Republic v National Assembly & 2 others; Okoiti (Exparte); Retirement Benefits Authority (RBA) & 2 others (Interested Parties) (Judicial Review Application 095 of 2020) [2022] KEHC 15587 (KLR) (Judicial Review) (23 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15587 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION 095 OF 2020

AK NDUNG'U, J

NOVEMBER 23, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

NATIONAL ASSEMBLY ..... 1ST RESPONDENT

CABINET SECRETARY, NATIONAL TREASURY AND PLANNING .... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

OKIYA OMTATAH OKOITI ..... EXPARTE

AND

RETIREMENT BENEFITS AUTHORITY (RBA) ..... INTERESTED PARTY

ASSOCIATION OF RETIREMENT BENEFITS SCHEME . INTERESTED PARTY

ASSOCIATION OF PENSION TRUSTEES AND ADMINISTRATORS ..... INTERESTED PARTY

JUDGMENT

1. The application before this court is the *ex parte* applicant's amended notice of motion application dated 10th February,2021 filed under, Order 53, Rule 1, 2, 3 & 4 of the *Civil Procedure (Revised Rules)*; Sections 8 and 9 of the *Law Reform Act* (Chapter 26 the Laws of Kenya); and all other enabling

provisions of the Law). The application is supported by an amended Statutory Statement dated 10th February,2021 and a verifying affidavit sworn on even date by the *ex parte* applicant.

2. The application seeks the following prayers;

    1. That an order of *certiorari* do issue, to bring to this Honourable Court for purposes of being quashed, and to be quashed:

        a. The amendments made by the *Tax Laws (Amendment) Act, 2020* to Section 38(1A) of The *Retirement Benefits Act*, No 3 of 1997.

        b. The *Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020* (Legal Notice No 192 of the 14th September, 2020)

    2. That an order of prohibition do issue, prohibiting the respondents herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing:

        (a) The amendments made by the *Tax Laws (Amendment) Act, 2020* to Section 38(1A) of The *Retirement Benefits Act*, No 3 of 1997.

        (b) The *Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020* (Legal Notice No 192 of the 14th September, 2020).

    3. Thatconsequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

    4. That costs be in the cause.

3. The Notice of Motion application is supported by an amended statutory statement dated 10th February,2021 and a verifying affidavit sworn by the *ex parte* applicant on even date.

4. The *ex parte* applicant's case is that the new tax law which was assented to on 25th April,2020 by former president H. E. President Uhuru Kenyatta to cushion the economy and the Kenyan public against the effects of the Coronavirus (Covid-19) pandemic amends several tax-related statutes in Kenya and these are the *Income Tax Act* (CAP 470), the *Value Added Tax Act* of 2013, the *Excise Duty Act* (2015), the *Tax Procedures Act* (2015), and the Miscellaneous Levies and Fees Act (2016).

5. It is also said to contain substantive amendments to the *Retirement Benefits Act* (1997), which amendments according to the applicant were sneaked into the amendment Bill after it had been passed by the National Assembly but before the President assented to it.

6. The proceedings before this court, it is urged, relate to the patent objection by the *ex parte* applicant to the decision by the National Assembly to, without prior notification, sneak into the *Tax Laws (Amendment) Act, 2020* the following amendments to Section 38(1A) of The *Retirement Benefits Act*, No 3 of 1997:

> " s.38 (1A) Notwithstanding the provisions of subsection (1), a prescribed proportion of the benefits accruing to a member in a scheme may be assigned and used by the member to secure a mortgage loan or to purchase a residential house from such institutions and on such terms as may be prescribed in regulations made by the Minister"
>
> " s.38 (1A) Insert the words "or to purchase a residential house" immediately after the word "mortgage loan"

7. The *ex parte* applicant urges that in a release from State House Nairobi on the 25th April,2020 by the President's Strategic Communications Unit on the amendments to the *Retirement Benefits Act* (1997) it was stated that they were "aimed at increasing home ownership in the country as envisaged in the housing pillar under Big 4 Agenda."

8. The substratum of these proceedings is the fact that the amendment Act amended Section 38 (1A) of the *Retirement Benefits Act* (1997) to allow the use of retirement benefits to purchase a residential house, yet these substantive amendments to the Act were not in the amendment Bill and were never considered and passed by Parliament.

9. The *ex parte* applicant reiterates the fact that the new law allowing members of pension schemes to purchase homes through their pension savings under the Government's Big Four Agenda was not raised in the amendment Bill presented to Parliament. This means that the law allowing someone to use their pension savings for residential housing did not go through the due process in law for enacting legislation including public participation.

