



Orange Democratic Movement Party v Speaker of the National Assembly & 2 others (Petition E494 of 2023) [2024] KEHC 5290 (KLR) (Constitutional and Human Rights) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5290 (KLR)

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

PETITION E494 OF 2023

EC MWITA, J

MAY 17, 2024

BETWEEN

ORANGE DEMOCRATIC MOVEMENT PARTY PETITIONER

AND

THE SPEAKER OF THE NATIONAL ASSEMBLY 1ST RESPONDENT

THE CABINET SECRETARY NATIONAL TREASURY AND ECONOMIC PLANNING 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. On 23rd November 2023, the President assented to the Supplementary Appropriation (No. 3) Act, 2023 (the Act) which was to commence on 24th November. The Act affected among others, the funds that had been appropriated to the Political Parties Fund (the Fund) which was reduced by Kshs. 812, 303, 858.
2. Orange Democratic Movement Party, (ODM), filed a petition dated 4th December 2023, arguing that the Act adversely varied, modified and/or altered mandatory statutory financial allocations to the Fund to its detriment and that of other qualifying political parties.
3. It is ODM’s case, that the National Assembly and the CS Treasury had no mandate in law to vary the amount appropriated in the Appropriations Act, 2023 (of 26th June 2023) through a Supplementary Appropriations Act or to reduce the minimum allocation to the Fund as required by section 24(1(a) the Political Parties Act (the PPA).



4. ODM argues that in reducing the allocation, the legitimate expectation that the full allocation of funds would be made available to qualifying political parties to facilitate discharge of their civic duties, was violated.
5. ODM relies on article 92 (f) of *the Constitution*, sections 23, 24 and 25 of the Act and decisions in *Orange Democratic Movement (ODM) v National Treasury & 3 others* [2019] eKLR and *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR to support its case.
6. ODM asserts that the reduction of allocation to the Fund violates and threatens to violate articles 1(1), 2, 3, 4, 10(2), and 38 of *the Constitution*. ODM further asserts that article 223 of *the Constitution* was only intended to authorize the national government to spend money not appropriated but not to vary or re-allocate already appropriated funds as the CS Treasury purported to do.
7. Relying on articles 10(2) (a) and 118(1) (b) of *the Constitution* and Standing Order No. 127(3) of the National Assembly Standing Orders, as well as the decisions in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR, ODM contends that the National Assembly did not comply with articles 10 and 118(1) (b) of *the Constitution* before passing the impugned Act.
8. ODM, therefore, seeks the following reliefs:
 1. A declaration that the Supplementary Appropriations Act, (No. 3) 2023 published in the Kenya Gazette on 24th November, 2023 vide Kenya Gazette Supplement No. 229 (Acts No. 17) did not meet the constitutional threshold of adequate and/ or effective public participation under Articles 10 and 118 of *the Constitution* and is accordingly unconstitutional, null and void.
 2. A declaration that the Supplementary Appropriations Act, (No. 3) 2023 published in the Kenya Gazette on 24th November, 2023 vide Kenya Gazette Supplement No. 229 (Acts No. 17), in so far as it purports to adversely, vary modify and/ or reduce minimum statutory allocations to the Political Parties Fund violates article 92(f) of *the Constitution* as read with section 23, 24 and 25 of the Political Parties Fund and is unconstitutional, illegal, null and void.
 3. A declaration that the reduction or variation of the Political Parties Fund violated the petitioner/applicant's legitimate expectation to its lawful share of the Political Parties Fund.
 4. A declaration that article 223 of *the Constitution* of Kenya can only authorize the national government to spend money that has not been appropriated and cannot be invoked to adversely vary already appropriated funds vide a supplementary appropriations Act.
 5. A declaration that the reduction or variation of the Political Parties Fund violates and/or threatens to violate articles 1(1), 2, 3, 4, 10(2), and 38 of *the Constitution* of Kenya 2010.
 6. An order of certiorari to quashing and/ or nullifying vote No R1311 in the second schedule to the Supplementary Appropriations Act, (No. 3) 2023 published in the Kenya Gazette on 24th November, 2023 vide Kenya Gazette Supplement No. 229 (Acts No. 17).
 7. An order of mandamus compelling the respondents, jointly and severally to comply with the provisions of section 24 of the *Political Parties Act*, namely to allocate and appropriate not less than 0.3% of the national government revenue collected to the Political Parties Fund for



administration by the Office of Registrar of Political Parties for disbursement to qualifying parties in accordance with the legally established formula under the *Political Parties Act*.

