



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 229 OF 2015**

**IN THE MATTER CONCERNING THE PROBE BY THE SENATE INTO KIAMBU COUNTY  
SUPPLEMENTARY APPROPRIATION BILL, 2015**

**IN THE MATTER CONCERNING ARTICLE 1(1), 2 (1), 2 (2), 2 (4), 3 (2), 6 (2), 10 (1), 94 (1) 94  
(4), 96 (2), 96 (3), 174 (1), 183 (3), 185 (1) AND 189 (1) OF THE CONSTITUTION**

**IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 6 (2), 175 (A), 179 (1), 183 (1),  
189 (1) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**THE COUNTY GOVERNMENT OF KIAMBU.....1<sup>ST</sup> PETITIONER**

**COUNCIL OF COUNTY GOVERNORS.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE SENATE & OTHERS.....RESPONDENTS**

**JUDGEMENT**

This petition raises three fundamental issues, namely; **(a)** whether or not under the provisions of Articles 96 of the constitution of Kenya, 2010 the Senate can scrutinize the process and legality of county legislation, **(b)** Whether this court has jurisdiction to entertain this case and **(c)** whether this suit offends the provisions of section 12 of the National Assembly (Powers and Privileges) Act.

To my mind, the answer to the first two issues lie in the wording and proper interpretation of Articles 96, 185 and 165 of the constitution which defines the constitutional mandate of the Senate, the county assemblies and the jurisdiction of the high court respectively, while the answer to the third issue lies in the wording and interpretation of section 12 cited above of the National Assembly (Powers and Privileges) Act. Before addressing the above issues, I find it necessary to summarize the facts of this case and the arguments advanced by the parties.

The petitioners case is that pursuant to the provisions of section 135 of the Public Finance Management Act, the County Executive of Kiambu County tabled before the County Assembly a supplementary Appropriation Bill for the Assembly's consideration, that the County Assembly considered and passed

the said Bill being Supplementary Appropriation Bill number 3 of 2015 which sought to supplement the County Governments' budget and cater for the County's unforeseen expenditures.

The bill was forwarded to the County Governor for assent but pursuant to section 24 (2) (b) of the County Government Act he referred it back to the assembly for reconsideration and amendment to reflect concerns he had highlighted because the bill as passed failed to take into account the views of the County Executive Committee Members for finance and public on the proposed recommendations as required by Public Finance Management Act.

The Bill together with the recommendations was considered, debated and passed by the County Assembly on 18<sup>th</sup> May 2015 but on 20<sup>th</sup> May 2015 some nine Members of the County Assembly petitioned the Senate seeking an investigation into the passage of the Bill into Law. The petitioners case is that the persons who petitioned the Senate had the opportunity to ventilate their objections in the County Assembly and that the Bill allows important and lawful expenditure made from the County Revenue Fund that will facilitate the provision of county government services to the people of Kiambu County.

It is the applicants case that on 20<sup>th</sup> May 2015 the Senate Speaker directed the Senate Standing Committee on Finance, Commerce and Budget to probe the passage of the Bill. Other reasons in the petition are that the proceedings before the Senate were politically instigated by persons opposed to the leadership of the Governor and insisted that the Senates investigation is unconstitutional.

It is the petitioners case that Article 185 (2) of the Constitution empowers a county assembly to make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the fourth schedule and further that article 6 (2) connotes a measure of autonomy of the levels of government and that one organ of the state may not use its powers in such away as to undermine the effective functioning of another and that the senate has the mandate of protecting devolution at the national level only and has no mandate to interfere with the functioning of County Assemblies and further that the Senates' power is limited to oversight national agencies which manage national revenue allocated to counties such as the national treasury as provided under article 96 of the constitution and that the said role does not include intermeddling in the affairs of the County Assemblies. The petitioners position is that the Senates role is limited to revenue allocated to counties only and does not cover grants, loans and revenues generated locally by counties.

