha Rules is critical to the determination of this petition. On 28th December 2017, the Cabinet Secretary for Health published the Public Health (Control of Shisha Smoking) Rules, 2017, which outlawed the manufacture, importation, sale, offer for sale, use, advertisement, promotion, or distribution of shisha in Kenya. The rules were made under the authority of Section 36(m) of the Public Health Act (Cap. 242), which empowers the Cabinet Secretary to make rules for the prevention, control, or suppression of infectious diseases.
4. Aggrieved by the ban, traders and users of shisha filed judicial review proceedings before the High Court in Nairobi; ***Republic v Ministry of***

Health, Cabinet Secretary Ministry of Health & Attorney General Ex-parte Kennedy Amdany Langat & 14 others & Amit Kwatra & 12 others [2018] KEHC 5221 (KLR). In a judgment delivered on 26th July 2018 by Aburili J., the court made several findings. It held that the Cabinet Secretary had wide-ranging powers under Section 36 of the Public Health Act to take measures to ensure public safety. However, the court found that the Cabinet Secretary had flouted the procedural requirements for issuing the legal notice. The court specifically found that there was no compliance with Sections 4 and 5 of the Statutory Instruments Act, 2013, which require consultation with persons likely to be affected by a proposed statutory instrument. Furthermore, the court found that there was no evidence that the Rules had been transmitted to the responsible Clerk for tabling before Parliament as required by Section 11 of the Statutory Instruments Act.

5. Despite these procedural irregularities, the High Court declined to quash the ban. The court applied the precautionary principle, holding that it was the duty of the state to take protective measures to prevent potential harm to public health without having to wait until the reality and seriousness of those risks are fully demonstrated. The court reasoned that public health must take priority over commercial interests. The court therefore ordered as follows: *“the Shisha ban imposed by the Cabinet Secretary, Ministry of Health vide Legal Notice No. 292 of 28th December, 2017, however irregular, shall remain in force and the respondents are hereby directed to follow the procedural*

requirements to the letter in regularizing the ban. The process should be undertaken within Nine months from the date of this judgment.”

6. The decision was appealed to the Court of Appeal in **Civil Appeal No. 450 of 2018, Hussein Taher & 12 Others v Ministry of Health & 2 Others**. In a judgment delivered on 23rd December 2024, the Court of Appeal (Musinga P., Asike-Makhandia & Mativo JJ.A.) upheld the High Court’s decision. The appellate court reiterated that judicial review is concerned with the decision-making process, not the merits of the decision. It found that the learned judge had exercised her discretion properly in allowing the ban to remain in force on the ground of public interest, despite the procedural irregularity. The Court of Appeal stated that there was great public interest in protecting and enforcing public health from the harmful effects associated with the consumption of shisha, and that the government has a stake in ensuring and promoting the health and well-being of the general populace.
7. Importantly, the Court of Appeal did not disturb the High Court’s finding that the Shisha Rules were procedurally irregular. However, it affirmed the order that the ban would remain in force pending regularization. The Court of Appeal did not expressly state that the Rules would lapse if regularization did not occur within nine months. The order for regularization within nine months was an order of the High Court, which was not set aside by the Court of Appeal. The record before this Court shows that the regularization process, which was to be undertaken within nine months from 26th July 2018, was not completed by the

Respondents. The nine-month period expired in April 2019, and no subsequent regularization has been carried out.

8. Subsequent to these decisions, the Shanzu Chief Magistrate's Court in ***Republic v Chaka (Criminal Case Nos. E061, E062, E063 & E064 of 2024 (Consolidated))*** delivered a ruling on 28th March 2024. In that ruling, the learned Magistrate (J.M. Omido, SPM) held that because the Cabinet Secretary had failed to regularize the Shisha Rules within the nine months directed by the High Court, the rules ceased to have effect and there was no valid ban on shisha in force. The Magistrate discharged the accused persons, holding that the offences with which they were charged did not exist at the time they were alleged to have been committed.
9. It is against this backdrop of conflicting judicial pronouncements that the Petitioner filed the present petition. The Petitioner also challenges three administrative actions taken in 2025: a press release dated 3rd February 2025 by the Principal Secretary for Public Health titled "Shisha Ban in Kenya Remains in Force"; a second press release dated 14th April 2025 announcing a "Crackdown on illegal shisha outlets in Nairobi"; and a directive by the Cabinet Secretary for Health dated 31st May 2025 suspending all existing licences and import clearances relating to the manufacture, importation, distribution, sale, or promotion of nicotine and related products, including shisha. The Petitioner states that pursuant to these directives, the 3rd and 4th Respondents have

conducted raids, arrested members of the Petitioner, confiscated and destroyed goods, and closed business premises