10. The *ex parte* applicant's case is that the amendments are also unreasonable because retirement benefit schemes in Kenya are set up and exist primarily to provide income to members when they retire and that their noble objective can be, and will be, defeated if other noncore objectives and competing interests are introduced and forced on the scheme as has been done vide the impugned amendments. Mr. Omtatah argues that Trustees of schemes are actually not allowed to and have no powers to vary the trust and deviate from the purpose it was set up for as to do so would be a breach of trust.

11. The *ex parte* applicant compares Kenya's NSSF to that of Singapore's Central Provident Fund (CPF). The Fund is said to be a comprehensive social security system that enables working Singapore Citizens and Permanent Residents to set aside funds for retirement. It also addresses healthcare, home ownership, family protection and asset enhancement.

12. The contributions to pension schemes in Singapore according to the *ex parte* applicant are set at 37% of one's salary - being from the employee 20% of their income and, from the employer, 17% of the employee's income. Further that mandatory CPF contributions are tax-exempt for both the employer and employee. Both the employer and employee may make additional voluntary contributions to the CPF, but these contributions are not subject to tax breaks.

13. The *ex parte* applicant argues that most people who retire in Kenya prefer to relocate to their rural homes where land and building materials are more readily available and cheaper compared to urban areas and therefore according to Mr. Omtatah, it is incorrect and misleading to postulate that every urban dweller needs a house in the cities.

14. The *ex parte* applicant posits that, since Section 38 of The *Retirement Benefits Act*, No 3 of 1997 imposes restrictions on the use of scheme funds, any amendments to the section must be carried out in strict compliance with the law, including by meeting the thresholds therein for transparency and accountability, stakeholder consultation, and public participation.

15. The impugned amendments change section 38(1A) from reading thus:

> "(1A) Notwithstanding the provisions of subsection (1), a prescribed proportion of the benefits accruing to a member in a scheme may be assigned and used by the member to secure a mortgage loan from such institutions and on such terms as may be prescribed in regulations made by the Minister.
>
> to reading thus:

(1A) Notwithstanding the provisions of subsection (1), a prescribed proportion of the benefits accruing to a member in a scheme may be assigned and used by the member to secure a mortgage loan or to purchase a residential house from such institutions and on such terms as may be prescribed in regulations made by the Minister."

16. The Bill's Memorandum of Objects and Reasons is said to provide thus:

> " The Tax Laws (Amendment) Bill, 2020 seeks to make several amendments to the following tax-related statutes –
>
> The *Income Tax Act* (Cap. 470) The Bill, seeks to amend the *Income Tax Act* to reduce the individual top tax rate and resident corporate tax rate. This will increase disposable income for individuals in order to enhance consumption and enhance investments for companies.
>
> The *Value Added Tax Act*, 2013 (No 35 of 2013) The Bill seeks to amend the *Value Added Tax Act* to align the incentives contained in the Bill with the best practice.
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> The *Excise Duty Act*, 2015 (No 23 of 2015) The Bill, seeks to amend the *Excise Duty Act*, 2015 to enhance equity and fairness in taxation of excisable goods.
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> The *Tax Procedures Act*, 2015 (No 29 of 2015) The Bill, seeks to amend the *Tax Procedures Act*, 2015 in order to streamline the administration of the tax laws.
>
> The *Miscellaneous Fees and Levies Act*, 2016 (No 29 of 2016) The Bill, seeks to amend enhance equity and fairness in the imposition of miscellaneous fees and levies.
>
> The *Kenya Revenue Authority Act*, 1995 (No 2 of 1995) The Bill, seeks to amend the *Kenya Revenue Authority Act*, 1995 enhance the capacity of the Kenya Revenue Authority."

17. The National Assembly's Departmental Committee on Finance and National Planning's Report on the Consideration of the Tax Laws (Amendment) Bill, 2020, is also said to have limited itself to the examination/consideration of the proposed amendments to the following six statutes:

    p. The *Income Tax Act* (Cap. 470)

    q. The *Value Added Tax Act*, 2013 (No 35 of 2013)

    r. The *Excise Duty Act*, 2015 (No 23 of 2015)

    s. The *Tax Procedures Act*, 2015 (No 29 of 2015)

    t. The *Miscellaneous Fees and Levies Act*, 2016 (No 29 of 2016)

    u. The *Kenya Revenue Authority Act*, 1995 (No 2 of 1995).

