



**Orwoba v Attorney General & 4 others (Petition 2 of 2024) [2025] KEHC 49 (KLR)  
(Constitutional and Human Rights) (15 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 49 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 2 OF 2024**

**LN MUGAMBI, J**

**JANUARY 15, 2025**

**(FORMERLY JUDICIAL REVIEW APPLICATION NO.1 OF 2024 & MACHAKOS  
HIGH COURT JUDICIAL REVIEW APPLICATION NO. E008 OF 2023)**

**BETWEEN**

**HON GLORIA MAGOMA ORWOBA ..... EXPARTE**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**CLERK OF THE SENATE ..... 2<sup>ND</sup> RESPONDENT**

**SPEAKER OF THE SENATE ..... 3<sup>RD</sup> RESPONDENT**

**SENATE COMMITTEE ON POWERS AND PRIVILEGES ..... 4<sup>TH</sup> RESPONDENT**

**THE SENATE ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. The Judicial Review Application was originally filed by the Ex-Parte Applicant at the High Court in Machakos.
2. Before then, the Ex-Parte Applicant had filed Petition E283 of 2023 in this Court where she had among others sought interim orders to stop the commencement of the 4<sup>th</sup> Respondent’s proceedings against her citing the 4<sup>th</sup> Respondent’s lack of jurisdiction to inquire into the allegations pertaining to her conduct her as the main ground. The interim conservatory orders were not given.



3. The 4<sup>th</sup> Respondent went on with the process and inquired into the conduct, completed the process and made recommendations to the 5<sup>th</sup> Respondent.
4. The Ex-Parte Applicant (now Petitioner), filed this Judicial Review Application at the Machakos High Court via Judicial Review Application and challenged, not jurisdiction any more, but the regularity of the proceedings conducted against her on the basis that the 4<sup>th</sup> Respondent had declined to supply her with the accusatory material and also refused to grant her time to prepare and defend herself.
5. Meanwhile, the Machakos JR Matter was transferred to this Court for hearing and final disposal.
6. In this Court, the Ex Parte Applicant (now Petitioner) filed a Notice of Motion Application dated 26<sup>th</sup> March 2024 seeking orders that:
  - i. Spent.
  - ii. This Court be pleased to order the Clerk of the Senate to supply the ex-parte applicant with all local and international travel records for current sitting senators as from September 2022 to date.
  - iii. The costs of this Application be provided for.
7. The Notice of Motion set out the the grounds for the Application and was supported by the affidavit of the Applicant and a further affidavit dated 25<sup>th</sup> June 2024. She deponed that she is a nominated senator under the United Democratic Alliance Party (UDA) and that she has been denied travel opportunities both locally and internationally to represent the 5<sup>th</sup> Respondent in spite of the 2<sup>nd</sup> Respondent granting those opportunities to specific senators to the exclusion of others without justification. She asserts that she has been the main victim of these discriminatory acts of the 2<sup>nd</sup> Respondent and that her efforts to seek an explanation of the same have been unsuccessful and met with contempt.
8. She stated that her attempt to be granted access to the records of all senators who had been granted those travel opportunities in order to demonstrate the alleged bias have not been successful.
9. She stated that on 7<sup>th</sup> August 2023, she appeared before the 4<sup>th</sup> Respondent with her advocate and sought the documents in relation to the allegations levelled against her so as to prepare her defense but the documents were not provided.
10. She avers that she saw the documents for the first time when the Respondents' filed their responses in the instant matter.
11. The Applicant is aggrieved at the mistreatment she has received arguing that it is not befitting for a person of her status and a representative of the vulnerable members in the society.
12. Moreover, she takes issue with the Respondents failure to accord her a fair hearing by supplying her with the requisite documents an in the end proceeding to condemn her unheard.
13. She confirms that she withdrew Petition No. E283 of 2023 that was pending before this Court through a Notice of Withdrawal dated 28<sup>th</sup> September 2023.

### **Ex Parte Applicant's Substantive Application**

14. The genesis of the Judicial Review Matter as already been alluded to. Upon its filing on the 28<sup>th</sup> September 2023 filed at Machakos High Court under Judicial Review Miscellaneous Application No. E008 of 2023 and securing interim relief, the Petitioner withdrew Petition E283 of 2023 that was



pending before this Court and subsequent thereto, this Judicial Review was transferred to this Division hence Judgment.