8. An order of mandamus compelling the respondents and interested party, jointly and severally to remit to the petitioner arrears of all monies due to it pursuant to section 25(1) (a) of the *Political Parties Act* for the 2023/2024 financial year.
9. Such other orders and/or reliefs as the court may deem fit.
10. Costs of the petition.

1st respondent's case

9. The Speaker National Assembly (the Speaker) opposes the petition through grounds of opposition dated 13th December 2023 and a replying affidavit sworn by Jeremiah Ndombi M.B.S on 10th January 2024. The Speaker contends that section 24(1)(a) of Act allows the National Assembly to determine the amount to be allocated to the Fund, taking into account the prevailing economic realities and expenditure needs of the national government.
10. According to the Speaker, appropriations of expenditures approved by the National Assembly through the Appropriation Act is based on projection of taxes and other forms of revenue collectable or received within the financial year. The Supplementary Appropriation Act was thus enacted to respond to the emerging and pressing needs as guided by the actual revenue collected and competing expenditure needs.
11. The Speaker maintains that the Supplementary Estimates 1 for the Financial Year 2023/20234 was meant to cut on expenditure as an austerity measure implemented by the national government to reduce the levels of public debt. According to the Speaker, the National Assembly has powers to vary, reduce, or alter appropriations through a Supplementary Appropriations Act, where there is need for additional funds or changes to the approved budget due to unforeseen circumstances, emergencies, or changes in economic conditions.
12. It is the Speaker's position that the variations did not only target the Fund but cut across various sectors. According to the Speaker, article 95(4) as read with article 223 of *the Constitution*, sections 16 and 43 of the *Public Finance Management Act*, (PFM Act) and Standing Orders 243, 244A and 244B do not bar the National Assembly from effecting changes to allocations through supplementary appropriations.
13. The Speaker relies on the decisions in Minister of Health v New Clicks South Africa (PTY) Ltd (2006) (2) SA and Robert N. Gakuru & others v Governor, Kiambu County & 3 others [2014] eKLR to assert that the Supplementary Appropriations Act, 2023 complied with constitutional principles of public participation in articles 10 and 118 of *the Constitution*.
14. The Speaker takes the position, that section 24(1) (a) of the Act imposes on the National Assembly discretion rather than mandatory obligation. The Speaker relies on the decision in *Macharia Mwangi & Njeru Advocates v Ecobank Limited (Civil Appeal E474 of 2021)* [2023] KECA 1501 (KLR) and the minority decision of Githinji J.A. in Orange Democratic Movement (ODM) v National Treasury & 3 others (supra) on the interpretation of section 24(1)(a) of the Act.
15. The Speaker contends that ODM has not satisfied the conditions on legitimate expectation. The Speaker relies on Communications Commission of Kenya & 5 others v Royal Media services Ltd & 5 others [2015] eKLR and Navjyoti Cop. Group Housing Society v Union of India AIR 1993 SC 155; [1992] 4 SCC 477, for the argument that the authority can depart from legitimate expectation if there is some justifiable public policy reason to do so.



16. The Speaker argues, therefore, that reduction of the allocation to the Fund was justifiable so as align it with fiscal austerity measures to cut expenses and maintain public debts at sustainable levels. Public interest thus takes precedence over legitimate expectations in this context.
17. The Speaker urges the court to dismiss the petition with costs.

2nd respondent's case

18. The CS Treasury opposes the petition through a replying affidavit sworn on 26th February 2024 by Dr. Chris Kiptoo the Principal Secretary to the National Treasury. It is deposed that allocation of funds to eligible political parties and other budgetary allocations is subject to the availability of resources.
19. The CS Treasury contends that the Financial Year 2023/2024 Supplementary Estimates No. 1 was necessitated by the need to create space for the settlement of the FY 2022/2023 carryovers, pending bills and provision for emerging priorities and emergencies which included the drought and el nino rains. Due to these factors, the National Treasury proposed rationalization of expenditure across ministries, departments and government agencies (MDAs) to support the needed additional funding.
20. The CS Treasury asserts, therefore, that allocations for the Financial year 2022/2023 were reduced following a government directive to rationalize expenditure by Kshs. 300 billion while the reduction in the financial year 2023/2024 was a decision by the National Assembly.
21. The CS Treasury further asserts that the process of approving the supplementary estimates by the National Assembly is similar to that of the printed estimates, thus the requirements of article 221(5) of *the Constitution*, including public participation, are adhered to.
22. According to CS Treasury, the National Assembly may amend budget estimates where an increase in expenditure in a proposed appropriation is balanced by a reduction of expenditure in another proposed appropriation. A proposed reduction is used to decrease the deficit. The rationalization of expenditure that occasioned the supplementary estimates did not, therefore, violate article 223 of *the Constitution*.
23. The CS Treasury contends that budget making and allocation of revenue are functions reserved for the executive and the legislature. The Court can only act to protect the authority of *the Constitution* and law when necessary. CS Treasury, urges that the petition be dismissed.

