



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 331 OF 2018

SHADRACK MUYESU SHARU.....1ST PETITIONER

ROTICH ENCOK KIPKOECH.....2ND PETITIONER

JUSTICE CHONGA MWAMUYE.....3RD PETITIONER

VERSUS

JUSTIN MUTURI SPEAKER - NATIONAL ASSEMBLY....1ST RESPONDENT

SOIPAN TUYA.....2ND RESPONDENT

THE NATIONAL ASSEMBLY.....3RD RESPONDENT

RULING

1. The petitioners herein, who describe themselves as male adults of sound minds and residents of Nairobi City sued the respondents herein through a petition filed on 27th September 2018 in which they sought the following orders:-

a) Spent

b) This Honourable court be pleased to issue interim conservatory orders restraining the gazette of the Finance Bill (National Assembly Bill No. 20 of 2018 that was unconstitutionally debated and passed by the National Assembly on 20th September, 2018 and ratified by the Speaker of the National Assembly and assented by the President).

c) Pending the hearing and determination of this application and/or petition herein the Honourable court be pleased to issue interim conservatory orders declaring the decision of the Speaker and temporary Deputy Speaker, Ms. Soipan Tuyu as she was then, null and void therefore the status quo of the Finance Act, 2016 maintains.

d) This Honourable court be pleased to declare that the Finance Bill (National Assembly Bill No. 20 of 2018) was debated and passed unprocedurally and is therefore invalid as it denies, violates, infringes or threatens the rights and fundamental freedoms in the Bill of Rights and is not justified by any limitation of rights and fundamental freedoms as envisaged by the Constitution.

e) This Honourable court be pleased to declare that the petitioners/applicants have a right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and the respondents have a duty to observe this right in executing their legislative mandate.

f) This Honourable court be pleased to issue the judicial review order of mandamus compelling the Speaker of the National Assembly to conduct another voting exercise in accordance with right to Fair Administrative Action as envisaged in the Constitution of Kenya 2010, the Fair Administrative Action Act, 2015 and the Standing Orders of Parliament, 2013.

g) Costs do issue in favour of the petitioners herein.

2. In opposition to the said petition, the 1st and 2nd respondents filed a notice of preliminary objection dated 8th October 2018 in which

they listed the following grounds;

1) The 1st and 2nd respondents are joined in this petition in their personal capacities for presiding over proceedings of the National Assembly despite being entitled to parliamentary privilege and immunities under Article 117 of the Constitution 2010 and Section 12 of the Parliamentary Powers and Privileges Act No. 29 of 2017.

2) These proceedings violate the decision of the Supreme Court of Kenya in Supreme Court Petition No. 32 of 2014; Justus Kariuki Mate & another v Martin Nyaga Wambora & Another [2017] e KLR that members of the legislature and their Speakers are protected from judicial proceedings for the act done in the performance of their legislative functions.

3) In light of the foregoing, the petition herein is bad in law and is liable to be struck out by this Honourable Court with costs to the 1st and 2nd respondents.

3. Parties thereafter filed written submissions to the preliminary objection.

Petitioners' submissions

4. Mr. Kuyoni, learned counsel for the respondents submitted that under Article 117 of the Constitution and Section 12 of the Parliamentary Powers and Privileges Act the 1st and the respondents are entitled to Parliamentary privilege and immunities and are therefore precluded from being enjoined in this petition in their personal capacities for presiding over proceedings in the National Assembly. Counsel relied on the Supreme Court's decision in the case of Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another, [2017] eKLR wherein it was held that members of the legislature and their speakers are protected from judicial proceedings for acts done in the performance of their legislative functions.

5. Counsel also cited the case of Teng Chang Kim vs Badrul Hisham Bin Abdullah & Another, Malaysia Civil Appeal No. 01(F)-26-08/2016 where the Supreme Court of Malaysia, in considering the issue of immunity of parliament from judicial interference held:

“Thus, there can be doubt that the business of parliament and state legislative assemblies are immune from judicial interference. The courts have no power to interfere with the internal management of Parliament or any state legislative assembly. The immunity arises from the doctrine of separation of powers between the three principal arms of government namely the executive, the legislature and the Judiciary.

