Njenga v National Assembly of Kenya; Judicial Service Commission & 2 others (Interested Parties) (Petition 259 of 2018) [2019] KEHC 10900 (KLR) (Constitutional and Human Rights) (30 April 2019) (Judgment)

Adrian Kamotho Njenga v National Assembly of Kenya; Judicial Service Commission & 2 others (Interested Parties) [2019] eKLR

Neutral citation: [2019] KEHC 10900 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 259 OF 2018

WA OKWANY, J

APRIL 30, 2019

BETWEEN

ADRIAN KAMOTHO NJENGA ..... PETITIONER

AND

NATIONAL ASSEMBLY OF KENYA ..... RESPONDENT

AND

JUDICIAL SERVICE COMMISSION ..... INTERESTED PARTY

THE HONOURABLE ATTORNEY GENERAL ..... INTERESTED PARTY

THE CONTROLLER OF BUDGET ..... INTERESTED PARTY

JUDGMENT

1. The judgment herein, who describes himself as a Kenyan citizen of sound mind, a public spirited individual and an ardent defender of the Constitution sued the respondent herein the National Assembly of the Republic of Kenya through the petition dated 25th July 2018 in which he sought the following orders:-

    1. A declaration that the Appropriation Act, 2018 is constitutionally invalid, null and void be and is hereby issued.

2. A declaration that Article 173 of the Constitution as read together with the Fifth Schedule to the Constitution requires the respondent to appropriate a specified allocation of funds to the Judiciary Fund be and is hereby issued.

3. A declaration that Section 3 of the Judiciary Fund Act, 2016 is unconstitutional be and is hereby issued.

4. A declaration that the ambiguity of Section 3 of the Judiciary Fund Act, and the failure to assign specific funds to the Judiciary Fund renders the entire Judicial Fund Act moribund, hollow and constitutionally invalid be and is hereby issued.

5. A declaration that the respondent has not discharged the constitutional obligation imposed under Article 173(5) as read together with the Fifth Schedule to the Constitution be and is hereby issued.

6. An order directing the respondent to enact the Judiciary Fund Act within six (6) months, in strict compliance with the Constitution be and is hereby issued.

7. An order that the petitioner or any other person be at liberty to petition the Honourable Chief Justice to advise the President to dissolve the National Assembly in the event the respondent fails to constitutionally enact the Judiciary Fund Act within the aforesaid period of six (6) months.

2. The petitioner also cited the Judicial Service Commission (JSC), the Honourable Attorney General of the Republic of Kenya and the Controller of Budget, in the petition, as 1st, 2nd and 3rd interested parties respectively. The petition is supported by the petitioner's affidavit sworn on 25th July 2018.

3. The petitioner's case is that the Appropriation Act (herein after "the Act") contravenes Article 201 of the Constitution and the peremptory principles of public finance which demand for openness accountability and public participation in financial matters. He states that the Act is inconsistent with the provisions of Article 173 of the Constitution which obligates the respondent to ensure that the judiciary has adequate resources for its functions.

4. He further states that contrary to the express provisions of Article 221(5) of the Constitution, the Budget and Appropriations Committee of the National Assembly did not seek representations from the public in discussing and reviewing the estimates submitted by the Chief Registrar of the Judiciary(CRJ) under Article 173 of the Constitution and adds that had the said committee sought representations from the public, it would have come to the conclusion that the budgetary allocation made to the judiciary is unrealistic and unlawful.

5. He argues that having failed to comply with the plain provisions of Article 221(5) of the Constitution, the recommendations of the Budget and Appropriations Committee are manifestly unconstitutional and devastatingly fatal to the Appropriations Act, 2018 as the respondent failed to appropriate funds to the Judiciary Fund as mandated under Article 95(4) (b) of the Constitution.

6. The petitioner claims that failure to establish the Judiciary Fund in the nature contemplated by Article 173 of the Constitution as read with Fifth Schedule to the Constitution has paralyzed the judicial structures that are required in order to deal with corruption and massive looting of public resources.

