



**Kimanthi v Attorney General & another (Constitutional Petition  
2 of 2024) [2025] KEHC 11098 (KLR) (22 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11098 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CONSTITUTIONAL PETITION 2 OF 2024**

**RC RUTTO, J**

**JULY 22, 2025**

**BETWEEN**

**INNOCENT MUSUMBI KIMANTHI ..... PETITIONER**

**AND**

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

**NATIONAL ASSEMBLY OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**The Petition**

1. The petitioner described himself as a Kenyan citizen who brings this petition in the interest of the public by dint of Articles 22 and 258 of *the Constitution*. The 1<sup>st</sup> respondent is a State Office established pursuant to Article 156 of *the Constitution* of Kenya. It is the principal legal advisor of the National Government. The 2<sup>nd</sup> respondent is a legislative body established under Article 94 of *the Constitution*. Its primary responsibility is to enact legislation with the force of law in Kenya.
2. By a petition dated 6<sup>th</sup> February 2024, supported by his affidavit sworn on 2<sup>nd</sup> February 2024, the petitioner stated that on 25<sup>th</sup> January 2013, the 2<sup>nd</sup> respondent enacted the *Statutory Instruments Act* whose objective is to provide for the making, scrutiny, publication and operation of statutory instruments. The Act further defines statutory instruments.
3. The petitioner continued that since operationalization of the statute on 25<sup>th</sup> January 2013, most statutory instruments were set to expire on 25<sup>th</sup> January 2023. That however, on 29<sup>th</sup> November 2023, the 1<sup>st</sup> respondent, by dint of section 21 (2) of the Act, extended the validity period by one year, that would lapse on 25<sup>th</sup> January 2024. He continued that vide Gazette Supplement No. 94 of 2022, under the Statutory Instruments (Exemptions from Expiry) Regulations 2022, the 1<sup>st</sup> respondent gazetted a



total of 400 statutory instruments that were due for expiration on 25<sup>th</sup> January 2023, for extension of their validity period by an extra one year.

4. Thereafter, that the 2<sup>nd</sup> respondent, through section 89 of the Finance Act 2023, repealed section 21 of the *Statutory Instruments Act*. In effect, the 10-year validity period was quashed. The petitioner contended that the said Finance Act was challenged before the High Court in *Okoiti & 6 others vs. Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner General, Kenya Revenue Authority & 3 others (Interested Parties)* [2023] KEHC 25874 (KLR). In its judgment dated 28<sup>th</sup> November 2023, the High Court found that section 89 was unconstitutional. The declaration of its unconstitutionality was however suspended up to 10<sup>th</sup> January 2024. Come 26<sup>th</sup> January 2024, the Court of Appeal declined to extend the suspension.
5. In light of the Court of Appeal decision, the petitioner avowed that section 21 was in essence effective. As a consequence, its validity meant that over 1000 statutory instruments contained in 400 Acts of Parliament had expired. Unless an urgent intervention was made, the petitioner stated that extreme hardship was likely to occur to the general public for their inability to access various services absent Regulations that operationalize critical legislations.
6. Premised on the foregoing averments, the petitioner relied on the following provisions of *the Constitution*: Articles 2, 2(4), 10, 20, 22, 38, 40, 42, 48, 53, 55, 94 (5) & (6) and 258 as well as sections 13, 14 and 21 of the *Statutory Instruments Act*. He lamented that the provisions of section 14 of the *Statutory Instruments Act* gave powers to exempt instruments from scrutiny. In essence, that excluded certain instruments from checks in terms of whether they align with *the Constitution* and human rights and fundamental freedoms as set out in section 13, a protection afforded to the public.
7. The petitioner continued that by exempting scrutiny, the 2<sup>nd</sup> respondent's obligations were shrunk in terms of discharging its duties in Article 94 (6) of *the Constitution*. As a result, the principles of good governance as enshrined in Article 10 of *the Constitution* were violated. He decried that section 21 was too wide in scope for failing to monitor the age of various statutory instruments. It was therefore unconstitutional for offending Article 94 of *the Constitution*. This is because the sudden and unstructured expiry of critical statutory instruments had the potential effect of occasioning unprecedented difficulties and harm to the public in terms of access to public goods and services.
8. The petitioner asserted that the following statutory instruments had expired: the *Elections Act* (The Registration of Voters) Regulations 2012, the *Elections Act* (General) Regulations 2012, the Trade Marks Rules, the Environment (Impact Assessment and Audit) Regulations 2003, the National Environment Tribunal Procedure Rules 2003, the Environmental (Prevention of Pollution in Coastal Zone and other Segments of the Environment) Regulations 2003, the Environmental Management (Lake Naivasha Management Plan) Order 2004 and the Environmental Management and Co-ordination (Water Quality) Regulations 2006.
9. In addition, the Environmental Management and Co-ordination (Waste Management) Regulations 2006, the Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006, the Environmental Management and Co-ordination (Controlled Substances) Regulations 2007, the Environmental Management and Co-ordination (Wetlands, Riverbanks, Lakeshores and Seashore Management) Regulations 2009, the Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009, the Environmental Management and Co-ordination (Public Complaints Committee) Regulations 2012 and the Environmental Management and Co-ordination (Air Quality) Regulations 2014.