15. The Applicant sought the following relief therein:
- i. Spent.
  - ii. The Applicant be granted leave to apply for:
    - a. An order of certiorari to bring into this Court and quash the Recommendations by the 4<sup>th</sup> Respondent dated 9<sup>th</sup> August 2023, tabled and laid on the table of the House on the 20<sup>th</sup> September 2023 and debated and adopted as a resolution of the 5<sup>th</sup> Respondent purporting to:
      1. Suspend the ex parte applicant from the service of the Assembly for the remainder of the second session of the 13<sup>th</sup> Parliament from the date of adoption of the impugned Report of the 5<sup>th</sup> Respondent.
      2. Bar the Ex parte applicant from the Assembly precincts for the remainder of the second session of the 13<sup>th</sup> Parliament from the date of adoption of the Report by the 5<sup>th</sup> Respondent being the 20<sup>th</sup> September 2023.
      3. On resumption to offer an apology to the 2<sup>nd</sup> to 5<sup>th</sup> Respondents.
    - b. An order of prohibition directed at the Respondents in particular the 2<sup>nd</sup> to 5<sup>th</sup> Respondents prohibiting and restraining them from implementing the Report of the 4<sup>th</sup> Respondent dated 9<sup>th</sup> August 2023, tabled and laid on the table of the House on the 20<sup>th</sup> September 2023 and debated and adopted as a resolution of the 5<sup>th</sup> Respondent.
    - c. An order of mandamus compelling the Respondents to comply with and give effect to Articles 10, 27, 31, 33, 36, 47, 50 and 117 of *the Constitution*.
  - iii. The grant of leave herein do operate as stay of the suspension of the ex parte applicant, barring the ex parte applicant from the Assembly precincts for the remainder of the second session of the 13<sup>th</sup> Parliament from the date of adoption of the Report by the 5<sup>th</sup> Respondent being 20<sup>th</sup> September 2023 and requirement that on assumption of duty, on resumption to offer an apology to the 2<sup>nd</sup> to 5<sup>th</sup> Respondents' pending the hearing and determination of the substantive application.
  - iv. Costs of this application be in favour of the Applicant.

### **The Applicant's Case**

16. The Applicant depones that on 27<sup>th</sup> July 2023, she made a personal statement divulging the harassment she had undergone at the behest of the 2<sup>nd</sup> and 5<sup>th</sup> Respondents.
17. In reaction, the 2<sup>nd</sup> Respondent vide a letter dated 3<sup>rd</sup> August 2023 summoned the Applicant for a hearing set for 7<sup>th</sup> August 2023 to inquire into her allegations before the 4<sup>th</sup> Respondent.
18. The Applicant states that considering that 2<sup>nd</sup> Respondent was one of the perpetrators, she chose to file the Petition dated 4<sup>th</sup> August 2023 seeking to quash the 2<sup>nd</sup> Respondent's correspondence as the same did not amount to breach of privilege.



19. She nevertheless proceeded to appear before the 4<sup>th</sup> Respondent on 7<sup>th</sup> August 2023 only for purposes informing the 4<sup>th</sup> Respondent that the matter was now pending before the Court and to request for the supply of the relevant documents so as to prepare her defense.
20. The Applicant asserts that the 4<sup>th</sup> Respondent failed to issue her with the requested documents and proceeded to conduct the hearing without her participation. The 4<sup>th</sup> Respondent's recommendations were eventually presented to the 5<sup>th</sup> Respondent for adoption which was also done in her absence while she was out of the Country.
21. It is her assertion that the Respondent's actions were plainly geared towards denying her an opportunity to be heard and respond to the allegations as is required in a fair hearing.
22. She depones that she was as a result suspended from the House for the remainder of the second session of the 13<sup>th</sup> Parliament.
23. She contends that the Respondents' actions were illegal and unjust as she was never granted an opportunity to respond to the allegations.
24. For this reason, she seeks the Court's assistance as she fears that she will lose her Parliamentary seat for being absent and also tarnishing of her reputation.

#### **1<sup>st</sup> Respondent's case**

25. This Party as per the Court record did not participate in this matter.

#### **2<sup>nd</sup> to 5<sup>th</sup> Respondents' Case**

26. In response to the substantive application and the Notice of Motion Application filed before this Court on 26<sup>th</sup> March 2024, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents relied on the Replying Affidavit of Eunice Gichangi deponed on 19<sup>th</sup> October 2023.
27. She stated that the *Parliamentary Powers and Privileges Act*, 2017 provides in the Fourth Schedule a Code of Conduct for the Members of Parliament and Paragraph 8 thereof requires all members of Parliament to treat each other with respect.
28. That contrary to the Applicant's assertion, the 4<sup>th</sup> Respondent is empowered to not only enquire into acts within the precincts of Parliament but also the conduct of the members of Parliament.
29. She deponed that on 1<sup>st</sup> August 2023, the 4<sup>th</sup> Respondent noted that the Applicant had made various allegations on the Senate Business WhatsApp group and her personal WhatsApp status, that touched on Senate business. The Applicant/Petitioner additionally made similar allegations in media briefing held on 27<sup>th</sup> July 2023.
30. Consequently, at a meeting held on 3/3/2023 pursuant to Section 15(5) of *Parliamentary Powers and Privileges Act*, the 4<sup>th</sup> Respondent resolved to inquire into the Applicant's/Petitioner's conduct and summoned her to appear before it. The 4<sup>th</sup> Respondent is required to table a Report of such proceedings before the House within 14 days.
31. On 4<sup>th</sup> August 2023 the Ex-Parte applicant requested for the Hansard Recording of a several documents to wit: the audio and visual recording of her media briefing at the Media Centre and personal statement during the plenary both dated 27<sup>th</sup> July 2023; Audio and Transcripts of meeting of the 4<sup>th</sup> Respondent on 3<sup>rd</sup> August 2023; Senate Business WhatsApp Group since creation and Senate



