**Apollo Mboya v Attorney General, National Assembly & Senate (Petition 472 of 2017) [2018] KEHC 6933 (KLR) (Constitutional and Human Rights) (21 May 2018) (Judgment)**

*Apollo Mboya v Attorney General & 2 others [2018] eKLR*

Neutral citation: [2018] KEHC 6933 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 472 OF 2017**

**JM MATIVO & JM MATIVO, JJ**

**MAY 21, 2018**

**IN THE MATTER OF ARTICLES 1, 2, 3, 4, 10, 93, 94, 95, 109(1)& (2), 115, 117, 159, 165(3), 258, 259 AND 260 OF THE CONSTITUTION AND IN THE MATER OF THE PARLIAMENTARY POWERS AND PRIVILEGES (NO. 29 OF 2017)**

**BETWEEN**

**APOLLO MBOYA ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1ST RESPONDENT**

**NATIONAL ASSEMBLY ..... 2ND RESPONDENT**

**SENATE ..... 3RD RESPONDENT**

**Sections 7 and 11 of the Parliamentary Powers and Privileges Act are unconstitutional on grounds of being ouster clauses which unjustifiably limit the right of access to justice**

Reported by Beryl A Ikamari

***Constitutional Law****-interpretation of constitutional provisions-principles applicable to constitutional interpretation-considerations applicable to the interpretation of the Constitution-Constitution of Kenya 2010, articles 2, 19 & 259.*

***Statutes****-interpretation of statutory provisions-principles applicable to statutory interpretation-scope of the Court's duty when interpreting a statute-scope of statutory interpretation where there was a lacuna (gap) in the law.*

***Statutes****-interpretation of statutory provisions-constitutionality of sections 3, 7 and 11 of the Parliamentary Powers and Privileges Act-whether sections 7 and 11 of the Parliamentary Powers and Privileges Act created ouster clauses which violated the principle of the rule of law, right of access to justice and the constitutional duty of the High Court to hear and determine disputes, by extending the scope of parliamentary immunity-Constitution of*

*Kenya 2010, articles 1, 2, 3, 10, 19, 20, 21(1), 22, 23, 24, 48, 50, 93 (2), 94 (4), 159 & 258; Parliamentary Powers and Privileges Act, No 29 of 2017, sections 3, 7 & 11.*

***Constitutional Law**-the executive-the presidency-scope of the President's mandate when assenting to a Bill-where it was alleged that a statute which received presidential assent had provisions which were unconstitutional-whether the grant of presidential assent under those circumstances could be questioned and subjected to a court challenge-Constitution of Kenya 2010, article 115.*

***Constitutional Law**-national values and principles of governance-public participation-threshold to be met in the facilitation of public participation-considerations of the Court in determining whether efforts made to facilitate public participation were reasonable-whether there was adequate public participation in the process leading to the enactment of the Parliamentary Powers and Privileges Act-Constitution of Kenya 2010, article 117.*

**Brief facts**

The Petitioner challenged the constitutionality of sections 3, 7 and 11 of the Parliamentary Powers and Privileges Act (the Act). He also questioned the process leading to the enactment of the Parliamentary Powers and Privileges Act on grounds of failure to undertake public consultations with all stakeholders.

The Petitioner stated that section 7 of the Act was unconstitutional as it insulated Parliament's staff and legal officers from service of process from Courts in Kenya while permitting service of foreign court process within the precincts of Parliament.

The Petitioner challenged section 11 of the Act on various grounds. Generally, he stated that it purported to confer non-existent privileges and immunities on all staff and advocates of Parliament from court process. He said that it insulated the proceedings and decisions of Parliament including enactments and appointment of public officers from court scrutiny even where they were unconstitutional or a violation of fundamental rights and freedoms. Further, the Petitioner stated that the provision limited the right to fair administrative action and access to justice guaranteed under articles 47 and 48 of the Constitution and amounted to a limitation on the enjoyment of fundamental rights and freedoms which was contrary to article 24 of the Constitution. According to the Petitioner, section 11 of the Act made Parliament a house of secrets that was beyond the reach of the Constitution.

The challenge raised against section 3 of the Act by the Petitioner was that it purported to confer non-existent privileges and immunities to all staff of Parliament, members of the public and press who were within the precincts of Parliament from Court processes and it elevated them above the law. The Petitioner stated that the provision was a contravention of article 117(2) of the Constitution on powers, privileges and immunities of Parliament granted to the business of Parliament, its committees, the leaders of the Majority and Minority and Chairpersons and Members of Committees.

**Issues**

i. What were the principles applicable to constitutional interpretation?
ii. What were the principles applicable to statutory interpretation?
iii. Whether sections 3, 7 and 11 of the Parliamentary Powers and Privileges Act, which granted privileges and immunities to all staff and advocates of Parliament from service of process from courts in Kenya, were unconstitutional on grounds that they entailed ouster clauses which extended the scope of parliamentary immunity beyond its traditional limits.
iv. Whether the President's decision to assent to a Bill, whose provisions were alleged to be unconstitutional, could be a basis for challenging the constitutionality of a statute.
v. Whether the duty to facilitate public participation in the enactment of the Parliamentary Powers and Privileges Act was complied with.

**Held**

1. In interpreting the Constitution, pursuant to article 259 of the Constitution, courts were obliged to promote the spirit, purport, values and principles of the Constitution, advance the rule of law, human rights and fundamental freedoms in the Bill of Rights and contribute to good governance.

2. An established principle of constitutional interpretation is that constitutional provisions must be construed purposively and in a contextual manner. Courts were constrained by the language used and they would not impose a meaning that the text was not reasonably capable of bearing.
3. Having been enacted under the provisions of article 117 of the Constitution, the Parliamentary Powers and Privileges Act had to be understood purposively because it was linked to the Constitution. In its interpretation, the Court had to promote the spirit, purport and objects of the Constitution.
4. In searching for the purpose of an Act, it was necessary to identify the mischief sought to be remedied by the legislation. Where appropriate, due regard would be had to the social and historical background of the legislation. The impugned provisions were to be understood within the context of any related provisions and the Constitution as a whole including the underlying values of the Constitution which were to be promoted and protected.
5. Although the text of a statute was the starting point in statutory interpretation, the meaning that it bore had to pay regard to the context. That was so even when the ordinary meaning of the provision to be interpreted was clear and unambiguous.
6. In interpreting the impugned provisions, the Court was obliged to avoid an interpretation that clashed with constitutional values, purposes and principles and seek a meaning that promoted those constitutional purposes, values and principles. The Court would pursue an interpretation that advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance.
7. As a rule of constitutional interpretation, no one provision of the Constitution is to be segregated from the others and to be considered alone. All constitutional provisions with a bearing upon a particular subject would be considered and interpreted so as to effectuate the purpose of the instrument.
8. On numerous occasions courts were called upon to bridge the gap between what the law was and what the law was intended to be. In those circumstances courts could not refuse to fill the gap. In performing that duty, they would not impose their value judgments on society. They would respect and accept the prevailing values and do what was expected of them. The courts would fail in performing that duty if they helpless approved an interpretation of a statute which would subvert societal goals and endanger the public good.
9. The Legislature would become *functus officio* after enacting statutes and they could not interpret the statutes. Judges interpret statutes. Judges had to offer an interpretation to statutes and they could not say that they do not understand the statutes or remand them back to the Legislature for interpretation. The need for such interpretation, led to the creation of the principles of interpretation applicable in situations where the clarity and precision in the provisions of a statute were missing.
10. The most important rule of statutory interpretation was the rule dealing with the statute's plain language. The language of a statute was the starting point in interpreting a statute and ordinarily it would be taken as the conclusive criteria in interpreting a given provision.
11. Where the language of a provision was plain and clear, the Court could not enlarge the scope of legislation or the intention of the Legislature. The Court had no power to legislate and it could not rewrite, recast or reframe the legislation. The Court was incapable of adding words to a statute or reading words into a statute where those words were not there in the statute. If a statute had a defect or omission, the Court could not correct or make up the omission.
12. The rule on literal construction would be used where a statute's words were clear and unambiguous and it would suffice and there would be no need to use other rules of statutory interpretation. Other rules of statutory interpretation would be used where the legislative intention was not clear.
13. Article 2 of the Constitution was to the effect that the Constitution entailed Kenya's supreme law and that any law or conduct that was inconsistent with it was invalid. Further, under article 19 there was a declaration to the effect that the Bill of Rights was the cornerstone of Kenya's democracy. The Bill

of Rights was an integral part of Kenya's democratic state and was the framework for social, economic and cultural policies.