10. The petitioner asserted that by dint of expiry of the above statutory instruments, there was a breach of Articles 38, 40, 42 and 70 of *the Constitution* respectively. Explaining a breach of Article 43 for instance, the petitioner advanced that the Kenyatta National Hospital Board and the Moi Teaching and Referral Hospital Board's Orders expired on 25<sup>th</sup> January 2024. In effect, the absence of Boards of Directors gave rise to paralysis in the management of the two biggest hospitals in Kenya; threatening the right of access to health services.
11. On violation of Articles 53 and 55 of *the Constitution*, the petitioner explained that the Youth Enterprise Development Fund Board's Order had seemingly expired on 25<sup>th</sup> January 2024. Without it, management of the fund was likely to be in disarray as the youth will be unable to access credit to enhance their economic activities thereby hamstringing their economic wellbeing. Similarly, the expiry of the Kenya Institute of Education Council Order meant that the absence of the body was a violation of the rights of education to children.
12. Turning to Article 48, the petitioner observed that certain provisions of the Civil Procedure Rules, the Probate and Administration Rules and the Oaths and Statutory Declaration Rules had expired bringing to the fore a lacunae in terms of the public's access to justice.
13. In view of the above, the petitioner sought the following reliefs:
  - a. A declaration that the Respondents' action of failing to monitor and forestall the unstructured expiry of statutory instruments is a violation of Articles 94 (5) & (6) as well as 156 of *the Constitution* of Kenya 2010 and is a dereliction of duty and thus unconstitutional;
  - b. Section 14 of the Statutory Instrument Act is unconstitutional to the extent that it allows the 2<sup>nd</sup> respondent to exempt some statutory instruments from scrutiny by the National Assembly ensure (sic) compliance with *the Constitution*;
  - c. Section 21 of the *Statutory Instruments Act* is unconstitutional to the extent that it creates an unstructured expiry period for Statutory Instruments under the Act without providing a framework for monitoring of the statutory instrument to ensure their timely renewal to avoid exposing the public to uncertainty and regulatory hardship;
  - d. Section 21 of the *Statutory Instruments Act* is unconstitutional to the extent that it lacks clarity on the status of statutory instruments that are amended after their enactment in a piecemeal manner with substantive provisions of the instrument remaining generally unchanged;
  - e. Costs of the petition be awarded to the petitioner.

## The Response

14. From the record, the 2<sup>nd</sup> respondent is the only party that filed a response. It relied on the affidavit of Samuel Njoroge, the Clerk of the National Assembly, sworn on 8<sup>th</sup> February 2024. The affidavit echoed the 2<sup>nd</sup> respondent's mandate as set out in Articles 94 (5) & (6) of *the Constitution*. It was deponed that in line with its mandate, the 2<sup>nd</sup> respondent passed the *Statutory Instruments Act* 2013 whose role is set out in section 10 and Part IV. The Act also defines a statutory instrument at section 2.