18. The *ex parte* applicant also points out that, as the law stands, the impugned amendments could not be introduced after the departmental committee stage on the floor of the National Assembly during the Committee of the Whole House. Further that, the National Assembly Standing Order 133(5) categorically states that:

> " (5) No amendment shall be permitted to be moved if the amendment deals with a different subject or proposes to unreasonably or unduly expand the subject of the Bill, or is not appropriate or is not in logical sequence to the subject matter of the Bill."

19. The *ex parte* applicant contends that the unlawful amendments contravene several Articles of the *Constitution* that is Article 1, 2(1-4), 3(1), 4(2), 10, 19 (1) , 20 (1), 21 (1), 24, 27, 41(1), 47, 48,73(2) 93 (2),Article 94(4), 118(1), 109 and 259(1) and also Section 52(1) of the *Leadership and Integrity Act*, No 19 of 2012.

20. The *ex parte* applicant reiterates that denial of the right to public participation was contrary to Article 10(2)(a) and 118(1)(b) of the *Constitution* and the National Assembly Standing Order No 127(3). The 2nd respondent is also said to have published the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 so as to operationalize the impugned amendments.

21. On 25th September, 2020, the 2nd Respondent is said to have Gazetted the *Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020* (Legal Notice No 192 of the 14th September, 2020), and the Regulations commenced on 14th September, 2021. The Regulations implement the impugned amendments to Section 38(1A) of the *Retirement Benefits Act* (1997) to allow the use of retirement benefits to purchase a residential house. Regulation 22 requires that all schemes shall amend their scheme rules to comply with the provisions of this Part within twelve months from the date of the commencement of the said Regulations.

22. The impugned amendments are, according to the *ex parte* applicant, irregular, arbitrary, unreasonable, illegitimate, unlawful and unconstitutional, and, therefore, invalid, null and void ab initio, and of no consequence in law.

23. On whether the impugned amendment to section 38(1) of the *Retirement Benefits Act* were in accordance with the *Constitution* and pertinent legislative laws, the *ex parte* applicant contended that whereas parliament has the mandate to make laws, due process and constitution requirements were not followed. The applicant's case is that the impugned amendments were also enacted in violation of the National Assembly's Standing Orders which have a constitutional underpinning because they were enacted pursuant to Article 124(1) of the *Constitution* to govern the legislative process in Kenya.

24. The *ex parte* applicant argues that subject to the National Assembly's Standing Order 133(5) & (6), the impugned amendments should not have been introduced on the floor of the National Assembly at the tail-end of the legislative process during the Committee of the Whole House after the Departmental Committee Stage. Further that the failure to mention amendments to Section 38(1A) of The *Retirement Benefits Act*, No 3 of 1997, in the Bill's Memorandum of Objects and Reasons invalidated any amendments to the section as a Bill's Memorandum of Objects and Reasons is not an idle provision, but an important summary of the intended legislation that the legislature has no powers to ignore.

25. The *ex parte* applicant's case is that Order 114(1) of the Standing Orders requires such a Bill and Memorandum to be submitted to the Speaker of the House who in turn, refers it to the Clerk who shall draft it in proper form. The said Order 114 and 117 are said to have been an absolute bar to making the amendments given the fact that the impugned amendments were not in the Bill's Memorandum of Objects and Reasons.

26. The applicant also contends that it is during the Committee of the Whole House to consider the Tax Amendment Bill that the Leader of Majority moved the House to amend the Bill by introducing an amendment to S. 38(1A) of the *RBA* by inserting the words "or to purchase a residential house" immediately after the word "mortgage loan." The Leader of Majority is said to have argued that the amendment was from Government. This according to the *ex parte* applicant meant that the members of the public and, specifically, the stakeholders in the retirement benefits sector, were never accorded the opportunity to contribute to the proposed amendments through public participation.

27. The leader of majority is said to have justified the amendment by saying that the bulk of bank deposits constitute pension funds which members of schemes are unable to access through a mortgage to buy a house owing to bank restrictions imposed by qualifications for a bank loan. Thus, the amendment will make it easier for scheme members to access their money from the scheme and buy a residential house.

28. The *ex parte* applicant also cited several cases on the principle of public participation one of which is the famous South African case of *Doctors for Life International v Speaker of the National Assembly and others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

29. It is the *ex parte* applicant's case that to the extent that the impugned amendment of Section 38(1A) of the *Retirement Benefits Act* (1997) was irregular, illegal, unconstitutional, null and void, the impugned Regulations are also void *ab initio*, with no effect in law as was held in the case of *Galaxy Realtors Limited v Kenya Forest Service* [2020] eKLR.

30. As to the appropriate costs, the petitioner relies on the principle of award of costs in constitutional litigation between a private party and the State being that a private party who is successful should have costs paid by the State, and if unsuccessful, each party should bear their own cost as was held by the Court in *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR.