14. When the constitutionality of a statute was challenged, the Court had to determine whether through the application of all legitimate interpretive aids, the impugned legislation or provision was capable of being read in a manner that was constitutionally compliant. The well-known general principles applicable to constitutional interpretation are the following:-
    a. The Constitution is not interpreted like an ordinary statute. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion. A broad, liberal and purposive interpretation of the Constitution is to be undertaken while avoiding a narrow, mechanistic, rigid and artificial interpretation. However, there were situations where it was not possible to have both a generous and purposive interpretation and the generous would have to yield to the purposive.
    b. In interpreting constitutional rights close scrutiny should be given to the language of the Constitution itself in order to ascertain the underlying meaning and purpose of the provision in question.
15. Section 11 of the Act ousted the jurisdiction of the Court to entertain cases challenging the decisions of Parliament or the Committee of Powers and Privileges. The ouster was wide enough to cover any decision made by Parliament, legislation and decisions made by the Committee of Powers in exercise of its quasi-judicial mandate. Such decisions could have far reaching implications on the citizens including affecting the citizens' constitutionally guaranteed rights.
16. The import of section 7 of the Act was that parliamentary decisions were out of the reach of the Courts. The provision was an ouster clause.
17. An ouster clause or privative clause is, in countries with common law legal systems, a clause or provision included in a piece of legislation by a legislative body to exclude judicial review of acts and decisions of the executive by stripping the courts of their supervisory judicial function. Under the doctrine of separation of powers one of the important functions of the judiciary is to keep the other organs of the State in check by ensuring that their actions comply with the law. Ouster clauses would prevent courts from exercising that constitutional function.
18. Under both constitutional law and administrative law, courts possessed supervisory jurisdiction over the exercise of executive power and also jurisdiction to determine whether a statute was constitutional. When carrying out judicial review of administrative action, the Court would scrutinize the legality and not the substantive merits of an act, or decision made by a public authority under the three broad headings of illegality, irrationality and procedural impropriety. In jurisdictions which had written Constitutions, the courts also assessed the constitutionality of legislation, executive actions and governmental policy. Therefore, part of the role of the judiciary was to ensure that public authorities acted lawfully and to serve as a check and balance on the Government's power.
19. The High Court's jurisdiction to interpret the Constitution was recognized in article 163(3)(d) of the Constitution. It included determinations on questions concerning whether an act or legislation was constitutional. Additionally, article 165(6) of the Constitution provided for the High Court's supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. Parliamentary committees were part of the bodies or authorities that exercised quasi-judicial functions.
20. The exercise of freedom of speech in parliamentary proceedings was an important right accorded to Members of the House. Without that right, they would be hampered in the performance of their duties. It helped them speak without inhibition, refer to any matter, express any opinion freely and say what they felt needed to be said in furtherance of national interest and the aspirations of their constituents.

21. Parliamentary privilege is a legal immunity enjoyed by members of Parliament, in which legislators are granted protection against civil or criminal liability for actions done or statements made in the course of their legislative duties.
22. Parliamentary immunity ensured the proper operation of Parliament. It conferred rights and privileges to members of Parliament; most importantly freedom of speech. That freedom of speech enabled Parliament to do its job of legislating, adopting the budget and overseeing the activities of the Government. If members of Parliament could not criticize the Government and investigate and denounce abuses because of fear of reprisals by the executive branch or other powerful actors, they would not live up to their role. Freedom of speech would enable them to raise questions affecting the public good which could be difficult to voice elsewhere owing to the possibility of court action.
23. Members would participate in parliamentary proceedings usually by speech and also through formal action including voting and giving a notice of motion. Strangers could also participate in parliamentary proceedings by giving evidence before parliamentary committees or presenting petitions with respect to private bills. While participating in parliamentary proceedings, members, officers and strangers were protected under parliamentary immunity. They could not be asked to account for their actions before any authority other than Parliament itself.
24. The hard core of parliamentary immunity covered statements made from the floor of the House or in committees, Bills or proposed resolutions and motions, written and oral questions, interpellations, reports made at the request of Parliament, and votes cast. Such actions were protected by absolute privilege of freedom of speech. Members of Parliament could not be sued for defamatory statements or statements that would otherwise be a criminal offence.
25. Section 11 of the impugned Act offered more immunity than would be covered under parliamentary immunity. It barred any person from challenging decisions made by Parliament or its committees in Court. It did not limit the nature of decisions which could not be challenged. It shielded Parliament's decisions from court scrutiny. It took the form of an ouster or finality cause which restricted or eliminated judicial review.
26. Traditionally, courts interpreted provisions which ousted the Court's jurisdiction narrowly. That meant that a decision that was the subject of an ouster clause could still be subjected to judicial review.
27. It was possible for legislation to be nullified by a court on grounds of unconstitutionality on the basis of its content or the process of its enactment. Similarly, a decision of a parliamentary committee, made in exercise of its quasi-judicial functions could be quashed by a court for being *ultra vires*, an error of law, unreasonable, illegal, arbitrary or for violating the Bill of Rights.
28. By denying an aggrieved citizen access to court in order to challenge a particular decision, ouster clauses offended the constitutional principle of rule of law. The issue that was most likely to provoke the Court's rejection of an ouster clause was that it violated the constitutional right to access to the courts and it attacked the constitutional duty of the Court to hear cases relating to violations of fundamental rights and freedoms and also to determine the constitutionality of legislations and the legality of decisions made.
29. To the extent that section 11 of the Act restricted service of civil process to staff working in Parliament, including legal officers, it was a violation of the right of access to justice as recognized in article 48 of the Constitution. Court process would not be served inside Parliament in the course of parliamentary proceedings but to Parliament's officers or advocates authorized to accept service. Thus, it could not be said that the impugned section 11 was meant to protect parliamentary proceedings from disruptions. The justification given for the infringement of the right of access to justice by the Act did not meet the test provided for in article 24 of the Constitution.
30. Section 3 of the Act described the precincts of Parliament. There was nothing unconstitutional about it. However, section 7 and 11 of the Act did not pass constitutional muster and were inconsistent with articles 1, 2, 3, 10, 19, 20, 21(1), 22, 23, 24, 48, 50, 93 (2),94 (4), 159, and 258 of the Constitution.

Judicial review was part of the basic structure of the Constitution and it could not be ousted by a statutory provision.

31. Assenting to a bill implied at least the possibility of refusing or withholding assent. The power of a head of state to refuse or to withhold assent to legislation is known as the veto power. It allows a President to protect the Constitution, uphold the balance and separation of powers, prevent the enactment of rushed or badly drafted legislation and to thwart legislation that served special interests rather than the common good.
32. Article 115 of the Constitution made provisions with respect to assent to a Bill by the President. Where the President decided to refuse to assent to a Bill he was required to note any reservations that he had concerning the Bill.
33. With respect to presidential assent to a Bill, a reservation was a clear statement of the President's objections, giving a reasoned justification for refusing to assent to the Bill. The statement would give the President an opportunity to lay out precisely what was wrong with a Bill and to specify how it could be improved.
34. It was not unusual for legislation to be struck down on grounds of being unconstitutional. That would not mean that Parliament or the President were to blame. Even courts rendered judgments which could be overturned on appeal.
35. Separation of powers is a constitutional safeguard. Parliament had the role of passing a Bill and the President would assent to it and it would become law. The Court's role would be to interpret the law and determine how it ought to be applied and whether or not it conformed to the Constitution. There was no intention in the Constitution for the President to undertake a judicial review of the intended legislation as that was a function reserved to the High Court.
36. The President properly assented to the Bill and the mandate shifted to the Court to determine its constitutionality. There was no basis to invalidate the legislation on the basis of an alleged breach of article 115 of the Constitution.
37. There were at least two aspects of the duty to facilitate public participation. The first was the duty to provide meaningful opportunities for public participation in the law-making process. The second was the duty to take measures to ensure that people had the ability to take advantage of the opportunity offered.
38. In assessing whether there was compliance with the duty to facilitate public participation, the Court would determine whether Parliament did what was reasonable under the circumstances. The factors considered in determining reasonableness included rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. In making its determination, the Court would strike a balance between the need to respect parliamentary institutional autonomy and the right of the public to participate in public affairs. That balance would be achieved by determining whether what Parliament did was reasonable.
39. There were reasonable attempts made to undertake public participation. Views were offered against some provisions but Parliament went ahead and enacted them. Public participation did not mean that the collected views had to prevail.