In their grounds of opposition, the Respondents maintained that the High Court lacks jurisdiction under Article 1 (1) and 96 of the Constitution to grant the orders sought and that the petition is an affront to the right of every citizen under Article 119 of the constitution to petition parliament to consider any matter within its authority including, amending or repealing any legislation. However, Article 119 (1) of the constitution reads:- "*Every person has a right to petition Parliament to consider any mater within its authority, including to enact, amend or repeal any legislation.*"

The above words are clear. The operative words are "*any matter within its authority*" meaning matters within the authority of parliament, raising the question whether or not the matters complained of in this petition are within the constitutional mandate of the Senate. I will address this question shortly.

The Respondents further aver that the orders sought are an affront to the doctrine of separation of powers and that the jurisdiction of this court has been ousted by the provisions of section 12 of the national Assembly (Powers and Privileges) Act whose provisions apply to the Respondent by virtue of Article 117 of the constitution and clause 7 of the sixth schedule to the constitution which provides that no proceedings or decisions of the Respondents shall be questioned in any court. Further, the Respondents aver that the petition does not disclose the impropriety of the Respondents, hence the courts must wait for parliament to complete its work before determining on the constitutionality of the act in question.

The petitioners counsel submitted that article 165 (3) (d) of the constitution vests this court with jurisdiction to entertain this case and that section 12 of the National Assembly ( Powers and Privileges) Act cannot oust the said constitutional provisions since the constitution is the supreme law of the land.

Counsel cited the Supreme Court decision in the case of *Speaker of Senate vs A.G. & 4 Others* where the court held *inter alia* that parliament has to always abide by the prescriptions of the constitution and that it cannot operate besides or outside the four corners of the constitution.

Counsel also cited the decision in *Okiya Omutatah Okiiti & 3 Others vs Attorney General & 5 Others* where the court held *inter alia* that the constitution disperses powers among various constitutional organs and when any of these organs steps out of its area of operation, this court will not hesitate to state so and added that it is the mandate of the court to check the constitutionality of the resolutions and statutes made by the legislature.

Counsel further submitted that the Senate does not have constitutional mandate to examine the process of enactment, legality and constitutionality of county legislations and premised this proposition on the provisions of articles 96, 109 to 113 of the constitution, hence submitted that the decision of the Speaker of the Senate to probe the Kiambu County Supplementary Appropriations Bill, 2015 is unconstitutional to the extent that it bestows on the Senate functions that are outside its constitutional authority.

The petitioners counsel also submitted that the provisions of Article 119 refers to "any matter within the authority of the Senate" which authority can only be derived from article 96 of the constitution and further argued that examining the process of enactment, legality and constitutionality of county legislation does not fall within the Senates mandate and reinforced this argument with the decision rendered in *International Legal Consultancy Group vs Senate & Clerk of the Senate*.

The gist of the Respondents' counsels submissions is that the High Court lacks jurisdiction under Articles 1 (1) and 96 of the constitution to issue the orders sought and that the petition is an affront to the right of every citizen under Article 119 of the constitution to petition parliament, offends the doctrine of separation of powers and encroaches the legislative mandate of parliament and reiterated that the suit offends section 12 of the National Assembly (Powers and Privileges) Act whose provisions apply to the 3<sup>rd</sup> to 18<sup>th</sup> Respondents. Counsel also submitted that the orders sought seek to suspend the provisions of Articles 1, 94, 96 & 119 of the constitution.

To reinforce her arguments, Respondents counsel cited several decisions among them the much quoted decision by Nyarangi JA on jurisdiction and argued that that courts ought to exercise restraint while venturing into the legislative field reserved by the constitution to the legislature. Counsel also cited leading decisions emphasizing privilege accorded to the Respondents under the law and the doctrine of separation of powers.