31. In a replying affidavit sworn by Ukur Yatani on 6th July,2020,the 2nd and 3rd respondents contend that the amendment introduced to Section 38(1A) of the *Retirement Benefits Act*, 1997 allows the members of a pension scheme to utilize a portion of their accumulated benefits to purchase a residential house from such institutions and on such terms as may be prescribed in the Regulations, this being in addition to an option for members of a pension scheme to use their benefits to secure mortgage loans.

32. They contend that the amendments to the *Retirement Benefits Act*, 1997 were included in the Bill in accordance with the National Assembly Standing Orders during the Committee Stage and urge that before the amendments to section 38(1A) of the *Retirement Benefits Act*,1997,the provision allowed use of pension benefits to secure a mortgage.

33. It is also the respondents' case that contrary to the *ex parte* applicant's argument, the draft Regulations have undergone public participation as is required by the law and they are at an advanced stage of finalization.

34. The 2nd and 3rd Respondents in their rebuttal contend that there has been a well settled criteria for issuance of the orders of judicial review; these include illegality, impropriety of procedure and irrationality as was held in *Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 43 and *Pastoli v Kabale District Local Government Council and others* [2008] 2 EA 300.

35. On the role of a judicial review court the respondents contend that where the ground for the judicial review application is illegality, the court's role is to construct the relevant legal provisions and come to a conclusion whether the administrative action was illegal or not. This was the position in the case *Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University* [2018] eKLR. The respondents also cite the case of *Republic v National Water Conservation & Pipeline Corporation & 11 others* [2015] eKLR where the court held that "Once a judicial review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith."

36. The 2nd and 3rd interested parties on the other hand urge that the constitutionality of legislation is a rebuttable presumption; and, where the Court is satisfied that the legislation fails to meet the constitutional muster, nothing bars the Court from declaring it to be unconstitutional. Further that

it is also important in determining the constitutional validity of a statute to consider the purpose or effect of the legislation.

37. According to them the purpose of enacting legislation or the effect of implementing the legislation so enacted may lead to nullification of the statute or its provision if found to be inconsistent with the *Constitution* as was held by Mwita J in the case of *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR where he adopted the case of *Olum & another v Attorney-General* [2002] EA and also as was held in the Court of Appeal case of Centre for Rights Education Awareness & another v John Harun Mwau & 6 others [2012] eKLR.

38. The 2nd and 3rd interested parties also cite the decision in *Ecobank Kenya Limited v Commissioner for Domestic Taxes* [2012] eKLR where it held that "The Appellant and other business people have a right of certainty and predictability in the applicability of economic activities. This right necessarily militates against policies, regulations and procedures which are haphazardly resorted to by public regulatory bodies without adequate notice to those whose conduct or behaviour is to be regulated."

39. It is their case that the *Statutory Instruments Act* requires for the following to be done;(a) Consultation with stakeholders, (b)preparation of regulatory Impact Statement, (c) preparation of explanation memorandum (d) tabling of statutory instrument in the House, (e) consideration of the statutory instrument by the National Assembly. Further that section 13 of the *Statutory Instruments Act* provides for guidelines for the relevant Parliamentary committee while examining the instrument.

40. The interested parties also cite section 5(1) of the *Statutory Instruments Act*, 2013 which provides as follows:

    (1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—

    (a) have a direct, or a substantial indirect effect on business; or

    (b) restrict competition; the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.

41. The 2nd and 3rd Interested Parties contend that Parliament denied stakeholders public participation in the process leading to the amendment and that in failing to do so there was a violation of an important constitutional step. The Impugned Amendments according to them fail to meet the constitutional compliance step. The court of Appeal case of *Kiambu County Government & 3 others v Robert N. Gakuru & others* [2017] eKLR was cited on sufficiency of public participation.

42. The 2nd and 3rd interested parties contend that the impugned amendments infringed on Articles 27 and 201 (a)(b)(i) of the *Constitution* and that they were introduced at a time when the Government was giving tax incentives to Kenyans to cushion them against the adverse effects of the Covid-19 pandemic on the economy. Their effect being additional liquidity issues for schemes which was a burden during the Covid-19 pandemic. The South African case of *Prinsloo v Van der Linde* [1997] ZACC 5 and the Kenyan case of *Stanley Waweru, Samwel Gitonga, Benard Oranga and Paul Mukono Kuria, (Suing as Officials of Kitengela Bar Owners Association) v The National Assembly, The Kenya Revenue Authority and The Attorney General*; Petition No E005 of 2021 are cited in this regard.

