REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 366 OF 2018.

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL ASSEMBLY.....2ND RESPONDENT

RULING

1. The petitioner herein sued the respondents though the petition filed on 25th October 2018 in which he sought the following declarations and orders:

i. A declaration that Article 114 of the Constitution was violated to the extent that the impugned amendments to the Accountants Act 2008 do not belong in a money Bill.

ii. A declaration that there is no nexus between the Finance Act 2018 and the Accountants Act 2008 to warrant the amendment of Sections 2(1), 5, 8, 17, 18, 21, 24, 30, 41, and to the 5th Schedule of the Accounts Act No. 15 of 2008 by Sections 74, 75, 76, 77, 78, 79, 80, 81, 82, and 83, of the Finance Act 2018.

iii. A declaration that it was improper for drastic amendments affecting of Sections 2(1), 5, 8, 17, 18, 21, 24, 30, 41, and to the 5th Schedule of the Accountants Act No. 15 of 2008, which required the publication of a stand-alone Bill, to be effected via substantive provisions of Sections 74, 75, 76, 77, 78, 79, 80, 81, 82, and 83 of the totally unrelated Finance Act 2018.

iv. A declaration that the action of introducing the impugned amendment on the floor of the House, when the same was not the subject of the Bill that was published and was subjected to public participation, was contrary to the letter and spirit of Article 10 as read with Article 118 of the Constitution and, therefore, invalid, null and void ab initio.

v. A declaration that the amendment to introduce Section 2A to Section 17 of the Accountants Act 2018, vide Section 77 of the Finance Act 2018, violates Articles 36(2) of the Constitution and, therefore, is invalid, null and void ab initio.

vi. A declaration quashing Sections 74, 75, 76, 77, 78, 79, 80, 81, 82, and 83 of the Finance Act 2018 for being unconstitutional and, therefore, invalid, null and void ab initio.

vii. An order that the costs of this suit be provided for.

viii. Any other relief the court may deem just to grant.

2. Contemporaneously with the petition, the petitioner also filed notice of motion in which he sought the following orders:

1. Spent.

2. That pending the inter-partes hearing and determination of this application and/or the petition herein the Honourable court be pleased to issue a conservatory order suspending Sections 74, 75, 76, 77, 78, 79, 80, 81, 82, and 83 of the Finance Act 2018.

3. That pending the inter-partes hearing and determination of this application and/or the petition herein the Honourable court be pleased to issue a temporary order of prohibition prohibiting the implementation of Sections 74, 75, 76, 77, 78, 79, 80, 81, 82, and 83 of the Finance Act 2018.

4. That consequent to the grant of the prayers above the Honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

5. That the costs of this application be provided for.

3. The application is premised on the grounds inter alia, that to the extent that it covered matters that do not deal with revenue raising measures of the government, the decision to enact the amendments to the Accountants Act 2008 through the Finance Act 2018 violated Article 114 of the Constitution.

4. The petitioner contends that the impugned amendments made to Sections 2(1) 5, 8, 17, 18, 21, 24, 30, 41 and to the 5th Schedule of the Accountants Act No. 15 of 2008 by Sections 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, of the Finance Act 2018 are not miscellaneous but are controversial, substantial and far-reaching and should have been contained in a stand alone Bill.

5. He argues that the impugned Sections were clandestinely reintroduced on the floor of the house as new clauses 69A, 69B, 69C, 69D, 69E, 69F, 69G, 69H,691 and 69J to amend Section 69 of the Finance Bill 2018 which was under consideration by the committee of the whole house in violation of Order 133(5) and (6) of the Standing Order of the National Assembly, which deals with the procedure of the committee of the whole house the petitioner claims that the impugned amendments were not subjected to public participation contrary to the express provisions of the Constitution.

6. He maintains that the decision by the National Assembly to use the Finance Bill to sneak in substantive controversial and far-reaching amendments to the Accountants Act 2008 was unconstitutional, and therefore null and void ab initio.

7. He therefore argues that the conservatory orders sought are required to preserve the main motion so at to interdict the capture of the abuse of the legislative process by the National Assembly. He further contended that the orders sought in the application will advance the cause of justice.