7. It is the petitioner's case that failure to comply with the provisions of Article 173 of the Constitution has resulted in erratic and unpredictable allocation of funds to the judiciary thereby militating against the expeditious disposal of cases especially those involving Anti -corruption and Economic Crimes.

8. He contends that it is outrageous and unreasonable for the respondent to reduce the budget of the judiciary when litigation and criminal process demands are on the upward trajectory. He faults the respondent of increasing budgetary allocations to the office of the Director of Public Prosecutions, Directorate of Criminal Investigations, Ethics and Anti- Corruption Commission and Office of the Auditor General that all feed into the judiciary work load while at the same time scaling down the judiciary budget.

9. The petitioner states that whereas the respondent has allocated a meager kshs 364 million to the Judicial Service Commission (JSC) it has awarded a whooping kshs 14.9 billion to the Parliamentary Service Commission which has fewer constitutional functions and scope of responsibility compared to Judicial Service Commission.

10. At the hearing of the petition, the petitioner highlighted the 3 main issues raised in the petition as follows:

    a) The Constitutionality of the Appropriation Act 2018.

    b) The validity of the Judiciary Fund Act 2016.

    c) The underfunding of the judiciary.

11. The petitioner submitted that the respondent did not comply with the constitutional imperatives especially Article 10 of the Constitution in enacting the Appropriation Act and the Judiciary Fund Act. He relied on the decision in the case of the Attorney General & 2 Others –vs- IPOA & Another [2015] eKLR where the Court of Appeal observed that constitutional principles are not optional extracts but solemn commands that are binding.

12. On public participation, the petitioner submitted that the respondent did not avail the budget estimates for the judiciary as required under Article 135 of the Constitution which obligates the state to publicize any important information affecting the nation. He added that the reports from the 12 counties where public participation was allegedly conducted were not authenticated.

13. He further submitted that the funds allocated to the judiciary are not supposed to be made a component of the Appropriation Act but should be paid to the Judiciary Fund Account. On the Judiciary Fund Act, the petitioner submitted that the said Act was enacted in an unlawful fashion as it does not stipulate the allocation to the judiciary and is therefore incapable of sustaining funding to the judiciary thereby offending the provisions of Article 173 as read with the Fifth Schedule of the Constitution.

The respondent's case

14. The respondent opposed the petition through the replying affidavit and further affidavit of the clerk to the National Assembly dated 18th September 2018 and 21st November 2018 respectively. The respondent's deponent avers that the respondent is the only body mandated under Articles 95 of the Constitution, to appropriate funds for expenditure by the National Government and other National State organs.

15. He further states that Article 173(4) of the Constitution solely mandates the National Assembly to approve funds for the judiciary while Article 206(2) (a) of the Constitution provides that funds can only be appropriated from the consolidated fund as approved by an Act of Parliament.

16. He states the National Treasury conducted extensive public sector hearings on the budget policy statement for the 2018/2019 financial year where members of the public were invited to submit their

views as shown in annexure marked "MS1 a-d" to the replying affidavit. He further avers that the Budget and Appropriations Committee invited members of the public to submit comments on the 2018/2019 financial year budget estimates. He attached a copy of the said invitation and public hearing reports to the replying affidavit as annexures "MS2" and "MS4" respectively. He confirms that the committee also received written memoranda/submissions from the public though his office which submissions he also attached to the replying affidavit as "MS5".

17. He also avers that the committee tabled the report to the National Assembly for debate and approval of appropriation for the 2018/2019 financial year and that the Appropriation Act was assented to by the President in which case he states that the respondent met all the requirements in Article 249 of the Constitution. He states that following a petition for additional funds made to the respondent by the Judicial Service Commission, the respondent approved the recommendation of the committee and as a result, the judiciary budget for the 2018/2019 financial year was increased by the sum of kshs 1.5 billion. He further states that budget making is a continuous process pursuant to part 5 of Chapter 12 of the Constitution and that as such the instant petition is unfounded and bad in law.