*Petition partly allowed.*

***Orders***

i. *A declaration was issued decreeing that sections 7 and 11 of the Parliamentary Powers and Privileges Act (No. 29 of 2017) were inconsistent with and contravened articles 1, 2, 3, 10, 19, 20, 21(1), 22, 23, 24, 48, 50, 93 (2), 94 (4), 159, and 258 of the Constitution of Kenya, 2010.*
ii. *A declaration was issued declaring that sections 7 and 11 of the Parliamentary Powers and Privileges Act (No. 29 of 2017) were unconstitutional and therefore null and void.*
iii. *There were no orders as to costs.*

**Citations**

**Cases**

1. Law Society of Kenya vs The Kenya Revenue Authority & Another , Pet No. 39 of 2017
2. Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013
3. vs National Assembly Committee of Privileges & 2 Others ex-parte Ababu Namwamba JR Case No.129 of 2015

**Statutes**

1. Constitution of Kenya, 2010
2. Parliamentary Powers And Privileges Act

**Advocates**

None mentioned

## JUDGMENT

### The Parties

1. The Petitioner is an Advocate of the High Court of Kenya.

2. The Respondent is the honourable Attorney General of the Republic of Kenya and the Principal Government legal adviser pursuant to Article 156 of the Constitution.

3. The first and second Interested Party is the National Assembly and the Senate which consists Parliament as established under Article 93 of the Constitution. Article 94 of the Constitution confers legislative authority to Parliament. The National Assembly represents the people of the Constituencies and special interests in the National Assembly.[1]The Senate represents the Counties, and serves to protect the interests of the Counties and their governments.[2]

### The Petitioner's case

4. The Petitioner challenges the Constitutionality of Sections 3, 7 and 11 of the Parliamentary Powers and Privileges Act[3] (hereinafter referred to as the Act) on grounds that the said provisions are inconsistent with and or contravene the Constitution. The Petitioner's assault on Section 7 of the act is premised on the ground that the section insulates legal officers and staff of Parliament from service of process from the Courts in Kenya exercising civil jurisdiction; and that the section attempts to permit service of foreign court process within the precincts of Parliament to the exclusion of process of Courts in Kenya.

5. The Petitioner challenges Section 11 of the act on the following grounds:-

    a. The section limits the right to fair administrative action and access to justice guaranteed under Article 47 and 48 of the Constitution;

    b. The section limits a right and fundamental freedom in the Bill of Rights contrary to Article 24 of the Constitution.

1 See Article 95 (1) of the Constitution.

2 See Article 96 (1) of the Constitution.

3 Act No. 29 of 2017.

c. The section attempts to confer non-existent privileges and immunities on all staff of Parliament from Court process thereby elevating them above the law;

d. The section prevents service of process issued by any Court in Kenya to the advocates working from within the precincts of Parliament.

e. The section insulates the proceedings or decisions of Parliament including the enactment of laws and appointment of public officers from scrutiny by the Courts in Kenya.

f. The section elevates Parliament beyond scrutiny by the Courts in Kenya even when there is a violation of the Constitution or infringement, denial or violation of rights guaranteed by the Constitution and the law contrary to Article 23 of the Constitution to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights in accordance with Article 165 of the Constitution.

g. The section makes Parliament a house of secrets beyond the reach of the Constitution.

6. The Petitioner challenges section 3 of the act on grounds that the section confers non-existent privileges and immunities to all staff of Parliament, members of public and press who may be within the precincts of Parliament from Court processes thereby elevating them above the law; and that it contravenes Article 117 (2) of the Constitution on Powers, Privileges and Immunities of Parliament, granted to business of Parliament, its Committees, the leaders of the Majority and Minority and Chairpersons and Members of Committees.

7. The Petitioner also avers that the President of the Republic of Kenya abused his powers and mandate under Article 115 (1) of the Constitution by assenting to the act instead of referring it back to Parliament for reconsideration of the impugned provisions which are manifestly unconstitutional.

8. He also challenges the constitutionality of the act on grounds that Parliament failed to conduct public consultations with all the stakeholders during the process leading to the enactment of the act which ousts the jurisdiction of Courts to question Parliamentary proceedings or decisions.

9. The Petitioner seeks the following reliefs from this Court:-

i. A declaration be made that Section 3, 7 and 11 of Parliamentary Powers and Privileges Act (No. 29 of 2017) are inconsistent with and contravene the Constitution of Kenya, invalid, null and void be struck off forthwith.

ii. A declaration that the Parliamentary Powers and Privileges Act (No. 29 of 2017) is invalid on account of lack of public consultation and a flawed law-making process.

iii. Any other relief or such other orders as this Honourable Court shall deem fit and just to grant.

iv. Costs of this Petition be awarded to the Petitioner.

**First Respondent's Grounds of Opposition**

10. The Hon. Attorney General filed grounds of opposition stating inter alia:-

a. Article 117 (2) of the Constitution provides for the powers, privileges and immunities of Parliament and confers it with powers to enact laws that provide for orderly and effective discharge of its business, powers, privileges and immunities of its committees, the leader of the majority and minority parties, and chair persons of committees and members.

b. Section 7 of the act is borrowed from the best international practice and aims at safeguarding the principle of parliamentary immunity for Members of Parliament by protecting them from civil action while they are in the precincts of Parliament.

c. Parliamentary privilege is the privilege of a house of Parliament as a whole not the individual member and it's no more than what Parliament needs to undertake its mandate.

d. Courts should be slow is declaring legislation unconstitutional, and that until the contrary is proved, there is a presumption of constitutionality of a statute.

**First Interested Party's Replying Affidavit**

11. Michael Sialai, the Clerk to the National Assembly swore the Replying Affidavit filed on 29th November 2017. He avers that this Petition is an affront to the legislative role of Parliament under Articles 1(1),92, 94, 95,96 and 117 of the Constitution. He also avers that Article 117 of the Constitution permits Parliament to enact legislation to provide for the Powers, Privileges and Immunities of Parliament, its Committees and Members and to make provision regulating admittance to and conduct within the precincts of Parliament.

12. Mr. Sialai also averred that the Act was enacted in accordance with the Constitution, and that the impugned sections are constitutional and give effect to Article 117 of the Constitution. Further, he averred that section 3 of the Act describes the precincts of Parliament to include other buildings that Parliament may carry out its business; and, that the description is necessary to provide for the Powers, Privileges and Immunities of Parliament, its Committees, the Majority and Minority Party leaders, Chairpersons and Members of Committees and to make provision regulating admittance to and conduct within the precincts of Parliament. He also averred that section 7 limits service of civil processes to members and staff of Parliament when Parliament is in session, and that Parliamentary staff are employed pursuant to Articles 127 and 128 of the Constitution to serve the Members of Parliament and to ensure Parliament functions in an orderly and effective manner.

13. He further averred that allowing service of process when Parliament is in session will affect orderly conduct of business of Parliament and its committees, and, that service of process when Parliament is in session is not permitted. He also averred that immunity provided under Section 11 of the Act operates as a safeguard to the principle of separation of powers and the sovereignty of Parliament in that it prevents other branches of government, the executive and the judiciary from calling into question or inquiring into the proceedings of the legislature. He further averred that Courts ought to refrain from judicial interference in Parliamentary proceedings.[4]

14. Mr. Sialai also averred that there was sufficient public participation prior to the enactment of the Act, and that the public were invited to submit memoranda through advertisements in the local dailies. He deposed that the Committee received representations from among others, the Media Council of Kenya, Dr. Fred Matiangi, Cabinet Secretary for Information and Communication, the Parliamentary Initiatives Network, a Mr. Njoroge Waweru, a member of the Public and the Kenya Parliamentary Journalists Association.

