



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW**

**MISCELLANEOUS APPLICATION NO. 483 OF 2016**

**IN THE MATTER OF AN APPLICATION BY ORANGE DEMOCRATIC MOVEMENT FOR  
LEAVE TO APPLY FOR JUDICIAL REVIEW AND ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF THE POLITICAL PARTIES FUND ESTABLISHED UNDER THE  
POLITICAL PARTIES ACT, 2011**

**AND**

**IN THE MATTER OF ARTICLES 1, 4(2), 10, 38, 95(4), 201(a) and 201(b) (iii) OF THE  
CONSTITUTION OF KENYA**

**BETWEEN**

**ORANGE DEMOCRATIC MOVEMENT .APPLICANT**

**VERSUS**

**THE NATIONAL TREASURY.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY FOR**

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

**REGISTRAR OF POLITICAL PARTIES .....3<sup>RD</sup> RESPONDENT**

**THE NATIONAL ASSEMBLY..... 4<sup>TH</sup> RESPONDENT**

**RULING ON LEAVE**

***(To apply for judicial review orders of Mandamus)***

1. By an amended chamber summons dated 2nd November 2016 and filed in court on 9<sup>th</sup> November 2016, the applicant Orange Democratic Movement (ODM) seeks from this court orders of:

a) to apply for Judicial Review Orders of Mandamus compelling the respondents to forthwith allocate, appropriate and disburse to the applicant the sum of kshs 4,135,903,545 and or such other outstanding amount lawfully due to the applicant under the Political Parties Fund; such amount being not less than 40% of 95% of not less than 0.3 of the total revenue collected by the National Government during the period between 2012 and 2016 less the sum of kshs 501,575,919 which has been received by Orange Democratic Movement during the same period.

b) Directors do issue for the urgent hearing and determination of this application upon grant of leave.

c) The costs of this application be costs in the cause.

2. The chamber summons is predicated upon the statutory statement and the matters set out in the verifying affidavit of Oduor Ongwen sworn on 2<sup>nd</sup> November 2016.

3. According to the applicant, it is a duly registered political party as established under Article 38 of the Constitution of Kenya.

4. That the applicant is entitled as a matter of right, and pursuant to Section 24 of the Political Parties Act, 2011, to receive funds from the Political Parties Fund established under the Act.

5. That following the outcome of the 2013 general elections, the applicant is entitled to at least 40% of the funds required to be distributed to Political Parties pursuant to Section 25(a) of the Act.

6. That the aforesaid funding is essential to the applicant for purposes of:

a) Promoting the representation in Parliament and in the County Assemblies of women, persons with disabilities, Youth Ethnic and other minorities and marginalized communities.

b) Promoting active participation by individuals citizens in political life:

c) Covering its election expenses and the broadcasting of its policies.

d) Organization by the applicant of civic education in democracy and other electoral processes.

e) Bringing the applicant's influence to bear on the shaping of public opinion; and

f) Administrative and staff expenses of the applicant.

7. It is averred that the Political Parties Fund is entitled to receive from the National Government such funds not being less than zero point three percent ( 0.3% ) of the revenue collected as may be provided by Parliament, and contributions and donations to the Fund from any other sources.

8. That contrary to the Act, the Fund has, since its establishment in 2011 been receiving from the National Treasury only about 0.03% of the revenue collected by the National Government.

9. That for the years 2012/2013; 2013/2014; 2014/2015 and 2015/2016, the total revenue received by the National Government is approximately 4,284,478,728,351 (trillion). Therefore, that in accordance with the Political Parties Act, during the same period, the Fund should have received at least kshs 12,853,436,185.00 being 0.3% of the National Revenue.

10. That in accordance with the Act, 95% of kshs 12,853,436,185.00 should have been distributed to the political parties including the applicant who qualify to receive funding from the Fund. That the applicant is entitled to receive and should have received at least 40% of this amount during the said financial years.

