



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 95 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL ASSEMBLY.....1ST RESPONDENT

THE CABINET SECRETARY, NATIONAL

TREASURY AND PLANNING.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

THE RETIREMENT BENEFITS AUTHORITY.....INTERESTED PARTY

EX PARTE APPLICANT:

OKIYA OMTATAH OKOITI

RULING NO 2

The Application

1. On 13th May 2020, this Court delivered a ruling in which it granted Okiya Omtatah Okoiti, the *ex parte* Applicant herein, leave to commence judicial review proceedings pursuant to his Chamber Summons dated 8th May 2020. The specific orders made by the Court in this regard were as follows:

i. The *ex parte* Applicants' Chamber Summons application dated 8th May 2020 be and is hereby certified as urgent, and that the same is hereby admitted for hearing *ex parte* at the first instance.

ii. The *ex parte* Applicant is granted leave to seek by way of Judicial Review, that an order of *Certiorari* to bring to this 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.

iii. The *ex parte* Applicant is granted leave to seek by way of Judicial Review, that an order of Prohibition, 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.

iv. Prayer 4 of the *ex parte* Applicant's Chamber Summons dated 8th May 2020 seeking orders that "pending the filing, hearing, and the final determination of the substantive Judicial Review Notice of Motion herein, or until further Court Orders, leave so granted do operate as a stay or suspension of:

(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."

shall be heard *inter partes* , and a ruling thereon shall be reserved at a hearing to be held on 9th June 2020 .

2. The Court further directed the parties to file and serve their respective submissions on prayer 4 of the Chamber Summons dated 8th May 2020 that was seeking orders of stay. This ruling is on the prayer for stay, and the parties' respective cases in this regard are summarised in the following sections.

The ex parte Applicant's Case

3. The *ex-parte* Applicant filed his skeletal written submissions dated 21st May, 2020 in support of prayer 4 of the Chamber Summons Application dated 8th May, 2020. He reiterated that the amendments to section 38(1A) of the Retirement Benefits Act, No.3 of 1997 by the Tax Laws (Amendment) Act, 2020 and enactment of the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020, to operationalize the impugned amendments was done illegally and unprocedurally.

4. The *ex-parte* Applicant averred that the Tax Laws (Amendment) Bill, 2020 was published on 30th March, 2020, and that there was no mention therein of amendments to the Retirement Benefits Act, No.3 of 1997 in the Bill's Memorandum of Objects and Reasons, nor in the newspaper advertisement the Clerk of the National Assembly published in the Press and other media on Wednesday, 1st April, 2020, calling for views, representations, or written memoranda from stakeholders and the general public to be received on or before Monday, 6th April, 2020, and when he extended the deadline to Monday, 13th April, 2020 at 5.00 pm.

5. Further, that when the National Assembly passed the Bill on 20th April, 2020 , no amendments were proposed to Section 38 of the Retirement Benefits Act, No.3 of 1997 in the Bill that was passed by the National Assembly. However, that on 25th April, 2020, when H. E. President Uhuru Muigai Kenyatta assented to the Tax Laws (Amendment) Bill, 2020 enacting the Tax Laws (Amendment) Act, 2020, surprisingly also amended the Retirement Benefits Act (1997), which was not the subject of the Bill approved by Parliament were included in the Bill. He stated that the amendments to Section 38(1A) of the Retirement Benefits Act (1997), which were not in the Bill and were never considered and passed by Parliament, are substantive to the extent that they allow the use of retirement benefits to purchase a residential house.

6. The *ex parte* Applicant's submissions on the issue whether the leave granted by the Court to commence judicial review proceedings should operate as a stay or suspension of the impugned amendments and the regulations being developed thereunder, were as follows. Firstly, that the court has jurisdiction to do so under Article 165(3)(d)(i)&(ii) and Article 23(3)(b) & (c) of the Constitution. which vests specific authority in the High Court with regard to the interpretation of the Constitution, and to grant conservatory or stay orders. He cited the decision in the case of **Commission for the Implementation of the Constitution vs Speaker of the National Assembly [2016] eKLR**, that nothing alleged to be in conflict with the Constitution is immune from the Court's scrutiny, and in **Simeon Kioko Kitheka & 18 others vs County Government of Machakos & 2 others [2018] eKLR**, that Courts can grant conservatory orders where a piece of legislation is under challenge to uphold the provisions of the Constitution. Furthermore, that this Court is vested with jurisdiction to suspend statute or parts of a statute where it is necessary to do so to preserve the integrity of proceedings before a court.