15. He further averred that the Media Council of Kenya raised concerns with regard to clauses 22 (4), 27 (1) and 34 of the Bill, the Parliamentary Journalists Association recommended deletion of clauses 27, 34 and 35 of the Bill, while the Parliamentary Initiatives Network raised issues with clause 10 of the Bill. He averred that the Committee considered the proposals and made its observations in its report, and that the act was properly passed. He averred that the orders sought violate Article 117 of the

[4] He referred to Civil Appeal No. 1157 of 2009, John Harun Mwau vs Dr. Andrew Mullei & Others.

Constitution, the principle of separation of powers, and that the jurisdiction of this court can only be invoked in the event of violation of the Constitution. Further, he averred that the High Court ought not to interfere with the internal business of the legislature.[5] Lastly, he averred that the Petitioner has not established prove of violation of the Constitution.

**Second Interested Party's Replying Affidavit.**

16. Jeremiah Nyengenye, the Clerk to the Senate swore the Replying Affidavit filed on 20th December 2017. His averments are similar to those of Mr. Sialai, namely; the Petition is an affront to Articles 1 (1),92,94,95,96 and 117 of the Constitution; that Article 117 of the Constitution grants power to Parliament to enact legislation to provide for its powers, Privileges and Immunities; that legislative authority is vested in Parliament; that the impugned sections are constitutional. He also averred that section 3 defines the precincts of Parliament, while section 7 only limits service of civil processes to members of staff, and that effecting service of Court process while Parliament is in session will disrupt its business, and that the immunity operates as a safeguard to the principle of separation of powers and the sovereignty of Parliament. He further averred that there was sufficient Public participation prior the enactment of the Act.

17. Upon analyzing the above facts presented, I find that three issues fall for determination, namely:-

    a. Whether Sections 3, 7 and 11 of the Act violate any of the provisions of the Constitution;

    b. Whether the President violated Article 115 of the Constitution;

    c. Whether there was sufficient public participation prior to the enactment of the Act.

18. Determining these issues involve interpreting various provisions of the Constitution and the impugned sections. It is imperative that I outline principles of statutory and constitutional interpretation[6] which will guide me in this determination.

**Principles of Constitutional and Statutory Interpretation**

19. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence.

20. It is useful to bear in mind that Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. It obliges courts to promote 'the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance, an approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation'. The Article imposes a mandatory duty upon everyone to adopt an interpretation that conforms to Article 259.

21. It is also an established principle of interpretation that Constitutional provisions must be construed purposively and in a contextual manner. Courts are constrained by the language used. Courts may not

[5] He referred to R vs National Assembly Committee of Privileges & 2 Others ex-parte Ababu Namwamba JR Case No.129 of 2015.

[6] See Federation of Women Lawyers Kenya (FIDA) VS The Hon. Attorney General & Initiative for Strategic Litigation in Africa (ISLA) Amicus Curiae, NBI Pet No.164 B of 2016, delivered on 14 May 2018.

impose a meaning that the text is not reasonably capable of bearing. In other words, interpretation should not be "unduly strained."[7] It should avoid "excessive peering at the language to be interpreted.[8]

22. The Parliamentary Powers and Privileges Act,[9] having been enacted pursuant to Article 117 of the Constitution, must be understood purposively because it is umbilically linked to the Constitution. It follows that we must seek to promote the spirit, purport and objects of the Constitution. We are obliged to prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible constitutional guarantees.

23. In searching for the purpose of the act, it is legitimate to seek to identify the mischief sought to be remedied by the legislation. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We are obliged to understand the provisions within the context of the grid, if any, of related provisions and of the Constitution as a whole, including the underlying values of the Constitution that must be promoted and protected. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.

24. In construing the impugned provisions, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights. We are obliged to pursue an interpretation that permits development of the law and contributes to good governance. We are obliged to be guided by the provisions of Article 159 (e) which requires us to promote and protect the purposes and principles of the Constitution.

25. It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone. All constitutional provisions bearing upon a particular subject are to be brought into view and interpreted as to effectuate the greater purpose of the instrument.[10]

26. The duty of a court in construing statutes is to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in Article 259.

27. Courts have on numerous occasions been called upon to bridge the gap between what the law is and what it is intended to be. Courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. Courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, which is certain to subvert the societal goals and endanger the public good.

7 Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others vs. Smit NO and Others [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24.

8 Johannesburg Municipality vs. Gauteng Development Tribunal and Others [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another 1950 (4) SA 653 (A) at 664G-H.

9 Act No. 29 of 2017.

10 Smith Dakota vs. North Carolina, 192 US 268(1940).

28. It is beyond argument that the Legislature, after enacting statutes becomes functus officio so far as those statutes are concerned. It is not the function of the Legislature to interpret the statutes. Legislature enacts statutes and the Judges interpret them. Judges cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. This led to the birth of principles of interpretation to find out the real intent of the Legislature. Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunas. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing.

29. There are numerous rules of interpreting a statute, but, without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

30. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.

31. In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

32. Article 2 of the Constitution proclaims the Constitution to be the supreme law of the country. Importantly, it declares that any law or conduct inconsistent with it is invalid. The Constitution is underpinned by a Bill of Rights that, according to Article 19, is declared a cornerstone of our democracy. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

33. When the constitutionality of legislation or a provision in a statute is challenged, a court ought first to determine whether, through "the application of all legitimate interpretive aids,"[11] the impugned legislation or provision is capable of being read in a manner that is constitutionally compliant. Differently put, whether a law is invalid is determined by an objective enquiry into its conformity with the Constitution.[12]

[11] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

[12] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

34. It is useful to restate the well-known general principles relating to constitutional interpretation, which are, in any event, incontrovertible. The first principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence, the late Mahomed AJ described the Constitution as '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 tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.[13]In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner.[14]Instead, constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid what has been described as the 'austerity of tabulated legalism.'[15]It is also true to say that situations may arise where the generous and purposive interpretations do not coincide.[16] In such instances, it was held that it may be necessary for the generous to yield to the purposive.[17] Secondly, in interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.[18]

35. Applying the above principles, I now proceed to examine the issues identified above sequentially.

**Whether Sections 3, 7 and 11 of the Act violate any of the provisions of the Constitution.**

36. The Petitioner represented himself in this Petition instructed by Apollo & Co Advocates. He submitted that the import of section 7 of the act is that Parliamentary staff including advocates working therein cannot be served with court process issued by any Court in Kenya in exercise of its civil jurisdiction even if the process does not relate to business or proceedings of Parliament. He submitted that he act unduly limits freedom of expression.

37. He urged the court to consider the effect and purpose of the act[19] which he argued is to grant a blanket immunity and contravenes constitutional powers of the judiciary by insulating legal officers and staff of Parliament from service of court processes from Kenyan courts and permitting service of foreign court process within the precincts of Parliament. He argued that section 7 grants unfettered license to Parliament to make decisions that cannot be challenged in a Court of law even if such decisions or proceedings violate constitutional provisions.

38. He submitted that section 11 limits the right to fair administrative action,[20] the right to access to justice,[21] and limits rights in the Bill of Rights contrary to Article 24 of the Constitution. He added that

13 S v Acheson 1991 NR 1(HC) at 10A-B.

14 Government of the Republic of Namibia v Cultura 2000 1993 NR328 (SC) at 340A.

15 Id at 340B-C.

16 See the South African Constitutional Court cases of S v Makwanyane 1995 (3) SA 391 (CC) at Para [9] footnote 8; Soobramoney v Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC) at para 17.

17 Kauesa v Minister of Home Affairs and Others 1995 NR 175 (SC) at 183J-184B; S v Zemburuka (2) 2003 NR 200 (HC) at 20E-H; Tlhoro v Minister of Home Affairs 2008 (1) NR 97 (HC) at116H-I; Schroeder and Another v Solomon and 48 Others 2009 (1) NR 1 (SC) at 6J-7A; Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia 2009 (2) NR 596 (SC) at 269B-C.

