



**Okoiti & 2 others v National Assembly of Kenya & 2 others; Senate
(Interested Party) (Petition E250 of 2024) [2024] KEHC 14435 (KLR)
(Constitutional and Human Rights) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14435 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E250 OF 2024
LN MUGAMBI, J
NOVEMBER 21, 2024**

BETWEEN

**OKIYA OMTATAH OKOITI 1ST PETITIONER
ELIUD KARANJA MATINDI 2ND PETITIONER
LEMPAA SUYINKA 3RD PETITIONER**

AND

**NATIONAL ASSEMBLY OF KENYA 1ST RESPONDENT
CABINET SECRETARY FOR THE NATIONAL TREASURY AND
PLANNING 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

AND

THE SENATE INTERESTED PARTY

RULING

Introduction

1. The Petition dated 21st May 2024 assails the Finance Bill, 2024 on the grounds that it was tabled prematurely in Parliament before the enactment of the Appropriation Act, 2024. The Petitioners assert that no approved fiscal framework for the financial year 2024/2025 existed without Appropriation Act, 2024 that Parliament had failed to enact.
2. The 1st Respondent's filed a Notice of Preliminary Objection dated 10th June, 2024.



Preliminary Objection

3. The 1st Respondent Notice of Preliminary Objection was/is based on the following grounds:
 - i. The Petition is res judicata, the issues raised having been heard and determined in Nairobi High Court Constitutional Petition No. E253 of 2018 Okiya Omtatah Okoiti & Others v The Cabinet Secretary, National Treasury and Planning & Others.
 - ii. The Petition is sub judice as the issues raised herein are the subject of an appeal being Civil Appeal No. E003 of 2024 as Consolidated with Civil Appeals No. E016, E021, E049, E064, E080 of 2024 The National Assembly & Another v Okiya Omtatah Okoiti & Others which is pending determination by the Court of Appeal.
 - iii. The Petitioners' Notice of Motion and Petition are not justiciable for violating the doctrine of ripeness.
 - iv. The Petitioners' Notice of Motion and Petition are speculative and deals with prospective anticipatory circumstances rather than current or probable events.
 - v. The Petition and the Notice of Motion is frivolous, incompetent, vexatious, misconceived and an outright abuse of the court process to the extent that the Petitioners are challenging a Bill which has not yet been enacted.
 - vi. The Petitioners, having failed to exhaust all avenues available to them under *the Constitution* and the Standing Orders, the Petition and Application violate the doctrine of exhaustion and are therefore premature.

Petitioners' Response to the Preliminary Objection

4. In response, the Petitioners filed grounds of opposition dated 12th June 2024 on the premise that:
 - i. The Preliminary objection is incompetent.
 - ii. The Preliminary objection is vexatious, scandalous, and is brought malafides.
 - iii. The Preliminary objection is an abuse of the process of the Court.
 - iv. In particular response to Paragraphs 1 and 2 of the Preliminary Objection, the Petitioners state that this matter is not res judicata, and it is also not sub judice.
 - v. In particular response to Paragraphs 3 and 4 of the Preliminary Objection, the Petitioners state that the Petition is ripe.
 - vi. In particular response to Paragraph 5 of the Preliminary Objection, the Petitioners state that both the Petition and the notice of motion application are merited.
 - vii. In particular response to Paragraph 6 of the Preliminary Objection, the Petitioners state that the bar of the doctrine of exhaustion cannot be raised herein.

2nd and 3rd Respondent's and Interested Party's Case

5. The 2nd did not file responses or submissions to the Preliminary Objection.
6. The 3rd Respondent did not put in a response but filed submissions in support of the 1st Respondent's Preliminary Objection.