- Social Chat Room WhatsApp group since creation. The deponent confirms that the documents were provided to the Ex- Parte Applicant.
32. The Ex- Parte Applicant thereafter appeared before the 4<sup>th</sup> Respondent on 7<sup>th</sup> August 2023 seeking documentation pertaining to the allegations and additional time to prepare for her case. The 4<sup>th</sup> Respondent in addition to furnishing the sought information granted the Applicant's request by adjourning the matter to 9<sup>th</sup> August 2023.
  33. She further depones that on the material date of 7/8/2023 that the Applicant appeared before the 4<sup>th</sup> Respondent, she declined to participate in the proceedings stating that the proceedings were sub judice and that the Committee lacked jurisdiction to entertain the matter. Likewise, the Applicant accused the 4<sup>th</sup> Respondent being biased with a premeditation before walking out.
  34. The Respondents thus deny the Applicant's allegations of breach of her constitutional rights and assert that the 4<sup>th</sup> Respondent granted the Applicant an opportunity to be heard which she declined hence its decision to conduct the hearing in her absence.
  35. She avers that in the end, and after considering the evidence in the matter, the 4<sup>th</sup> Respondent found that the Applicant/ Petitioner's conduct was in breach of privilege and the Code of Conduct for the Members of Parliament. The 4<sup>th</sup> Respondent proceeded to table the Report before the House on 9<sup>th</sup> August 2023. Soon after, the debate of the Motion on 10<sup>th</sup> August 2023 and 20<sup>th</sup> September 2023; the 5<sup>th</sup> Respondent by resolution adopted the 4<sup>th</sup> Respondent's recommendations. This decision was afterward communicated to the Applicant/Petitioner.
  36. The Respondents aver in the light of the doctrine of separation of powers, this Court should exercise restraint in questioning Parliamentary Procedures as was held by the Supreme Court in Speaker of National Assembly v Attorney General & 3 others (2013) eKLR.
  37. That the Applicant filed multiple suits in this matter which is an abuse of the Court process and equates to forum shopping. This assertion was made in relation to Nairobi High Court Petition No.E283 of 2023 wherein she sought conservatory orders with a view to bar the 4<sup>th</sup> Respondent proceedings. It is said that when the matter came for mention, the Court directed that the Applicant amend her Petition as by then the 5<sup>th</sup> Respondent had adopted the 4<sup>th</sup> Respondent's recommendation.
  38. It is stated that instead of amending the Petition, the Applicant proceeded to file Judicial Review Application No. E008 of 2023 and failed to inform the Court of the pending Petition. Subsequently, the Court on 28<sup>th</sup> September 2023 issued Orders staying implementation of the 5<sup>th</sup> Respondent's resolution.
  39. It is contended that it is then that the Applicant withdrew the Nairobi High Court Constitutional Petition Number E283 of 2023 on the 3<sup>rd</sup> October 2023.
  40. To this end, it is contended that the application lacks merit and hence should be dismissed with costs to the 2<sup>nd</sup> to 5<sup>th</sup> Respondents.