In conclusion, we are of the view that in the present case, the Speaker was acting within the limits of the power given to him under Article 69 of the Selangor Constitution when he declared the N64 Relabuhan Klang Constituency seat vacant. Even though the declaration was made outside the SLA proceedings, it was inevitably connected with the essential business of SLA, made within the parameters set out in Article 69 of the Selangor Constitution and was made to regulate the internal affairs of SLA. Consequently, we rule that the Speaker's act is non-justiciable and the Speaker is entitled to the protection of Parliamentary privilege enjoyed by the SLA as provides for under Article 72(1) of the Federal Constitution and paragraphs 2 and 3 of the Schedule of Article 77 of the Selangor Constitution.”

6. Counsel further submitted that the 1st and 2nd respondents acted in their official capacity as speakers and that by dint of Article 117 of the Constitution and Section 12(2) of the Parliamentary Powers and Privileges Act, they are entitled to immunity and that the petition against them is therefore bad in law and should be dismissed with costs.

Petitioner's Submissions

7. The 3rd petitioner submitted that under Article 165(3) of the Constitution, this court has supervisory jurisdiction over other bodies and that the conduct of the speakers was therefore subject to the scrutiny of this court. The 3rd petitioner urged the court to interpret the constitution liberally, and holistically. For this argument the 3rd petitioner cited the case of Ndyanabo vs Attorney General and Kigula & Others vs Attorney General [2001] EA 495 wherein the court held that all the provisions of the Constitution should be considered as a whole.

8. He further submitted that the actions of the speakers fell short of the provisions Fair Administrative Actions Act and that the court therefore has powers to interfere with the legislative process. The petitioners also submitted there was a distinction between the instant petition and the cases cited by the respondents which they observed were not relevant to this case.

Analysis and determination

9. I have considered the preliminary objection raised by the respondents and the petitioners response thereto. The main issue for determination is whether the 1st and 2nd respondents, can in the discharge of their functions as the Speakers of the National Assembly, be sued in their individual capacities. In essence, this court is required to determine if the preliminary objection raised by the respondents is merited. In the celebrated case of Mukhisa Biscuits Manufacturing Company Ltd. vs. West End Distributors Ltd. [1969] E.A. 696—the Court of Appeal said:-

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

10. In the instant case, it has not been disputed that the 1st and 2nd respondents have been sued in their individual/private capacities. In other words, it is not the respective offices of the Speaker and the Deputy Speaker of the National Assembly that have been sued in this petition but rather, the respective holders of those offices.

11. A finding on whether or not the 1st and 2nd respondents have been properly enjoined in these proceedings will have the effect of determining the dispute between them and the petitioners and I therefore find that the preliminary objection is well founded.

12. Turning to the merits of the objection, I note that Article 117 of the Constitution stipulates as follows:

1. There shall be freedom of speech and debate in Parliament

2. Parliament may, for the purpose of the Orderly, and effective discharge of the business of Parliament provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members.

13. Section 12(2) of the Parliamentary Powers and Privileges Act No. 29 of 2017 on the other hand provides as follows:

(2) No civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office.”

14. It is not disputed that the instant petition is founded on the role that the 1st and 2nd respondents played during the debate that took place in the National Assembly on 20th September 2018 that culminated in the passing of the Finance Bill 2018.

15. Clearly, therefore, the 1st and 2nd respondents have been enjoined in these proceedings because of the role that they played as Speakers during the said debate. Section 12(2) of the Parliamentary Powers and Privileges Act is clear that on the issue of the immunity of the 1st and 2nd respondents from civil suits for any act done or ordered by them in the discharge of the functions of their office. My take is that immunity that is envisaged under Section 12(2) of the Act is not blanket immunity to the National Assembly from being interrogated for any act said to be done pursuant to the provisions.

16. I have to make it clear that pursuant to the constitution all public and state officers and organs including the legislature and the executive are subject to the courts’ scrutiny in the performance of their constitutional roles. This was the finding of the Court of Appeal in the case of **Martin Nyaga Wambora –vs Justus Kariuki Mate & Another [2014] eKLR.**

17. In the present case however, the objection is not on whether or not the actions of the National Assembly can be interrogated, but rather whether in so doing the speakers can be held personally liable and hence be sued in his/her individual capacity in the exercise of his/her functions as speaker.

18. My finding is that Section 12(2) of the Act is clear on the immunity of the Speakers and needs no further explanation. I therefore find the instant preliminary objection is merited and I allow it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 29th day of November 2018.

W. A. OKWANY

JUDGE

In the presence of:

2nd petitioner present

3rd petitioner present

Mr Angaya for the respondents and the 2nd and 3rd petitioners

Court Assistant- Kombo