Parties' Submissions

Applicant/1st Respondents' Submissions

7. Sandra Nganyi for the Applicant/1st Respondent filed submissions dated 10th June 2024 where and submitted on the two main issues: whether the Petition is sub Judice and/or res judicata and whether the Petition is in violates the doctrine of ripeness.
8. On res judicata, Ms. Nganyi submitted that the Petitioners were seeking to stop the consideration of the Finance Bill on the basis that the Appropriation Bill had not been passed. Ms. Nganyi argued the issue of timelines within which the two Bills ought to be considered by the National Assembly was conclusively determined by this Court in Petition No. 253 of 2018, Okiya Omtatah Okoiti v Cabinet Secretary, National Treasury and Planning & Others hence the matter is res judicata.
9. She emphatically submitted that the doctrine of res-judicata and/or issue-based estoppel applies in Constitutional Petitions as affirmed by the Supreme Court in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment).
10. The Applicant's Counsel relied on the Supreme Court of Canada decision of Angle v Canada (Minister of National Revenue-MNR), 1974 CanLII 168 (SCC), [1975] 2 SCR 248 set out the conditions to be fulfilled in order to successfully invoke issue-based estoppel as follows:
 - a. The same question has been decided;
 - b. The decision said to create the estoppel was final;
 - c. The parties to the previous decision or their privies are the same as the parties to the proceeding in which the estoppel is raised."
11. Relied upon was also the case of Abukar G Mohamed v Independent Electoral and Boundaries Commission (2017) eKLR.
12. Further, it was the 1st Respondent's contention that the Petitioners were obligated to bring their whole case at time that matter was before the Court hence the issue ought to have been raised in Petition 253 of 2018 citing the case of John Florence Maritime Services Limited (Supra) where it was held that:

"...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable, diligence, might have brought forward at the time."
13. Still on res-judicata, the Applicant/1st Respondent submitted that in Nairobi High Court Constitutional Petition No. E181 of 2023 Okiya Omtatah Okoiti & Others v The National Assembly & Others (as consolidated with Petitions No. E211, E217, E219, E221, E227, E228, E232, E234, E237 and E254 of 2023), the Petitioners herein argued that estimates of revenue and expenditure ought



to have been included in the Appropriation Act in accordance with the Constitution and the Public Finance Management Act. The Court in the end found this argument as lacking merit.

14. In response the Petitioners filed an appeal, being Civil Appeal No. E021 of 2024 Okiya Omtatah Okoiti & Others v Cabinet Secretary, National Treasury & Planning & Others challenging the findings of the Court on the issue of whether estimates of revenue should form part of an Appropriation Bill. This matter is yet to be finalized and thus the issues raised herein are in effect sub judice.
15. On whether the matter is premature, the Applicant/1st Respondent argued that the Finance Bill, 2024 was tabled before the National Assembly and read for the first time on 13th May 2024 before being referred to the National Assembly's Departmental Committee on Finance and Planning for consideration. On 15th May 2024, the Clerk of the National Assembly caused to be published in the local dailies a notice inviting stakeholders to submit memoranda on the Finance Bill. At the time of filling these submissions the Bill was at the public participation stage. For this reason, the prayers sought in the Petition are pre-mature as the legislative process is yet to be concluded.
16. In light of this, Counsel submitted that there is no real and actual dispute between the parties by reason of justiciability principle that grants the Court power to adjudicate on matters. Reliance was placed in *Wanjiru Gikonyo and Others v National Assembly of Kenya and 4 Others* Petition No. 453 of 2015 (2016) eKLR where it was held that:

“Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through actual matrix, for determination...The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.”

17. Identical dependence was also placed in *Robert N Gakuru & another v Governor Kiambu County & 3 others* (2013) eKLR, *Minister of Finance and Another v Paper Manufacturers Association of South Africa* (567/07) [2008] ZASCA 86; 2008 (6) SA 540 (SCA); [2008] 4 All SA 509 (SCA) (2 September 2008) and *Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others* (2013) eKLR.
18. Considering this, Counsel argued that it is only prudent to await completion of the process as the constitutional scheme contemplates that challenges to the constitutional validity of a bill passed by Parliament must await the completion of the legislative process as held in *Doctors for Life International v The Speaker of the National Assembly & Others* CCT 12 of 2005 [2006] ZACC 11.

3rd Respondent's Submissions

19. Chief State Counsel, Emmanuel Bitta in support of the Preliminary Objection filed submissions dated 14th June 2024. He submitted that the Petition was premature as the National Assembly had not yet considered the Finance Bill.



20. He urged the Court to desist from assuming the duty of supervising Parliament in its mandate as envisaged under Article 94, 95 and 109 of *the Constitution*. In support, reliance was placed on SDV Transmi Kenya Limited v Attorney General 7 2 others & another (2016)eKLR where it was held that:

“(179) There is public law duty of Court not to interfere with the constitutional functioning of public bodies trace-able to the constitutional doctrine of Separation Powers. As a consequence, I, respectfully, agree that there is a duty not to hamstring public bodies in exercise of their constitutional or statutory mandates....”
21. Similarly, he relied on Justus Kariuki Mate & another v Martin Nyaga Wambora & another (2017) eKLR and Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR on separation of powers.
22. Mr. Bitu while acknowledging that the Court has jurisdiction to review the manner in which the 1st Respondent carries out its parliamentary processes, he submitted on the need of upholding the doctrine of judicial restraint and exercise jurisdiction after 1st Respondent has had an opportunity to exercise its constitutional legislative function. For this reason, Counsel submitted that the Petition ought to be dismissed as it is not yet ripe for determination.