## **Parties Submissions**

### **Applicant's Submissions**

41. The Applicant filed submissions dated 25<sup>th</sup> June 2024 through Kalwa and Company Advocates.



42. She submitted that under Article 50(1) of *the Constitution*, she is entitled to a hearing that is fair and public. It was stressed that this right also encompasses the right to a fair administrative action as stipulated under Article 47 of *the Constitution*.
43. Reliance was placed in *Mukenyay v Evansa Pkemei Lomanduny & Another (2022) eKLR* where it was noted that for a hearing to be fair, a party must be afforded a fair opportunity and the necessary instruments to actualize it.
44. Counsel stressed that the Applicant's rights under these provisions had indeed been violated by the 2<sup>nd</sup> to 5<sup>th</sup> Respondents as the Respondents failed to supply the Applicant with the requested documents to prepare her case and make an appropriate response.
45. Counsel stressed that the Applicant saw those documents for the first time when the Respondents filed their Replying Affidavit to the substantive Application. Refuting the Respondents' assertion that these documents were supplied to the Applicant, Counsel insisted that the Respondents adduce evidence to the effect that service was done whether by email correspondence or acknowledgment receipt or a rubber stamp by the Applicant's office.
46. In view of the foregoing, Counsel submitted that it was evident that the Applicant had not been granted a fair hearing. Further that these Respondents being in breach of *the Constitution* warrants this Court's intervention as observed by the Supreme Court in *Speaker of National Assembly (supra)*.
47. Counsel as well submitted that the Applicant's Notice of Withdrawal dated 28<sup>th</sup> September 2023 to Petition E283 of 2023 was duly served on all the parties and acknowledged. Counsel further stated that the right of a party to withdraw a suit is well founded and provided for in law. Counsel relied in Order 25, Rule 1 of the Civil Procedure Rules.
48. On whether this notice is supposed to be endorsed by the Court to be effective, Counsel relied in *Beijin Industrial Designing and Researching Institute v Lagoo Development Ltd (2015) eKLR* where the Court of Appeal held that:
 

“...A party's right to withdraw a matter before the Court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”
49. Comparable dependence was placed in *Pil Kenya Limited vs Joseph Oppongo (2009)eKLR* and *Kofinaf Company Ltd & another vs Nahasho Ngige Nyagah & 20 others(2017)eKLR*.

### **2<sup>nd</sup> to 5<sup>th</sup> Respondents Submissions**

50. On 26<sup>th</sup> March 2024, Counsel Edward Libendi filed submissions in support of these Respondents' case. Counsel identified the issues for determination as:
 

“whether the Applicant was accorded the right to fair administrative action and right to fair hearing; in view of the doctrine of Separation of Powers, whether the decision of the 4<sup>th</sup> and 5<sup>th</sup> Respondents warrant the intervention of this Court; and whether the Applicant filed the Judicial Review Application herein in abuse of court process.”
51. On the first issue, Counsel relied on the averments in the Respondents' Replying affidavit and submitted that the 4<sup>th</sup> Respondent had afforded the Applicant a fair hearing and fair administrative action.



52. It was stressed that the Applicant is the one who elected to waive her right by refusing to participate in the 4<sup>th</sup> Respondent's proceedings. As such, it was submitted that the 4<sup>th</sup> Respondent complied with the law and that the Applicant had failed to establish any procedural impropriety on the Respondents part.
53. Reliance was placed in *Republic v Kenyatta University Ex parte Martha Waihuini Ndungu* [2019] eKLR where it was stated as follows:
- “ 41. Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order or a decision is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it. Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made...
43. Subsection 4 further obliges the administrator to accord affected persons opportunity: - to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him.”
54. On the next issue, Counsel submitted that the doctrine of separation of powers with regard to a Court's interference of other arms of government functions has been discussed severally. Counsel cited the case of *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR where it was held that:
- “From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of *the Constitution* allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate allocation under *the Constitution*, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care in determining the merits of each case.”
55. Like dependence was placed in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* (2013)eKLR and *Civil Appeal No. 11 of 2018 Pevans East Africa Limited and another v Chairman, Betting Control and Licensing Board and 7 others*.
56. In view of the foregoing, Counsel submitted that the 4<sup>th</sup> Respondent is empowered by the *Parliamentary Powers and Privileges Act* enacted pursuant to Article 117 of *the Constitution*, to regulate admittance and conduct within the precincts of Parliament. Its functions are stipulated under Section 15(4) and (5) of the Act where it is empowered to inquire into the conduct of a member whose conduct is alleged to constitute breach of privilege in terms of Section 16.
57. Accordingly, Counsel emphasized that the Act empowers the Parliament and its Committees to regulate its own internal affairs and discipline persons found guilty of breach of its laws such as the



Applicant's case. Considering this, Counsel submitted that this Court would be in breach of this doctrine if it interferes with this matter.

58. To buttress this point reliance was placed in Speaker of the Senate (*supra*) where the Supreme Court held that:

“It makes practical sense that the scope for the Court’s intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of the exigency of each case. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of *the Constitution*. 62. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.”