THE PETITIONER'S CASE

10. The Petitioner, Novel Tobacco Products Association, is a society registered under the Societies Act. It describes its objectives as promoting the safe use of novel tobacco products, advocating for industry self-regulation, safeguarding consumer rights, and advancing the commercial interests of its members. The Petitioner filed the petition dated 8th July 2025, supported by the affidavit of its Chairperson, Kennedy Amdany Langat.
11. The Petitioner's case rests on several key factual and legal pillars. First, it contends that there is no valid legal ban on shisha currently in force in Kenya. The Petitioner relies on the High Court's finding in the 2018 case that the Shisha Rules were procedurally irregular, and the Court of Appeal's affirmation of that finding. The Petitioner argues that the order to regularize the ban within nine months was a conditional order, and the failure by the 1st Respondent to comply with that condition has rendered the Shisha Rules void. In support of this argument, the Petitioner cites the decision of the Shanzu Chief Magistrate's Court in ***Republic v Chaka (supra)***, which expressly held that the rules ceased to have effect upon the expiry of nine months from the High Court's judgment. The Petitioner further relies on the mandatory language of Section 11(4) of the Statutory Instruments Act, which provides that if a copy of a statutory instrument that is required to be laid before

Parliament is not so laid, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid.

12. Second, the Petitioner argues that the continued enforcement of the ban violates the constitutional rights of its members. The Petitioner cites Article 27 on equality and freedom from discrimination, arguing that the Respondents are giving preferential treatment to manufacturers and distributors of conventional cigarettes while banning shisha, without any scientific justification. The Petitioner has annexed to its supporting affidavit a research article titled “Nicotine products relative risk assessment: an updated systematic review and meta-analysis,” published in F1000Research in 2022. The Petitioner points to this article to argue that water pipe tobacco (which includes shisha) has a significantly lower lifetime cancer risk relative to combustible cigarettes. On this basis, the Petitioner argues that the ban on shisha while permitting cigarette smoking is irrational and unsupported by empirical evidence.
13. Third, the Petitioner argues that the ban violates the right to property under Article 40. The Petitioner contends that its members have legitimate businesses, have obtained licences from county governments, pay taxes, and have invested substantial resources. The enforcement of the ban through raids, confiscation of goods, and closure of premises constitutes arbitrary deprivation of property without due process of law. The Petitioner further invokes Article 47 on fair administrative action, arguing that the press releases and the directive were issued without

any prior notice, without affording the stakeholders an opportunity to be heard, and without any legal basis. The Petitioner also cites Article 50(2) (n), which protects a person from being convicted for an act that was not an offence at the time it was committed, arguing that members have been arrested and charged for conduct that is no longer an offence following the lapse of the Shisha Rules.

14. Fourth, the Petitioner argues that the Respondents' actions are in contempt of court. The Petitioner points to the express order of the High Court in 2018 directing the Respondents to regularize the ban within nine months. The Petitioner states that this order has never been complied with, and that the continued enforcement of the ban without regularization constitutes willful disobedience of a lawful court order. The Petitioner therefore seeks an order of contempt against the 1st Respondent.
15. In its written submissions, the Petitioner elaborated on these arguments. The Petitioner submits that the Court of Appeal did not grant an indefinite lease of life to the Shisha Rules. According to the Petitioner, the Court of Appeal upheld the High Court's finding that the rules were irregular, and the order that they remain in force was only to allow for regularization. The Petitioner argues that the Court of Appeal did not overturn the High Court's finding that the rules would cease to have effect if not regularized, as that was the consequence expressly provided by Section 11(4) of the Statutory Instruments Act. The Petitioner further submitted that the decision of the Shanzu Magistrate's Court, while not

binding on the High Court, is a persuasive authority that correctly interpreted the effect of non-compliance with the regularization order. The Petitioner urges this Court to adopt a similar reasoning.

16. On the issue of delay, the Petitioner submits that there is no inordinate delay in bringing this petition, as the impugned press releases and the directive were issued in 2025, and the petition was filed promptly thereafter. The Petitioner argues that even if there was any delay, it cannot be a bar to a constitutional petition that seeks to enforce fundamental rights, as rights violations are a continuing wrong.

THE RESPONDENTS' CASE

17. The Respondents oppose the petition. The 1st and 2nd Respondents filed a Replying Affidavit sworn by Mary Muthoni Muriuki, the Principal Secretary for the State Department for Public Health and Professional Standards at the Ministry of Health. The Replying Affidavit is dated 28th July 2025. The 3rd, 4th, and 5th Respondents did not file separate affidavits but rely on the submissions filed by the Honourable Attorney General, who represents all Respondents.
18. The Respondents' case is built on the primacy of public health. The Respondents highlight Kenya's international obligations under the WHO FCTC, which was ratified in 2004 and forms part of the laws of Kenya by virtue of Article 2(6) of the Constitution. The Respondents argue that the WHO FCTC requires member states to adopt effective legislative, executive, and administrative measures to reduce tobacco consumption

and exposure to tobacco smoke. The Respondents also rely on Article 43(1)(a) of the Constitution, which guarantees every person the right to the highest attainable standard of health, and Article 21(2), which mandates the State to take legislative, policy, and other measures to achieve the progressive realisation of this right.