Interested party's case

24. The Registrar of political parties, (the Registrar), has filed a replying affidavit in support of the petition. The Registrar argues that during the Financial year 2022/23 Kshs. 1,475,000,000 allocated to the Fund was reduced to Kshs. 884, 354,000, a reduction of Kshs. 590, 646,000. For the 2023/2024 financial year, the Kshs. 1,475, 300,000 allocated to the Fund was reduced to Kshs. 608,300,000, a reduction of Kshs. 867,000,000.
25. The Registrar states that although she appeared before the National Assembly Committee responsible for budget considerations of supplementary estimates No.1 for the fiscal year 2023/2024, she made submissions on the proposed reduction and its negative implications to the Fund. The Registrar relies on the judgment of the Court of Appeal in *Orange Democratic Movement v National Treasury & 3 others*, (Civil Appeal No. 15 of 2018); [2019] eKLR.
26. The Registrar takes the position, that the reduction or variation of the allocation to the Fund is an affront to multi-party democracy. It not only vitiates but also affects the capacity of political parties to implement section 26 of the PPA.



27. According to the Registrar, the net effect of the reduction in the allocations is reduced meaningful inclusion of special interest groups in political and electoral processes, thus shrinking space for multi-party democracy. The registrar relies on an article by Professor Charles Manga Fombad on “Constitutionalizing of the rights of Political Parties”, for the argument that while state funding is not the only source of funds as party members can donate to their party, there is limited meaningful financial contribution that a party member can make to sustain a political party to enable it satisfy its role as a political party.
28. It is the Registrar’s case that lack of state funding for parties or reduction in the state funding of parties does not have the same effect on all parties. Some may have different access to other resources; particularly those in power. The Registrar relies on the decision in *Orange Democratic Movement (ODM) v National Treasury & 3 others* [2019] eKLR which, it is argued, protects the Fund.
29. The Registrar contends that reduction of the allocation to the Fund is an attempt to weaken political parties and limit political competition which should not be allowed.
30. Regarding the prayer for an order to compel it to remit monies due to the petitioner arrears pursuant to section 25(1) (a) of the Act for the 2023/2024 financial year, the Registrar argues that this can only be possible if the CS Treasury fully complies with section 24 of the PPA.

Analysis and determination

31. The court has considered the petition, the response, arguments by parties and the decisions relied on. During the highlighting of submissions, Mr. Awele, learned counsel for ODM, told the court that they were pursuing the prayer only to the extent of the reduction of the amount that had been allocated to the Fund. In that regard, therefore, the one question for determination is whether the National Assembly could legally reduce the amount allocated to the Fund through the Supplementary Appropriation Act, 2023.
32. ODM argues that the National Assembly cannot reduce the amount allocated to the Fund in the Appropriation Act through Supplementary Appropriation Acts. ODM’s position is that sections 24(1)(a) of the PPA confers on the Parliament a positive obligation to allocate to the Fund money not being less than zero point three percent of the collection of the national government. The money allocated to the Fund must, therefore, be zero point three percent, or more but not less than what is provided for in the PPA. This view is supported by the Registrar.
33. The Speaker and the CS Treasury on the other hand, contend that section 24(1) confers discretion to parliament when allocating money to the Fund. That means, the National Assembly can decide the amount to allocate to the Fund, which does not have to be zero point three percent of the national government’s collection. They argue, that the PPA gives discretion to National Assembly to allocate the amount it deems fit. They again contend, that the National Assembly had power to reduce the allocation in the Supplementary Appropriation Act, 2023.
34. The issue at hand really depends on the interpretation of section 24 of the PPA. Interpretation of a statute or its provision requires the court to look for what Parliament meant when it enacted the provision in question. The Court must bear in mind not only the text of the provision but also the context under which the provision in question was enacted.
35. Section 23 of the Act under the heading “funding and accounts of political parties”, establishes the Fund to be administered by the Registrar.
36. Section 24 provides for the sources of the Fund as follows:



1. The sources of the Fund are—
 - a. such funds not being less than zero point three per cent of the revenue collected by the national government as may be provided by Parliament; and
 - b. (b) contributions and donations to the Fund from any other lawful source.
2. The balance of the Fund at the end of the financial year shall be retained for the purposes for which the Fund is established, subject to any law relating to public finance. (emphasis).
37. The argument by parties revolves around the meaning of section 24(1)(a) more so, whether the section confers a mandatory obligation that the amount to be allocated to the Fund must be zero point three percent or the National Assembly has discretion to allocate less than this amount.
38. The ODM supported by the Registrar, has taken the position that the minimum amount to be allocated is zero point three percent of the revenue collected by the national government. The Speaker and CS Treasury argue that the National Assembly has discretion to determine the amount to allocate, and which can be less than zero point three percent.
39. For context, the long title to the PPA shows that the Act is to provide for the registration, regulation and funding of political parties, and for connected purposes. Funding of political parties is, therefore, a key objective of the PPA.
40. Part III of the PPA deals with funding and accounts of political parties. As earlier stated, section 23 establishes the Fund to be administered by the Registrar. Section 24 provides for the sources of the funds, that is: “such funds not being less than zero point three per cent of the revenue collected by the national government provided by Parliament; and contributions and donations to the Fund from any other lawful source.” (emphasis).
41. Section 25 provides on how the money allocated to the Fund is to be distributed, while section 26 is on the purposes for which the money allocated to a registered political party from the Fund is to be used. That is: “for purposes compatible with democracy including—promoting the representation in Parliament and in the county assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities; promoting active participation by individual citizens in political life; covering the election expenses of the political party and the broadcasting of the policies of the political party; the organisation by the political party of civic education in democracy and other electoral processes; bringing the political party’s influence to bear on the shaping of public opinion and administrative and staff expenses of the political party which shall not be more than thirty per cent of the moneys allocated to the political party”, among others.
42. It is clear from section 26 of the PPA, that the Fund plays an important role in promoting political parties’ activities, and that is why political parties are funded by the people through the national government.
43. The primary issue before the Court is whether the National Assembly has discretion to allocate to the Fund less than zero point three percent out of the revenue collected by the national government. Tied to that, is the question whether the National Assembly could reduce the amount that had been allocated to the Fund in the Supplementary Appropriation Act, 2023.
44. Section 24(1) (a) states that the fund is to have such funds not being less than zero point three per cent of the revenue collected by the national government as may be provided by Parliament. In interpreting a statute or its provision, where the words used are plain and there is no ambiguity, the court should give effect to the words used.



45. In this respect, the language used in section 24(1) (a) is plain that the money to be allocation to the Fund “not less than zero point three percent” of the revenue collected by the national government; “as may be provided by parliament.”
46. The section has two parts: the first part of the section is plain and in mandatory form that the money to be allocates to the Fund should “not be less than zero point three percent” of the revenue collected by the national government. The National Assembly has a positive obligation to allocate to the Fund at the very least, zero point three percent of the national revenue collection. If parliament’s intention was to confer discretion regarding the least amount to be allocated to the Fund, or that it was not mandatory that the money to be allocated to the Fund could be less than zero point three percent of the revenue allocation by the national government, it should not have used the words “not being less than.”
47. My reading of section 24(1)(a) is that the words used place a positive duty on the National Assembly to take legislative steps and measures to promote the protection, preservation and improvement of political parties standing by allocating money to the Fund that is not less than zero point three percent of the national government revenue collection.
48. This reasoning is in conformity with the Court of Appeal decision in *Orange Democratic Movement v National Treasury & 3 others*, (supra). In a majority decision, (Otieno-Odek and Musinga, JJA (Githinji JA dissenting), the Court of Appeal held that the words used in section 24(1)(a) meant a mandatory obligation.
49. After considering sections 24(1)(a) and 25 of the *Political Parties Act* and Article 223 of *the Constitution*, Otieno-Odek JA, writing for the majority stated:
- [28.] A literal reading of Section 24(1) (a) of the *Political Parties Act* demonstrates that the allocation of 0.3 % of the national revenue to the Political Parties Fund is mandatory. It is provided that there shall be allocated to the Fund not less than zero point three per cent of the revenue collected by the national government. It is manifest that the duty to table revenue and expenditure estimates before the Assembly as well as the duty to allocate and appropriate is a both a constitutional and statutory duty bestowed upon the Cabinet Secretary responsible for Finance and the National Assembly respectively.
50. The learned Judge then considered whether the duty of CS Treasury and National Assembly under section 24(1)(a) is discretionary, and stated:
- [29]. The next issue is whether the discharge of the duty under Section 24 (1) (a) of the Political Parties Fund by the Cabinet Secretary and National Assembly is discretionary. Whereas Section 24 (1) (a) use both words “shall” and “may”, the use of the “shall” connote mandatory nature of the duty to allocate and appropriate a minimum of 0.3 %. The use of the word “may” in the Section denotes the discretionary nature of the National Assembly to determine the upper limit of allocation and appropriation of monies for the Political Parties Fund. The Section gives the Assembly discretion and latitude to determine the upper limit of allocation and appropriation every financial year. The lower limit, the minimum allocation and appropriation, has been set by statute at 0.3% of the total revenue collected by the national government and it being a statutory obligation is not negotiable.
- [30]....I find that the National Assembly has a statutory obligation under Section 24 (1) (a) of the *Political Parties Act* in each financial year to allocate, appropriate and disburse to the Political Parties Fund a minimum of 0.3% of the revenue collected by the national