7. While referring to the nature of conservatory orders as explained in **Simeon Kioko Kitheka & 18 others (supra)**, **Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR** and **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors (supra)** and **Centre for Rights Education and Awareness (CREAW) & 7 Others, NRB Petition No. 16 of 2011**, the *ex parte* Applicant submitted that the first condition required to be established is a *prima facie* case with a likelihood of success. It was contended that the Court in its ruling it delivered herein on 13th May, 2020, found that the *ex parte* Applicant had an arguable case. Therefore, having demonstrated that he has an arguable case, it follows that it is necessary to preserve that motion from being rendered nugatory where successful.

8. Further, the Applicant submits that the refusal to grant the said orders will be prejudicial to him and to members of retirement schemes and other Kenyans, who were not consulted. He averred that by not publishing and publicizing the impugned amendments in the Bill, he and other Kenyans were denied the chance to participate in the consideration of the impugned amendments before their enactment in violation of the right to be informed by the State in Article 35(3) of the Constitution, as read with Section 5 of the Access to Information Act, No. 31 of 2016. He stated that Article 109 (1) of the Constitution states categorically that "*Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.*" Hence, since it has been demonstrated beyond reasonable doubt that the impugned amendments were not in the Bill, there is absolutely no way they can be law in Kenya. Reliance was in this respect placed on the procedures on the consideration of a Bill provided by the National Assembly Standing Orders 114 and 117, and in Article 118 of the Constitution.

9. Reliance was also placed on the case of **Law Society of Kenya vs. Attorney General & 2 Others, [2013] eKLR**, **Kenya Human Rights Commission v Attorney General & Another [2018] eKLR** , **Kiambu County Government & 3 Others v Robert N. Gakuru & Others [2017] eKLR** and **Okiya Omtatah Okoiti & 4 others v Attorney General & 4 others; Council of Governors & 4 others (Interested Parties), [2020] eKLR** on the need and process of public participation, in the enactment of legislation. The *ex-parte* Applicant submits that

the impugned amendments were not the product of a legislative process, and while relying on the decision in **Republic vs National Assembly & 6 others Ex-parte George Wang'ang'a [2018] eKLR**, it was submitted that if any of the stages in the process of enactment of legislation is flawed, the law that is enacted as a result is defective.

10. The decision in **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127** were cited for the submission that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Further, that where the action is of a continuing nature, then it is still possible to suspend the implementation. The decisions in **Taib A. Taib vs. The Minister for Local Government & Others, Mombasa HCMISCA. No. 158 of 2006, Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995. Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR and James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR.**

11. In conclusion, the *ex-parte* Applicant submitted that he has met the test for grant of conservatory orders as he had made out a prima facie case with very high chances of success, and that it is in the interest of justice that this Court grants the stay sought since the people of Kenya in general stand to suffer grave injustice and irreparable loss and damage. The Applicant also submitted that the Court needs to preserve the subject matter of the motion by granting the stay. The *ex-parte* Applicant also urged the Court to apply the criteria for the grant of interlocutory injunctions in **Giella vs Cassman Brown [1973] E. A. 358** when considering whether to grant interim relief in the nature of conservatory orders to redress denial, violation or infringement of fundamental rights or freedoms. Lastly, the *ex-parte* Applicant relied on the principle that a private party who is successful in constitutional litigation should have costs paid by the State, and if unsuccessful, each party should bear their own costs, as held in **Kenya Human Rights Commission vs Communications Authority of Kenya & 4 Others [2018] eKLR.**

The Respondents' Case

12. The 2nd Respondent filed a Replying Affidavit dated 6th July, 2020. He deposed that on 25th April, 2020, H.E. the President assented to the Tax Laws (Amendments) Bill, 2020, that sought to amend tax laws and other laws relating to finance matters including the Retirement Benefits Act. He averred 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 Regulations. He stated that this is in addition to option for members of a pension scheme being allowed to use their benefits to secure mortgage loans.