19. On the validity of the Shisha Rules, the Respondents argue that the High Court and the Court of Appeal have both upheld the ban on public health grounds. The Respondents contend that the order to regularize the rules within nine months was a directive aimed at correcting procedural defects, but it did not nullify the ban. The Respondents argue that the decision of the Shanzu Magistrate's Court in ***Republic v Chaka (supra)*** is not binding on this Court, as a subordinate court cannot overturn, vary, or review the decision of a superior court. The Respondents cite the principle of judicial hierarchy, as affirmed in ***Mureithi v Republic (Petition E006 of 2021) [2025] KEHC 3519 (KLR)*** and the Court of Appeal in ***Kenya Hotel Properties Limited v Attorney General & 5 others [2020] eKLR***. The Respondents argue that the decision of the Court of Appeal is binding on this Court, and that this Court cannot declare the Shisha Rules unconstitutional when the Court of Appeal has already upheld them.

20. On the alleged violation of constitutional rights, the Respondents argue that the Petitioner has failed to plead with precision as required by the

principles established in *Anarita Karimi Njeru v Republic* [1979] KLR 154 and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. The Respondents contend that the Petitioner has merely cited articles of the Constitution without demonstrating, with evidence, how those articles have been violated. The Respondents also rely on the Supreme Court's decision in *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* [2019] KESC 15 (KLR), where the Court held that not all discrimination is unfair, and that differential treatment is permissible where it is based on objective criteria and serves a legitimate public interest. The Respondents argue that shisha presents unique public health risks, including its appeal to youth through flavouring, its social use in enclosed spaces, and the shared apparatus which can transmit infectious diseases such as tuberculosis.

21. On the right to property, the Respondents argue that the right is not absolute. The Respondents rely on the Ministry of Health's Report on Morbidity, Mortality and Economic Implications of Tobacco Use in Kenya (2025), which is annexed to the Replying Affidavit. The Report shows that tobacco use causes significant morbidity, mortality, and economic loss, with for every dollar accrued from tobacco revenue and tax, Kenya loses between USD 2.2 and 3 to costs associated with tobacco-related illnesses. The Respondents argue that the impugned measures are proportionate to the legitimate objective of protecting public health, and

that the Petitioner has not demonstrated that its members' economic interests outweigh the national interest in safeguarding health.

22. On the issue of delay, the Respondents argue that the Shisha Rules were enacted in 2017, and the High Court judgment on the matter was delivered in 2018. The Respondents contend that the Petitioner has waited until 2025 to file this petition, and that this delay is inordinate and unexplained. The Respondents argue that the petition should be dismissed on the ground of laches.

ANALYSIS AND DETERMINATION

23. From the pleadings, affidavits, and submissions of the parties, the following issues arise for determination:
 - i. *Whether the Petitioner has the locus standi to bring this petition on behalf of its members and the public interest.*
 - ii. *Whether there is an inordinate and inexcusable delay in filing this petition that should bar the grant of relief.*
 - iii. *Whether the Public Health (Control of Shisha Smoking) Rules, 2017 (Legal Notice No. 292 of 2017) remain valid and enforceable, or whether they ceased to have effect due to the failure to regularize them within the nine months ordered by the High Court in 2018.*
 - iv. *Whether the continued enforcement of the ban on shisha, including through the press releases dated 3rd February 2025 and 14th April 2025, and the directive dated 31st May 2025, is lawful.*

- v. *Whether the Respondents' actions violate the Petitioner's members' constitutional rights under Articles 27, 40, 47, and 50(2)(n) of the Constitution.*
- vi. *Whether the Petitioner is entitled to the reliefs sought, including a declaration of unconstitutionality, an order of certiorari, and an order of contempt.*

Whether the Petitioner has the locus standi to bring this petition on behalf of its members and the public interest

- 24. The question of *locus standi* in constitutional petitions has been settled by the Constitution itself. Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, or infringed, or is threatened. Article 22(2)(c) specifically provides that such proceedings may be instituted by an association acting in the interest of one or more of its members. Article 258(1) similarly provides that every person has the right to institute court proceedings claiming that the Constitution has been contravened, and Article 258(2)(c) allows an association to do so in the interest of its members.
- 25. The Petitioner is a registered society under the Societies Act. Its membership comprises manufacturers, traders, sellers, and consumer representatives of tobacco products, including shisha. The impugned press releases and the directive directly affect the businesses and interests of these members. The Petitioner has produced a resolution of its members dated 8th July 2025, authorizing its Chairperson, Kennedy

Amdany Langat, to sign all documents and pleadings and to instruct MNO Advocates LLP to act on behalf of the society. The resolution is annexed to the supporting affidavit as “MPP-1”.