43. The 2nd and 3rd interested parties' argument is also that the National Assembly cannot purport to be the originator or formulator of monetary policy in Kenya as its mandate is to deliberate on the monetary policy statement laid before it by the Cabinet Secretary. The impugned Amendments according to the interested parties negatively affect the monetary economy. In addition, that schemes that have

inadequate liquidity having invested in illiquid assets will find it difficult to avail adequate cash to implement the Impugned Amendments by 14th September, 2021.

44. The case of *Katiba Institute & another v Attorney General & another* [2017] eKLR is cited on whether the *ex parte* Applicant is entitled to the reliefs sought.

Determination

45. I have had due regard to the application, the supporting grounds, affidavit evidence and learned submissions by counsel for the respective parties. of determination is whether the Applicant has established the legal threshold for the grant of the judicial review orders sought, and, if in the affirmative, what orders should issue.

46. Chapter eight of the *constitution* of Kenya, 2010 establishes the legislature. Article 94(1) thereof vests legislative authority on Parliament. Article 94(5) of the *Constitution* gives parliament the exclusive power to make provision having the force of law in Kenya except where such authority is conferred by the *constitution* or by legislation. Article 10 provides the national values and principles of governance which bind Parliament when it legislates and Article 118 provides that Parliament shall conduct its business in an open manner and facilitate public participation and involvement in the legislative process while Article 93(2) provides that the National Assembly and the Senate shall perform their respective functions in accordance with the *Constitution*.

47. The scope of judicial review was elucidated in the Ugandan case of *Pastoli v Kabale District Local Government Council & others* [2008] 2 EA 300 at pages 303 to 304 where the court held as follows;

> "In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also, *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).
>
> Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....
>
> Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".
>
> Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."

48. The Court of Appeal in the case of *Pharmacy and Poisons Board v George Wang'anga & 5 others* [2020] eKLR while faced with the question of whether judicial review proceedings threaten the legislative

role of parliament more specifically the National Assembly's mandate to enact, amend and repeal laws stated as follows;

" In the Supreme Court case of *The Speaker of the Senate & another*, Supreme Court Advisory Opinion Reference No 2 of 2013 the Court expressed itself as follows:

> "[55] ....
>
> It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the *Constitution*, this Court, which has the mandate to authoritatively interpret the *Constitution* itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the "internal procedures" of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation.

53. Further, in the context of circumstances similar to this case, the doctrine of separation of powers was clearly spelt out in the Supreme Court case of Interim Independent Electoral Commission Constitutional Application No 2 of 2011 where the Court pronounced itself as follows:

> "[53] Separation of powers is an integral principle in Kenya's Constitution: for instance, Chapter 8 is devoted to the Legislature; Chapter 9 to the Executive; and Chapter 10, on the Judiciary, provides (Article 160(1)) that:
>
> "In the exercise of judicial authority, the Judiciary as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority".

(54) The effect of the *Constitution*'s detailed provision for the rule of law in the processes of governance, is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation." (Emphasis supplied).

The foregoing in our view answers the question on jurisdiction. The Court, as the last defence line in protection of the rule of law and the supremacy of the *Constitution*, cannot simply down its tools on the basis of the independence of the legislature or separation of powers even when it is clear that the legislature has exceeded its mandate as circumscribed under the *Constitution*. The legislative independence of the legislature only applies to the extent that it has acted and operated within the parameters of the *Constitution*. The judiciary is the people's watchdog and where the institution that is mandated to make laws trample on the same, the judiciary will not fold its hands in helplessness on account of the doctrine of separation of powers.

49. The subject Bill's Memorandum of Objects and Reasons provided as follows:

> " The Tax Laws (Amendment) Bill, 2020 seeks to make several amendments to the following tax-related statutes –
>
> The *Income Tax Act* (Cap. 470) The Bill, seeks to amend the *Income Tax Act* to reduce the individual top tax rate and resident corporate tax rate. This will increase disposable income for individuals in order to enhance consumption and enhance investments for companies.
>
> The *Value Added Tax Act*, 2013 (No 35 of 2013) The Bill seeks to amend the *Value Added Tax Act* to align the incentives contained in the Bill with the best practice.
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> The *Miscellaneous Fees and Levies Act*, 2016 (No 29 of 2016) The Bill, seeks to amend enhance equity and fairness in the imposition of miscellaneous fees and levies.
>
> The *Kenya Revenue Authority Act*, 1995 (No 2 of 1995) The Bill, seeks to amend the *Kenya Revenue Authority Act*, 1995 enhance the capacity of the Kenya Revenue Authority."