18 Minister of Defence v Mwandinghi 1993 NR 63 (SC); S v Heidenreich 1998 NR 229 (HC) at 234.

19 Counsel cited Pet 148 of 2014,Law Society of Kenya vs A.G. & 3 Others {2016} eKLR.

20 Article 47 of the Constitution.

the section confers non-existent privileges and immunities to all staff of Parliament thereby elevating them above the law. He also submitted that the act insulates the proceedings or decisions of Parliament from scrutiny by the Courts even when there is a violation of the Constitution.

39. He described section 3 of the act as unconstitutional to the extent that it confers non-existent privilege and immunities to all staff of Parliament, members of the public and press who may be within the precincts of parliament and that it contravenes Article 117 (2) of the Constitution.

40. He argued that the three provisions are unconstitutional to the extent that they limit rights conferred by Article 22 of the Constitution, and that the sections violate the supremacy of the Constitution.

41. Counsel for the Honorable Attorney General submitted that the act was enacted to give effect to Article 117(2) of the Constitution. He argued that section 3 of the act describes the precincts of Parliament, hence, the section is not unconstitutional. Further, he argued that Parliament has powers to restrict those entering its precincts.[22]

42. He submitted that section 7 seeks to give effect to the principle of Parliamentary Immunity that serves to reduce the possibility of pressing a Member of Parliament to change his or her vote for fear of persecution and or unwarranted sanctions against his person. He argued that the MPs are therefore protected from civil action whilst in the house, which is in line with international practices, and that the immunity protects them against civil liability for actions done or statements made in the course of their legislative duties, and that the provision was enacted in good faith.

43. He submitted that section 11 is geared at ensuring that the actions of Parliament made in good faith and are not questioned since they are enacted after being agreed upon by the elected representatives, and that Parliament was within its mandate in enacting the said provision.

44. Submissions by counsels for both interested Parties are identical. Both submitted that this Petition is an affront to Articles 1(1), 92, 94, 95 and 96 of the Constitution. Both argued that the impugned provisions enjoy a presumption of constitutionality until it is rebutted,[23] and to justify unconstitutionality, there must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative one. Further, they argued that the test of establishing the constitutionality of a statute was set out in Institute of Social Accountability & Another vs National Assembly & 4 Others.[24] They also argued that the Petitioner had not pleaded the provisions of the Constitution alleged to have been violated.

45. Drawing a comparison from Singapore, Tanzania and Seychelles where similar provisions exist, they argued that section 7 limits service of civil process to members and staff of Parliament when Parliament is in session, which, if allowed, will disrupt the orderly conduct of its proceedings.

46. They also submitted that the immunity accorded by the impugned provisions serves to further the doctrine of separation of powers[25] and stated that Parliamentary Powers and Privilege only cover both

21 Article 48 of the Constitution.

22 Counsel cited New Brunswick Broadcasting Co. vs Nova Scotia (Speaker of the House of Assembly) {1993} 1SCR 319.

23 Counsel cited Lenaola J. in Council of County Governors vs Inspector General of National Police Service & 3 Others {2015}eKLR, Commissioner for Implementation of the Constitution vs Parliament of Kenya & Another, High Court Petition No. 454 of 2012 and Law Society of Kenya vs A.G & 2 Others {2013}eKLR.

24 High Court Petition No.71 of 2014 {2015}eKLR.

25 Counsel cited John Harun Mwau vs Dr. Andrew Mullei & Others {Civil} Appeal No. 157 of 2009.

debates in the house and actions that allow members to participate in the business of the house. They urged the Court to consider the purpose and effect of the provision.

47. As stated above, counsels for the interested Parties drew a comparison from Singapore, Tanzania and Seychelles arguing that similar provisions as those under challenge in this Petition exist. I have also considered foreign decisions in this determination. Foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate that foreign case law and statutory provisions will not always provide a safe guide for the interpretation of our Constitution. The countries cited have not been shown to have a constitutions similar to ours. Our Constitution has correctly been described as highly transformative and progressive and a complete departure from our previous constitutional dispensation.

48. More important, when developing our jurisprudence in matters that involve constitutional rights and statutory interpretation, as the present case, we must exercise particular caution in referring to foreign jurisprudence[26]and similar statutory provisions in other countries. We must develop our common law in a manner that promotes the values and principles enshrined in our Constitution.

49. Regarding the statutes that existed prior to the promulgation of the 2010 Constitution, Section 7 (1) of Part two of the sixth schedule to the Constitution provides that:- (1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution." Secondly, the Constitution provided that Parliament shall enact legislations to give effect to various provisions of the Constitution. One such legislation is the act under challenge which was enacted pursuant to Article 117 (2) of the Constitution.

50. One thing is clear. All law must conform to the Constitutional edifice. It follows that the impugned sections must not only meet the constitutional threshold, but also the process of its enactment must also conform to the constitutional dictates.

51. Our Constitution gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law.[27] The philosophy, values and the structures of the previous Constitution had to give way to those of the new constitutional order which included enactment of new legislations, the realignment of the bureaucracy and management of institutions and the rallying of the national consciousness to the new dawn.[28] Courts are accountable to the Constitution and the law which they must apply honestly, independently and with integrity. Courts have a Constitutional duty to point out laws which are not consistent with the Constitution and to strike them down where the circumstances so demand.

52. Section 7 of the act provides that "No process issued by any Court in Kenya in the exercise of its civil jurisdiction shall be served or executed- (a) within the precincts of Parliament while either one or both Houses are sitting; or (b) through the Speaker or any officer of Parliament-(i) unless it relates to a person employed within the precincts of Parliament or attachment of a member's salary; or (ii) if the subject matter relates to a member or members exercising their personal duties. Sub-section (2) thereof provides that "The right of access to justice under Article 48 of the Constitution shall be limited as specified under this section for the purposes of facilitating the conduct of business and the affairs of Parliament."

26 Ibid.

27 Article 10 (1) (a)-(e).

28 Ibid.

53. Section 11 of the act provides that "No proceedings or decision of Parliament or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court."

54. The Act defines proceedings as:- (a) all things said, done or written by a Member or by any officer of either House of Parliament or by any person ordered or authorized to attend before such House or its committees, in or in the presence of such House or its committees and in the course of a sitting for the purpose of transacting the business of the House or its committees; and (b) all things said, done or written between Members or between Members and officers of either House of Parliament for the purpose of enabling any Member or any such officer to carry out his or her functions.

55. One of the purposes of law is to regulate and guide relations in a society. One of the ways it does so is by providing remedies and facilitating access to courts and other fora for the settlement of disputes. As supreme law, the Constitution protects basic rights including the right to access courts.[29] In our constitutional dispensation, everyone is guaranteed access to a competent court to have their dispute resolved by the application of law and decided in a fair manner.

56. Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the State. Our courts are mandated to review the exercise of any power by State functionaries, from the lowest to the highest ranking officials. Legislation based on the Constitution is supposed to concretize and enhance the protection of these rights, amongst others, by providing for the speedy resolution of disputes.

57. Article 1 of the Constitution provides that the sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. It further provides that the people of Kenya may exercise their sovereign will either directly or indirectly through their democratically elected representatives. Sovereign power under the Constitution is delegated to Parliament and the legislative assemblies in the County governments, the national executive and the Judiciary and independent Tribunals.

58. Article 2 (1) declares that the Constitution binds all persons and all State organs at all levels of government. It further decrees that no person may claim or exercise State authority except as authorized under the Constitution.[30]Article 2(3) provides that the validity or legality of the Constitution is not subject to challenge by or before any Court of State organ. Consistent with the supremacy clause, the Constitution declares that any law that is inconsistent with the constitution is void to the extent of the inconsistency. It also declares general rules of international law, treaties and conventions ratified by Kenya shall form part of the law of Kenya.

59. In a recent decision[31]I observed that "our Constitution is highly valued for its articulation. Such astute drafting is the fact that the Constitution gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law."[32] Rule of Law includes the right to approach the Court. The right to approach the Court is amplified by Articles 22 and 23 of the Constitution. Article 48 of the Constitution guarantees

29 Article 48 of the Constitution.

30 Article 2 (1).

31 The Law Society of Kenya vs The Kenya Revenue Authority & Another , Pet No. 39 of 2017.

32 Article 10 (1) (a)-(e).

the right to access justice, while Article 258 grants every person the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention.