In their further submissions filed on 26<sup>th</sup> October 2015, counsel for the Respondents urged the court to consider the High Court opinions rendered in *International Legal Consultancy Group vs The Senate & Clerk of the Senate* where it was held that the Senate's power of oversight under Article 96 (3) is limited to national revenue allocated to the County Governments and cited the powers of the Senate under article 125 of the constitution. Also cited is the decision in the *Senate & Another vs A.G* where the court rendered itself thus the role of the Senate would be negated if the Senate were not to participate in the enactment of legislation pertaining to the devolved units. With respect, this decision related to the constitutional mandate of the Senate to participate in Bills in Parliament relating to Counties and not Bills in the County Assemblies.

Article 259 of the constitution, enjoins this court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 159 (2) (e) of the constitution to protect and promote the purposes and principles of the constitution. The constitution should be given a purposive, liberal interpretation. The provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other. To use the words expressed in the Namibian case of *State vs Acheson* "*The spirit of the constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.*"

In my view, the disposition of Constitutional questions must be formidable in terms of some Constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant case. The privy council in the case of *Minister for Home Affairs and Another vs Fischer* while interpreting the Constitution of Bermuda stated that:-

*“a constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation... It is important to give full recognition and effect to those fundamental rights and freedoms.....”*

**Lord Wilberforce**, while delivering the considered opinion of the court in the above case observed:-

*“Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language.....”*

The recognition of the sanctity of the Constitution and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in the case of *Anthony Ritho Mwangi and another vs The Attorney General* where the court stated:-

*“Our Constitution is the citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and the rule of law.”*

Courts must be innovative and take into account the contemporary situation of each age but innovations must be supported by the roots. My discernment from the foregoing jurisprudence is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

However, consistently with the ethic of respect, it is well established that the primary obligation of a court construing a statute is to give effect to the intention of the Parliament to be ascertained from the words used by the Parliament in the statute. The court interprets the constitution and how legislation should apply in a particular case as no legislation unambiguously and specifically addresses all matters. Legislation may contain uncertainties for a variety of reasons such as:-

1. Words are imperfect symbols to communicate intent. They can be ambiguous and change in meaning over time.
2. Unforeseen situations are inevitable, and new technologies and cultures make application of existing laws difficult.
3. Uncertainties may be added to the statute in the course of enactment, such as the need to compromise or catering for certain groups.

Therefore, a court must try to interpret the constitution and determine how a statute should be enforced, but I am alive to the fact that in exercising this power, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully.

There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the

language must ordinarily be taken as conclusive. *Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete.* The implication is that when the language is clear, then it is not necessary to belabour examining other rules of statutory interpretation.

One key function of the court in interpreting the law is the creation of certainty in law. Certainty in law enables planning of human affairs in reliance on the law, and the realization of expectations based on such planning. It creates uniformity in the administration of justice, and prevents the unbridled discretion of the judiciary. It makes available the tested legal experience of the past. The other key point for the court to consider while interpreting the law is to change and adapt the law to new and unforeseen conditions. Law must change because social institutions change. And in applying generalized legal doctrine, such as statutes, to the facts of specific cases uncertainties and unforeseen problems arise. As conditions change with the passage of time, some established legal solutions become outmoded. The courts should resolve these uncertainties and assist in adapting the law to new conditions.

Finally while interpreting the law, the court should bear in mind that they should make laws when necessary to make the ends of justice. Legal systems world over could not grow as has been the case without a great amount of judicial law making in all fields, Constitutional law, Common Law and statutory interpretation. However, to the extent that judges make laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policy making. This includes not only the facts peculiar to the controversy between the litigants before them, but also enough of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case.

This court has been called upon to determine the Constitutionality or otherwise of a decision by the Senate to examine the process of enactment, legality and constitutionality of the Kiambu County Supplementary Appropriation Bill, 2015. As intimated earlier, the answer lies in the wording of the relevant provisions of the constitution.

The concepts and principles of democratic governance in the constitution expressly provide for an unfettered sovereignty of the people as the arch-stone of government. Hence, the unequivocal right of the people to participate in and oversight the government, traverses the entire Constitution. Embedded, therein and of no less significance, are the objects and principles of devolved government. Devolution is principally meant to take away and re-distribute/share out the power to plan, legislate, budget and make policies for governing from an erstwhile highly centralized national executive and legislature to forty-seven county executives and assemblies.