15. That under section 21 of the Act, statutory instruments expire on the tenth-year post enactment. It continued that owing to the copious number of statutory instruments that were set to expire in 2023, the 2<sup>nd</sup> respondent deployed the following mitigating measures: first, 29<sup>th</sup> November 2022, the 2<sup>nd</sup> respondent approved the 1<sup>st</sup> respondent's extension of the operation of 400 statutes set to expire after ten years.
16. The 2<sup>nd</sup> respondent then sought to amend that section by including section 89 of the Finance Act 2023. However, the judgment of the court in *Okoiti & 6 others vs. Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner General, Kenya Revenue Authority & 3 others* (Supra) held that the amendment to section 21 of the *Statutory Instruments Act* was unconstitutional for being outside the parameters of a money bill under Article 114 (3) of *the Constitution*. This unconstitutionality finding was however suspended for 45 days pending an appeal to the Court of Appeal. The 2<sup>nd</sup> respondent filed an application for stay of execution of the judgment that was dismissed by the Court of Appeal on 26<sup>th</sup> January 2024.
17. The deponent stated that in light of that jurisprudence, section 21 of the *Statutory Instruments Act* was in full operation. Consequently, all statutory instruments set to expire on 24<sup>th</sup> January 2024 had lapsed. On 26<sup>th</sup> January 2024, the 1<sup>st</sup> respondent submitted to the 2<sup>nd</sup> respondent, through the leader of the Majority Party, a letter seeking to amend inter alia, section 21 of the *Statutory Instruments Act*.
18. That on 1<sup>st</sup> February 2024, the 2<sup>nd</sup> respondent published the Bill in the Kenya Gazette, seeking to cure the effects of section 21 of the Act. In it, clause 7, thereof, sought to delete the provisions of section 21 of the said Act. The 2<sup>nd</sup> respondent decried that following the effect of section 21 of the Act, confusion has been created with the subsistence of a gap in various statutes requiring subsidiary legislation for their implementation.
19. In view of the above, the 2<sup>nd</sup> respondent submitted that it was in the interest of the public for the orders to be granted to facilitate deliberation and probable enactment of legislation under review by the 2<sup>nd</sup> respondent. It also emphasized that if the orders sought are granted, the same will pave way for the 2<sup>nd</sup> respondent to fulfill its legislative mandate to repeal that section. It thus prayed that the petition be allowed.
20. A further affidavit by James Ngigi Githumbi, sworn on 24<sup>th</sup> January 2024 was filed. Supporting the petition, he described himself as the advocate for the petitioner. It regurgitated that section 89 of the Finance Act 2023 repealed section 21 of the *Statutory Instruments Act* to remove the 10-year validity cap. That however, pursuant to the decision in *Okoiti & 6 others vs. Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner General, Kenya Revenue Authority & 3 others* (supra), section 89 was declared unconstitutional on grounds that the Finance Act, being a money bill, was incapable of amending the provisions of the *Statutory Instruments Act*.

### **The submissions**

21. The petition was heard by way of written submissions. However, only the petitioner filed his written submissions which are dated 24<sup>th</sup> April 2025. He framed four issues for determination as follows: whether the respondents actions of failing to Monitor and Forestall the unstructured expiration of Statutory Instruments is a violation of Article 94(5), 94(6) and 156 of *the Constitution* of Kenya; whether Section 21 of the *Statutory Instruments Act* is unconstitutional to the extent that it creates an unstructured expiry period for Statutory Instruments under the Act; whether Section 21 of the Statutory Instrument Act is unconstitutional to the extent that it lacks clarity; and who should bear costs of this petition.