60. Section 11 of the act needs to be examined in light of the provisions guaranteeing the Rule of Law, the Right to Access justice, the Right to approach the Court, and the values underlying the Bill of Rights, the Supremacy of the Constitutional and its binding nature. In the words of the U.S. Supreme Court in U.S. vs Butler[33] the duty of the Court when the constitutionality of a statutory provision is challenged, "is to lay the Article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." A reading of Section 11 of the act leaves no doubts that it ousts the jurisdiction of the Court to entertain cases challenging decisions of Parliament or Committee of Powers and Privileges. A literal interpretation of the phrase "decisions of Parliament or Committee of Powers" leaves no doubt that the phrase is wide enough to cover any decisions made by Parliament, legislation, decisions made by the Committee of Powers in exercise of its quasi-judicial mandate. Such decisions or legislation may have far reaching implications on the citizens including affecting the citizens constitutionally guaranteed rights.

61. Parliamentary decisions may affect the way the Country is governed and or affect the Citizens rights. Parliament also performs an important oversight role. Decisions made by Parliamentary Committees can have serious impacts on citizens fundament rights and freedoms. The import of section 7 is that Parliamentary decisions have been put out of reach of Court scrutiny. The provision falls under the category of what is described as "ouster clauses."An ouster clause or privative clause is, in countries with common law legal systems, a clause or provision included in a piece of legislation by a legislative body to exclude judicial review of acts and decisions of the executive by stripping the courts of their supervisory judicial function. According to the doctrine of the separation of powers, one of the important functions of the judiciary is to keep the other organs of the State in check by ensuring that their actions comply with the law, including, where applicable, the constitution. Ouster clauses prevent courts from carrying out this constitutional function.

62. In the United Kingdom, the effectiveness of total ouster clauses is fairly limited. In the case of Anisminic Ltd. vs. Foreign Compensation Committee,[34] the House of Lords held that ouster clauses cannot prevent the courts from examining an executive decision that, due to an error of law, is a nullity.

63. The High Court of Australia has held that the Constitution of Australia restricts the ability of legislatures to insulate administrative tribunals from judicial review using ouster clauses. Similarly, in India ouster clauses are almost always ineffective because judicial review is regarded as part of the basic structure of the Constitution that cannot be excluded. The position in Singapore is unclear. The Chief Justice of Singapore, Chan Sek Keong, suggested in a 2010 lecture that ouster clauses may be inconsistent with Article 93 of their Constitution, which vests judicial power in the courts, and may thus be void.

64. Under both constitutional and administrative law, the courts possess supervisory jurisdiction over the exercise of executive power and also has power to determine constitutionality of legislation and decisions made by Parliament. When carrying out judicial review of administrative action, the court scrutinizes the legality and not the substantive merits of an act, or decision made by a public authority under the three broad headings of illegality, irrationality and procedural impropriety. In jurisdictions which have written constitutions like ours, the courts also assess the constitutionality of legislation, executive actions and governmental policy. Therefore, part of the role of the judiciary is to ensure that public authorities act lawfully and to serve as a check and balance on the government's power.

33 1{1936}.

34 {1968).

65. Article 165 (3) (d) of the Constitution vests the High Court with jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of-The question whether any law is inconsistent with or in contravention of this Constitution; The question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution; Any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the two levels of governments.

66. Article 165 (6) provides that "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function." Parliamentary Committees do exercise quasi-judicial functions.

67. Counsels for the Interested Parties argued that section 7 limits service of civil process to members and staff of Parliament when Parliament is in session, which, if allowed, they argued, will disrupt the orderly conduct of its proceedings. They also argued that the immunity accorded by the impugned provisions serves to further the doctrine of separation of powers.[35] They also argued that Parliamentary Powers and Privilege only cover both debates in the house and actions that allow members to participate in the business of the house.

68. By far, the most important right accorded to Members of the House is the exercise of freedom of speech in parliamentary proceedings. This right been described as:- "a fundamental right without which they would be hampered in the performance of their duties. It permits them to speak in the House without inhibition, to refer to any matter or express any opinion as they see fit, to say what they feel needs to be said in the furtherance of the national interest and the aspirations of their constituents."[36]

69. Parliamentary privilege is a legal immunity enjoyed by members of Parliament, in which legislators are granted protection against civil or criminal liability for actions done or statements made in the course of their legislative duties.

70. The Supreme Court of Canada has previously dealt with the question of parliamentary privilege in New Brunswick Broadcasting Co. vs. Nova Scotia (Speaker of the House of Assembly). In that case, the Court made these observations about parliamentary privilege:-

> " Privilege" in this context denotes the legal exemption from some duty, burden, attendance or liability to which others are subject. It has long been accepted that in order to perform their functions, legislative bodies require certain privileges relating to the conduct of their business. It has also long been accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch.
>
> The privileges attaching to colonial legislatures arose from common law. Modelled on the British Parliament, they were deemed to possess such powers and authority as are necessarily incidental to their proper functioning. These privileges were governed by the principle of necessity rather than by historical incident, and thus may not exactly replicate the powers and privileges found in the United Kingdom."

71. Parliamentary immunity is designed to ensure the proper operation of Parliament; It confers specific rights and privileges to members of parliament, most importantly the privilege of freedom of speech.

35 Counsel cited John Harun Mwau vs Dr. Andrew Mullei & Others {Civil} Appeal No. 157 of 2009.

36 http://www.ourcommons.ca/MarleauMontpetit/DocumentViewer.aspx?Sec=Ch03&Seq=7&Language=E

Indeed, freedom of expression is the working tool of Members of Parliament which enables them to do their job as representatives of the people, legislating, adopting the budget and overseeing the activities of the government. If they cannot speak out, criticize the government and investigate and denounce abuses because they fear reprisals by the executive branch or other powerful actors, they cannot live up to their role. Freedom of speech enables them to raise questions affecting the public good which might be difficult to voice elsewhere owing to the possibility of court action. They require immunity to freely express themselves without obstruction and without fear of prosecution or harassment of any kind.

72. An individual Members takes part in proceedings usually by speech, but also by various recognized kinds of formal action, such as voting, giving notice of a motion, etc; or presenting a petition or a report from a Committee, most of such actions being time-saving substitutes for speaking. Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers can also take part in the proceedings of the House, e.g. by giving evidence before one of its committees, or by presenting petitions for or against private bills. While taking part in the proceedings of the House, Members ,officers and strangers are protected by the same sanction as that by which freedom of speech is protected, namely, that they cannot be called to account for their actions by any authority other than the House itself.

73. Parliamentary immunity is not an individual privilege granted to members of parliament for their personal benefit, but rather a privilege for the benefit of the people and the institution which represents them, Parliament. Parliamentary immunity ensures that Parliament can fulfill its tasks and function without obstruction from any quarter. Obviously, a Parliament can only work insofar as its members are free to carry out their mandate. Immunity is therefore a prerequisite for ensuring that a Parliament can indeed function as an independent institution and vindicate its own authority and dignity.

74. The hard core of the privilege of freedom of speech is indisputably constituted by statements made from the floor of the House or in committees, bills or proposed resolutions and motions, written and oral questions, interpellations, reports made at the request of Parliament, and votes cast. These are protected by the absolute privilege of freedom of speech, as are generally documents which are ancillary to those matters, such as drafts of questions or notes. As stated earlier, absolute privilege means that such statements or acts cannot be challenged in court. Members of Parliament cannot therefore be sued for defamatory statements they make nor for statements that would otherwise constitute a criminal offence.

75. The foregoing paragraphs summarize the nature and purpose of Parliamentary immunity. A reading of section 11 leaves no doubt that it covers more than the immunity discussed in the above paragraphs. It bars any person from challenging in Court decisions made by Parliament or it committees. The provision does not specify the nature of the decisions. It does not refer to immunity in the performance of their Parliamentary duties. It seeks to shield their decisions from court scrutiny. It is an ouster or finality clause which restricts or eliminates Judicial Review. In our constitutional dispensation, it is not Parliament, or the executive or the Judiciary that are Supreme, but the Constitution.