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.

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.

The constitution clearly stipulates the mandate of the Senate in Article 96. The Senate represents the counties, and serves to protect the interests of the counties and their governments. The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113. The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments. The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.

The respective functional competencies of the national and county governments are provided under Article 186 of the Constitution as read with the Fourth Schedule. Counties have both executive and legislative powers over the functions allocated to them under the Fourth Schedule. A function or power not assigned by the Constitution or law to a county belongs to the national government. A county assembly is the legislative body of a county government. In addition to making laws, the county assembly has oversight powers over CEC members and other county executive organs.

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.

The other issue raised by the Respondents for this court to satisfy itself is the question of jurisdiction. Article 165 (3) (d) (i) & (ii) of the Constitution provides that the High Court has power to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of this constitution or of any law is in consistent with, or in contravention of, this constitution. I have no doubt in my mind that this matter is properly before the court and that this court by dint of the above provisions has the requisite jurisdiction to examine and determine the constitutionality or otherwise of the actions complained of, namely, whether the Senate has powers to scrutinize the process and legality of county legislation and or to determine the constitutional mandate of the Senate over the counties. Judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality or constitutionality of decisions or actions or purported decisions or brought before the court.

The Constitution of Kenya, 2010 sets out from the plain, general statement of principle regarding governance. “All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.”

The people’s sovereign power is to be exercised “in accordance with the Constitution. The Constitution further qualifies the initial general statements, by making the primary allocations of governmental responsibility, in the following terms. “Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution – (a) Parliament and the legislative assemblies in the county governments; (b) the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals.”

It is clear that the broad profile of the Constitution, commits law-making to the legislature and the county assemblies, and that only *the courts* can resolve disputes relating to uncertainties in the laws. Such uncertainties, mainly relate to the mode of legislative *drafting*, and the shape and detail of the statutes as they appear in the books.

In *Judicial Service Commission v. Speaker of the National Assembly and 8 Others*, the court proceeded on the basis that the *separation of powers doctrine* obligated it to be conscious of certain limitations to

judicial authority; the court remarked that certain matters, by the terms of the Constitution, had been *expressly committed to other arms of government*. The court thus held:-

*“The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by Article 165(3)(d)(ii) to determine whether anything said to be done under the authority of the Constitution or any other law is inconsistent [with] or in contravention of the Constitution.”*

A relevant observation on such issues has been made by the Nigerian scholar, Professor B.O. Nwabueze, in these terms:-

*“The review by the ordinary courts of the constitutionality or legality of legislative and executive acts, and of the propriety of administrative acts of a quasi-judicial nature is the main bulwark of constitutionalism in the Commonwealth and the United States....The court’s jurisdiction for this purpose may be invoked by an aggrieved party..., provided he can establish a **locus standi** entitling him to challenge the act in question. This condition means that what can be challenged is an actual legislative act in being; it is not in general permissible to impugn through the process of the courts a bill before it has actually become law.”*

Such an observation sheds some light on the concept of legislative autonomy. Professor Nwabueze, in effect, attributes to the legislative authority the charge over its proceedings and its law-making: save that *its statutes* may properly stand to question before the courts, *subsequently*.

The Respondents counsel also cited section 12 of the National Assembly (Powers and Privileges) Act and argued that the committee of the Senate cannot be sued. Article 124(1) of the Constitution thus provides that:-

*“Each House of Parliament...shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.”*

The Act further provides that:-

*“No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court.”*

Before I address my mind to the question of immunity provided under section 12 cited above, I find it necessary to address one pertinent issue. The third to Eighteenth Respondents are members of the Senate Standing Committee on Finance, Commerce and Budget. I'm not persuaded that the third to the Eighteenth Respondents are necessary parties to these proceedings either in their personal capacities or as a committee. As a committee, the provisions of Section 12 cited above are clear on the question of privilege.