26. It is therefore beyond question that the Petitioner has the requisite locus standi to bring this petition. The Petitioner is not a meddlesome interloper; it is an association acting in the interest of its members whose rights are directly threatened by the actions of the Respondents. This Court so holds.

Whether there is an inordinate and inexcusable delay in filing this petition that should bar the grant of relief.

27. The Respondents have raised the issue of delay, contending that the Shisha Rules were enacted in 2017, and the High Court judgment on the matter was delivered in 2018, yet the Petitioner waited until 2025 to file this petition. The Respondents argue that this delay is inordinate and unexplained, and that the petition should be dismissed on the ground of laches.
28. The law on delay in constitutional petitions is not rigid. While it is true that constitutional petitions, like all civil proceedings, must be filed within a reasonable time, the courts have recognised that the violation of fundamental rights is a continuing wrong. In ***Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR***, the Court held that where a violation of a constitutional right is continuous, the cause of action

accrues each day the violation continues, and delay cannot be a bar to the petition.

29. In the present case, the direct cause of action for the Petitioner is not the enactment of the Shisha Rules in 2017, but the enforcement actions taken in 2025. The press release of 3rd February 2025, the press release of 14th April 2025, and the directive of 31st May 2025 are the immediate triggers for this petition. The Petitioner filed its petition on 8th July 2025, which is within a reasonable time from those events. Even if one were to trace the cause of action to the Respondents' failure to regularize the ban within nine months from 26th July 2018, that failure is an ongoing omission. The Respondents continue to enforce a ban that they have not regularized, and that enforcement is a continuing violation of the rights that the Petitioner asserts.
30. Moreover, the Respondents have not demonstrated any prejudice that they have suffered as a result of the delay. The Respondents have been aware of the legal challenges to the Shisha Rules since 2018. They have had ample time to prepare their defence. In these circumstances, this Court finds that the petition is not barred by delay. The issue of delay is resolved in favour of the Petitioner.

Whether the Public Health (Control of Shisha Smoking) Rules, 2017 (Legal Notice No. 292 of 2017) remain valid and enforceable, or whether they ceased to have effect due to the failure to regularize them within the nine months ordered by the High Court in 2018.

31. This is the central issue in the petition. The determination of this issue requires a careful examination of the High Court's judgment in the 2018 case, the Court of Appeal's judgment in 2024, and the provisions of the Statutory Instruments Act.
32. In ***Republic v Ministry of Health, Cabinet Secretary Ministry of Health & Attorney General Ex-parte Kennedy Amdany Langat & 14 others & Amit Kwatra & 12 others (supra)***, Aburili J. made two critical findings. First, she found that the Cabinet Secretary had not complied with the procedural requirements under the Statutory Instruments Act. Sections 5 and 6 of the Statutory Instruments Act require consultation with persons likely to be affected by a proposed statutory instrument and the preparation of a Regulatory Impact Statement. Section 11 of the Act requires the Cabinet Secretary to transmit a copy of the statutory instrument to the responsible Clerk for tabling before Parliament within seven sitting days after publication. The court found that there was no evidence of compliance with these provisions.
33. Second, despite finding these procedural irregularities, the court declined to quash the ban. The court applied the precautionary principle. This principle, which has been recognised in international environmental and health law, holds that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental or health degradation. The court reasoned:

"Therefore, applying the precautionary principle, which principle is designed to prevent potential risks, I find and hold that it is the duty of the state to take protective measures without having to wait until the reality and seriousness of those risks are fully demonstrated or manifested. This approach takes into account the actual risk to public health, especially where there is uncertainty as to the existence or extent of risks to the health of consumers. The state may take protective measures without having to wait until the reality and the seriousness of those risks are apparent."

34. The court further stated:

"It is therefore out of public interest that I exercise judicial discretion and decline to issue the orders that the applicants have sought despite the irregularity identified in issuing the ban by the Cabinet Secretary. This is so because no country and no court of law can afford to gamble with the present and future lives and livelihoods of this country in the name of fear of loss of social and economic gains. Commercial enterprises go under and can be revived. Lives lost can never be revived."

35. The court therefore made an order that the ban shall remain in force and directed the Respondents to follow the procedural requirements to the letter in regularizing the ban within nine months from the date of the judgment (26th July 2018). The court did not say that the ban would lapse if the regularization did not occur. However, the court did not invoke Section 11(4) of the Statutory Instruments Act, which provides that a statutory instrument that is not laid before Parliament "shall cease

to have effect immediately after the last day for it to be so laid." The court appears to have proceeded on the basis that the ban was a temporary measure to protect public health while the procedural defects were being cured.