76. Traditionally, the courts have interpreted provisions ousting the jurisdiction of Courts narrowly, that is to mean that, the decision is still subject to judicial review. In other words, the decision under attack may be final on the facts but it is not to be regarded as final on the law. Denning L.J. put is better when he stated that:-"I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words."[37]

77. A legislation can be nullified for being unconstitutional or on grounds that the process leading to its enactment was unconstitutional. A decision rendered by a Parliamentary Committee in the exercise

[37] In R vs Medical Appeal Tribunal (ex parte Gilmore) [1957].

of its quasi-judicial functions can be quashed for an being ultra vires, an error of law, unreasonable, illegal, arbitrary or for violating the Bill of Rights.[38] That is the mandate and sacred duty of the Court.

78. In a lecture in 1994, Lord Woolf, in the context of a discussion about ouster clauses, said that there may be situations in which the courts, in upholding the rule of law, may have to "take a stand". In those circumstances, he said, there were some "advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold". The rationale behind this reasoning is that ouster clauses offend the constitutional principle of the rule of law because an aggrieved citizen is denied the possibility of access to the courts to challenge the decision affecting him.

79. It is hardly surprising that the rule of law should weigh more heavily on the constitutional scales today than it did in Professor Dicey's times. Democracy must be defined as much by what governments should be permitted to do in the name of the people, as what they should be prevented from doing in the name of human rights. It is no longer self-evident, therefore, that courts would inevitably concede Parliament's right to ride roughshod over fundamental rights and the newly discovered constitutional principles. And the issue that most likely provokes the Court's rejection of ouster clauses is that such clauses are an attack to the Constitutionally guaranteed right to Access the Courts, it is also an attack on the Courts' constitutional duty to hear cases citing violation of Rights and to determine constitutionality of legislations and to determine the legality of decisions made. That is a constitutional mandate the Court should fiercely protect.

80. Parliament should be cautious about upsetting that balance by undercutting the constitutional power of the high court to review Constitutionality of legislations and decisions rendered by Parliamentary Committees. The High Court is entrusted under Article 165(2)(d) with the mandate of hearing any question respecting the interpretation of the Constitution including the determination of the questions whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

81. The Supreme Court of India[39] addressing the question of ouster clauses in cases involving fundamental rights stated that an ouster clause, no matter where placed, is wholly ineffective against the infringement of constitutional or natural justice rights. It is my finding that section 7 flies on the face of Articles 165(2)(d), 48, 22, 24, 258,1,2,3,10,19 of the Constitution.

82. Similarly, to the extent that section 11 restricts service of Civil Process to the staff working in Parliament among them legal officers, then, the same is a violation of Article 48 of the Constitution. Court processes are not served inside Parliament in the course of Parliamentary proceedings but to its officers or advocates authorized to accept service. Thus, the argument that the provision is meant to protect disruption of proceedings cannot be stand nor can it be justified. It is my view that the justification given for the infringement of Article 48 of the Constitution does not meet the Article 24 analysis test. It has not been shown that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

38 Ibid.

39 In the case of Kesava Nandabharati vs. State of Kerala & Anor AIR {1973} S.C. 1461.

83. Section 3 describes the precincts of Parliament. It provides that "the precincts of Parliament shall comprise the area of land and every building or part of a building under Parliament's control including — (a) the chambers in which the proceedings of Parliament are conducted including the galleries and lobbies of the chambers; (b) all the parts of the buildings in which the chambers are situated including the entrances, forecourts, yards, gardens, enclosures or open spaces appurtenant thereto; (c) committee rooms and other meeting places provided or used for Parliament's purposes; (d) the offices of Parliament including the places within such offices that are provided for the use of members, members of staff, members of the public and the press; (e) places provided for the use or accommodation of the members, members of the public and representatives of the press used in connection with the proceedings of Parliament or its committees; (f) all other buildings or parts of a building provided or used in connection with the proceedings of Parliament or its committees while so used by Parliament including such premises as may be leased by Parliament; and (g) such other areas as the Speaker may designate, in writing, for the purpose of parliamentary business. Sub-section (2) provides that "Where Parliament or a committee convenes outside the premises ordinarily used for its sittings, this Act shall apply as if the premises where Parliament or the committee is sitting were within the precincts of Parliament."

84. A clear reading of section 3 leaves no doubt that it merely defines the precincts of Parliament. There is nothing unconstitutional in the said section.

85. However, it is my finding that Sections 7 and 11 discussed above do not and cannot pass the constitutional muster and are inconsistent with Articles 1, 2, 3, 10, 19, 20, 21(1), 22, 23, 24, 48, 50, 93 (2),94 (4), 159, and 258 of their Constitution. In our constitutional dispensation, Judicial review is part of the basic structure of the Constitution that cannot be excluded.

86. In our constitution dispensation, the court is mandated to assess the constitutionality of legislation, executive actions and governmental policy. Therefore, part of the role of the judiciary is to ensure that public authorities act lawfully and to serve as a check and balance on the government's power. In our constitutional dispensation, it is not Parliament, or the executive or the Judiciary that are Supreme, but the Constitution.

87. It is my finding that ouster clauses offend the constitutional principle of the rule of law because an aggrieved citizen is denied the possibility of access to the courts to challenge the decision affecting him.[40]

**Whether the President violated Article 115 of the Constitution.**

88. The Petitioner argued that the President violated Article 115 of the Constitution in that he ought to refer the Bill back to Parliament for re-consideration instead of assenting to it.

89. The Respondent's Counsel argued that no evidence was tendered to show that that the President violated Article 115 (1) of the Constitution and that he executed his Mandate.

90. In a recent decision of this Court,[41] I had occasion to discuss in detail Article 115 of the Constitution. Article 115 provides that:-

[40] Section 23 (2) of the Sixth Schedule to the Constitution is also an ouster clause. It has been upheld by the Court of Appeal and the Supreme Court. This is a constitutional provision which was included in the Constitution suspending provisions of the Constitution that grant security of Tenure to Judges to allow for their vetting which was a requirement under the 2010 Constitution. Understood in that perspective and having been introduced to give effect to constitutional provisions, the said provision is in accord with the Constitution as opposed to the ouster clauses under consideration in this case which are statutory provisions and subservient to the Constitution.

[41] See Pet No 353 of 2017.

(1) Within fourteen days after receipt of a Bill, the President shall--

(a) assent to the Bill; or

(b) refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.

(2) If the President refers a Bill back for reconsideration, Parliament may, following the appropriate procedures under this Part -

(a) amend the Bill in light of the President's reservations; or

(b) pass the Bill a second time without amendment.

(3) If Parliament amends the Bill fully accommodating the President's reservations, the appropriate Speaker shall re-submit it to the President for assent.

(4) Parliament, after considering the President's reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported--

(a) by two-thirds of members of the National Assembly;

and

(b) two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate.

(5) If Parliament has passed a Bill under clause (4)--

SUBPARA (a)

the appropriate Speaker shall within seven days re-submit it to the President; and (b) the President shall within seven days assent to the Bill.

(6) If the President does not assent to a Bill or refer it back within the period prescribed in clause (1), or assent to it under (5)(b), the Bill shall be taken to have been assented to on the expiry of that period.

91. The contestation here is that the President assented to an unconstitutional Bill instead of returning it to Parliament for re-consideration, hence acted unconstitutionally. In a society governed by the Rule of Law, it is important to have a clear statement of what the law is. It is therefore necessary to make an unambiguous distinction between a mere legislative proposal and an adopted law. This distinction is made at the moment of enactment (the usual term in common law systems) or promulgation (the usual term in civil-law systems) and is typically marked by the formal signature of the bill that is about to become a law by the head of state. In granting his or her signature, or assent, to the new law, the head of state gives it finality and formal legitimacy.[42]

92. Assenting to a bill implies at least the possibility of refusing or withholding assent. The power of a head of state to refuse or to withhold assent to legislation is known as the veto power. In principle, this allows a president to protect the constitution, to uphold the balance and separation of powers, to prevent the enactment of rushed or badly drafted legislation and to thwart legislation that serves special interests rather than the common good.

[42] International IDEA, http://www.constitutionnet.org/sites/default/files/presidential_veto_powers.pdf.