22. On the first issue, the petitioner submitted that Articles 94(5) and (6) of *the Constitution* gave the 2<sup>nd</sup> respondent authority to delegate its powers in line with *the Constitution*. In the spirit of avoiding abuse of that delegated power, the 2<sup>nd</sup> respondent enacted the provisions of the *Statutory Instruments Act*. Emphasizing on the cruciality of delegated legislation, the petitioner submitted that delegation ought to be met with proper implementation of statute. If such a legislation is allowed to expire, it means that its implementation will be greatly hampered to the detriment of the public.
23. In the present case, the petitioner observed that from the respondents' responses, no further action had been taken to avert the explosive effects of section 21 of the *Statutory Instruments Act* after 29<sup>th</sup> November 2023. Bearing the responsibility, the 2<sup>nd</sup> respondent was accountable for failing to advise the various delegates on impending expiration of the various statutory instruments with a requirement that they submit the statutory instruments to Parliament for consideration. As a result of the above failure, the petitioner and members of public, he submitted, were threatened with violations of several constitutional rights as set out in the petition.
24. The petitioner submitted that the failure of the respondents to monitor legislation exposed the public to threat of violation of rights and freedoms and also violation of *the Constitution*. It therefore urged this Court to find that the failure by the respondents to monitor the impending expiration was a violation of the Articles 95(4) and 95(6) of *the Constitution* of Kenya.
25. On the second issue, the petitioner took keen on the provisions of sections 13 and 14 of the *Statutory Instruments Act* to submit that once a statutory instrument is exempt by virtue of section 14 above, in essence, it was exempted from scrutiny in terms of ascertaining whether it violated any of the parameters set out therein. He argued that the danger with that provision was to sanction statutes that had the retrospectivity effect, violated *the Constitution*, contained matters that could only be dealt with by Parliament or infringed on the fundamental rights and freedoms of all and sundry. In effect, this was a violation of Article 10 of *the Constitution*.
26. The petitioner continued that the effect of section 14 shrunk the parliamentary responsibility of ensuring that all legal instruments are properly securitized. Furthermore, he interpreted that it served the purpose of reducing accountability on passing of legislation. The petitioner thus prayed that the provisions of sections 13 and 14 be declared unconstitutional and the purposed power to exempt be declared null and void.
27. On the third issue, the petitioner submitted that section 21 of the impugned Act was vague as it failed to create a structure intended to monitor the age of the statutory instruments to ensure that the process of renewal of the instrument is clear. In addition, it failed to provide for protection of accrued rights where a statutory instrument expires without a replacement instrument. Absent that, he submitted that statutory instruments would become prone to expiration without notice to great inconvenience to the public and other stakeholders.
28. The petitioner also submitted that the Statutory Instrument Act failed to spell out the effect of an amendment of a statutory instrument during its lifetime. It explained that an amendment to a statute may not operate retrospectively. For example, an instrument that is 8 years old and amended extensively on the 8<sup>th</sup> year would still suffer the expiry date noting the commencement date.
29. Lastly, the petitioner justified that since he had expended his resources and time to litigate, as admitted by the respondents, the petitioner was entitled to costs of this petition.



## Analysis and determination

30. I have keenly considered the petition, the affidavit in support alongside the annexures thereto as well as the affidavit in response. I have also given due consideration of the petitioner's written submissions. The crux of this petition revolves around the constitutionality of sections 14 and 21 of the Statutory Instruments Act which the petitioner wants declared unconstitutional.

31. The principles governing the interpretation of statutes were well elucidated by Mativo, J. (as he then was) in the case of Association of Retirement Benefits Schemes vs. Attorney General & 3 others [2017] KEHC 8534 (KLR) when he stated:

- i. Under Article 259 of the Constitution, the court is enjoined to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 159 (2) (e) of the Constitution to protect and promote the purposes and principles of the Constitution.
- ii. There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. (The court should start by assuming that the Act in question is constitutional).
- iii. In determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.
- iv. The Constitution should be given a purposive, liberal interpretation.
- v. That the provisions of the Constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.
- vi. The spirit of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.

The disposition of issues relating to interpretation of statutes and determining constitutional questions must be formidable in terms of some statutory and constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be ad hoc. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the case at hand. The privy council while interpreting the Constitution of Bermuda stated that a constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation. It is important to give full recognition and effect to fundamental rights and freedoms.



Lord Wilberforce, while delivering the considered opinion of the court in the above case observed:-

“A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms...”

The recognition of the sanctity of *the Constitution* and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in the case of Anthony Ritho Mwangi and another vs The Attorney General where the court stated:-

“Our Constitution is the citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, is not so, as it is obligated to observe and uphold the spirit and the majesty of *the Constitution* and the rule of law.”

Ringera J (as he then was) put it more succinctly when he observed that *the Constitution* is a living document and not like an Act of Parliament. Courts must be innovative and take into account the contemporary situation of each age but innovations must be supported by the roots. In this regard, I endorse fully the presumption of constitutionality which was powerfully expressed by the Supreme Court of India in the case of Hamdarddawa Khana vs Union of India Air where the respected Court stated:-

“In examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is,



therefore, in favour of the constitutionality of an enactment.”