18. At the hearing of the petition Miss Thanji, learned counsel for the respondent, submitted that the petition is superfluous because under Article 223 of the Constitution, the respondent is allowed to carry out supplementary appropriation where money previously allocated is insufficient or where there is a need.

19. Counsel submitted that under Article 206 of the Constitution the respondent has the power of the purse and is the only body mandated to approve withdrawal of funds from the Consolidated Fund. Counsel submitted that the budget making process is an extensive process that involves consultation between the National Treasury, Parliamentary Budget Office and the Budget and Appropriation Committee of the National Assembly together with experts who generate policy while taking into account the amount of money that can be raised. Counsel maintained that the petitioner has not demonstrated a violation of the Constitution so as to warrant this courts intervention under Article 165 of the Constitution.

20. On the claim that the funds allocated to the judiciary was not adequate in comparison to the role of the judiciary in the expeditious determination of cases, counsel submitted that in allocating funds, Parliament must balance competing national interests while taking into account the audited accounts from the Auditor General and the government's fiscal policy. In this regard, counsel argued that there was nothing unconstitutional about the Appropriation Act as the committee engaged in extensive deliberations before coming up with various allocations.

21. On the constitutionality of the Judiciary Fund Act counsel submitted that the petitioner did not state the specific Article of the Constitution that was violated by the failure to provide for the specific figure to be allocated to the judiciary in the said Act. Counsel noted that Article 221(3) of the Constitution requires the Chief Registrar of the Judiciary (CRJ) to generate estimates every year and argued that providing for a fixed figure in the Judiciary Fund Act, as suggested by the petitioner, would have the effect of taking away the power given to the Chief Registrar of the Judiciary to generate estimates.

22. On public participation, counsel submitted that the respondent had demonstrated, through annexures attached to the replying affidavit, that public participation was undertaken in various counties in the country where members of the public presented their views and submitted written memoranda by email and post. It was the respondent's case that the respondent complied with the all the constitutional provisions and the Public Finance Management Act in the making of the Appropriation Act and the Judiciary Fund Act.

2nd interested party's case.

23. The 2nd interested party opposed the petition through grounds of opposition filed on 22nd October 2018 in which it listed the following grounds:

1. That pursuant to Article 95(4) (a) & (b) and 206(2) of the Constitution the respondent is the government organ that is exclusively mandated to determine allocations of revenue and appropriate funds for expenditure by the national government and other national state organs.

2. Further that this court should exercise deference over the decision of the National Assembly to allocate the judiciary amounts appropriated through the Finance Act, 2018. Whilst the mandate of the respondent is to appropriate the national revenue, this courts mandate, under Article 165 of the Constitution, is interpreting the constitution. The question of the adequacy, sufficiency and insufficiency of the amounts allocated by the respondent to any government organ cannot be a constitutional question or a constitutional interpretation question.

3. That under Article 173 it is the sole mandate of the respondent to approve funds for the judiciary; further that even the estimates prepared but the Chief Registrar are still subject to the National Assemblies approval .

4. That the budget making process is mainly guided by Chapter 12 of the Constitution and the Public Finance Management Act. Under the laws inter alia the Cabinet Secretary responsible or finance submits financial estimates for the following, which include the estimates if the Chief Registrar of the Judiciary; A committee of the National Assembly then makes recommendations to the National Assembly on estimates submitted by the National Organs to House; the National Assembly is required to carry out public participation and finally the national assembly debates and passes the Appropriation Bill.

5. That allegations that this year's budgetary allocations through the Appropriation Act, 2018 to judiciary was not open[it is vague], that the amounts are inadequate, that the funding has paralyzed the judiciary, that the disposal of economic crimes has been hampered, that the allocation of the funds has been erratic, that the judiciary has capacity constraints, that the judiciary is being set up to fail and specifically paragraphs 6, 9, 10, 15, 16, 18, 20, 22, 71, 72, 73 and 74 of the petition lack precision. They are unsupported and therefore they cannot from a basis for granting the final orders sought herein.