The presence of opposing parties is one of the essential requirements of any civil suit. But all parties are not necessary for the suit to be adjudicated upon. Therefore, distinction should be made between necessary and non-necessary parties. **‘Necessary Parties’** are those parties from whom relief is claimed. **‘Non-necessary Parties’** are those parties who may be parties to the suit, but from whom no relief has been claimed. The presence of necessary parties is obviously required for the court to adjudicate and pass an effective and complete decree granting relief to the plaintiff. However, the same does not hold good for non-necessary parties. In the absence of necessary parties, the court may dismiss the suit, as it shall not be able to pass an effective decree. But a suit can never be dismissed due to absence of non necessary-party. As **Nambuye J** (as she then was) held, **‘Necessary Parties’** are those parties in the absence of whom no effective decree can be passed by the court.

In the Indian case of *Benares Bank Ltd. v. Bhagwanda* the court laid down the two tests for determining the questions whether a particular party is necessary party to the proceedings. The said

tests were reiterated in the case of *Deputy Commissioner of Hardoi v. Rama Krishna*. The said tests are:-

- i. *There has to be a right of relief against such a party in respect of the matters involved in the suit.*
- ii. *The court must not be in a position to pass an effective decree in the absence of such a party.*

Generally, a party from whom no relief is sought is not a necessary party. Thus, the nature of relief claimed is important in deciding who is a necessary party. Necessary parties are essentially those parties from whom the plaintiff has claimed relief, not those parties from whom he may claim relief. Proper parties need not be impleaded. Therefore, if complete and effective relief can be claimed by the plaintiff from some parties, there is no need to join other parties since other parties are not necessary parties.

Turning to this case, and guided by the above jurisprudence, I am persuaded that the 3<sup>rd</sup> to 18<sup>th</sup> Respondents are not necessary parties to this suit and ought not to have been enjoined. First, it is not clear from the petition whether any substantive relief has been sought against them either individually or as a committee. Secondly and more important, the reliefs sought against the Senate if granted or refused can effectively and competently resolve the dispute. Thirdly, it has not been shown that the reliefs sought are against all the respondents jointly and severally. I am therefore tempted to conclude that the inclusion of the 3<sup>rd</sup> to 18<sup>th</sup> Respondents in these proceedings was improper and that they are not necessary parties and that this dispute can be effectively and competently resolved their absence notwithstanding and this ground alone I would not hesitate to strike their names from these proceedings.

The striking out or adding of parties is in the realm of judicial discretion of the Court, which will be exercised in the light of the following principles:-

- i. *Striking off the name of a person who has been improperly joined whether as plaintiff or defendant; or*
- ii. *adding the name of a person whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.*

The second category mentioned above pertains to proper parties. When a person is neither a necessary party nor a proper party, the Court would not allow him to be added as a party to the suit. The scope of the suit cannot be enlarged and questions which are not involved in the suit cannot be decided, simply by adding parties. Guided by the aforesaid authorities and considering the relevant law, the facts of this case I find that the presence of the 3<sup>rd</sup> to 18<sup>th</sup> Respondents in these proceedings is not necessary to enable the court to wholly and effectively determine the matters in question.

On the question of separation of powers and privilege, the Court of Appeal, in *Mumo Matemu v. Trusted Society of Human Rights Alliance and 2 Others*, considered the scope of application of the separation of powers doctrine, and adopted the High Court's standpoint in the following terms:-

*“[Separation of powers] must mean that the Courts must show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy, as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the respondents also concede Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions....”*

*“[I]n a jurisdiction such as ours in which the Constitution is supreme, the Court has jurisdiction to intervene where there has been a failure to abide by [the] Standing Orders which have been given constitutional underpinning under the said Article. However, **the Court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each***

**case.”**

To the same intent, the High Court, in *Okiya Omtatah and 3 Others v. Attorney-General and 3 Others*, thus stated:-

*“To agree with the National Assembly that this Court cannot interrogate its work will amount to saying that the National Assembly can fly beyond the reach of the radar of the Constitution. That is a proposition we do not agree with. Our view is that all organs created by the Constitution must live by the edict of the Constitution.”*