50. In the Bill's memorandum of objects and reasons no proposed amendments to the Section 38(1A) of the *Retirement Benefits Act* (1997) were included.

51. Standing Order 133(5) of the National Assembly Standing Orders states as follow;

> " (5) No amendment shall be permitted to be moved if the amendment deals with a different subject or proposes to unreasonably or unduly expand the subject of the Bill, or is not appropriate or is not in logical sequence to the subject matter of the Bill." (emphasis added)

52. The *ex parte* applicant and 2nd and 3rd interested parties challenge the legality of the impugned amendments on grounds that the amendments were done during the Committee of the whole House stage barring stakeholders from publicly participating and further that the said amendments are not currently sustainable considering the current retirement schemes in the country.

53. The Court of Appeal in the case of *Pharmacy and Poisons Board* (*supra*) restated the limits of judicial review and stated;

> 69. From the above excerpt of the learned Judge's judgment it would appear that he delved into the contents of the section 34 and the rest of the Bill and arrived at the conclusion that there was no nexus between them. He even concluded that the National Assembly (2nd respondent) deleted a provision of the Act by mistake. The pertinent question that arises from this is whether he had jurisdiction to do so while sitting on judicial review. We don't have to belabour the point that judicial review is about the process and not about the merit of the decision that is challenged. In determining the relevance of the amendments in question, the learned Judge overstepped his jurisdiction. We appreciate the fact that Parliament has the unfettered constitutional mandate to legislate and where they make mistakes in the substance of the amendments, they have a process of amending the same. The court cannot step into

Parliament's shoes and purport to legislate or correct perceived mistakes in the content of the Bills. That is over-reaching and hijacking the constitutional legislative mandate bestowed on the legislature.

70. The order of *certiorari* sought was to quash the proceedings in the National Assembly that led to the amendments and passing of the impugned Bill. We reiterate that the National Assembly in its deliberations is guided by the *Constitution* and its standing orders and the court cannot prescribe to it how to conduct its affairs. We hasten to reiterate however that where Parliament passes a law that is inconsistent with the *Constitution*, the courts will not shy away from declaring such law a nullity to the extent it contravenes the *Constitution*. Were the impugned proceedings unconstitutional or did they merely fail to abide by the 1st respondent's standing orders?

71. From the contents of the Judicial Review application the applicant appears to have been aggrieved by the fact that a major amendment was introduced at Committee stage and this amounted to making serious amendments without subjecting the same to public participation, and further that the Bill ought to have been debated by the Senate too as it affected County Governments. Public participation was not going to be done on the floor of the house on the date in question. That would not therefore be a reason to quash those proceedings by way of Judicial Review. Were there sufficient grounds to warrant the learned Judge to exercise his discretion sitting on judicial review to quash the impugned proceedings and Bill?

72. The comprehensive grounds for the exercise of judicial review jurisdiction were stated in the case of *Pastoli v Kabale District Local Government Council & others* [2008] 2 EA 300 at pages 303 to 304 thus:-

> "In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also, *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).
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> Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....
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> Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".
>
> Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a

decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)." (Emphasis supplied).

It is within these parameters that we must consider the impugned decision.

73. We are alive to the fact that the scope of the law on Judicial Review has expanded considerably under the *Constitution*. See this Court's decision in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* (2016) KLR where this Court held that Article 47 of the *Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act*, reveals an essential modification of judicial review to include aspects of delving into the merit of administrative action. This case is nonetheless distinguishable from the Suchan case (supra) because the former was challenging an executive/administrative action under the *Fair Administrative Actions Act* and not the conduct of The National Assembly in exercise of its Constitutional mandate to legislate. We therefore maintain that the learned Judge was out of step in delving into the merits of the amendments in question."

54. Flowing from the above excerpt, it is a legal truism that the Court in exercising its judicial review mandate ought to be very cautious so as not to usurp the powers/mandate of independent bodies that have been established under statute (and in this case, the *constitution*) to undertake a certain mandate. A word of caution though; since the court cannot without undue intrusion into the operations of parliament engage in scrutiny of the merits of legislation passed by it (except where a question of constitutionality of the legislation arises), the court must of necessity find its entry point in exercise of its supervisory jurisdiction where Parliament adopts a procedure that results in a breach of the *constitution* and the set legal procedure in law making. This supervisory space must be jealously guarded and properly invoked in promotion of transparency and accountability in law making and in defence of the rule of law.

55. In our instant suit, the challenge to the impugned amendment is premised on the alleged flawed process adopted by Parliament in the amendment of Section 38(1A) of the *Retirement Benefits Act* (1997).