8. The 1st respondent opposed the application through the grounds of opposition dated 30th October 2018 in which it states that the instant petitions is sub judice in view of a similar constitutional petition pending before this court being petition No. 327 of the 2017, **Okiya Omtata Okoiti vs The Honourable Attorney General and the National Assembly.**

9. The 1st respondent further states that the application does not meet the threshold for the grant of conservatory orders and further offends the doctrine of presumption of constitutionality enjoyed by the impugned Act. It is the 1st respondent's case that the applicant has not demonstrated at this interlocutory stage, that rights and fundamental freedoms have been violated by the challenged Act.

10. The 1st respondent further argues that the suspension of the implementation of Sections of the Finance Act will be tantamount to ousting the legislative will of the people through parliament as provided for under Article 94 of the Constitution.

11. The 1st respondent argues that the applicant has Alternative Avenue provided under Article 119 of the Constitution, to petition parliament to enact, amend or repeal the legislation.

12. It was the 1st respondent's case that the petition will not be rendered nugatory if the conservatory orders sought are not granted.

13. The 2nd respondent also opposed the application through Grounds of Opposition and reiterated the 1st respondent's position that the instant petition is subjudice, an abuse of the court's process and does not meet the threshold for the grant conservatory orders.

14. At the hearing of the application, Miss Ndirangu, learned counsel for the 2nd respondent, submitted that under Article 119 of the Constitution and Parliamentary Procedure Act, any individual aggrieved by Sections of an Act can move parliament to amend the said Sections instead of resorting to court action.

15. Counsel further argued that suspending the implementation of the provisions of the impugned Act will amount to suspending the will of the people and further, offend the doctrine of presumption of constitutionality of Act of Parliament.

16. I have considered the instant application, the respondent's grounds of opposition and the parties rival arguments. The main issue for determination is whether the applicant has made out a case for the grant of the conservatory orders sought. Courts have severally held that in considering an application for conservatory orders the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage, the applicant only needs to establish a *prima facie* case with a likelihood of success which means that the Court is not required, and will not venture into making any definite and conclusive findings on either fact or law as to do so may have the impact of prejudicing the hearing of the main Petition.

17. Apart from establishing a *prima facie* case, the applicant must further demonstrate that unless the conservatory order is granted he or she stands suffer real danger or prejudice. See **Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General**, Nairobi HC Pet. No 16/2011, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission,** Mombasa HC Pet. No. 7 of 2011

18. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others Nairobi** Petition No. 16 of 2011 **Musinga, J** (ahtw) stated that:

> ***"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."***

19. In a majority decision in the case of **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held as follows:

> ***"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."***

20. Similarly, in **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows in regard to Conservatory orders:

> ***"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."***

21. This position was adopted by the Supreme Court in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014**, the Court held as follows at paragraph 86 and 87:

> ***"Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes...The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:***
>
> ***i. the appeal or intended appeal is arguable and not frivolous; and***
>
> ***ii. Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.***
>
> ***These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:***
>
> ***iii. That it is in the public interest that the order of stay be granted.***
>
> ***This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution."***

22. On the issue of a *prima facie* case, I find that it has been held that a *prima facie* case is not a case which must succeed at the hearing of the main case but is rather a case which is not frivolous. In other words the applicants needed to demonstrate that their case discloses arguable issues and in this case arguable Constitutional issues. In the instant case I note that the petitioner's main grievance is that the amendments introduced to the Accountants Act No. 15 of 2008 were made in violation of Article 114 of the Constitution. It is therefore my finding that, on the face of it, the instant petition raises fundamental issues regarding the interpretation of the constitutionality of the amendments introduced to the impugned Accountants Act and that the petition therefore raises arguable issues thus satisfying the condition on the establishment of a prima facie case.

23. Turning to the second condition for the granting of conservatory orders which is the requirement that the applicant establishes that he will suffer substantial loss, danger or prejudice unless the orders sought are granted, I note that no material was placed before this court to show that the petition herein will be rendered nugatory unless the conservatory orders are granted. I find that the applicant did not demonstrate that the impugned amendments to the Accountants Act violated any of his fundamental rights and freedoms so as to warrant the granting of the conservatory orders.

24. Consequently, I find that the instant application does not meet the threshold of the conditions for the grant of conservatory orders and I

therefore decline to grant the orders sought in the application. The costs of the application shall abide the outcome of the main petition.

Dated, signed and delivered in open court at Nairobi this 9th day of January 2019

W. A. OKWANY

JUDGE

In the present of:

Miss Ndirangu for the Attorney General

No appearance for petitioner

Court Assistant – Kombo