13. The 2nd Respondent denied that the substantive amendments to the Retirement Benefits Act, 1997 were sneaked into the Tax Laws (Amendment) Bill, 2020 after it had been passed by the National Assembly and contended 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. He annexed a copy of the National Assembly Order Paper of 22nd April, 2020 and Hansard for the Parliamentary debate of that date as evidence. He further deposed that in order to implement the amendment to the Tax Laws (Amendment) Act, 2020 to the Retirement Benefits Act, 1997, the Retirement Benefits Authority developed the draft Retirements Benefits (Mortgage Loans) (Amendments) Regulations, 2020 to guide the Pensioners, and that the draft Regulations had undergone public participation as required by law and were in advanced stage of finalization

14. The 2nd and 3rd Respondents filed written submissions dated 17th June, 2020 on the issue of whether leave was to operate as a stay. Senior State Counsel Munene E. Wanjohi submitted that the decision to grant or deny stay is an exercise of judicial discretion, and urged the Court not to exercise its discretion in favour of the *ex parte* Applicant, as the decision sought to be stayed has already been implemented. Reliance was in this regard placed on the decisions in **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005 and R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another**, where it was held that if the decision sought to be quashed has been fully implemented leave ought not to operate as a stay, as there is nothing remaining to be stayed. He averred that according to these decisions, it is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted, as held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995.** and in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006**. Mr. Munene further contended that this is a matter of public interest thus the order of stay ought not be granted, and relied on the decision in the case of **Munir Sheikh Ahmed vs Capital Markets Authority [2018] Eklr**

The Determination

15. I have considered the arguments by the parties, and I am guided by the exposition on the purpose of a stay in **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, where it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

16. It has in this regard been held that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation. See in this regard the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006, Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995. Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR and James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR.**

17. In the present application, the *ex parte* Applicant is seeking a suspension of the amendments made by the Tax Laws (Amendment) Act, 2020 to Section 38(1A) of The Retirement Benefits Act, No.3 of 1997 and of the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 pending the hearing and determination of the substantive application. Various judicial decisions have emphasized in this regard that strong and cogent reasons and a constitutional basis must be shown before legislation can be suspended at an interlocutory stage.

Therefore, the threshold that requires to be met in this regard is higher than that of an arguable or *prima facie* case.

18. It was in this regard held as follows in **Coalition for Reform and Democracy (CORD) & Another v Republic of Kenya & Another** [2015] eKLR,:

“It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment...It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain...I am still of the view that “there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void.” It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first.”

19. Likewise, J. Majanja, in **Susan Wambui Kaguru & Ors vs. Attorney General & Another** (2012) eKLR expressed himself *inter alia* as follows:

“I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious legal arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so.”

20. It must however be clarified at this stage that once cogent reasons have been established, this Court has power to suspend impugned provisions of a statute as held by the Court of Appeal in **Attorney General & another vs Coalition for Reform and Democracy & 7 others**, [2015] eKLR in which the Court stated **that it is not in the interest of justice to enact or implement a law that may violate the Constitution and in particular the Bill of Rights.**

21. The *ex parte* Applicant has in this regard put forward the arguments that the correct procedure for amendment was not followed in the amendments made by the Tax Laws (Amendment) Act, 2020 to Section 38(1A) of the Retirement Benefits Act, No.3 of 1997, and that there was no public participation in the enactment, and as a result the public will be prejudiced thereby. The 2nd and 3rd Respondents argue that the said amendments were properly brought during Committee stage of the hearing of the Bill after public participation, and in accordance with the Standing Orders of the National Assembly. These are therefore contested issues that cannot be decided at this stage, and will have to await the final determination of the instant application, and cannot therefore be grounds for suspending the said amendments.

22. In addition, it is not evident what immediate prejudice will be caused to the public in terms of threat to life and limb by the impugned amendments and regulations.

The Orders

23. It is thus my finding that the immediate threat to infringement of rights and the public interest element have not been sufficiently demonstrated, to justify the stay sought in terms of suspension of the impugned laws and regulations. In the premises, I hereby make the following orders:

i. Prayer 4 of the *ex parte* Applicant’s Chamber Summons dated 8th May 2020 seeking orders that the leave granted commence judicial proceedings operates as a stay or suspension of the amendments made by the Tax Laws (Amendment) Act, 2020 to Section 38(1A) of the Retirement Benefits Act, No.3 of 1997 and of the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 is hereby declined.

ii. The *ex parte* Applicant shall file and serve the Respondents with submissions on the substantive Notice of Motion dated 21st May 2020 within thirty (30) days from today’s date.

iii. The Respondents are granted leave to file and serve their reply submissions within twenty-one (21) days of service by the *ex parte* Applicant.

iv. The Notice of Motion dated 21st May 2020 shall be heard on 7th December 2020.

v. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant’s Notice of Motion dated 21st May 2020 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

vi. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system,

and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

vii. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

viii. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

ix. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 7th December 2020.

x. Parties shall be at liberty to apply.

24. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant and Respondents' Advocates on record.

P. NYAMWEYA

JUDGE