56. My humble view on the matter is that the court would be abdicating its constitutional role if it was to watch with inaction as Parliament conducts its constitutional mandate of law making without having due regard to constitutional ethos and statute as well as its own set procedures under the Standing Orders. Such derogation must be amenable to judicial review or a declaration of unconstitutionality as the case may be. This is no doubt the import of the dicta in the Supreme Court decision in *The Speaker of the Senate & another*, Supreme Court Advisory Opinion No 2 (*supra*). I hold that view very much alive to the need for judicial restraint necessary and the boundaries beyond which the court ought not to cross as clearly stated by the court in *The Council of Governors and others v The Senate* Petition No 314 of 2014. Where the court held as follows:

"The court preference is for judicial restraint. If Judges decided only those cases that meet certain justifiability requirements, they respect the spheres of their co-equal branches, and minimize the troubling aspects of counter majoritarian Judicial review in a democratic

> society by maintaining a duly limited place in government...This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with or in contravention of, the provision of, the *Constitution*, and having done that its duty ends..."

57. I have carefully considered the pleadings on record. There is no denial that the impugned amendment was introduced at the Committee of the Whole House stage. There is no rebuttal that the amendment is contrary to Standing Order 133(5) of the National Assembly Standing Orders which sets the parameters of the amendments that can be introduced at that stage.

58. In introducing and passing the amendment in those circumstances, Parliament fell afoul of Article 118(1) of the *Constitution* which is reproduced here for its full meaning and import;

> Article 118(1) Parliament shall-
>
> a. Conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and
>
> b. Facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

59. The sovereign power of the people to make laws is delegated to Parliament by the people through their representatives elected every 5 years. So long as a piece of legislation has been subjected to the due process of law making as postulated in the law and the House's standing orders, the law binds every citizen and the only opportunity to offer views on the law is during the window for public participation opened by Article 118. The *Constitution* clearly spells out how Parliament is to conduct its business as seen in Article 118 above. If Parliament fails to abide by the set criteria and where there is a procedural flaw, the court shall intervene to ensure that Parliament conducts its business in accordance with the *constitution* and the law.

60. The amendment of Section 38(1A) of the *Retirement Benefits Act* (1997) was an amendment impacting heavily the utilization of funds in pension schemes. It thus would call for a robust process of stakeholder engagement and public participation. The introduction of the amendment at the committee stage denied the players in the industry, stakeholders and members of pension schemes the opportunity to contribute to the content of the envisaged law.

61. Whereas the court must respect the boundaries in observance and deference to separation of powers which is an integral principle in our constitution, in exercise of judicial authority, the court has the supervisory power over the other arms of Government to determine if administrative actions and processes by the executive and the legislature meet legal and constitutional muster.

62. I distinguish the decision in the Pharmacy and Poisons Board case above in that the learned trial judge in the decision at the High Court which was under challenge in the appeal had broached on the question of the merits of the amendments by Parliament and the Court of Appeal thereby held that the court cannot step into Parliament's shoes and purport to legislate or correct perceived mistakes in the content of a bill. The Court termed that as over-reaching and hijacking the constitutional mandate bestowed on the legislature.

63. It is not within the province of this court in judicial review to interrogate the merits of the impugned law. But however good intentioned Parliament may be in the process of law making, if the process is

legally flawed, the court must step in and defend the rule of law. To quote from the decision in Supreme Court Advisory Opinion Reference No 2 of 2013;

> "The foregoing in our view answers the question on jurisdiction. The Court, as the last defence line in protection of the rule of law and the supremacy of the *Constitution*, cannot simply down its tools on the basis of the independence of the legislature or separation of powers even when it is clear that the legislature has exceeded its mandate as circumscribed under the *Constitution*. The legislative independence of the legislature only applies to the extent that it has acted and operated within the parameters of the *Constitution*. The judiciary is the people's watchdog and where the institution that is mandated to make laws trample on the same, the judiciary will not fold its hands in helplessness on account of the doctrine of separation of powers."

Such judicial intervention is necessary to guard against mischief and to inculcate a culture of openness and transparency in the process of law making. Failure so to do could lead to draconian or self - serving laws finding their way to our statute books to the detriment of the people. It is an intervention backed by law and is applicable despite the established doctrine of separation of powers recognized in the *constitution* and I would again take refuge in the words of the Supreme Court in *Speaker of National Assembly v Attorney General and 3 others* [2013] eKLR where the court stated 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*. (emphasis added). 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*.