In *Ram Jawaya Kapur v. State of Punjab*, the Supreme Court of India held that:-

*“[The] Constitution has not indeed recognized the separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”*

Prof. J. B. Ojwang argues that that such a practical approach as in the above cited case is to be preferred, especially as it is guided by considerations of pragmatics and proportionality, in the interplays between the main branches of government, and it is also the reality in the American constitutional set-up. This was observed by Mr. Justice Cardozo in *Panama Refining Company v. Ryan*:-

*“The doctrine of ‘separation of powers’ is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment in response to the practical necessities of government which cannot foresee today the development of tomorrow in their nearly infinite variety.”*

The Canadian case, *Canada (House of Commons) v. Vaid* addressed specifically the question of parliamentary privilege, as it would stand before the courts:-

*“Parliamentary privilege consists of rights and immunities which the two Houses of Parliament and their members and officers possess, to enable them to carry out their parliamentary functions effectively. Without this protection then the members would be handicapped in performing the parliamentary duties.”*

It was held that Parliament is to be the judge of the occasion and the manner of exercise of its privileges, and that this matter falls outside the remit of the courts. The position in Great Britain, a country without a codified constitution, secures the privileges and immunities of Parliament in clear terms, thus depicted by Professors T.C. Hartley and J.A.G. Griffith:-

*“Parliamentary privilege is the name given to the special rights and immunities enjoyed by members of the two Houses of Parliament and to the powers and immunities of each House in its corporate capacity. The basis of parliamentary privilege is the law of Parliament, an ancient body of customary law which regulates many aspects of parliamentary activities....Any action which impedes the effectiveness of the House could constitute contempt and the House has the power to punish both its own members and any member of the public.”*

Parliamentary privilege includes the “necessary immunity” that the law provides for Members of Parliament, in order for the legislature to do its legislative work. The idea of necessity is thus linked to the autonomy required by legislative assemblies and their members to do their job. However, organs created by the Constitution must live by the edict of the Constitution and restrict themselves to the roles vested in them by the constitution.

The separation of powers is the vital constitutional distinction between the Parliament, the executive and the judiciary. What emerges from the above jurisprudence is that the constitution does not contemplate even for a moment a scenario whereby one organ of the government usurps the functions of the other.

The constitution creates the various organs of the state and vests them with authority. The role of the Senate is well defined under Article 96 while the role of the county assemblies and in particular its legislative power is well defined under Article 185. Clearly, my understanding of the constitution is that the Senate has no oversight role in county legislation. The legislative power of counties is vested in the county assembly by the constitution. Since the role of the Senate is clearly defined in Article 96 cited above, acting outside the constitutionally laid down mandate would in my view be a violation of the letter and spirit of the constitution and this court has a constitutional duty to intervene and stop such breach of the constitution.

The relationship between the courts and the Parliament is defined by Commonwealth and State Constitutions and the common law. To work, that relationship also requires the respect of each for the limits of its own function and the proper functions of the other. It requires courtesy and civil discourse between the institutions. These are necessary aspects of any working relationship however tightly defined by law.

In view of my above findings, I find that the petition has merits. Consequently, I allow this petition and make the following orders/Declarations:-

- a. A declaration be and is hereby issued that the decision of the Speaker of the Senate dated on or about 20<sup>th</sup> May 2015 to probe the Kiambu County Supplementary Appropriations Bill, 2015 is unconstitutional to the extent that it bestows on the Senate functions that are outside its constitutional authority contemplated under Article 96 of the Constitution.*
- b. An order striking out the suit against the third to the Eighteenth Respondents.*
- c. A declaration be and is hereby issued that pursuant to the provisions of Article 185 of the constitution, the legislative power of county governments is vested in county assemblies.*
- d. No orders as to costs.*

Orders accordingly

**Dated at Nairobi in this 1<sup>st</sup> day of February 2017**

**JOHN M. MATIVO**

**JUDGE**