My discernment from the foregoing jurisprudence is that in interpreting *the Constitution*, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

Statutory interpretation is the process by which courts interpret and apply legislation. The court interprets how legislation should apply in a particular case as no legislation unambiguously and specifically addresses all matters. Legislation may contain uncertainties for a variety of reasons such as:-

- a. Words are imperfect symbols to communicate intent. They can be ambiguous and change in meaning over time.
- b. Unforeseen situations are inevitable, and new technologies and cultures make application of existing laws difficult.
- c. Uncertainties may be added to the statute in the course of enactment, such as the need to compromise or catering for certain groups.

Therefore, a court must try to determine how a statute should be enforced, but I am alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully. There are numerous rules of interpreting a statute, but in my view and 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. Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete. The implication is that when the language is clear, then it is not necessary to belabour examining other rules of statutory interpretation.

In my view, 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.

The Supreme court of India in Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others observed that:-

“Interpretation must depend on the text



and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.”

In any event, one possible suggestion of the indeterminacy of canons is that statutory construction should be a narrow pursuit, not a broader one:-

”[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all



others....  
[C]ourts  
must  
presume  
that a  
legislature  
says in  
a statute  
what it  
means and  
means in  
a statute  
what it  
says there.  
When the  
words of a  
statute are  
unambiguous,  
then, this  
first canon  
is also the  
last:

“judicial  
inquiry is  
complete.”

A word in  
a statutory  
provision  
is to be  
read in  
collocation  
with its  
companion  
words.

The  
pristine  
principle  
based on  
the maxim  
noscitur a  
sociis  
(meaning  
of a word  
should be  
known  
from its  
accompanying  
or



associating  
words) has  
much  
relevance  
in  
understanding  
the import  
of words in  
a statutory  
provision.

In  
addition to  
being  
guided by  
rules of  
statutory  
interpretation,  
one key  
function  
of the  
court in  
interpreting  
a statute is  
the  
creation of  
certainty  
in law.  
Certainty  
in law  
enables  
planning  
of human  
affairs in  
reliance on  
the law,  
and the  
realization  
of  
expectations  
based on  
such  
planning.  
It makes  
for  
uniformity  
in the  
administration  
of justice,



and prevents the unbridled discretion of the judiciary. It makes available the tested legal experience of the past. The other key point for the court to consider while interpreting the law is to change and adapt the law to new and unforeseen conditions. Law must change because social institutions change. And in applying generalized legal doctrine, such as statutes, to the facts of specific cases uncertainties and unforeseen problems arise. As



conditions  
change  
with the  
passage of  
time, some  
established  
legal  
solutions  
become  
outmoded.  
The courts  
should  
resolve  
these  
uncertainties  
and assist  
in  
adapting  
the law  
to new  
conditions.

Finally  
while  
interpreting  
the law,  
the court  
should  
bear in  
mind that  
they  
should  
make laws  
when  
necessary  
to make  
the ends  
of justice.  
Legal  
systems  
world over  
could not  
grow as  
has been  
the case  
without a  
great  
amount of  
judicial



law  
making in  
all fields,  
Constitutional  
law,  
Common  
Law and  
statutory  
interpretation.  
However,  
to the  
extent that  
judges  
make laws,  
they  
should do  
so with  
wisdom  
and  
understanding.  
Judges  
should be  
informed  
on the  
factual  
data  
necessary  
to good  
policy  
making.  
This  
includes  
not only  
the facts  
peculiar to  
the  
controversy  
between  
the  
litigants  
before  
them, but  
also  
enough of  
an  
understanding  
of how  
our society



works so that they can gauge the effect of the various alternative legal solutions available in deciding a case.

In my view, there are two key assumptions relied by courts to explain and justify statutory interpretation.

One is the assumption that meaning in legislative texts is "plain" -- that is, clear and certain, not susceptible of doubt.

This assumption is the necessary basis for the plain meaning rule. The other assumption is that legislatures have



intentions  
when they  
enact  
legislation  
and these  
intentions  
are  
knowable  
by courts  
when  
called on  
to  
interpret  
legislation.

