



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NUMBER 187 OF 2015**  
**BETWEEN**  
**THE COUNCIL OF GOVERNORS.....PETITIONER**  
**VERSUS**  
**THE SENATE.....RESPONDENT**  
**JUDGEMENT**

**Introduction**

1. The Petitioner herein the Council of County Governors is a statutory body established by the *Intergovernmental Relations Act, 2012*.
2. The Respondent, the Senate, is a legislative arm of Parliament of Kenya.
3. According to the petition, what provoked these proceedings was the decision by the Respondent vide a letter dated 6<sup>th</sup> May, 2015 to Kiambu County Government purporting to investigate the legality of the Kiambu County Finance Act, 2014.
4. It is the petitioner's case that the said action by the Respondent is/was unconstitutional since the powers of the Respondent are limited to oversight over national agencies which manage national revenue allocated to counties such as the National Treasury.
5. The petitioner therefore sought the following orders:
  - A. A declaration that resonating the intention of Articles 2, 3, 10 and within the intendment of Article 159(1), 160(1) and 259 of the Constitution of Kenya, if the Constitution makes provision as to how the legislature should conduct its internal affairs or as to the mode of the exercise of its legislative powers, a Court of law can exercise its jurisdiction to ensure the legislature comply with the Constitutional requirement.**
  - B. A declaration that resonating the intention of Articles 6(2), 209 and 10 of the Constitution, the Senate cannot scrutinise the process and legality of a county legislation.**
  - C. A declaration that resonating the intention of Article 96 of the Constitution, the Senate's oversight role over nationally collected revenue to counties is not identical to the County**

**Assembly's oversight over the executive.**

**D. A permanent injunction to restrain the Senate from considering the process and legality of the Kiambu Finance Act and any other County Legislation.**

**E. There be no order as to costs**

6. The Respondent did not respond to the petition.

7. However during the pendency of these proceedings, **Mativo, J** in **County Government of Kiambu & Another vs. Senate & Others [2017] eKLR** delivered his Judgement in a matter in which one of the issues, and in my view the substantial issue, was whether or not under the provisions of Article 96 of the Constitution of Kenya, 2010, the Senate can scrutinize the process and legality of county legislation.

8. After analyzing the facts and the applicable constitutional and statutory provisions as well as the authorities, the Learned Judge expressed himself *inter alia* as follows:

**“Under Article 185 of the Constitution of Kenya 2010, the legislative authority of a county is vested in, and exercised by its county assembly. A county assembly may make any laws that are necessary for, incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule. The legislative authority of a county is therefore by virtue of Article 185 cited above, vested in, and exercised by its County Assembly. The County Assembly makes any laws that are necessary for the effective performance of the functions and exercise of the powers of the County Government. It exercises oversight over the County Executive Committee and other county executive organs, Receives and approves plans and policies, Approves the budget and expenditure of the County Government, Approving borrowing by the County Government, Vets and approves nominees for appointment to county public offices, should conduct its business in an open manner, and hold its sittings and those of its committees in public and Should facilitate public participation and involvement in the legislative and other business of the assembly and its committees.**

9. The Learned Judge added that:

**“The county assembly in Kenya is the law-making organ of the county government. It is one of the state organs that the Constitution delegates power. The Constitution vests the legislative authority of the county on the county assembly. It also empowers the county assembly to exercise this authority. The county assembly can make any laws that enable the county governments to perform effectively. The performance involves the functions and exercise of the powers of the county government under the Fourth Schedule. On the other hand, the Constitution designates the Senate as a representative of the counties and mandates it to, *inter alia*, ‘protect the interests of the counties and their governments’. The supreme law also bestows upon the Senate the role of ‘oversight over national revenue allocated to the county governments,’ thus creating a web of relations between the Senate as a body at the national level and the counties and county governments.”**

10. The learned Judge concluded as follows:

**“To my mind, the above provisions are clear and require no explanation. There is no mandate granted by the constitution to the Senate to scrutinize the process and legality of county legislation. To me, the legality or otherwise of the county legislation can only be challenged in court.”**

11. For avoidance of doubt I associate myself with the learned Judge's findings and conclusions. The parties to this petition were in agreement that the said decision be adopted to the instant petition *mutatis mutandi*. The only issue that remains for determination in this matter is the effect of the said

determinations.

12. In my view, the determination depends on the nature of the orders made in **County Government of Kiambu & Another vs. Senate & Others** (supra) vis-à-vis the instant one. The general rule is that orders which are personal in nature, or orders *in personam* in legal parlance, do not affect third parties to the cause. See **Ernest Orwa Mwai vs. Abdul S Hashid & Another Civil Appeal No. 39 of 1995**, **Kotis Sandis vs. Ignacio Jose Macario Pedro De Silva Civil Appeal No. 38 of 1950 [1950] 1 EACA 95**, **The Town Council of Ol'kalou vs. Ng'ang'a General Store Civil Appeal No. 269 of 1997** and **Sakina Sote Kaitany and Anor. vs. Mary Wamaitha Civil Appeal No. 108 of 1995**.

