



Republic v Cabinet Secretary for the National Treasury & Economic Planning & 3 others; Kenya Bankers Association (KBA) (Ex parte Applicant) (Judicial Review Miscellaneous Application E043 of 2023) [2023] KEHC 22724 (KLR) (Judicial Review) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E043 OF 2023
JM CHIGITI, J
SEPTEMBER 29, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**THE CABINET SECRETARY FOR THE NATIONAL TREASURY &
ECONOMIC PLANNING 1ST RESPONDENT**

THE KENYA REVENUE AUTHORITY 2ND RESPONDENT

THE NATIONAL ASSEMBLY 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

KENYA BANKERS ASSOCIATION (KBA) EX PARTE APPLICANT

RULING

1. What is before the Court is the 3rd Respondent’s Preliminary Objection dated 30th May, 2023 in opposition to the Ex parte Applicant’s Miscellaneous Application dated 20th April, 2023. The Objection raises the following grounds;
 1. That the Income Tax (Financial Derivatives) Regulations 2023 (“Regulations”) are a legislation within the meaning of Article 260 of the *Constitution* of Kenya, 2010 and not an administrative decision. The 1st Respondent’s making of the Regulations and the resultant scrutiny by the 3rd Respondent amount to exercise of the legislative mandate and not administrative action.



2. That this legislative mandate is conferred on the 3rd Respondent by Article 95 (3) of the Constitution and is delegated to the 1st Respondent by Articles 94 (5) and 94(6) of the Constitution. The exercise of legislative mandate by the 1st and 3rd Respondents is not administrative action subject to judicial review under the Fair Administrative Actions Act, 2015 or otherwise.
 3. That to the extent that the ex parte Applicant challenges the Regulations through judicial review, the leave granted by this Honourable Court was made without jurisdiction and is nullity ab initio.
 4. That in the circumstances, this Honourable Court lacks jurisdiction to hear and determine these proceedings as a court exercising judicial review jurisdiction.
2. There are rival positions by the parties herein.

Analysis and Determination:

3. Sir Charles Newbold in the same case said:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

4. The circumstances under which a preliminary objection may be raised was in this regard explained by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

5. In *Oraro vs. Mbaja* [2005] 1 KLR 141 by Hon. Ojwang, J. (as he then was) thus:

“...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”



6. It is upon this court to identify whether the 3rd Respondent's preliminary objection raises pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. In this respect, it is notable that other than the ground raised on this Court's jurisdiction, all the other grounds raised by the 3rd Respondent are grounds which either call for the exercise of this Court's discretion in reaching a decision thereon, or for evidence and argument, and can therefore not be raised as pure questions of law.
7. It is trite that the issue of jurisdiction is one that goes to the root of a case and as such must be determined before a court can take any further action in the matter.
8. The Supreme Court in *Samuel Macharia & Another vs. Kenya Commercial Bank Ltd & 2 others* [2012] eKLR had this to say on jurisdiction of courts;

“68. A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

9. The 3rd Respondent herein is challenging this court's jurisdiction on grounds that the 1st Respondent's making of the *Income Tax (Financial Derivatives) Regulations 2023* amounts to exercise of the legislative mandate and not an administrative action and that therefore the same is not subject to judicial review.
10. This legislative mandate is conferred upon the 3rd Respondent by dint of Article 95(3) of the Constitution and is said to be delegated to the 1st Respondent by dint of Articles 94(5) and 94(6) of the Constitution.
11. In the case of *Kiraitu Murungi & 6 Others v Musalia Mudavadi & Another* Civil Case No. 1542 of 1997 (Unreported) where Bosire, J (as he then was) stated that Parliament had created and provided itself with powers and privileges giving it absolute immunity by virtue of section 4 of the *National Assembly (Powers and Privileges) Act*. However, as we have observed above, the situation prevailing in that case can be easily distinguished from the present scenario. In that case, the Judge indeed observed that no provision of the Constitution had been presented to show that the Court had jurisdiction to deal with the matters brought before it. That is not the situation in the instant case, as Article 165 (3) (d) of the Constitution expressly gives this Court such power. In a constitutional democracy like we have, Parliament is not beyond the reach of the Court



12. In the case of *Okiya Omtatah & 3 Others v Attorney General & 3 Others* [2014] eKLR, the Court acknowledged, as we indeed do, that the people of Kenya gave the responsibility of making laws to Parliament, and such legislative power must be fully respected. This means Courts can only interfere with the work of Parliament in situations where Parliament acts in a manner that defies logic and violates the Constitution.
13. In the case of *Kiraitu Murungi & 6 Others v Musalia Mudavadi & Another* Civil Case No. 1542 of 1997 (Unreported) where Bosire, J (as he then was) stated that Parliament had created and provided itself with powers and privileges giving it absolute immunity by virtue of section 4 of the National Assembly (Powers and Privileges) Act. However, as we have observed above, the situation prevailing in that case can be easily distinguished from the present scenario. In that case, the Judge indeed observed that no provision of the Constitution had been presented to show that the Court had jurisdiction to deal with the matters brought before it. That is not the situation in the instant case, as Article 165 (3) (d) of the Constitution expressly gives this Court such power. In a constitutional democracy like we have, Parliament is not beyond the reach of the Court
14. Justice Nyamweya (as she then was) was faced with a similar objection in the case of Republic v Clerk of the National Assembly & another Ex parte Bernard Njiraini; Cabinet Secretary, Ministry of Industrialisation, Trade & Enterprise Development & 4 others (Interested Parties) [2021] eKLR where she held as follows;