11. That contrary to the Act and legitimate expectation of the applicant, it has only received shs 501,575,919 during the same period and that the outstanding sum is kshs 4,135,903,545.00 due to the applicant, based on the total national revenue collected.
12. The applicant laments that refusal/failure to allocate , appropriate and or disburse all the funds due to the applicant undermines democracy, the Rule of Law and the objectives for which the Fund was established.
13. That the Republic of Kenya being a multiparty democratic state, failure and or refusal to allocate, appropriate and or disburse all the funds due to the applicant and other political parties under the Fund undermines the Constitution, the sovereign power of the people and democratic governance.
14. In addition, it is alleged that the right of citizens to make political choices guaranteed under Article 38 of the Constitution are also contravened and undermined hence the application is in the public interest and ought to be heard and determined expeditiously because as a result of the underfunding, the applicant has been unable to undertake its core mandate and to utilize the funds to which it is entitled by law to achieve the objectives outlined herein above.
15. It is further stated that the general elections are barely a year away and that the applicant's ability to prepare and participate meaningfully and effectively is greatly affected by the lack of funding.
16. Further, that the respondents are acting illegally and unlawfully by failing to adhere to the provisions of the Constitution and the Political Parties Act.
17. That the respondents are acting ultra vires the Constitution and the Political Parties Act by unlawfully allocating, appropriating and or disbursing funds less than the amount stipulated by law.
18. That the respondents have no power and authority to determine how much to allocate, appropriate or disburse to the Fund when the amount is established by law.
19. It is further alleged that the respondents have therefore acted irresponsibly, arbitrarily, capriciously and unreasonably and that their action frustrates and undermines the applicant's ability to execute its constitutionally enshrined mandate.
20. Further, that the respondents' conduct is aimed at unlawfully and illegally weakening the power and ability of political parties to operate, grow and participate meaningfully in the democratic governance of the country.
21. It is also claimed that the respondent's decision is unlawfully and illegally aimed at undermining the ability of the applicant to bring its influence to bear on the shaping of public opinion by starving the applicant of the funds which is unjustifiable and unacceptable in a democratic society.
22. The ex parte applicant also relied on exhibits annexed including certificate of full registration of the applicant as a political party on 18<sup>th</sup> April 2012; IEBC records showing three national parties qualifying for funds from the Political Parties Fund; Election results for President in the 2013 March Elections; summary of all elective positions in the March 4<sup>th</sup> 2013 elections in Kenya; summary report of the Auditor General on the appropriation accounts, other public accounts and of the funds of the Republic of Kenya for the year 2011/2012 financial year;202/2013;2013/2014; 2014/2015; correspondence between the applicant and the Registrar of Political Parties; Budget presentation to the Parliamentary Committee on Justice and Legal Affairs for 2015/2016 financial year.
23. The chamber Summons by the applicant was ordered to be considered inter parties. The applicant dutifully effected service of the application upon the respondents and interested parties as directed by the court.

24. On 13<sup>th</sup> January 2017 the 4<sup>th</sup> Respondent (National Assembly ) filed grounds of opposition dated 12<sup>th</sup> January 2017 through the firm of S.N. Mwendwa advocate contending that:

1. The prayers sought by the applicant are too general and vague and fails to disclose to the court what end the Judicial Review remedies of Mandamus would be applied in the event that the leave sought is granted;
2. The applicant had not exhausted all the remedies available of resolving the matter so as to apply for Judicial Review;
3. This court lacks jurisdiction to issue the orders sought against the National Assembly in that Article 95(4) of the Constitution mandates the National Assembly to exercise legislative functions and does not exercise any administrative functions or its action in quasi judicial capacity thus the matter complained about by the applicant is outside the purview of Judicial Review;
4. That the applicant has not demonstrated to this court that the grounds upon which Judicial Review can be sought, have been met and therefore this court ought to decline to exercise its powers of Judicial Review;
5. The applicant relies on frivolous, vexatious and hopeless grounds to seek a prerogative order against the National Assembly, which is contrary to Article 95 of the Constitution.