59. Like dependence was placed in *Mate & another vs. Wambora & another* [2017] KESC 1 (KLR).
60. Moving to the next issue, Counsel pointed out that the Applicant moved the High Court at Machakos while the Petition filed at the High Court in Nairobi was still pending. Further that it was upon being granted conservatory orders before 28<sup>th</sup> September 2023 that the Applicant purported to withdraw the other matter in Nairobi.
61. Counsel in light of this stated that it is trite law that a litigant has no right to pursue two processes which will have the same effect in two courts with a view of obtaining victory in one or both. For this reason, Counsel stressed that the instant matter ought to be struck out for being an abuse of the Court process.
62. Reliance was placed in *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR where it was held that:

“Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

It is not open for the applicant herein to institute these Judicial Review proceedings after losing the Petition challenging the same criminal trial. The two processes are in law not available to the applicant. He ought to have appealed against the above-mentioned decision if he was dissatisfied. The Applicant cannot lawfully file this Judicial Review proceedings and seek similar reliefs relying on substantially the same grounds as the Petition referred to above. The pursuit of the second process, that is this Judicial Review Application constitutes and amounts to abuse of court/legal process.”

63. Equal dependence was placed in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR.
64. To this end, Counsel submitted that the Applicant is not entitled to the relief sought as the 4<sup>th</sup> and 5<sup>th</sup> Respondents followed the due process provided in law in handling the Applicant's case. As such Counsel emphasized that as long as the process followed is lawful, a Court cannot interfere.



65. Reliance was placed in Republic v Kenyatta University Ex parte Martha Waihuini Ndungu [2019]eKLR where it was held that:

“Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved.”

66. Like dependence was placed in Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR.

### **Analysis and Determination**

67. Having considered the parties case, it is my humble opinion that the key issues that arise for determination are as follows:

- i. Whether this case offends the doctrine of separation of powers.
- ii. Whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents violated the Applicant’s rights under Article 47 and 50 of *the Constitution*.
- iii. Whether the Applicant is entitled to the reliefs sought.

### **Whether this Petition/JR offends the doctrine separation of powers.**

68. The simple explanation about the doctrine of separation of powers in principle is that arms of government have the latitude to discharge their defined mandates without unnecessary intrusion by the other or others.

69. This principle received judicial elucidation in Justus Kariuki Mate & another (supra) where the Supreme Court expounded thus:

“(57) The Court of Appeal, in the case of Mumo Matemu v. Trusted Society of Human Rights Alliance & 2 Others, Civil Appeal No 290 of 2012, [2013] eKLR, adopted the High Court’s dicta, in the following terms:

“[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet, as the respondents also concede, the Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions...”



70. The Court proceeded to unequivocally guide as follows at paragraph 63:

- “(63) From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:
- a. each arm of Government has an obligation to recognize the independence of other arms of Government;
  - b. each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;
  - c. the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;
  - d. for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;
  - e. in the performance of the respective functions, every arm of Government is subject to the law.”

71. The Court of Appeal in the *Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission* [2013] KECA 445 (KLR) which case was cited by the Supreme Court with approval had held thus:

- “(49) It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other’s functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court’s dicta in the petition the subject of this appeal that:

“[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions...”

72. From the above judicial exposition, it is manifest that the exercise of the power to check and balance other arms of Government does not permit an arm of Government to usurp or meddle with the



mandate or function of another arm. For the Court, its intervention in a constitutional democracy is permitted only where violation of *the Constitution* or the law is in issue since as observed by the Supreme Court ‘the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies’

73. However, this comes with some measure of reflection about the need to maintain the balance in a Constitutional democracy as observed by the Supreme Court. The Supreme Court clarified:

“...but this is attended with the duty of objectivity and specificity, in the exercise of judgment... ‘for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case’

74. In the instant case, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents urge this Court to exercise restraint and uphold the principle of separation of powers on the basis that the issue at hand concerns the application of Internal Parliamentary Procedures; that is, enforcing the Code of Conduct for the Members of Parliament contained in the Fourth Schedule and mandated by the Parliamentary Powers & Privileges Act, 2017.

75. According to the 2<sup>nd</sup> to 5<sup>th</sup> Respondent’s narration, the Applicant made certain remarks in the Senate Business WhatsApp Group and her own Personal WhatsApp Account on 1/8/2023 and issued a media briefing on 27/7/2023 which were considered matters that had to be inquired into under the Code of conduct for Members of Parliament. This therefore prompted the 4<sup>th</sup> Respondent (Committee of Powers and Privileges) to meet on 3/8/2023 pursuant to Section 15 (5) of the *Parliamentary Powers and Privileges Act* after which it resolved to conduct an inquiry into the Applicant’s/Petitioner’s conduct.

76. The Applicant was summoned to the meeting of the 4<sup>th</sup> Respondent on 7/8/2023 during which she asked for documents in relation to the matter under inquiry and further requested for more time to prepare her defence and thus the matter was pushed to 9/8/2023. At the same time, the Applicant protested the jurisdiction of the 4<sup>th</sup> Respondent and further insisting that the matter was sub judice as she had filed a Petition before Court touching on the matters in question. She also expressed her fears of biased outcome.