The great  
advantage  
of the plain  
meaning  
rule is that,  
in theory  
at least,  
it creates  
a zone of  
certainty --  
an  
interpretation-  
free zone,  
in effect.  
It tells the  
public that  
if the text  
is plain,  
it means  
what it says  
and it is  
safe to rely  
on it. This  
emphasis  
on text at  
the  
expense of  
intention  
ensures  
that the  
law is  
certain and  
that the  
public has



fair notice,  
both of  
which are  
prerequisites  
for  
effective  
law.

However,  
we need  
not forget  
that the  
touchstone  
of  
interpretation  
is the  
intention  
of the  
legislature.  
The  
legislature  
may reveal  
its  
intentions  
directly,  
for  
example by  
explaining  
them in  
a preamble  
or a  
purpose  
statement.  
The  
language  
of the  
text of  
the statute  
should  
serve as the  
starting  
point for  
any  
inquiry  
into its  
meaning.  
To  
properly  
understand



and interpret a statute, one must read the text closely, keeping in mind that the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.

Courts generally assume that the words of a statute mean what an “ordinary” or “reasonable” person would understand them to mean. I personally adhere to the principle that if the words of a statute are clear and unambiguous, the court need not



inquire  
any further  
into the  
meaning  
of the  
statute.

These  
principles  
are not  
new. There  
are  
important  
principles  
which  
apply to  
the  
construction  
of statutes  
which, in  
my view,  
also apply  
to the  
construction  
of a  
Constitution  
such as  
presumption  
against  
absurdity  
– meaning  
that a  
court  
should  
avoid a  
construction  
that  
produces  
an absurd  
result; the  
presumption  
against  
unworkable  
or  
impracticable  
result -  
meaning  
that a  
court



should  
find  
against a  
construction  
which  
produces  
unworkable  
or  
impracticable  
result;  
presumption  
against  
anomalous  
or illogical  
result, -  
meaning  
that a  
court  
should  
find  
against a  
construction  
that creates  
an  
anomaly  
or  
otherwise  
produces  
an  
irrational  
or illogical  
result and  
the  
presumption  
against  
artificial  
result –  
meaning  
that a  
court  
should  
find  
against a  
construction  
that  
produces  
artificial  
result and,



lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

In interpreting a statute, the court should give life to the intention of the



lawmaker  
instead of  
stifling it.”

32. The petitioner has urged this Court to find that sections 14 and 21 of the *Statutory Instruments Act* are unconstitutional. The facts giving rise to this petition are not disputed. On 25<sup>th</sup> January 2013, the 2<sup>nd</sup> respondent enacted the *Statutory Instruments Act*. The said statute was annexed to the petition.
33. The provisions of sections 14 and 21 of the *Statutory Instruments Act* were indicative that as at 25<sup>th</sup> January 2023, most statutory instruments were set to expire. On 29<sup>th</sup> November 2023, the 1<sup>st</sup> respondent extended the validity period by one year lapsing on 25<sup>th</sup> January 2024. Vide Gazette Supplement No. 94 of 2022, the 1<sup>st</sup> respondent gazetted a total of 400 statutory instruments due for expiration on 25<sup>th</sup> January 2023, for extension of their validity period by an extra one year.
34. Through section 89 of the Finance Act 2023, the 2<sup>nd</sup> respondent sought to repeal section 21 of the *Statutory Instruments Act*. The Finance Act 2023 was challenged before the High Court in *Okoiti & 6 others vs. Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner General, Kenya Revenue Authority & 3 others (Interested Parties)* [2023] KEHC 25874 (KLR). In its judgment dated 28<sup>th</sup> November 2023, the High Court found that section 89 was unconstitutional. The declaration of its unconstitutionality was however suspended up to 10<sup>th</sup> January 2024. Come 26<sup>th</sup> January 2024, the Court of Appeal declined to extend the suspension.
35. It is also common knowledge that the dispute regarding the amendment of section 21 of the *Statutory Instruments Act* by section 89 of the Finance Act 2023 was heard by the Supreme Court in *Cabinet Secretary for the National Treasury and Planning & 4 others vs. Okoiti & 52 others; Bhatia (Amicus Curiae)* [2024] KESC 63 (KLR). Addressing section 21 of the *Statutory Instruments Act*, the Apex Court pronounced itself as follows:
- “Consequently, the order that commends itself is an order setting aside the Court of Appeal’s judgment save for the finding that the questions relating to Sections 84 (Affordable Housing Levy) 88 and 89 (*Statutory Instruments Act*) of the Act were moot.”
36. Section 21 of the *Statutory Instruments Act* antecedently provided as follows:
1. “Subject to subsection (3), a statutory instrument is by virtue of this section revoked on the day which is ten years after the making of the statutory instrument unless- It is sooner repealed or expires; or A regulation is made exempting it from expiry.
  2. The responsible Cabinet Secretary may in consultation with the Committee, make a regulation under this Act extending the operation of a statutory rule that would otherwise be revoked by virtue of this section for a period as is specified in the regulation not exceeding twelve months;
  3. Only one extension of the operation of a statutory rule can be made under subsection (2).”
37. I had the benefit of looking at the *Statutory Instruments Act* as at the time I was writing this judgment. As it stands, section 21 reads: “repealed by *Act No 4 of 2023*, s. 89.” Gathered from the decision of the Supreme Court, as well as the provision having being repealed, I see no reason why I should dissect the same since it is an issue that has been determined by the Supreme Court. I therefore find