36. The Court of Appeal in ***Hussein Taher & 12 Others v Ministry of Health & 2 Others (Civil Appeal No. 450 of 2018)*** upheld the High Court's decision. The Court of Appeal specifically addressed the argument that the Rules should be declared void for non-compliance with the Statutory Instruments Act. The appellate court held that the High Court had exercised its discretion properly in refusing to grant the order of certiorari. The court cited with approval the principle that judicial review remedies are discretionary, and that a court may refuse to grant certiorari even when the requisite grounds for its grant exist, taking into account factors such as public interest. The Court of Appeal stated:

"We fully associate ourselves with the views expressed by the learned judge that there was great public interest in protecting and enforcing public health from harmful effects and practices associated with consumption of Shisha."

37. The Court of Appeal did not expressly state that the Shisha Rules would continue in force indefinitely regardless of regularization. However, it also did not state that the Rules would lapse after nine months. The Court of Appeal upheld the entire structure of the High Court's decision, which included the order that the ban remain in force pending regularization. The Court of Appeal's judgment was delivered on 23rd

December 2024, long after the nine-month period had expired. The Court of Appeal did not find that the Rules had lapsed. If the Court of Appeal had intended to give effect to Section 11(4) of the Statutory Instruments Act, it would have done so. The fact that it did not suggests that the appellate court considered the order for regularization as an ongoing directive, not a condition subsequent that would automatically terminate the ban.

38. However, this Court is not bound by the Court of Appeal's decision in the same way that a subordinate court would be. The Court of Appeal's decision in *Hussein Taher* was an appeal from a judicial review application. The Court of Appeal was not called upon to interpret the effect of Section 11(4) of the Statutory Instruments Act in the context of the High Court's order. The Court of Appeal's decision was based on the discretionary nature of judicial review remedies, and the public interest in upholding the ban. The Court of Appeal did not make a definitive pronouncement on the legal effect of the Rules after the expiry of the nine-month period. This Court, as a court of coordinate jurisdiction with the High Court that issued the original order, is at liberty to interpret the effect of that order and the applicable law.
39. The decision of the Shanzu Chief Magistrate's Court in ***Republic v Chaka*** (*supra*) provides a compelling analysis. The learned Magistrate, J.M. Omido, SPM, addressed the very issue that is before this Court. He considered the High Court's judgment in detail and made the following findings. First, he noted that the High Court had found that the Cabinet

Secretary had flouted the procedural requirements under the Statutory Instruments Act. Second, he noted that the High Court had directed that the ban would remain in force for the purpose of allowing regularization within nine months. Third, he noted that the Cabinet Secretary had failed to regularize the rules within the nine-month period. Fourth, he concluded that the High Court's order meant that in the event the irregular rules were not regularized within nine months, they would stand rendered as irregular and their force would immediately cease.

40. The learned Magistrate reasoned that there was no way the High Court could give life indefinitely to the rules when the statute itself requires mandatorily that there be compliance. He stated: *"Doing so would in my view mean bypassing Parliament, which is the body mandated to legislate. It is for that reason that I find that the extension was not indefinite or infinite but was limited to the period of nine (9) months."* The Magistrate further reasoned that the High Court's order, when read alongside Section 11(4) of the Statutory Instruments Act, leads to the inescapable conclusion that the rules ceased to have effect upon the expiry of the nine-month period.
41. This Court finds the reasoning of the Shanzu Magistrate's Court to be sound and persuasive. The Court is not bound by that decision, as it is a decision of a subordinate court. However, the persuasive value of the decision is significant. The Magistrate correctly interpreted the High Court's order and the applicable law. The High Court's order did not grant an indefinite extension of the ban. It granted a temporary reprieve

to allow for regularization. The failure to regularize within the specified period meant that the temporary reprieve expired, and the rules reverted to their status as irregular and void. To hold otherwise would be to render the nine-month period meaningless and to allow the executive to circumvent the mandatory requirements of the Statutory Instruments Act indefinitely.

42. Section 11(4) of the Statutory Instruments Act is couched in mandatory terms. It provides:

"If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid."

43. The High Court in 2018 found that the Shisha Rules had not been laid before Parliament. The High Court did not declare the Rules void on that ground, but instead allowed them to remain in force temporarily for the purpose of regularization. Once the nine-month period expired without regularization, the Rules ceased to have effect by operation of law. This is the plain meaning of Section 11(4), and this Court must give effect to it.

44. This Court is further guided by the principle established in **George Ndemo Sagini v Attorney General & 3 Others [2017] eKLR**, where the court held that statutory instruments are void when they do not follow the procedure specified in the Statutory Instruments Act. This principle

applies with equal force to the Shisha Rules. The Rules were made in violation of the Statutory Instruments Act, and they were not regularized within the time allowed by the High Court. They are therefore void.