25. The 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent made an appearance through Mr Munene of the Office of the Attorney General and Department of Justice but the 3<sup>rd</sup> respondent and the interested parties did not participate in these proceedings.

26. The application was canvassed orally with Senator James Aggrey Orenge appearing and urging the chamber summons on behalf of the applicant, jointly with Ms Julie Soweto, Mr Magaya and Mr Alex Muchiri whereas Mr Munene submitted on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Mr Mwendwa submitted on behalf of the 4<sup>th</sup> respondent, the National Assembly.

27. In his comprehensive submissions, Honourable Senator Orenge submitted, relying on the amended chamber summons, statutory statement and verifying affidavit together with the annexed exhibits.

28. In his view, the applicant had established that there was a public legal duty owed by the respondents to allocate, appropriate and disburse the political party funds as stipulated in the law.

29. Further, that Article 95(4),(a) and (b) of the Constitution mandates the National Assembly to determine the appropriate funds for allocation and that the 4<sup>th</sup> respondent therefore is under a duty to appropriate funds for expenditure to the 3<sup>rd</sup> respondent Registrar of Political Parties, and to pay to the applicant their entitlement as appropriate.

30. Further, that the function of the National Assembly is not just legislative but appropriates funds and exercises oversight functions over such expenditure. That Articles 220 & 221 of the Constitution vests upon the 1<sup>st</sup> , 2<sup>nd</sup> and 4<sup>th</sup> respondent a duty to oversee on how money is raised, allocated and disbursed to various state organs.

31. According to the applicant, its complaint is that money has not been paid into the political parties Fund and that albeit the 3<sup>rd</sup> respondent Registrar of Political Parties has been petitioning the National Treasury to pay into the Fund, the disbursement over the years have not been done in accordance with the law which stipulate that an amount should not be less than 0.3 % of the National Revenue and distributed between qualifying political parties as required under Section 24 of the Political Parties Act.

32. Reliance was placed on **CA 80/2014 Political Parties Forum Coalition & Others Vs Registrar of Political Parties & Others** CA 80 OF 2014(2016)Eklr where the Court of Appeal acknowledged the role of the National Assembly in appropriation and allocation of monies.

33. Further, that correspondence exchanged between the applicant and the Registrar of Political Parties show the role of the National Treasury & the Cabinet Secretary in charge of Treasury acknowledged in the disbursement of National Revenue once money is appropriated.

34. In Hon Senator Orengo's view, there is an arguable case which is prima facie for the exercise of this court's jurisdiction and discretion in granting leave as sought in order to minimize any access to the courts by litigants who may come before the court with frivolous or statute barred or openly without any legal foundation or basis.

35. Counsel for the applicant further submitted that mandamus is located where the duty is proclaimed or stipulated in the law and where it is shown that the applicant's actions are ultra vires the law.

36. Counsel for the applicant urged the court to grant leave and issue directions for the matter to be heard expeditiously as the budget process has begun.

37. In brief response, Mr Munene counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application for leave and submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have no specific duty towards the applicant which this court can compel its performance and that therefore the orders sought might end up being paper judgment incapable of enforcement. Further, that the only specific duty is against the 3<sup>rd</sup> respondent Registrar of Political Parties.

38. Mr Munene urged this court to dismiss the application against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

39. In response on behalf of the 4<sup>th</sup> respondent National Assembly, Mr Mwendwa opposed the applicant's application and maintained that the role of the National Assembly under Article 92(f) and Article 95 of the Constitution relates to legislation and appropriation of funds which obligations it has not failed to perform.

40. That the 4<sup>th</sup> respondent has enacted the Political Parties Act as required and appropriated funds towards funding of political parties and that as to whether funds are appropriated in accordance with the Political Parties Act is a matter of Evidence and Judicial Review remedies cannot apply in legislative matters but by way of constitutional interpretation on validity.