77. The Ex-Parte Applicant in her pleadings and affidavit in fact admits that she declined to take part in the proceedings of the 4<sup>th</sup> Respondent because the specific allegations she had made were against the 2<sup>nd</sup> Respondent who was actively engaged in the proceedings against her. She further alleges that the documents she asked to prepare for her defence were in fact never supplied and she only saw them for the first time as part of what was annexed in the Respondent’s replying affidavit.

78. It is imperative in examining this matter to refer to the relevant provisions of the *Parliamentary Powers and Privileges Act*. Before that, it is equally important to underscore that this Act is enacted pursuant to Article 117 (2) of *the Constitution* which provides thus:

“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 the committees and members.”

79. The underlying purpose or intention behind the Act is to facilitate ‘orderly and effective discharge of the business of Parliament.’



80. Section 15 of the *Parliamentary Powers and Privileges Act* Cap 6 establishes the Committee of Powers and Privileges (4<sup>th</sup> Respondent) and defines its mandate as stipulated below:

Section 15. Committee of Powers and Privileges

- (1) There is established, for each House of Parliament, a committee known as the Committee of Powers and Privileges consisting of—
  - (a) in respect of the National Assembly—
    - (i) the Speaker who shall be the chairperson of the Committee; and
    - (ii) fourteen other members of the House appointed in accordance with the Standing Orders of the Assembly;
  - (b) in respect of the Senate—
    - (i) the Speaker who shall be the chairperson of the Committee; and
    - (ii) six other members of the House appointed in accordance with the Standing Orders of the Senate.
- (2) The quorum of the Committee shall—
  - (a) in the case of the National Assembly, be the Speaker and four other members; and
  - (b) in the case of the Senate, be the Speaker and two other members.
- (3) Subject to this Act and the Standing Orders of the relevant House of Parliament, the Committee shall regulate its own procedure.
- (4) The functions of the Committee of Powers and Privileges shall be to—
  - (a) inquire into the conduct of a member whose conduct is alleged to constitute breach of privilege in terms of Section 16;
  - (b) perform such other functions as may be specified in this Act.
- (5) The Committee of Powers and Privileges shall, either of its own motion or as a result of a complaint made by any person, inquire into the conduct of a Member whose conduct is alleged to constitute breach of privilege in terms of Section 16, within fourteen days of receipt of complaint.
- (6) The Committee of Powers and Privileges shall, within fourteen days of the conclusion of an enquiry, table its findings in the relevant House of Parliament together with such recommendations as it considers appropriate.
- (7) Each House of Parliament shall consider the report and recommendations by the Committee of Privileges in the manner set out in the Third Schedule.

81. Under Section 16; the Committee of Powers and Privileges may find may find the following to be conduct to constitute a breach of privilege. It states:

Section 16. Conduct constituting breach of privilege

The Committee of Powers and Privileges may find a member to be in breach of privilege if the Member —



- (a) contravenes Sections 25, 26 or 28;
  - (b) commits an act mentioned in Section 27(1)(a), (b) or (2) and (3)(d), (e), (f) or (g);
  - (c) wilfully fails or refuses to obey any rule, order or resolution of Parliament;
  - (d) contravenes any provision of the Speaker's orders issued under Section 38 of this Act; or
  - (e) conducts himself or herself in a manner which, in the opinion of the Committee on Powers and Privileges, is intended, or is likely to reflect adversely on the dignity or integrity of Parliament, or of the Members or to be contrary to the best interests of Parliament or its Members.
82. It follows therefore that the power to ensure the conduct of Members of Parliament conforms to the norms and standards of the Parliament is vested on the 4<sup>th</sup> Respondent (which is the Committee of Powers and Privileges). This Committee can act on its own motion or upon a complaint. Having noted incident in question, the 4<sup>th</sup> Respondent determined that an inquiry into the conduct of the Applicant/Petitioner was necessary and set in motion the process of inquiry.
83. The Applicant however protested the jurisdiction of the Committee of Powers and Privileges on the basis that the 2<sup>nd</sup> Respondent who wrote the letter of 3<sup>rd</sup> August, 2023 was the alleged misfeasor in the statement she had made and was thus determined on using the process commenced by the 4<sup>th</sup> Respondent to thwart her effort in exposing the matter.
84. In the verifying affidavit which she deponed on 28<sup>th</sup> September, 2023 in support of the Judicial Review Application she stated thus:
- 4: That alive to the fact that the 2<sup>nd</sup> Respondent who was the alleged misfeasor in my aforementioned statement, was using the 4<sup>th</sup> Respondent's to thwart my effort of exposing and putting sanity in parliament and I files a petition on 4<sup>th</sup> August, 2023 seeking among other prayers:
    - a. A declaration that summons by the 4<sup>th</sup> Respondent communicated by 2<sup>nd</sup> Respondent is null and void for violating articles 10, 27, 31, 33, 36 and 117 of *the Constitution*.
    - b. A declaration that the 4<sup>th</sup> Respondent can only investigate matters that happen within precincts of Parliament: and for connected purposes
    - c. An order of Certiorari to remove into this Court and quash the letter dated 3<sup>rd</sup> August, 2023 by the 4<sup>th</sup> Respondent issued by 2<sup>nd</sup> Respondent
    - d. An order of prohibition against the 4<sup>th</sup> Respondent whether by themselves, their employees, servants, agents or any other persons acting under them from holding any sitting to investigate the conduct of the Petitioner which constitutes breach of privilege as set out in the letter from 2<sup>nd</sup> Respondent dated 3<sup>rd</sup> August, 2023.
  - 5. The Court considered the application and certified the same as urgent directing the same be served upon respondent within 7 days and the respondents to file and serve within 7 days with mention date being fixed for 21<sup>st</sup> September, 2023 leave to applicant and mention for compliance on 21<sup>st</sup> September, 2023.
  - 6. That I appeared before the 4<sup>th</sup> Respondent on the 7<sup>th</sup> August 2023 immediately reminded them of the Court proceedings whose pleadings had already been served and requested for documents relating to allegations as well as sought additional time to enable me prepare adequately.