13. Similarly, in **Gitau & 2 Others vs. Wandai & 5 Others [1989] KLR 231**, Tanui, J held that:

**“The plaintiffs in this suit were not party to the suit in which the consent judgement was entered and consequently they are not bound by a compromise made between the advocate who acted for the second, third, fourth, fifth and sixth defendants on one part and the advocates for the first defendant on the other.”**

14. In **Conflict of Laws** (7<sup>th</sup> Edn. 1974) at page 98 by R H Graveson it is stated:

**“An action is said to be *in personam* when its object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgement in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action *in personam*.”** See **Black's Law Dictionary**, 9<sup>th</sup> Edn. Page 862.

15. However, there is a class of orders or judgements which are said to bind the whole world as they determine the state of affairs rather than the rights of the parties before the Court. These orders are decisions *in rem*. In this respect it was held in **Kamunyu and Others vs. Attorney General & Others [2007] 1 EA 116** that:

**“In a suit seeking judgement *in rem*, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world.”**

16. Therefore the mere fact that the applicant was neither a party to the petition nor a party on whose behalf the petition was instituted does not deprive it of the benefit of the said order as long as the same was a decision *in rem*. I further associate myself with the decision in **George William Kateregga vs. Commissioner for Land Registration & Others Kampala High Court Misc. Appl. No. 347 of 2013** in which the Court while citing the South African case of **Nicholas Francois Martemns & Others vs. South African National Parks, Case No. 0117**, expressed itself as follows:

**“Therefore, in the instant case even if the parties other than the Applicant crafted a consent judgement over the suit land which was sanctioned by the court, it necessarily became a judgement of the court. The effect was that the Applicant would be bound by it notwithstanding that he was not privy to the consent agreement or suit; which renders the judgement in that case a judgement *in rem*. A judgement *in rem* invariably denotes the status or condition of the property and operates directly on the property itself. It is judgement that affects not only the thing but all persons interested in the thing; as opposed to judgement *in personam* which only imposes personal liability on the defendant.”**

17. Similarly in **Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd [2008] eKLR** it was held:

**“It is trite law that ordinarily a judgement binds only the parties to it. This is known as**

**Judgement *in personam*. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement *in rem*. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the *jural* relation of the person or thing to the world generally.”**

18. I am also alive to the decision in **Pattni vs. Ali & Anor (Isle of Mann (Staff of Government Division) [2006] UKPC 51** in which reliance was sought from *Jowitt’s Dictionary of English Law* (2<sup>nd</sup> Edn.) p. 1025-6 to the effect that:

**“A judgement *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgement *in rem*.”**

19. In my considered view, the issue of the legality or constitutionality of the Senate’s action cannot be said to be restricted to the parties before the Court. Such a decision is a decision *in rem* which are defined as final judgements or orders or decrees of competent courts which confer or take away from any person any legal character, or to be entitled to any specific thing, not as against any specific person but absolutely. See **Koech vs. African Highlands and Produce Limited and Another [2006] 2 EA 148**.

20. Although the decision of a Court of concurrent jurisdiction is not binding, if the said decision reflects the true legal position there would be no basis for a divergent opinion. **Benjamin Cardozo’s**, in *‘The Nature of the Judicial Process’*, New Haven; Yale University Press (1921) p. 149 opines:

**“In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”**

21. The House of Lords similarly held in **R vs. Knuller (Publishing, Printing and Promotions) Ltd (1973) A.C 435** :

**“It was decided by this House in *Shaw vs Director of Public Prosecution* [1962] A.C 220 that conspiracy to corrupt public morals is a crime known to the law of England...I dissented in *Shaw’s* case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice is no longer regarding previous decision of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act...I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament.”**

22. I also associate myself with the decision of **Lord Wilberforce** in **Fitzleet Estates vs Cherry (1971) 1 WLR 1345**, where he expressed himself as follows;

**“Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected ...[D]oubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much**

**more than doubts as to the correctness of such opinion to justify departing from it.”**

23. Accordingly, a Court ought only to depart from its earlier findings, if there is a substantial cause and in exceptional circumstances.

24. In this case since I share in the reasoning of **Mativo, J**, I have decided not to reinvent the wheel as it were but instead follow the beaten path of my learned brother and adopt his determinations and conclusions therein in this case.

25. In the premises, I find this petition merited and declare that resonating the intention of Articles 6(2), 209 and 10 of the Constitution, the Senate cannot scrutinise the process and legality of a county legislation. I therefore grant a permanent injunction restraining the Senate from considering the process and legality of county legislation.

26. As this was a proceeding in rem, there will be no order as to costs.

27. It is so ordered.

**Dated at Nairobi this 20<sup>th</sup> day of February, 2017**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Wanyama for the Petitioner***

***Miss Thanji for the Respondent***

***CA Mwangi***