45. The Respondents' argument that the Court of Appeal upheld the ban and that this Court is bound by that decision is misplaced. The Court of Appeal upheld the High Court's decision on the basis of the discretionary nature of judicial review. The Court of Appeal did not make a finding that the Shisha Rules were valid and enforceable indefinitely. The Court of Appeal's decision must be read in the context of the specific order that was made by the High Court. That order was that the ban would remain in force pending regularization within nine months. The Court of Appeal upheld that order. It did not uphold the ban beyond the nine-month period. The failure to regularize within the nine-month period meant that the basis for the temporary extension of the ban ceased to exist.
46. It is also important to consider the doctrine of the separation of powers. The Constitution vests legislative authority in Parliament. Article 94(1) of the Constitution provides that the legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament. Article 94(5) provides that no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by the Constitution or by legislation. The Cabinet Secretary's power to make regulations is delegated legislation. The delegated power must be exercised strictly within the limits set by the enabling Act and the Statutory Instruments

Act. The failure to comply with the Statutory Instruments Act, including the requirement to lay the regulations before Parliament, is a violation of the constitutional principle that legislative authority is vested in Parliament. To allow the Shisha Rules to continue in force indefinitely without parliamentary scrutiny would be to permit the executive to bypass Parliament, which is contrary to the constitutional order.

47. This Court finds that the proper interpretation of the High Court's order, read together with Section 11(4) of the Statutory Instruments Act, is that the Shisha Rules ceased to have effect upon the expiry of the nine-month period from 26th July 2018. The failure by the Respondents to regularize the Rules within that period means that the Rules are no longer in force. The continued enforcement of the ban is therefore unlawful.
48. Consequently, this Court holds that the Public Health (Control of Shisha Smoking) Rules, 2017 are no longer valid and enforceable. They ceased to have effect on 26th April 2019, being nine months from the date of the High Court's judgment.

Whether the continued enforcement of the ban on shisha, including through the press releases dated 3rd February 2025 and 14th April 2025, and the directive dated 31st May 2025, is lawful.

49. The Petitioner challenges three specific administrative actions: the press release of 3rd February 2025, the press release of 14th April 2025, and the directive of 31st May 2025. Having found that the Shisha Rules ceased to

have effect, this Court must examine whether these administrative actions are lawful.

50. The press release of 3rd February 2025, issued by the Principal Secretary for Public Health, states that "Shisha Ban in Kenya Remains in Force." It reminds the public of the prohibition enacted in 2017 under the Public Health (Control of Shisha Smoking) Rules, and calls on law enforcement agencies to strengthen surveillance and take action against those violating the law. This press release is based on the assumption that the Shisha Rules are still in force. Since this Court has found that the Shisha Rules ceased to have effect, the press release is based on a false premise. It misleads the public into believing that there is a valid ban in place when there is not. The press release is therefore unlawful.
51. The press release of 14th April 2025 announces a "Crackdown on illegal shisha outlets in Nairobi." It confirms that persons have been arrested and that coordinated arrests will persist. This press release is an administrative directive to law enforcement agencies to enforce the ban. Since the ban is no longer in force, the directive to enforce it is also unlawful. The Respondents have no legal authority to arrest, prosecute, or confiscate goods based on a non-existent ban.
52. The directive of 31st May 2025, issued by the Cabinet Secretary for Health, suspends all existing licences and import clearances relating to the manufacture, importation, distribution, sale, or promotion of nicotine and related products, including shisha. This directive requires

stakeholders to reapply for these approvals within 21 days. This directive is based on the assumption that the Shisha Rules are still in force and that the Respondents have the authority to regulate shisha. Since the Shisha Rules are no longer in force, the directive is unlawful. The Cabinet Secretary cannot suspend licences based on a non-existent ban. Any action taken pursuant to the directive is therefore null and void.

53. The Petitioner has also alleged that the Respondents have conducted raids, arrested members, and confiscated goods. These actions are based on the enforcement of a non-existent ban. They are therefore unlawful. The Petitioner has provided general allegations of these actions. While the Petitioner has not provided specific evidence of individual incidents, the Court takes judicial notice of the fact that the press releases announce these actions, and the Respondents have not denied that they are occurring. The Court finds that the enforcement actions are unlawful.

54. In summary, this Court finds that the continued enforcement of the ban on shisha is unlawful because the Shisha Rules are no longer in force. The press releases and the directive are therefore unlawful, and the enforcement actions taken pursuant to them are also unlawful.

Whether the Respondents' actions violate the Petitioner's members' constitutional rights under Articles 27, 40, 47, and 50(2)(n) of the Constitution.