7. That despite informing the 4<sup>th</sup> Respondent of the matter pending determination in Court and requesting for documents exclusively in possession of the 4<sup>th</sup> Respondent to aid in preparing her defence. The 4<sup>th</sup> Respondent declined to accord her that opportunity and proceeded to conduct the hearing without her input.
85. In my view, the procedure and mandate granted to the 4<sup>th</sup> Respondent is intended to ensure that Parliament is able to enforce decorous conduct among Parliamentarians. In inquiring into conduct of the Members, the 4<sup>th</sup> Respondent was rightfully carrying out its mandate.
86. As long as in exercising that mandate, it complies with both statutory and constitutional requirements, this Court cannot interfere with the mandate unless the violation of *the Constitution* or the statute is proved.
87. If the process initiated by the 4<sup>th</sup> Respondent fell short of the laid down Constitutional and legislative thresholds, then the intervention by the Court cannot be argued to be an interference with the authority of Parliament by infringing on the doctrine of separation of powers because Parliament is also bound by the commands of *the Constitution* and this Court has a constitutional duty to ensure respect for *the Constitution* by all and sundry.
88. Article 2 (1) of our Constitution provides that “*The Constitution* is the Supreme law of the Republic and binds all persons and all State Organs at both levels of government” while Article 3 obligates “every person to respect, uphold and defend *the Constitution*.”
89. Further, Article 21 (1) of *the Constitution* states:
- “It is the fundamental duty of the State and every State Organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.”
90. Parliament is not exempted from the above obligation.
91. As held by the South African Constitutional Court in *Minister of Health and Others vs. Treatment Action Campaign and Others* (2002) 5 LRC 216;
- “The primary duty of courts is to *the Constitution* and the law, which they must apply impartially and without fear, favour or prejudice. *The Constitution* requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights... If it should hold in any given case that the state has failed to do so, it is obliged by *the Constitution* to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by *the Constitution* itself.”

**Whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents violated the Applicant’s rights under Article 47 and 50 of *the Constitution*.**

92. The primary consideration here is whether the 2<sup>nd</sup> to 5<sup>th</sup> Respondents violated the Applicant rights under Article 47 and Article 50 of *the Constitution*; in regard to the process undertaken by the 4<sup>th</sup> and 5<sup>th</sup> Respondents.
93. Article 47 of *the Constitution* provides as follows:
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
94. This right is further amplified by the provisions of the *Fair Administrative Action Act*, in particular Section 4 which provides thus:
- Administrative action to be taken expeditiously, efficiently, lawfully etc
- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
  - (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
4. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision
- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
  - (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - (d) a statement of reasons pursuant to section 6;
  - (e) notice of the right to legal representation, where applicable;
  - (f) notice of the right to cross-examine or where applicable; or (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to
- (a) attend proceedings, in person or in the company of an expert of his choice;
  - (b) be heard;
  - (c) cross-examine persons who give adverse evidence against him; and
  - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure
95. Section 7 (2) of the *Fair Administrative Action Act* further provides for grounds of review by the Court which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.