41. Mr Mwendwa submitted that since the various appropriations have not been declared unconstitutional, there is no prima facie case. That it is a matter of fact that there is a dispute as to the revenue collected. That the National Assembly does not exercise quasi Judicial functions or administrative powers under Articles 206, 220 and 221 of the Constitution and that this is a pure claim for money had and received by the National Treasury which cannot be claimed through Judicial Review.

42. It was further submitted on behalf of the 4<sup>th</sup> respondent that there was no claim that the National Assembly had acted illegally, irrationally or ultra vires hence it will not be proper for this court to exercise jurisdiction and issue Judicial Review Orders since the applicants can seek Constitutional Declarations and only come for Judicial Review if there is an order on facts. Mr Mwendwa urged this court to dismiss the application with costs.

43. In a brief rejoinder Hon Senator Orengo submitted that the 4<sup>th</sup> respondent had completely misapprehended the decision in CA80 /2014 [2016]eKLR which involved a complaint by parties which did not qualify to get any allocations from the Political Parties Fund and they went to court on the question of discrimination and violation of political rights; and that the court made it clear that it could not rewrite the law as that was the role of Parliament and that the applicant could seek to

amend the law to enable them qualify for funding.

44. Counsel for the applicant denied that this was a question of money had and received but failure to perform a legal duty to allocate and appropriate and that the Financial Management Act stipulates how public finances are to be expended by public bodies in the performance of functions allocated by Parliament.

45. It was submitted that the respondent had made a case that Parliament and the National Treasury were not acting in accordance with the law to enable the Registrar of Political Parties to administer the Fund and that in CA 80/2014 the court located the duty to Parliament. Further, that the reports by the controller of budget and the Auditor General show that money was allocated and spent.

46. It was submitted that this is a Fund which Parliament cannot ignore. Further, that Article 221 of the Constitution is clear on the duty of the Cabinet Secretary for the National Treasury. Counsel for the applicant urged the court to grant the orders sought for leave to apply for Judicial Review orders of mandamus.

### **Determination**

47. I have carefully considered the applicant's chamber summons, verifying affidavit, statutory statement and annexures. I have also considered the 4<sup>th</sup> respondent's grounds of opposition and the parties' respective counsels' oral submissions both in support of and in opposition to the application for leave.

48. The main issue for determination is whether the leave sought to apply for judicial review order of mandamus is available to the applicant.

49. The purpose for application for leave to apply for Judicial Review orders was explained by a three judge bench of Honourable Justices Bosire, Mbogholi Msagha & Oguk JJ in **Matiba Vs Attorney General Nairobi HCC Miscellaneous Application No. 790 of 1993** in which the Court of Appeal held that it is supposed to assist the court eliminate frivolous, vexatious or applications which prima facie appear to be abuse of the process of the court or those applications which are statute barred.

50. In **Republic Vs Land Disputes Tribunal Court Central Division and Another Exparte Nzioka[2006] 1EA 321**, Nyamu J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in-depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmerited.

51. The Court of Appeal in **Mexner & Another V Attorney General [2005] 2 KLR 189** held that leave of the court is prerequisite to making substantive application for Judicial Review and that the purposes of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion which must be exercised judiciously and not capriciously.

52. Earlier on in **Mirugi Kariuki vs Attorney General CA 79/1991[1990-1994] EA 156** the Court of Appeal held:

*“ If he [the applicant] fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The curb presented by the need for the applicant to show, when he seeks leave to apply, that he has a case, in an essential protection against abuse of the legal process. It enables the court to prevent abuse by busy bodies, cranks and other mischief-makers.”*