64. From the foregoing, I reach the conclusion that the amendment to Section 38(1A) of the *Retirement Benefits Act* (1997) was achieved through a flawed Parliamentary process. The court has powers under its supervisory jurisdiction in judicial review to issue the necessary prerogative orders to deal with the illegality and procedural impropriety arising therefrom.

65. Having so found, what then are the appropriate orders to make? The Applicant sought the following substantive orders;

    1. That an order of *certiorari* do issue, to bring to this Honourable Court for purposes of being quashed, and to be quashed:

        a. The amendments made by the *Tax Laws (Amendment) Act, 2020* to Section 38(1A) of The *Retirement Benefits Act*, No 3 of 1997.

b. The Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 (Legal Notice No 192 of the 14th September, 2020)

2. That an order of prohibition do issue, prohibiting the respondents herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing:

(a) The amendments made by the *Tax Laws (Amendment) Act, 2020* to Section 38(1A) of The *Retirement Benefits Act*, No 3 of 1997.

(b) The *Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020* (Legal Notice No 192 of the 14th September, 2020).

66. The Court of Appeal set out the grounds upon which the judicial review reliefs of *certiorari*, prohibition and *mandamus* may be granted in the decision in Kenya National Examination Council v Republic, Exparte Geoffrey Gathenji & 9 others, Nairobi Civil Appeal No 266 of 1996 [1997] eKLR when it stated:

> "That now brings us to the question we started with, namely, the efficacy and scope of *mandamus*, prohibition and *certiorari*. These remedies are only available against public bodies such as the Council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See *Halsbury's Law of England*, 4th Edition, Vol. 1 at pg.37 paragraph 128...The next issue we must deal with is this: What is the scope and efficacy of an Order of *mandamus*? Once again we turn to *Halsbury's Law of England*, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says:-
>
> "The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."
>
> At paragraph 90 headed "the mandate" it is stated:
>
> "The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way."
>
> What do these principles mean? They mean that an order of *mandamus* will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is made

without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

67. In *Halisburys laws of England*, Fourth Edition, Reissue volume 1(1) page 202 Para.109, it is observed that;

> " The order of Prohibition is an order issuing out of the High Court and directed to an inferior Court or Tribunal or Public Authority, which forbids that Court or Tribunal, or Authority to act in excess of its jurisdiction or contrary to law. Prohibition is employed for the control of inferior Courts, tribunals and Public Authorities. Prohibition is concerned with decisions of the future. Prohibition will issue to prohibit a determination in excess of jurisdiction, error of law on the face of the record or breach of the rules of natural justice"

68. In the same text (*Hallisburrys Laws of England*, Supra) an explanation on when the prerogative writ of *certiorari* is applied is given, thus;

> "*certiorari* lies to bring a decision of an inferior Court, Public Tribunal, Public Authority or any other body of persons before the High Court for review, so that the Court may determine whether they should be quashed or to quash such a decision.... Certiorari is concerned with decisions in the past....Certiorari will issue to quash a determination for excess or lack of Jurisdiction, error of law on the face of the record, breach of the rules of Natural Justice or where the determination was procured by fraud, collusion or perjury."

69. The amendments by the *Tax Laws (Amendment) Act, 2020* to Section 38(1A) of The *Retirement Benefits Act*, No 3 of 1997 and the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 (Legal Notice No 192 of the 14th September, 2020) have already been made.

70. The applicable reliefs in the circumstances would, following the legal principles enunciated above, be an order of *certiorari* and prohibition. Am quick to point out that the grant of the prerogative writs is discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief, the court will take into account the conduct of the party applying and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.

71. In the circumstances of this case am satisfied that that the court should exercise the discretion to grant the orders of *certiorari* and prohibition in favour of the Applicant.

72. With the result that I allow the amended Notice of Motion dated 10th February 2021 and make the following orders;

    1. That an order of *certiorari* do issue, to bring to this Honourable Court for purposes of being quashed, and to be quashed:

        a. The amendments made by the *Tax Laws (Amendment) Act, 2020* to Section 38(1A) of The *Retirement Benefits Act*, No 3 of 1997.

        b. The Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 (Legal Notice No 192 of the 14th September, 2020).

    2. That an order of prohibition do issue, prohibiting the respondents herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing:

a. The amendments made by the *Tax Laws (Amendment) Act, 2020* to Section 38(1A) of The *Retirement Benefits Act*, No 3 of 1997.

b. The Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 (Legal Notice No 192 of the 14th September, 2020).

3. That in view of the public interest nature of the litigation, each party is to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY NOVEMBER, 2022

.....

A. K. NDUNG'U

JUDGE