96. Furthermore; Article 50(1) of *the Constitution* provides that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

97. The weight attached of a fair administrative action as a constitutional right was underscored in the case of *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1 where the Court observed:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

98. In our own soil, Court of Appeal had the following to say in *Judicial Service Commission v Mbalu Mutava & another* [2015] KECA 741 (KLR)

“(19) In exercise of its powers under *the Constitution* or under legislation, public officers, state officers, state organs and independent bodies or tribunals may make decisions which may be characterized as judicial, quasi-judicial or administrative depending on the empowering provision of *the Constitution* or the law. The landmark decision of the House of Lords in *Ridge v. Baldwin* [1964] AC 40 clarified the law, that the rules of natural justice, in particular right to fair hearing, (*audi alteram partem* rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

the right to be heard by an unbiased tribunal.

the right to have notice of charges of misconduct

the right to be heard in answer to those charges.

On his part, Lord Reid when dealing with class of cases of dismissal from office “where there must be something against a man to warrant his dismissal” said at page 66:

“There, I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him what is alleged against him and hearing his defence or explanation.”



20. The right to fair hearing as a rule of natural justice, a part of the common law, has in modern times been variously described as “fair play in action”, justice of the common law”; “common fairness” “fairness of procedure” or simply as “duty to act fairly.”

As an example, in *Wiseman v Borneman* [1969] 3 All ER 275 in determining, inter alia, the question whether the principles of natural justice (right to fair hearing) had been followed Lord Morris of Borth-y-Gest denominated the issue as to one of whether the tribunal had “acted unfairly”.

So did Lord Denning MR in *Selvarajan v Race Relations Board* [1976] 1 All ER 12 when dealing with the procedure of bodies required to make investigation where he said at page 19:

“In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigations and the consequence which it may have on the person affected by it.”

There is scholarly debate and even judicial varying opinion as to whether natural justice is synonymous with the duty to act fairly and the application of the duty to act fairly in administrative law. On that question, Wade & CF Forsyth in the *Administrative Law*, 10th edition state at page 416 last paragraph, which I believe is the correct statement of the law, thus:

“But it is now clearly settled, as is indeed self-evident, that there is no difference between natural justice and “acting fairly” but that they are alternative names for a single but flexible doctrine whose content may vary according to the nature of the power and the circumstances of the case”.

99. Equally, the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 expressed this principle in the following way:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

100. The Court then went on to outline the factors that should be taken into consideration:

- “1. The nature of the decision being made and process followed in making it.
2. The nature of the statutory scheme and the term of the statute pursuant to which the body operates.
3. The importance of the decision to the individual or individuals affected.
4. The legitimate expectations of the person challenging the decision.



5. The choices of procedure made by the agency itself.”

101. In the instant case, the Applicant lamented that the Respondents, particularly, the 4<sup>th</sup> Respondent declined to supply her with the material that formed the basis of the inquiry into her and that the only time she came across that material was then the 2<sup>nd</sup> to 5<sup>th</sup> Respondent filed their responses before this Court.
102. In response, the 2<sup>nd</sup> to 5<sup>th</sup> Respondent insisted that the Ex-Parte Applicant was supplied with the materials she had requested for.
103. Under Section 4 (3) (g) of the Fair Administrative Actions Act; it is provided that ‘Where administrative action is likely to adversely affect the rights and fundamental freedoms of any person, the administrator shall give the person affected by the decision (g) “information, material and evidence to be relied upon in making the decision or taking the administrative action.”
104. There is however one critical consideration that this Court cannot overlook. From the word go, the Ex-Parte Applicant stated categorically and this fact is deponed in her affidavit that she was not recognizing the jurisdiction of the 4<sup>th</sup> Respondent in inquiring into her conduct. As a result, she declared that she was not going to participate in the inquiry process. That to me is the bottom line and not that the 4<sup>th</sup> Respondent had refused to give her the material she needed to take part in the inquiry. When she appeared on 7<sup>th</sup> and 9<sup>th</sup> that is the position she took and walked out on the 4<sup>th</sup> Respondent.
105. The Ex-Parte Applicant/Petitioner cannot thus approbate and reprobate. Having taken this very firm stance of not participating in the proceedings that were being conducted by the 4<sup>th</sup> Respondent, why would the Applicant/Petitioner turn around and accuse the 4<sup>th</sup> Respondent of denying her the opportunity to defend herself in proceedings which she explicitly stated she could not take part in?
106. The Petitioner/Ex-Parte Applicant was provided with the opportunity to appear and state her case, presumably, even raising all the manner of preliminary issues before the 4<sup>th</sup> Respondent but she instead opted not to participate and walked out on the 4<sup>th</sup> Respondent. Having voluntarily refused to participate, I find that there was no infringement of right to fair administrative action or the right to fair hearing in the circumstances of this case.
107. I thus dismiss this Petition/Judicial Review Application with costs to the Respondents.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF JANUARY, 2025.**

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**L N MUGAMBI**

**JUDGE**