6. That the petition is otherwise incompetent, misconceived, misplaced and an abuse of the process of this Honourable Court as the petitioner's rights and fundamental freedoms have not been breached in any manner.

24. At the hearing of the petition, Mr. Moimbo, learned counsel for the 2nd interested party submitted that the petition is omnibus as while the petitioner claims that there were estimates made by the judiciary, he did not attach the said budget estimates to the affidavit in support of the petition so as to enable the court establish if the funds allocated to the judiciary were adequate or not. It was therefore the 2nd interested party's case that the petition is based on conjecture and therefore lacks the precision that can attract the granting of the orders sought.

25. On the claim that the Judiciary Fund Act is unconstitutional counsel submitted that all Acts of Parliament benefit from the principle of presumption of constitutionality and it was therefore the petitioner's duty to disclose this presumption in order to obtain the orders sought in the petition.

Determination

26. I have considered the pleadings filed herein, the submissions by the parties herein together with the law and authorities that they cited. The main issue for determination are as follows:

    a) Whether the respondent complied with the Constitution in enacting the Appropriation Act, 2018.

    b) Whether the Judiciary Fund Act is unconstitutional and by extension whether the Judiciary is underfunded.

    c) Whether the petitioner is entitled to the orders sought in the petition.

27. The petitioner's case was that in enacting the Appropriation Act 2018, the respondent did not comply with the provisions of Articles 173, 201, and 221(5) and of the Constitution. He contended that the respondent did not the constitutional principles of transparency, accountability and public participation thereby enacting the Act in an unlawful and unconstitutional fashion. On its part, the respondent argued that it adhered to all the constitutional principles in enacting the said Act The said Articles 173,201 and 221(5) stipulate as follows:

    173 Judiciary Fund

    (1) There is established a fund to be known as the Judiciary Fund which shall be administered by the Chief Registrar of the Judiciary.

    (2) The Fund shall be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary.

    (3) Each financial year, the Chief Registrar shall prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval.

    (4) On approval of the estimates by the National Assembly, the expenditure of the Judiciary shall be a charge on the Consolidated Fund and the funds shall be paid directly into the Judiciary Fund.

    (5) Parliament shall enact legislation to provide for the regulation of the Fund.

    201 Principles of public finance

    The following principles shall guide all aspects of public finance in the Republic—

    (a) there shall be openness and accountability, including public participation in financial matters;

    (b) the public finance system shall promote an equitable society, and in particular—

    (i) the burden of taxation shall be shared fairly;

    (ii) revenue raised nationally shall be shared equitably among national and county governments; and

    (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas;

    (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;

    (d) public money shall be used in a prudent and responsible way; and

(e) financial management shall be responsible, and fiscal reporting shall be clear. 221(5) Budget estimates and annual Appropriation Bill

(5) In discussing and reviewing the estimates, the committee shall seek representations from the public and the recommendations shall be taken into account when the committee makes its recommendations to the National Assembly.

28. A reading of the above Articles show that they mainly emphasize on the principle of public participation in the financial affairs of the state. In interpreting the above constitutional provisions it is important to keep in mind the words of Mahomed, Ag. JA in Namibian case of S v Acheson 1991 (2) SA 805(Nm HC) at 813 wherein he stated as follows regarding interpretation of the Constitution:

> " the constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."

29. There is the duty imposed on state organs to provide meaningful opportunities for public participation in the process and the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. Article 10 of the Constitution expressly provides that public participation is one of the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

30. Courts have held that public participation is not a mere public relations exercise and that for that reason, the legislative process ought to be true reflection of the public participation so that the end product is owned by the public as it then bears their seal of approval. The position was appreciated in Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) as follows:

> " If legislation is infused with a degree of openness and participation, this will minimize dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."