55. The Petitioner alleges violations of Articles 27 (equality and non-discrimination), 40 (right to property), 47 (fair administrative action), and 50(2)(n) (right not to be convicted for an act that was not an offence). This Court will examine each of these alleged violations in the context of the facts and the law.

56. On the alleged violation of Article 27, the Petitioner argues that the ban on shisha while permitting cigarette smoking is discriminatory. The Supreme Court in ***British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Ltd (Affected Party) (supra)*** addressed a similar argument. In that case, the tobacco industry argued that the Tobacco Control Regulations, 2014, which limited interactions between public officers and the tobacco industry, were discriminatory. The Supreme Court held that not all discrimination is unfair. The Court cited with approval the decision in ***Federation of Women Lawyers Fida Kenya & 5 others v Attorney General & another [2011] eKLR***, which stated that: -

"In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the [Constitution](#) had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the [Constitution](#).

We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases."

57. In the present case, the differentiation between shisha and cigarettes may have been based on objective criteria at the time the Shisha Rules were enacted. However, the issue is not the differentiation itself, but the continued enforcement of a ban that no longer exists. The Respondents are treating shisha differently from other tobacco products by enforcing a ban that has ceased to have effect. This differential treatment is not based on any valid law. It is arbitrary and unreasonable. The Respondents are therefore violating the Petitioner's members' right to equality and freedom from discrimination under Article 27.
58. On the alleged violation of Article 40 (right to property), the Court must balance the right to property with the State's duty to protect public health. The right to property is not absolute. Article 24 allows for the limitation of rights by law, and the limitation is reasonable and justifiable in an open and democratic society. However, the limitation must be by law. The Shisha Rules are no longer law. The enforcement of the ban is therefore not based on law. The deprivation of property through raids, confiscation of goods, and closure of premises is arbitrary and unlawful. It violates Article 40.
59. On the alleged violation of Article 47 (fair administrative action), the Petitioner argues that the press releases and the directive were issued

without notice, without an opportunity to be heard, and without legal basis. The Court has found that the press releases and the directive are unlawful because they are based on a non-existent ban. The actions taken pursuant to them are therefore procedurally unfair. The Respondents have not given the Petitioner's members an opportunity to be heard before taking action against them. The actions are arbitrary and in violation of Article 47.

60. On the alleged violation of Article 50(2)(n), the Petitioner argues that members have been arrested and charged for conduct that was not an offence because the Shisha Rules had lapsed. Since this Court has found that the Shisha Rules are no longer in force, the conduct of manufacturing, importing, selling, or using shisha is not an offence. The arrest and prosecution of the Petitioner's members for conduct that is not an offence violates Article 50(2)(n). The Respondents are prosecuting individuals for acts that were not offences at the time they were committed.
61. Therefore, this Court finds that the Respondents' actions violate the Petitioner's members' constitutional rights under Articles 27, 40, 47, and 50(2)(n) of the Constitution.

Whether the Petitioner is entitled to the reliefs sought, including a declaration of unconstitutionality, an order of certiorari, and an order of contempt.

62. The Petitioner seeks a declaration that the Shisha Rules are unconstitutional and unlawful. This Court has found that the Shisha Rules ceased to have effect and are no longer in force. They are therefore unlawful. The declaration is granted.
63. The Petitioner seeks a declaration that the continued ban on shisha is unlawful. This Court has found that the continued enforcement of the ban is unlawful. The declaration is granted.
64. The Petitioner seeks an order of contempt against the 1st Respondent for willfully disobeying the High Court's order to regularize the Shisha Rules within nine months. Contempt of court is a serious matter that requires proof beyond reasonable doubt. The Petitioner must show that there was a clear court order, that the Respondents were aware of the order, that they had the capacity to comply, and that they deliberately failed to comply. The High Court's order of 26th July 2018 directed the Respondents to regularize the ban within nine months. The Respondents have not complied with that order. The failure to comply is a continuing contempt. However, the order for contempt is a separate proceeding that must be initiated by a notice of motion specifically seeking contempt orders, and the alleged contemnors must be given an opportunity to be heard on why they should not be held in contempt. The Petitioner has not followed the proper procedure for contempt proceedings. The prayer for contempt is therefore denied, but the

Petitioner is at liberty to initiate proper contempt proceedings if it so wishes.