“It is however settled law that the Courts are competent and have jurisdiction to inquire whether a privilege exists and to determine its scope or extent. The principle that the courts have the authority to determine the scope of a privilege was confirmed by the Supreme Court of Canada in *Canada (House of Commons) v Vaid*, (2005) 1 SCR. 667. This principle is reflected in the doctrine of necessity, elaborated by the Supreme Court of Canada in the said case, under which courts preserve their jurisdiction to inquire into the existence and scope of privilege, but once a privilege has been found to exist, and its scope is considered appropriate, it will not question how Parliament exercises or applies a privilege.

15. She proceeds to state as follows;

“In a unanimous decision, the said Court held as follows:

‘Accordingly, to determine whether a privilege exists for the benefit of the Senate or House of Commons, or their members, a court must decide whether the category and scope of the claimed privilege have been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster. If so, the claim to privilege ought to be accepted by the court. However, if the existence and scope of a privilege have not been authoritatively established, the court will be required to test the claim against the doctrine of necessity — the foundation of all parliamentary privilege. In such a case, in order to sustain a claim of privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly’s work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their legislative



work with dignity and efficiency. Once a claim to privilege is made out, the court will not enquire into the merits of its exercise in any particular instance.’

24. Therefore, whereas Courts will exercise caution not to unduly interfere with, or micromanage Parliamentary proceedings, it is the duty and the obligation of this Court to ensure that Parliament, its officers and Parliamentary Committees conduct their proceedings in accordance with the Constitution and the law, under its judicial review jurisdiction. Put differently, the existence of the law on privilege in Article 117 of the Constitution and section 12 of the Parliamentary Powers and Privileges Act does not oust this Court’s supervisory jurisdiction granted by under Article 165 (3) and (6) of the Constitution, to review decisions and actions undertaken by Parliamentary bodies or officials.
25. This position was reiterated by the Supreme Court of Kenya in *Speaker of National Assembly vs. Attorney General and 3 Others* (2013) eKLR where the Court expressed itself as follows:

‘Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act.’

26. To this extent, the issue of whether, and to what extent the 1st and 2nd Respondents are protected by parliamentary privilege is one of fact and legal argument, and on which the Court is given express powers and discretion to decide upon.”

16. I am in agreement with the position taken by Justice Pauline Nyamweya as she then was that although the Court will exercise caution not to interfere with, or micromanage the 3rd Respondent’s proceedings, it is the duty and the obligation of this Court to ensure that Parliament, its officers and Parliamentary Committees conduct their proceedings in accordance with the Constitution and the law under its judicial review jurisdiction.



17. In the case of *The State v T. Makwanyane and Another* 1995 (3) SA. 391 (CC.) that:
- “Public opinion may have some relevance... but in itself it is no substitute for the duty vested in the Courts to interpret the *Constitution* and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of right could then be left to Parliament, which has a mandate from the public, and is answerable to the public, for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order...”(Emphasis added)
18. In the Indian decision of *Kiboto Holohan v Zachillu and Others* 1992 SCR (1) 886, the Supreme Court of India was called upon to consider an ouster clause which sought to impart statutory finality in the Speaker of Parliament. The Court held that the concept of statutory finality did not detract from or abrogate the Court’s jurisdiction in so far as the complaints made were based on violation of constitutional mandates or non-compliance with rules of natural justice.
19. In Zimbabwe, in the case of *Biti and Another v Minister of Justice, Legal and Parliamentary Affairs and Another* [2002] ZWSC 10, where the Supreme Court was called upon to resolve a conflict between fundamental rights and privileges of Parliament, the Court held that where a claim to parliamentary privilege violated constitutional provisions, the Court’s jurisdiction would not be defeated by the claim to privilege.
20. The powers and privileges of the 3rd Respondent and the 1st Respondent to whom the said duty has been delegated to does not oust this Court’s supervisory jurisdiction granted under Article 165 (3) and (6) of the *Constitution*, to review decisions and actions undertaken by Parliamentary bodies or officials.

Disposition:

21. In light of the above and in the interest of administration of justice, the Preliminary Objection cannot stand. Consequently, this Court disallows 3rd Respondent’s Preliminary Objection dated 30th May, 2023.

Orders;

- i. The 3rd Respondent’s Preliminary Objection dated 30th May 2023 is found to be without merit, and is hereby dismissed with no order as to costs.
- ii. The Applicant shall serve the application dated 20th April, 2023 within 7 days of today’s date.
- iii. The Respondents shall file and serve their responses to the application if any within 14 days of service.
- iv. The Applicant shall thereafter file and serve its submissions within 7 days thereafter.
- v. The Respondents shall thereafter file and serve their submissions within 7 days of service.
- vi. The submissions shall be limited to ten pages.
- vii. The matter shall be mentioned on 13th December, 2023 to confirm compliance.
- viii. There shall be maintained a status quo pending the determination of prayer 5 of the Application dated 20th April, 2023.

It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2023

J. CHIGITI (SC)

JUDGE