1st Petitioners’ Submissions

23. The 1st Petitioner in the submissions dated 17th June 2024 highlighted the issues for determination as:

“whether the Preliminary Objection is incompetent; whether and petition is res judicate; whether the petition is sub judice; whether the application and petition are frivolous, incompetent, vexatious, misconceived, and an abuse of the Court process; whether a Bill can be challenged before it is enacted into law; whether the application and petition are ripe and whether the application and the petition violate the doctrine of exhaustion.”
24. The 1st Petitioner submitted that the Preliminary objection is not merited for it does not raise pure points of law as held in Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696 and affirmed by the Court of Appeal in Nitin Properties Ltd v Singh Kalsi & another (1995) eKLR.
25. Also cited was the case of Oraro –v- Mbaja [2007] KLR 141, and Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others Civil Application No. 36 of 2014 (2015) eKLR.
26. The 1st Petitioner argued that res judicata is not a pure point of law as the 1st Respondent must demonstrate the identity of the thing sued upon; identity of the cause of action; identity of persons and parties to the action and identity of the quality or capacity of the parties suing or sued as underscored in a number of authorities such as Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) (2020) eKLR and John Florence Maritime Services Limited & Another (supra).
27. He further argued that this matter is not res judicata as the issues in the two petitions are unrelated. In the same way, the 1st Petitioner argued that the principle of res judicata as discussed applies also to the allegation of sub judice.
28. The 1st Petitioner additionally submitted that the Petition raises triable issues which ought to be heard on merit. As such, the 1st Respondent would be required to demonstrate, that the Petition does not raise a constitutional point and is frivolous, incompetent, vexatious, misconceived and an abuse of



the court process. Reliance was placed in *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another* [1980] eKLR where it was held that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

29. Equal dependence was placed in Civil Appeal Number 110 of 2001 *Rashid Odhiambo Aloggoh & 245 others vs Haco Industries Limited, Kenya Commercial Bank vs. Suntra Investment Bank Ltd, Milimani Commercial Court Commercial and Admiralty Division Civil Suit No. 380 of 2013*, *Luka Kipkorir Kigen v National Oil Corporation Limited* (2014) eKLR, *Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance v Mara Conservancy & 5 others* (2014)eKLR and *Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC)* (2015) eKLR.

30. On whether a Finance Bill can be challenged before conclusion of the legislative process, the 1st Petitioner answered in the affirmative placing reliance on *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & others* [2015] eKLR where it was observed that:

“we are satisfied, after due consideration of the provisions of Article 22, 165(3) (d) and 258 of *the Constitution*, that the words of *the Constitution*, taken in their ordinary meaning, are clear and render the present controversy ripe and justiciable: a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of *the Constitution* to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of *the Constitution*.

113. We take this view because it cannot have been in vain that the drafters of *the Constitution* added “threat” to a right or fundamental freedom and “threatened contravention” as one of the conditions entitling a person to approach the High Court for relief under Article 165(3) (b) and (d) (i)...”

31. Also relied upon was *Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v. The Hon. Vernon J. Symonette M.P. and 7 Others (Bahamas)* [2000] UKPC 31 (26th July, 2000), (Privy Council Appeal No. 6 of 1999), *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008 and *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and Another* [1970] 2 WLR 1264 at 1277G–H; [1970] AC 1136 (PC) at 1157E–F.

32. On whether this Petition is ripe for determination, the 1st Petitioner submitted that enacting the Finance Bill, 2024 before the enactment of the Appropriations Act, 2024 is a ripe issue. He argued that when enacted into law, the Finance Act, 2024, will contain a raft of approved amendments to various existing tax laws designed to enable the government raise the tax component of the approved estimates of revenue in the Appropriations Act, 2024, which are required to finance the tax component of the approved estimates of expenditure in the same Act. Considering this, he contended that the Appropriations Act, 2024, must first be enacted into law to establish a basis for raising funds. This is submitted to be a question on the constitutional and legal validity of the 1st Respondent’s decision to publish the Finance Bill, 2024 before considering and approving the Financial Year 2024/2025 budget estimates vide the Appropriations Act, 2024.