65. The Petitioner seeks declarations that the press releases are unconstitutional and unlawful. This Court has found that the press releases are unlawful. The declarations are granted.
66. The Petitioner seeks an order of certiorari to quash the press releases. Certiorari lies to quash a decision that is made without jurisdiction, in excess of jurisdiction, or in violation of the rules of natural justice. The press releases are administrative actions that are amenable to certiorari. Since this Court has found that the press releases are unlawful, the order of certiorari is granted. The press releases dated 3rd February 2025 and 14th April 2025 are hereby quashed.
67. The Petitioner seeks a declaration that the consumption of tobacco products cannot be outlawed through subsidiary legislation. This Court finds that the ban on shisha was an attempt to outlaw the consumption of a specific tobacco product through subsidiary legislation. The enabling Acts, the Public Health Act and the Tobacco Control Act, do not outlaw the consumption of tobacco products. The Shisha Rules went beyond the scope of the enabling legislation. The declaration is granted.
68. The Petitioner seeks a declaration that the preferential treatment on consumption of some tobacco products is unconstitutional. This Court

has found that the differential treatment is not based on valid law and is discriminatory. The declaration is granted.

69. The Petitioner seeks a declaration that the purported ban on shisha has no scientific backing. The Court of Appeal in ***Hussein Taher & 12 Others v Ministry of Health (supra)*** accepted the scientific evidence presented by the Respondents, including the health risks of shisha. This Court is not making a finding on the scientific merits of the ban. The issue is the legality of the ban, not its scientific basis. The declaration is refused.
70. The Petitioner seeks a conservatory order to restrain the Respondents from enforcing the press releases. A conservatory order is an interim measure to preserve the subject matter of the litigation pending the final determination. Since this Court has now made a final determination, the conservatory order is not necessary. The prayer is refused.
71. The Petitioner seeks a declaration that the highest attainable standard of health is inconsistent with a total ban on shisha. This Court finds that the right to health under Article 43 does not confer a right to use harmful substances. The State has a duty to protect the public from harmful substances. However, the State must do so through lawful means. The ban on shisha, as currently enforced, is unlawful. The declaration is refused.

CONCLUSION

72. Having considered the petition, the affidavits, the submissions, and the relevant law, this Court makes the following findings:
- a. The Petitioner has locus standi to bring this petition on behalf of its members.
 - b. The petition is not barred by inordinate delay.
 - c. The Public Health (Control of Shisha Smoking) Rules, 2017 (Legal Notice No. 292 of 2017) ceased to have effect upon the expiry of nine months from 26th July 2018, being the date of the High Court's judgment in ***Republic v Ministry of Health, Cabinet Secretary Ministry of Health & Attorney General Ex-parte Kennedy Amdany Langat & 14 others & Amit Kwatra & 12 others [2018] KEHC 5221 (KLR)***. The failure by the Respondents to regularize the Rules within that period means that the Rules are no longer in force.
 - d. The continued enforcement of the ban on shisha, including through the press releases dated 3rd February 2025 and 14th April 2025, and the directive dated 31st May 2025, is unlawful.
 - e. The Respondents' actions violate the Petitioner's members' rights under Articles 27, 40, 47, and 50(2)(n) of the Constitution.
 - f. The Petitioner is entitled to the declaratory reliefs and the order of certiorari sought.
73. Consequently, this Court makes the following final orders:

- a. A declaration be and is hereby issued that the Public Health (Control of Shisha Smoking) Rules, 2017 (Legal Notice No. 292 of 2017) ceased to have effect and are no longer in force for failure to be regularized within nine months as ordered by the High Court in ***Republic v Ministry of Health, Cabinet Secretary Ministry of Health & Attorney General Ex-parte Kennedy Amdany Langat & 14 others & Amit Kwatra & 12 others [2018] KEHC 5221 (KLR)***.
- b. A declaration be and is hereby issued that the continued ban on Shisha and its enforcement is unlawful, contrary to Article 10 of the Constitution and Section 11 of the Statutory Instruments Act.
- c. A declaration be and is hereby issued that the press release dated 3rd February 2025 issued by the 2nd Respondent that the ban on Shisha in Kenya remains in force is unlawful and unconstitutional.
- d. A declaration be and is hereby issued that the press release dated 14th April 2025 issued by the 2nd Respondent announcing a "Crackdown on illegal shisha outlets in Nairobi" is unlawful and unconstitutional.
- e. An order of certiorari be and is hereby issued quashing the press releases dated 3rd February 2025 and 14th April 2025.
- f. A declaration be and is hereby issued that the consumption of tobacco products cannot be outlawed through subsidiary legislation that offends the Statutory Instruments Act, 2013.

- g. A declaration be and is hereby issued that the preferential treatment on consumption of some tobacco products, as was framed in the current petition, is unconstitutional as it contravenes Article 27 of the Constitution of Kenya, 2010.
- h. A conservatory order be and is hereby issued restraining the 1st, 2nd, 3rd, and 4th Respondents, their agents, and employees from enforcing the unlawful notices issued on 3rd February 2025 and 14th April 2025 against the Members of the Association.
- i. Each party shall bear their own costs.

Orders accordingly. File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY 2026.

BAHATI MWAMUYEMBS

JUDGE