that the question of constitutionality of section 21 is rendered moot since it has already been repealed and secondly, was expounded sequentially by the High Court, the Court of Appeal and ultimately the Supreme Court.

38. Turning to section 14, the provision states as follows:

“Subject to section 16, the Committee may exempt certain statutory instruments or class of statutory instruments from scrutiny if the Committee is satisfied that the scrutiny is not reasonably practical due to the number of regulations in that class.”

39. In order to establish whether the provision is unconstitutional or otherwise, it is important to set out the scope, meaning and purpose of enacting the *Statutory Instruments Act* generally. That way, one will establish the root of section 14 in answering the question set out by the petitioner. In so doing, I am reminded of the provisions of Article 259 of *the Constitution* requiring the court to interpret *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance.

40. In interpreting that section, I am reminded of the general presumption that every statute is constitutional and the burden of proof lies on the propounder alleging the contrary. The assumption at this juncture is that section 14 of the *Statutory Instruments Act* is constitutional. It is also important to bear in mind that the meaning assigned to legislative texts is to be taken in its plain language in line with the plain meaning rule. Another assumption that I must bear in mind is that every legislation is enacted by design of intentions. Such intentions are knowable by courts when called upon to interpret legislation.

41. The intentions of legislature can be explained in the statute’s preamble and the language of the text. In understanding and interpreting a statute, I am called upon to read the text closing, bearing in mind that the initial understanding of the text may not be the only plausible interpretation of it or even the correct one. The texts must be construed from the lens of what an ordinary or reasonable person would rationalize the text. So much so that if the words are equivocal, the court does not have to inquire further into its meaning and do what is necessary for the ends of justice.

42. At its preamble, the *Statutory Instruments Act* is an Act of Parliament to provide for the making, scrutiny, publication and operation of statutory instruments. The objective of the Act is set out in section 4 as: to provide a comprehensive regime for the making, scrutiny, publication and operation of statutory instruments by imploring the following techniques:

- i. requiring regulation-making authorities to undertake appropriate consultation before making statutory instruments;
- ii. requiring high standards in the drafting of statutory instruments to promote their legal effectiveness, clarity and intelligibility to anticipated users;
- iii. improving public access to statutory instruments;
- iv. establishing improved mechanisms for parliamentary scrutiny of statutory instruments; and;
- v. establishing mechanisms to ensure that statutory instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed.