government. The minimum amount is a statutory obligation that is mandatory, not discretionary..(emphasis)

51. This decision settled the question of whether the mandate placed on the National Assembly is mandatory or discretionary. This court cannot hold otherwise as urged by the Speaker and CST Treasury bearing in mind the principle of stare decisis and hierarchy of courts so that decisions of the Supreme Court and the Court of Appeal are binding on all other inferior to the two courts. For that reason, the argument by the Speaker and CS Treasury that this Court should follow the minority decision, if accepted, would amount to this Court acting contrary to *the Constitution*.
52. The auxiliary question is whether the National Assembly could reduce the amount allocated to the Fund through the Supplementary Appropriation Act, 2023. This issue arises because the money the National Assembly had appropriated to the Fund in the Appropriation Act, 2023, was reduced in the Supplementary Appropriation Act of 2023.
53. ODM argues that the National Assembly cannot reduce the amount allocated and appropriated to the Fund. The Speaker and the CS Treasury support the mandate to reduce the allocations. As already held by the Court of Appeal in the ODM case, the CS Treasury proposes allocations and the National Assembly appropriates the money. Both the National Assembly and the CS Treasury have an obligation to act lawfully. Where the law provides that the allocations to the Fund be not less than zero point three percent of the revenue collected by the national government, the CS Treasury cannot propose and the National Assembly must not appropriate less than what is provided for in law.
54. The National Assembly has an obligation to act lawfully and does not have to agree with the CS Treasury's proposal to act contrary to the law. That is, the National Assembly cannot reduce the allocation to the Fund through a Supplementary Appropriations Act if the proposal and subsequent appropriation would be contrary to the law. Further, the National Assembly has to act in a manner that brings harmony in the law to avoid inconsistency in its legislative mandate. The amount to be allocated to the Fund being ring fenced and protected by law, the National Assembly must not act in violation of its own law.
55. ODM has also argues that once the National Assembly appropriates funds, the funds cannot be reallocated through supplementary appropriation Acts. The Speaker and CS Treasury contend that sections 13 and 16 of Public Finance and Management Act (PFMA) permit the National Assembly to reallocate funds in a Supplementary Appropriation Act, even though the money had previously been allocated through the Appropriation Act.
56. I have perused the PMFA and Article 223 of *the Constitution* on this issue as well as the prayers sought in the petition. I have not seen a prayer seeking to have any of the sections of the PFMA declared unconstitutional as contravening *the Constitution* for allowing the National Assembly to reallocate the funds through Supplementary Appropriation Acts. For that reason, the less I say about this issue, the better.

Conclusion

57. Having considered the petition and arguments by parties, and aware of the decision of the Court of Appeal on this issue, the inescapable conclusion I come to, is that the National Assembly has a positive statutory obligation to allocate to the Political Parties Fund money that is not less than zero point three percent of revenue collected by the national government.
58. Similarly, the amount allocated to the Political Parties Fund through the Appropriations Act is ring fenced by section 24(1)(a) of the *Political Parties Act* and, therefore, cannot be reduced through the



Supplementary Appropriation Act. In other words, the National Assembly cannot act contrary to its own laws.

Disposition

59. Considering the conclusions reached by this court, the appropriate orders that commend themselves and which I hereby make are that the petition is allowed to the extent that:
1. A declaration is hereby issued that the reduction of the money allocated to the Political Parties Fund is contrary to articles 1(1), 2, 3, 10 and 38 of *the Constitution* as read with section 24(1) (a) of the *Political Parties Act*.
 2. An order of Certiorari is hereby issued quashing and or nullifying vote No. R1311 in the Second Schedule to the Supplementary Appropriation Act, (No.3) of 2023 published in the Kenya Gazette on 24th November 2023 vide Kenya Gazette Supplement No. 229 (Acts No. 17).
 3. Costs being discretionary, each party will bear their own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY MAY OF 2024

E C MWITA

JUDGE