*“ Application for leave to apply for orders of Judicial Review are normally made ex parte and such application does restrict the court to threshold issues namely, whether the applicant has an arguable case, and whether if leave is granted, the same should operate as stay. Whereas Judicial Review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason, a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the court’s discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the laws and one had to consider without making any findings, the scope of the judicial remedy sought, the grounds and the, possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him. Although leave should not be granted as a matter of course or routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs Rees [1970] ch,345 at 402, that in the exercise of the discretion on whether or not to grant leave, the court takes into account the needs of good administration.”*

53. In **Republic vs County Council of Kwale & Another ex parte Kondo & 57 Others Mombasa HCC Miscellaneous Application No. 384 of 1996** the court (Waki J) as he then was stated:

*“ The purpose of application for leave to apply for Judicial Review is firstly to eliminate at an early stage any applications for Judicial Review which are either frivolous, vexatious or hopeless and secondly, to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial Review of it were actually pending even though misconceived. Leave may only be granted, therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant, the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always, it has to be exercised judicially.”*

54. From the above plethora of decisions, it clearly emerges that the grant of leave to institute Judicial Review proceeding is not a mere formality and or as a matter of course. The person applying for leave is under an obligation to demonstrate to the court that they have a prima facie arguable case for grant of such leave.

55. However, as the authorities speak, the applicant is not required at the leave stage to delve into the in depths of the application. They need to demonstrate that the application is not frivolous, malicious and futile or that the applicant has not come to court after an unexplained inordinate delay.

56. In the instant case, and without necessarily delving into the merits of the intended application, the applicants Orange Democratic Party (ODM) claims that the respondents have defaulted in the performance of their constitutional and statutory duties of appropriating, allocating and administering the funds meant for political parties through the Political Parties Fund as established under the Political Parties Act, 2011, and in accordance with the stipulations under the Act which failure has affected the rights and interests of the applicant hence the need for the court’s intervention to compel the performance of that public duty stipulated in the law.

57. Judicial Review Order of Mandamus is issued to compel the performance of a public duty where

the obligation arises out of the official status of the respondent. It is applicable in cases where the duty is imposed by law for the benefit of an individual provided there is no more appropriate alternative remedy (see **Shah Vs Attorney General No.3 Kampala HCC 31/1969[1970] EA 543**).

58. In **Joham Mulati Welamondi vs ICK Bungoma HC Miscellaneous Application 81/2002** it was held that Mandamus is a remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant.

59. In **Kenya National Examinations Council (KNEC) Vs Republic Ex parte Geoffrey Gathenji Njoroge & Others** the Court of Appeal held that Mandamus is a command requiring a person to do some particular thing specified which appertains to his or her office and is in the nature of a public duty and its purpose is to remedy the defects of justice. It is issued so that the ends of justice may be in all cases where there is a specific legal right or no specific legal remedy for enforcing that right. Therefore, even where there is no statutory provision obliging an authority to act, where the case meets the criteria herein above, mandamus may go forth.

60. In the instant case, Article 206 of the Constitution establishes the Consolidated Fund and other public funds.

61. The other public funds are established by an Act of Parliament and in this case, Section 23 of the Political Parties Act, 2011 establishes the Political Parties Fund which is administered by the Registrar of Political Parties, in accordance with Section 24 of the Act.

62. The Act also provides for purposes of the fund under Section 24 thereof and for specific budget allocation to the Fund by the National Treasury which is 0.3% of the National Revenue to be shared between or among qualifying political parties as per the provisions of Section 26 of the Political Parties Act.

63. In other words, the percentage % and formula for distribution of the Political Parties Fund is stipulated by law and not a mere factual issue and as to how that Fund is to be utilized is also regulated by the Political Parties Act under the supervision of the Registrar of Political Parties, being the administrator of the Fund.

64. On the other hand, it is the duty of the Cabinet Secretary for the National Treasury to submit to the National Assembly estimates of the Revenue and Expenditure of the National Government for the next financial year to be tabled before the National Assembly for consideration after discussion by committee of the Assembly and review of the estimates and make recommendations to the Assembly (see Article 221 of the Constitution).