31. In Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC), it was held that:

> " For the opportunity afforded to the public to participate in a legislative process to comply with section 118(1), the invitation must give those wishing to participate sufficient time to prepare. Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made. Two principles may be deduced from the above statement. The first is that the interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken.

These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken. The question whether the notice given in a particular case complies with these principles will depend on the facts of that case."

32. In the instant case, the petitioner contended that there was no evidence that the respondent published the budget estimates for the 2018/2019 financial year or put in place a mechanism to make the actual estimates known to the public or called for their input in the process. In other words, the petitioner's case was that there was no public participation in the budget making process. I however note that the respondent demonstrated that there was extensive public participation in the budget making process through annexures "MS1 a-d" "MS 2", "MS 3"and "MS4" which comprise documents showing that there was invitation from the Budget and Appropriations Committee for members of the public to submit comments to the 2018/2019 national government budget, the report of the Budget and Appropriation Committee on the Budget Estimates for the 2018/2019 financial year a copy of the National Budget Public Hearing Reports of the Budget and Appropriations Committee held in West Pokot, Kajiado, Bungoma, Nakuru, Kirinyaga, Tharaka Nithi, Nairobi, Migori, Nyamira, Marsabit, Mombasa and Makueni Counties. I also note that the respondent demonstrated that its budget and appropriation committee received written memoranda from the public which were similarly produced as annexure "MS5" to the replying affidavit.

33. Having regard to the above annexures and the respondents explanation that public participation was conducted in 12 counties after taking into account diversity and the principle of wider participation, I am satisfied that the requirement for public participation in the making of laws/policies was met by the respondent. As was aptly put in Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)

> " Once structured processes of consultation were put in place, with tangible consequences for the legislative process and of central importance to the community, the principle of participatory democracy required the establishment of appropriately formal lines of communication, at least to clarify, if not to justify, the negation of those consequences. In my view, then, it was constitutionally incumbent on the Legislature to communicate and explain to the community the fact of and the reasons for the complete deviation from what the community had been led to believe was to be the fruit of the earlier consultation, and to pay serious attention to the community's response. Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve..... I would hold that, after making a good start to fulfil its obligation to facilitate public involvement, the Legislature stumbled badly at the last hurdle. It ended up failing to exercise its responsibilities in a reasonable manner, with the result that it seriously violated the integrity of the process of participatory democracy. In choosing not to face the music (which, incidentally, it had itself composed) it breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government, and thereby rendered the legislative process invalid."

34. In the present case, I find that sufficient evidence was placed before the court to show adequate lines of communication were opened by the respondent to facilitate public participation besides the public sector hearings on the budget statement that was conducted by the National Treasury. I am therefore satisfied that the principle of public participation was observed in the enactment of the Appropriation

Act 2018. I wish to reiterate what was held in Doctors for Life International vs. Speaker of the National Assembly and Others (supra)to the effect that:

> " The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in New Clicks, "[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process."

35. Turning to the claim that Section 3 of the Judiciary Fund Act is unconstitutional, I note that the said Section stipulates as follows:

    (1) These Regulations shall apply to all matters relating to the financial management of the Fund.

    (2) The administration of the Fund is vested in the Chief Registrar.

    (3) The Regulations shall apply to a Judicial Officer or Judiciary Staff in exercise of any powers and functions relating to the administration of the Fund whether in exercise of delegated authority or otherwise.

36. The petitioner's case is that the respondent did not enact the above section Judiciary Fund Act in the manner contemplated by the Constitution as Article 173 of the Constitution envisages that a predictable and specific allocation be provided for and channeled directly to the Judiciary Fund. I have already highlighted the provisions of the said Article 173 of the Constitution elsewhere in this judgment. According to the petitioner, the Constitution contemplates that the estimates drawn by the Chief Registrar of the Judiciary would be based on the predictable allocation to the Judiciary fund that is not dictated by the Treasury so as to ensure the financial independence of the judiciary. On its part, the respondent argued that providing for a fixed amount in the Judiciary Fund Act would have the effect of taking away the power given to the Chief Registrar of the Judiciary to generate estimates.