43. Part IV of the Act gives provisions for parliamentary scrutiny of statutory instruments. It covers the provisions of section 10 through to section 19 of the *Statutory Instruments Act*. The purpose of the part is set out in section 10 as being to facilitate the scrutiny by Parliament of statutory instruments and to set out the circumstances and manner in which the statutory instruments, or provisions of the statutory instruments, may be disallowed, as well as the consequences of the disallowance.
44. Looking at the above, what arises from the provisions of section 14 is to give an exception to the general rule. Generally speaking, all statutory instruments are to undergo scrutiny by Parliament. However, the Committee has discretionary power to exempt certain statutory instruments, or a class of the same, if the Committee is satisfied that the scrutiny is not reasonably practical due to the number of Regulations in that class.
45. According to the petitioner, section 14 gave powers to exempt instruments from scrutiny. In essence, that excluded certain instruments from checks in terms of whether they align with *the Constitution* and human rights and fundamental freedoms as set out in section 13. That by exempting scrutiny, the 2<sup>nd</sup> respondent's obligations were shrunk in terms of discharging its duties in Article 94 (6) of *the Constitution*. As a result, the principles of good governance as enshrined in Article 10 of *the Constitution* were violated.
46. The petitioner further argued that the danger with that provision was to sanction statutes that had the retrospectivity effect, violate *the Constitution*, contain matters that could only be dealt with by Parliament or infringe on the fundamental rights and freedoms of all and sundry. In effect, this was a violation of Article 10 of *the Constitution*. Finally, it served the purpose of reducing accountability on passing of legislation.
47. Article 94 of *the Constitution* establishes the role of parliament. Under sub Article 5, there is established delegated legislation to the extent that only persons or bodies can only make provisions having the force of law in Kenya as long as the authority has been assigned under *the Constitution* or an Act of Parliament. It is against this background that the *Statutory Instruments Act* was enacted with an established Committee to monitor statutory instruments in Kenya.
48. Section 2 sets the meaning of "Committee" as the Committee on Delegated Legislation established under the Standing Orders of the National Assembly or the Senate or any other Committee that may be established by Parliament for the purpose of reviewing and scrutinizing statutory instruments. I therefore find that it was the intention of Parliament that in certain instances, delegated legislation would serve the best purpose and intentions for the sustenance of a democratic country.
49. Section 14 gives the Committee discretion to exempt certain statutory instruments or a class of them. A plain reading of that statement is that the Committee has the option of exempting certain statutory instruments. It is not couched in mandatory terms. In other words, the Committee has been vested with the powers to decide whether or not to exempt certain statutory instruments.
50. Next, it is crucial to demonstrate that the said provision gives certain parameters before the Committee is allowed to exercise this discretion. The Committee must be satisfied that the scrutiny is not reasonably practical due to the number of regulations in that class. The Committee, before making the exemption decision, must firstly be satisfied, mandatorily, that the scrutiny is not reasonably practical. That however does not stop there. In addition to that reasonably practical test, the Committee must also establish this test in the lines of the number of regulations in that class.
51. The above section, in plain language has set a barrage of qualifications before a decision to exempt a statutory instrument from scrutiny is effectuated. The drafters of that piece of legislation did not intend to give a blanket discretionary power, hence setting out in clear and uncertain terms, the



expected limitations that align with the provisions of Article 24 of *the Constitution*. I find that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. If a party is dissatisfied with a decision of the Committee, there is recourse before a court of law to intervene and correct the action.

52. I am therefore not satisfied, as advanced by the petitioner that the 2<sup>nd</sup> respondent’s obligations are shrunk on the strength of this provision and in the process, reduces accountability on passing legislation. There are certain safeguards that must be met before involving a decision under this section. If anything, it enhances the principle of good governance as set out in Article 10 of *the Constitution* in order to avoid spending a considerable amount of time and taxpayer resources where scrutiny is superfluous. Notably, it is worth emphasizing that the Committee clothed with the discretion to exempt, is a “Committee on Delegated Legislation established under the Standing Orders of the National Assembly or the Senate or any other Committee that may be established by Parliament for the purpose of reviewing and scrutinizing statutory instruments”. This court need not over-emphasize that National Assembly and the Senate are the two houses of Parliament, which Parliament operates in various ways including through committees. I find that the works of Parliamentary committee are all tailored towards meeting Parliament’s mandate under Article 94 of *the Constitution*.
53. Ultimately, I find that the petition lacks merit and is dismissed. Since this is a public interest litigation, I direct each party to bear its own costs of the petition.
54. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 22<sup>ND</sup> DAY OF JULY 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

.....Petitioner

.....Respondent

Selina Court Assistant