33. The 1st Petitioner further stressed that the Petition does not challenge the contents of the Finance Bill but the proper sequence in enactment of these two Acts. For this reason, it was argued that the doctrine of ripeness is not applicable.
34. On the doctrine of exhaustion, the 1st Petitioner submitted that the 1st Respondent had not demonstrated the alternative mechanisms in law or in the Standing Orders of the National Assembly that can be used to grant the reliefs sought in the Petition. According to him, this objection is wrongly applied in this case. Reliance was placed in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment) where it was held that:
- “The availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief.”
35. Similar reliance was placed in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR*. To this end, the 1st Petitioner submitted that the Preliminary Objection lacks merit and so should be dismissed with costs.

2nd Petitioner’s Submissions

36. The 2nd Petitioner in the submissions dated 15th June 2024 commenced by submitting that the 1st Respondent’s Preliminary Objection fails to meet the legal test for objections. According to him, the questions on *res judicata* and *sub judice* are questions of fact as the Court must interrogate the Petition herein and cited petitions to ascertain that this matter invokes these principles.
37. Reliance was placed in *John Florence Maritime Services Limited & another (supra)* where the Supreme Court stated that:
- “Hence, whenever the question of *res judicata* is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case.”
38. Similarly, on *sub judice*, he relied in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (2020) eKLR* where it was stated that:
- “A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
39. Correspondingly, the 2nd Petitioner on the ripeness of the matter asserted that the Petition is primarily challenging the introduction and consideration of the Finance Bill, 2024, before the enactment of the Appropriation Act, 2024. In his opinion, the matter became ripe when the Finance Bill, 2024 was



introduced before enactment of the Appropriation Act, 2024. Reliance was placed in *Cherotich v Haji & 5 others (Constitutional Petition 11 of 2023)* (2023) KEHC 20734 (KLR) where it was noted that:

“The Ripeness doctrine is just but one facet of the larger principle of non-justiciability. It is a jurisdictional issue that bars a court from considering a dispute whose resolution has not crystallized enough to warrant the court’s intervention...”

40. As such, he argued that only this Court under Article 165(3)(d)(ii) of *the Constitution*, can determine whether the introduction and commencement of consideration of the Finance Bill, 2024 before enactment of the Appropriation Act, 2024, is inconsistent with or in contravention of *the Constitution*.

Analysis and Determination

41. The only issue here is whether the Preliminary Objection is merited.

“In the preliminary objection raised by the 1st Respondent, one of grounds cited in the preliminary objection is that that ‘The Petition is sub judice as the issues raised herein are the subject of an appeal being Civil Appeal No. E003 of 2024 as Consolidated with Civil Appeals No. E016, E021, E049, E064, E080 of 2024 The National Assembly & Another v Okiya Omtatah Okoiti & Others which is pending determination by the Court of Appeal”

42. The other ground against the petition on grounds of is res-judicata. The Petition is res judicata, the issues raised having been heard and determined in Nairobi High Court Constitutional Petition No. E253 of 2018 Okiya Omtatah Okoiti & Others v The Cabinet Secretary, National Treasury and Planning & Others.

43. The 1st Respondent/ Applicant, heavily relied on the contemporary refined form of res-judicata that is now been embraced in the growing jurisprudence by courts known as issue-based estoppel. Elaborating on concept, the Court in *Anne Delorie v Aga Khan Health Service Limited* [2009] eKLR quoting Halsbury’s Law of England, observed:

“... At page 861 of Halsbury’s Laws of England there is some further comment on the issue of estoppel as follows: -

‘An estoppel which has come to be known as ‘issue Estoppel’ may arise where a plea of res judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, of one mixed fact and law.”

44. In *Mumira v Attorney General* [2022] KEHC 271 (KLR) the Court equally explained:

“18. In the United Kingdom, res judicata is known as cause of action estoppel or issue estoppel... (A distinction is made between “cause of action estoppel” and “issue estoppel”. In the first case— “the cause of action in the later



proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.” (Arnold v National Westminster Bank [1991] 2 AC 93 (HL) at 104.) In the second case— “a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.” (Arnold at 105.)