93. According to the classical doctrine of the separation of powers, the power of enacting laws (legislative power) should be separated from the power of administering the state (executive power) and the power of interpreting and applying the laws to particular cases (judicial power).[43] However, constitutions adhering to this doctrine such as ours do not typically keep the branches of government entirely separate. As James Madison argued, the doctrine allows for each of the three branches of government to have some involvement in, or control over, the acts of the other two. This partial mixture of mutually controlling powers is known as a system of checks and balances.[44]

94. When the court is called upon to consider the scope and extent of the Presidents power under Article 115, it may be helpful to consider how the checks and balances of the constitution reflect, and relate the Presidency as a means of protecting the constitution. One of the traditional functions of the Presidency is to protect against legislation that is blatantly unconstitutional or that has not been enacted in accordance with the proper constitutional procedure. The president's role is essentially that of a constitutional guardian, whose function is to conduct an executive review of proposed legislation (in contrast to the more widely known judicial review), a function vested in Courts.

95. The protection of the constitution is the original purpose of the powers under Article 115 as envisaged by the authors of the Constitution. This power, is conceived as a reactive, and quite exceptional, instrument that would be used only occasionally and that could only 'be applied legitimately to legislation that is clearly unconstitutional, or was badly drafted.[45] This Presidential power is also a protection against harmful policies and corruption. It can be used by Presidents to prevent the passage of legislation that the President finds objectionable on policy or substantive grounds, without having to make any complaint against the constitutional or procedural propriety of the bill in question.

96. In addition to being deployed against legislation to which the President is ideologically opposed, the power is often relied upon as a means of preventing the enactment of so-called pork-barrel bills (where legislators vote for public funds to be spent on projects in their own areas) or special-interest legislation (where lobbyists attempt to influence legislators to enact laws that privilege a certain section of society against the common good).

97. This understanding of the veto power, in contrast to the veto exercised solely on constitutional or procedural grounds, widens the scope of presidential discretion. It calls on the president, as a figure representing a national constituency, to consider the merits, wisdom and necessity of a bill, and to act as the guardian of general interests.[46] It envisages the president as an autonomous policy actor, but not necessarily as the sole or primary policy initiator.

98. To prevent the arbitrary or capricious use of the power, while keeping responsibility in the hands of the President, the drafters of the Constitution carefully in Article 115 included a provision requiring the President in the memorandum to note any reservations that the President has concerning the Bill.

99. My understanding is that this reservation is a clear statement of the president's objections, giving a reasoned justification for the exercise or the refusing to assent to the Bill. The statement also gives the president an opportunity to lay out precisely what is wrong with the bill and to specify how the bill could be improved. In this way, the veto power also becomes—albeit indirectly—an agenda setting

43 Ibid.

44 Ibid.

45 McCarty, Nolan, 'Presidential Vetoes in the Early Republic: Changing Constitutional Norms or Electoral Reform?' The Journal of Politics, 71/2 (April 2009), pp. 369–84.

46 Supra note 41.

power through which the president is able to exercise political leadership, to define policy stances to the electorate and to put political pressure on legislators.

100. As stated above, the President's role is essentially that of a constitutional guardian, whose function is to conduct an executive review of proposed legislation (in contrast to the more widely known judicial review), a function vested in Courts. It is not unusual for legislation to be struck down by Courts as being unconstitutional. It cannot be said that any time a legislation is declared unconstitutional, the President or Parliament be blamed. That was not the intention of the Constitution. Even Courts render judgments which are overturned on appeal. Just like the way judges cannot be faulted when their decisions are overturned, the executive or Parliament cannot be said to have acted unconstitutionally anytime a law is declared unconstitutional by a Court. The existence of separation of powers is the safeguard created by the Constitution. Parliament passes a Bill. The Executive Assents to it and it becomes law. The Court interprets the law and determines how it should be applied and whether or not it conforms to the Constitution. It was not the intention of the Constitution that the President would be required to undertake a judicial review of the proposed legislation, a function reserved to the High Court. In my view, the President properly assented to the Bill and the mandate shifted to the Court to determine the Constitutionality or otherwise of the law. I find no basis to invalidate the legislation on grounds of the alleged breach of Article 115 of the Constitution on the part of the President.

**Whether there was sufficient public participation prior to the enactment of the Act.**

101. The Petitioner urged the Court to invalidate the act citing absence of public participation as provided under Article 118 (1) (b) of the Constitution[47]in the process leading to its enactment. The Respondent's and Interested Party's counsels on the other hand argued that there was sufficient public participation; Parliament has a broad measure[48] of discretion in achieving the public participation; [49]and, whether or not there was public participation is a question of fact.

102. Mr. Sialai in the Replying Affidavit enumerated steps taken to fulfill this constitutional requirement. The question here is whether or not it was sufficient. Sachs, J. in the South African case of the Minister of Health vs. New Clicks South Africa (Pty) Ltd:-[50] observed:-

> "..... What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case." [Emphasis supplied]

103. As was held in the Doctors for life[51] case what is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the

47 Counsel cited Robert N. Gakuru & Others vs Governor of Kiambu County & 3 Others {2014}eKLR & Doctors For Life International vs Speaker of the National Assembly & Others (CCT12/05) {2006}ZACC 11.

48 Counsel cited Moses Munyendo & 908 Others vs The Hon. A.G ,High Court Pet No. 16 of 2005 at Par 18 and Minister of Health & Another No.vs New Clicks South Africa (Pty) Ltd & Others 2006 (2) SA 311 (CC) at Para 630.

49 Counsel cited Law Society vs A.G. NBI Pet No. 318 of 2012.

50 {2005} ZACC.

51 Infra.

opportunities provided. In this sense, public involvement may be seen as "a continuum that ranges from providing information and building awareness, to partnering in decision-making."[52]

104. Further, in the Doctors for life case,[53] the court went on to hold that "in determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."

105. The Court is required to satisfy itself on the reasonableness of the method used. I am satisfied that there was reasonable attempt to undertake public participation. Evidently, some of the views presented against some sections, but Parliament went ahead and enacted the legislation. In Republic vs County Government of Kiambu Ex parte Robert Gakuru & another it was stated:-[54]

> " 51. Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by Lenaola, J in Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013, public participation is not the same as saying that public views must prevail."

106. In Doctors for Life International vs. Speaker of the National Assembly and Others[55] as hereunder:-

> " 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."

107. When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question

52 For example, according to the United States National Park Service, "[p]ublic involvement (also called public participation) is the active involvement of the public in . . . planning and decision-making processes." United States National Park Service, Director's Order No 75A: Civic Engagement and Public Involvement, 17 November 2003, available at http:www.nps.gov/policy/DOrders/75A.htm [accessed 26 December 2017] at section V. See also United States Code of Regulations, Title 40 (Protection of Environment), 40 CFR 25(1)(a), (b) and (d), National Wildlife Federation v Burford// 835 F.2d 305, 322 (D.C. Cir. 1987).

53 Infra.

54 {2016} eKLR.

55 (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

Parliament has given effect to its constitutional obligations. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. But was held in the above cited case, which is of persuasive authority to this court, public participation does not mean that the views collected must prevail. I find no basis to invalidate the legislation in question on this ground.

Final Orders

108. The primary duty of the courts is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice."[56] And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.

109. In view of my conclusions herein above, I find and hold that this Petition succeeds. Consequently, I allow it and make the following orders:-

    a. A declaration be and is hereby issued decreeing that sections 7 and 11 of the Parliamentary Powers and Privileges Act (No. 29 of 2017) are inconsistent with and contravene Articles 1, 2, 3, 10, 19, 20, 21(1), 22, 23, 24, 48, 50, 93 (2), 94 (4), 159, and 258 of the Constitution of Kenya, 2010.

    b. A declaration be and is hereby issued declaring that sections 7 and 11 of the Parliamentary Powers and Privileges Act (No. 29 of 2017) are unconstitutional and therefore null and void.

    c. No Orders as to costs.

    Orders accordingly.

**DATED AT NAIROBI THIS 21ST DAY OF MAY 2018**

**JOHN M. MATIVO**

**JUDGE**

[56] Section 165(2) of the Constitution.