65. Political Parties perform important functions without which representative democracy could not exist. They offer alternative policies from which voters choose at elections, organize campaigns to mobilize voters and field candidates for public office. They may be unpopular but there is absolutely no better alternative way of organizing for democracy which is guaranteed by the Constitution and therefore the will of the people of Kenya.

66. Democracy is one of the national values and principles of governance espoused in Article 10 of the Constitution.

67. Political parties, undoubtedly constitute engines of democratic political systems for they encourage and enhance competition between societal groups and interests. They are the only effective mechanism by which ordinary people '**wanjiku**' can have any personal contact with the body politic.

68. Representative democracy cannot operate effectively without strong and healthy political parties. It is for that reason that Part 3 of the Chapter Seven of the Constitution of Kenya, 2010 is dedicated to political parties and under Article 92(f) thereof, Parliament is mandated to enact legislation to provide for the establishment and Management of a Political Parties Fund.

69. Article 94 of the Constitution espouses the role of Parliament whereas Article 95 is on the role of the National Assembly.

70. The legislative function of the National Assembly is only but one of the important functions of the National Assembly. It is not the only role. The National Assembly has many more equally important roles under the Constitution including determination of allocation of national revenue between the levels of government, appropriation of funds for expenditure by the National Government and other national state organs, exercises oversight over national state organs, exercises oversight over national revenue and its expenditure; exercises oversight of state organs; among other non legislature functions/roles.

71. It follows therefore, that any question about political parties is a question of quality governance of any country that believes in democracy and hence the financing of political parties is a critical issue for ensuring good governance.

72. Therefore, it cannot be said that the application by the applicant is frivolous, vexatious or that prima facie, the applicant is seeking for a paper judgment or money had and received. That argument by Mr Munene, in my humble view, is belittling of the constitutionally espoused institutions and the roles that these institutions play in the governance of this great nation of Kenya.

73. Albeit the parties to these proceedings have delved so much into the merits of the intended application, it is not within the province of this court to delve into the depths of the application.

74. However, I must satisfy myself that the applicant has an arguable prima facie case and that is why I have attempted to analyze what the parties have placed before me to illustrate that the respondent have not only constitutional but statutory mandates to ensure that the political parties Fund functions effectively as envisaged in the Constitution and in the Political Parties Act, 2011.

75. Borrowing the words in **Republic vs Secretary of state for Home Department Exparte Venebles [1998] AC 407**,

*“ a person on whom power is conferred cannot fetter the future exercise of its discretion by committing himself now as to the way in which he will exercise his power.....By the same token, the person on whom power has been conferred cannot fetter the way in which he will use that power by ruling out of consideration on the future exercise of power, factors which may be relevant to that exercise.”*

76. It therefore follows that where there is an allegation that a body is not properly exercising its power or statutory or constitutional mandate, thereby leading to possible abuse without legal justification, the court will be called upon to investigate into the matter to establish whether the legal duty is being performed in accordance with the law and for that reason, I find that this is a proper case for such indepth investigation.

77. It should be noted that judicial review remedies are powerful enforcers of constitutionalism, one of the greatest promoters of the rule of law and one of the most powerful tools against abuse of power and arbitrariness(see **Republic V Commissioner General KRA Nairobi JR 340/2012** ( citing with approval **Re Bivac International SA Bureau Veritas** (supra).

78. Therefore, as long as there is prima facie evidence that there exists a public duty imposed by statute in the fulfillment of which some other person has an interest, the court has jurisdiction to entertain the prayer for mandamus to compel the fulfillment.

79. The law expects that statutory power be exercised fairly and Parliament must be presumed not to legislate contrary to the rule of law. It also expects that the enacted laws are implemented to the letter.