45. The Court of Appeal case, Civil Appeal No. E003 of 2024 as consolidated with Civil Appeal Number E080, E16, E049, 064 of 2024 which the 1st Respondent had cited in raising the Preliminary objection heard and delivered its decision on 31st July, 2021 but this decision was subsequently appealed before the Supreme Court.
46. This was vide the Supreme Court Petition E031 of 2024 consolidated with Petition E032 and E033 of 2024- Cabinet Secretary for National Treasury and Planning & 4 Others v Okiya Omtatah Okoiti & 52 Others. The Supreme Court delivered its judgment on 29th October, 2024 that reversed the judgment of the Court of Appeal.
47. The above discourse is significant in this determination considering the findings that were made by Supreme Court were in rem since the Petition was filed in public interest just like the instant Petition. Clearly, a finding on an issue that was distinctly raised and decided by the Supreme Court marks the end of that controversy notwithstanding the fact that the causes of action may be different.
48. It is also worth noting that, besides consideration of issue based estoppel, under Article 163 (7) of *the Constitution* it provided that “All Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.”
49. In the instant Petition, the Petitioner sought a number of declarations based on legal assertions he claimed should be upheld by the Court. They interalia include:
 - The Appropriation Act must contain both the approved budget estimates of revenue and expenditure submitted to the National Assembly under Article 221 (1-3) of *the Constitution*.
 - The Revenue raising measures in the Finance Act, 2024 must be anchored on and directed at raising the total of revenue approved in the Appropriation Act, 2024
 - Trait for National Assembly to enact the Finance Act 2024 before Parliament enacts the Appropriation Act, 2024 will scam Kenya taxpayers by collecting unbudgeted revenue to finance unbudgeted expenditure
 - By setting out to enact Finance Act, 2024 before enacting the Appropriations Act 2024, the National Assembly is colluding in and abetting budgeted corruption and/or fraud scheme to scam Kenyan taxpayers by collecting unbudgeted revenue to finance unbudgeted expenditure

The National Assembly to enact Finance Act, 2024 before Parliament enacts Appropriation Act 2024 is both unlawful and unconstitutional and therefore invalid null and void abnatio.

50. The last of the statements above is what captures the gist of the instant Petition, namely that : ‘The National Assembly to enact Finance Act, 2024 before Parliament enacts Appropriation Act 2024 is both unlawful and unconstitutional and therefore invalid null and void abnatio’.



51. The Supreme Court decision aforesaid considered at length and in detail the application of Articles 220 and 221 of *the Constitution* and the relevant provisions of *Public Finance Management Act* which just like in the case that was before the Supreme Court are still a feature in the instant Petition.

52. For instance, one of the assertions made by the Petitioners in the instant Petition is that ‘the Appropriation Act must contain both Approved budget estimates of revenue and expenditure submitted by National Assembly under Article 221 (1-3) of *the Constitution*.’ This issue was considered in the Petition that was before the Supreme Court and answered in paragraph 174 and 175 of the Supreme Court judgment (supra) after an exhaustive examination of the Constitutional and the provisions of the *Public Finance Management Act* and held as follows:

“(174)] Arising from the afore stated provisions, it clear to us that the estimates that eventually make it into the Appropriation Bill are not the estimates of revenue. Rather, it is only the estimates of expenditure. This is supported by the definition of an appropriation act found at Section 2 of the PFM Act which provides as follows:

“Appropriation Act” means an Act of Parliament or of a county assembly that provides for the provision of money to pay for the supply of services; ...”

In any event, the purpose of an Appropriation Act is to provide for the provision of money to pay for the supply of services, therefore the estimates of revenue have no place in such an Act. [175] The above position is further reinforced by Regulation 37 of the Public Finance Management (National Government) Regulations that provides as follows: “Appropriation Bills shall provide for-

- a. the Votes and programs of the financial year;
- b. financial provision in respect of certain activities of the national governments during that financial year; and
- c. enabling the withdrawal out of the Consolidated Fund, or any other national public fund.”

53. The substratum of the present Petition is the Petitioners emphatic assertion “that the National Assembly action of considering the Finance Bill/Act before enacting the Appropriation Act is unlawful and unconstitutional and therefore null and void.” The Supreme Court in the Petition that was before it also addressed that contention expressly at paragraph 181 of its determination by stating thus:

“SUBPARA.181] Based on the foregoing, two things are apparent. First, the enactment of an Appropriation Bill is in no way tied to that of a Finance Bill. The submissions by counsel for the appellants are correct with respect to the pathways of the Finance Bill and the Appropriation Bill being different. Second, the estimates of revenue are also not included in the Finance Bill.”

54. In my view, the Supreme Court decision which is binding on this Court has settled the legal issues that the Petitioners by this Petition sought this Court to determine. This Petition is thus barred by the principle of issue-based estoppel considering that the decision of the Supreme Court is in rem



the matter having been instituted in public interest just like the present Petition. This Petition is thus incompetent as those issues cannot be relitigated as there is a conclusive determination of the same by the Supreme Court.

55. The Petition is struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024.

.....

**L N MUGAMBI
JUDGE**