37. When considering the constitutionality of the Act, one must bear in mind the rebuttable principle of presumption of constitutionality of statutes. The principle states that statutes should be presumed to be constitutional until the contrary is proved. The philosophy behind this principle is that Parliament as a peoples' representative legislates laws to serve the people they represent and therefore, as legislators, they understand the problems people face and enact laws to solve these problems.

38. The Supreme Court of India aptly highlighted the principle of constitutionality of statutes in the case of Hambardda Dawakhana v Union of India Air (1960) AIR 554, thus;

> " In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and, the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted. Presumption is therefore in favour of the constitutionality. In order to sustain the presumption of constitutionality, the court may take into account matters of common knowledge, the history of the times and may assume every state or facts as existing at the time of legislation."

39. It is therefore the duty of the person alleging constitutional invalidity of a statute or statutory provision to prove that indeed the statute or any of its provision(s) are unconstitutional. (See Ndyanabo v Attorney General of Tanzania [2001] EA 495).

40. The Court must also consider whether the purpose and effect of implementing the statute or statutory provision would result into unconstitutionality. In Olum and another v Attorney General [2002] 2 EA 508, the Constitutional Court of Uganda stated;

> " To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional..."

41. Bearing in mind the principle of constitutionality of statutes and the requirement that that legislation must be read in conformity with the Constitution, I now turn to consider the issue of Constitutionality of the impugned section 3 of the Judiciary Fund Act. I have already highlighted the provisions of the said section elsewhere in this judgment. The petitioner sought an order of declaration that the said section is unconstitutional as it does not provide for the allocation of funds to the judiciary and is therefore incapable of sustaining funding to the judiciary thereby offending Article 173 of the Constitution. My finding is that having regard to the clear provisions of Article 173 of the Constitution which mandates the Chief Registrar of the Judiciary to generate estimates of the Judiciary Budget each financial year it could not have been the intention of the makers of the Constitution that the amount of allocation to the judiciary be fixed upfront in the Judiciary Fund Act.

42. In the instant case I find that the petitioner did not explain or specify the manner in which Article 173 of the Constitution has been contravened by section 3 the Judiciary Fund Act. I also find that the petitioner's assertion that the Judiciary Fund Act is vague and unconstitutional as it does not make specific provision by way of percentage or any other predictable format is not supported by any provision of the constitution to that effect.

43. The petitioner further contended that the inclusion of the expenditure of the Judiciary in the Appropriation Act, 2018 violated the constitution as Article 173(4) of the Constitution exempts the expenditure of the judiciary from inclusion in the said Act.

Article 173 (4) stipulates as follows:

(4) Upon approval by the National Assembly, the expenditure of the Judiciary shall be a charge on the Consolidated Fund and the funds shall be paid directly into the Judiciary Fund.

44. My finding is that the inclusion of the judiciary expenditure in the Appropriation Act cannot be said to be unconstitutional in view of the fact that Article 221(6) of the Constitution specifically provides for the inclusion of the estimates of the expenditure if the Judiciary and Parliament in the Appropriation Bill to be introduced in the National Assembly to authorize the withdrawal from the Consolidated Fund. The said Article 221(6) stipulates as follows:

221(6) Budget estimates and annual Appropriation Bill

"When the estimates of national government expenditure, and the Estimates of expenditure for the Judiciary and Parliament have been Approved by the National Assembly, they shall be included in an Appropriation Bill, which shall be introduced into the National Assembly to authorize the withdrawal from the Consolidated Fund of the needed for the expenditure, and for the appropriation of that money for the purposes mentioned in the Bill."

45. Having regard to the findings that I have made in this judgment, I find that the instant petition is not merited and that the petitioner has not made out a case so as to warrant the issuance of the orders sought in this petition. Consequently I dismiss the petition with no orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF APRIL 2019

W. A. OKWANY

JUDGE

In the presence of:

Thande for the respondent

Petitioner present in person

Court Assistant – Ali