80. The rule of law enforces minimum standards of fairness, both substantive and procedural. The allegation that the respondents are not fulfilling the requirements of the provisions of the Political

Parties Act with regard to the 0.3 % percentage of total national revenue collected which is ascertainable, being allocated and approved to the Political Parties Fund is sufficient ground to establish prima facie arguable case since the actual amount of revenue collected by the National Government annually is a matter of public knowledge as it is always published in the Kenya Gazette notice hence it cannot be said that Parliament can be mandated by Article 92 of the Constitution to enact legislation on political parties and establish a fund which is stuffed with plain blank paper, when Article 3 (1) of the Constitution is clear that every person without exception, has an obligation to respect, uphold and defend the Constitution. The Political Parties Act, 2011 which was enacted after promulgation of the Constitution is one of the implementing Acts of the Constitution and therefore it is expected that the Act is implemented.

81. The Supreme Court in **Zacharia Okoth Obado Vs Edward Okong'o Oyugi & 2 Others [2014] e KLR** emphasized that;

*“ Article 3 (1) of the Constitution imposes an obligation on everyone, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) which requires that in the exercise of judicial authority the courts must pay heed to the purposes and principles of the Constitution being protected and promoted. However, all statutes flow from the constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this court cannot stop a constitutionally guided process.....”*

82. On whether the role of Parliament can be interfered with by the court, the case of **Republic vs Public Procurement Administrative Review Board & Another Exparte Selex Sistemi Integrata Nairobi HC Miscellaneous Application 1260/2007** is instructive where Nyamu J (as he then was) stated:

*“To exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant doctorial powers. It is no exaggeration, therefore, to describe this as an abuse of power of Parliament speaking constitutionally. This is the justification for the strong, it might even be rebellious stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law. Parliament is unduly addicted to this practice giving too much weight to temporary convenience and too little to constitutional principle.*

*The law's delay together with its uncertainty and expense, tempts governments to take short cuts by elimination of the courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease.”*

83. I cant agree more with the learned judge's observations. In the instant case, the court finds that it is arguable as to whether the respondents have any discretion in the manner in which the Political Parties Fund ought to be funded, managed and or distributed, being not less than 0.3 % of the revenue collected by the National Government as may be provided by Parliament, as stipulated in Sections 24 and 25 of the Political Parties Act.

84. For all the above reasons, I find that the application for leave to apply for Judicial Review Order of Mandamus is merited.

85. Albeit the 4<sup>th</sup> respondent claimed that there was an alternative remedy which ought to have been sought by way of constitutional interpretation for Declaration, it is clear that the applicant's claim is the performance of statutory duty to allocate, appropriate and disburse or distribute the Political Parties Fund in accordance with the established formula under the Political Parties Act.

86. And since the applicant's claim is that of entitlement in order to enforce and advance political rights which are guaranteed under Article 38 of the Constitution, those rights are enforceable under

Article 22 of the Constitution and the courts are obliged by Article 23 of the Constitution to uphold and enforce those rights under the Bill of Rights, the Political Rights inclusive. And in the enforcement of such rights, the court is given latitude to grant appropriate relief including a declaration of rights; and an order of Judicial Review is one of the remedies, among others.

87. Accordingly, I find the applicant's chamber summons dated 2nd November 2016 merited. I grant prayer No.B of the chamber summons as prayed.

88. I further order that the substantive notice of motion shall be filed and served within 7 days from the date of this order of leave, together with skeletal written submissions and list and bundle of authorities.

89. As the application was considered inter partes, the respondents and interested parties have 7 days from the date of service to file and serve their replying affidavits together with their submissions in writing and a list and bundle of authorities to be relied upon.

The matter shall be mentioned on 6th February 2017 to confirm compliance and for directions.

Costs shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 19th day of January 2017.

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Miss Julie Soweto for the applicant also h/b for Senator James Orengo

Mr Munene for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

Miss Otieno h/b for Mr Mwendwa for the 4<sup>th</sup> respondent

N/A for the 3<sup>rd</sup> respondent

CA: George