Njenga v National Assembly of Kenya & 3 others (Civil Appeal 266 of 2019) [2025] KECA 2037 (KLR) (28 November 2025) (Judgment)

Neutral citation: [2025] KECA 2037 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 266 OF 2019

M NGUGI, P NYAMWEYA & WK KORIR, JJA

NOVEMBER 28, 2025

BETWEEN

ADRIAN KAMOTHO NJENGA ..... APPELLANT

AND

NATIONAL ASSEMBLY OF KENYA ..... 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

THE CONTROLLER OF BUDGET ..... 4TH RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Nairobi (Hon. Lady Justice W. Okwany) dated 30th April, 2019 in Petition No. 259 of 2018)

JUDGMENT

1. In his petition dated 25th July 2018, the appellant, Adrian Kamotho Njenga, challenged the constitutionality of the Appropriation Act, 2018, the Judiciary Fund Act, 2016, and what he termed the underfunding of the Judiciary. It was his contention that the National Assembly had unconstitutionally enacted the Appropriation Act, 2018, without proper public participation and in violation of Article 173 of the Constitution, which relates to the Judiciary Fund, resulting in chronic underfunding of the Judiciary.

2. The petition was lodged against the 1st respondent, the National Assembly. The 2nd respondent, the Judicial Service Commission (JSC), the 3rd respondent, the office of the Attorney General (AG) and the 4th respondent, the Controller of Budget were joined to the petition as the 1st, 2nd and 3rd Interested Parties.

3. The appellant contended that the Appropriation Act, 2018 had been enacted in contravention of *akn ke act 2010 constitution the Constitution* and the peremptory principles of public finance which demand openness, accountability and public participation in financial matters; that Article 173 of *akn ke act 2010 constitution the Constitution* obligates the respondent to assign a specific allocation of funds to the Judiciary Fund and thereafter approve budget estimates prepared by the Chief Registrar of the Judiciary; that as currently enacted, the Appropriations Act, 2018 contradicts the provisions of Article 173 of *akn ke act 2010 constitution the Constitution* as read with Article 160 of *akn ke act 2010 constitution the Constitution* which safeguard the financial and operational independence of the Judiciary; that the Appropriations Act, 2018 is inconsistent with the plain provisions

   of Article 173 of *akn ke act 2010 constitution the Constitution* which obligate the Respondent to ensure that the Judiciary has adequate resources for its functions; and that Article 221 (5) of *akn ke act 2010 constitution the Constitution* places a mandatory obligation on the 1st respondent to seek representations from the public on budgetary estimates and to take such representations into account when making recommendations to the National Assembly.

4. The appellant contended, further, that contrary to the express provisions of Article 221 (5) of *akn ke act 2010 constitution the Constitution*, the Budget and Appropriations Committee of the National Assembly did not seek representations from the public in discussing and reviewing the estimates submitted by the Chief Registrar of the Judiciary under Article 173 of *akn ke act 2010 constitution the Constitution*; that had it sought such representations, it would have been informed that the budgetary allocation purportedly made to the Judiciary is unrealistic and unlawful.

5. The appellant further contended that having failed to comply with the plain provisions of Article 221 (5) of *akn ke act 2010 constitution the Constitution*, the Budget and Appropriations Committee's recommendations to the National Assembly are manifestly unconstitutional and devastatingly fatal to the Appropriations Act, 2018 as the 1st respondent had failed to appropriate funds to the Judiciary Fund as mandated under Article 95 (4) (b) of *akn ke act 2010 constitution the Constitution*.

6. It was his case further that the failure to establish the Judiciary Fund in the manner contemplated by Article 173 of *akn ke act 2010 constitution the Constitution* as read with the Fifth Schedule to *akn ke act 2010 constitution the Constitution* has paralysed the judicial structures needed to deal with corruption and massive looting of public resources; and that section 3 of the Judiciary Fund Act as currently enacted by the respondent does not disclose the specific sum of monies, based on the national government's share of revenue, that is to be allocated to the Judiciary as contemplated by Article 173 of *akn ke act 2010 constitution the Constitution*.

7. The appellant contended, among other things, that the failure to comply with the provisions of Article 173 of *akn ke act 2010 constitution the Constitution* has resulted in erratic and unpredictable allocation of funds to the Judiciary; and that it militates against the expeditious disposal of cases, especially those involving corruption and economic crimes, contrary to the dictates of Article 159 of *akn ke act 2010 constitution the Constitution*; and that capacity constraints occasioned by denial of funds to the Judiciary by the 1st respondent has crippled the work of other institutions within the administration of justice chain, especially the investigative and prosecutorial agencies; that despite increasing the budgetary allocations to the Office of the Director of Public Prosecutions, Directorate of Criminal Investigations, the Ethics and Anti-Corruption Commission and the Office of the Auditor-General, all of which feed into the Judiciary's work load, the 1st respondent has irrationally scaled down the budget of the Judiciary.

8. The appellant therefore asked the High Court to issue declarations that: the Appropriation Act, 2018 is constitutionally invalid, null and void; that Article 173 of *akn ke act 2010 constitution the Constitution*

as read together with the Fifth Schedule to *akn ke act 2010 constitution the Constitution* requires the respondent to appropriate a specified allocate of funds to the Judiciary; that section 3 of the Judiciary Fund Act, 2016 is unconstitutional; that the ambiguity of section 3 of the Judiciary Fund Act and the failure to assign specific funds to the Judiciary renders the entire Judiciary Fund Act moribund, hollow and constitutionally invalid; and that the 1st respondent has not discharged the constitutional obligation imposed under Article 173 (5) as read together with the Fifth Schedule to *akn ke act 2010 constitution the Constitution*. The appellant sought, finally, an order directing the 1st respondent to enact the Judiciary Fund Act within six months in strict compliance with *akn ke act 2010 constitution the Constitution*; and an order that the petitioner and any other person be at liberty to petition the Honourable Chief Justice to advise the President to dissolve the National Assembly in the event the 1st respondent fails to constitutionally enact the Judiciary Fund Act within the aforesaid period of six months.

9. The 1st respondent opposed the petition by an affidavit sworn by Michael Sialai, the Clerk of the National Assembly, on 18th September 2018 and a further affidavit, also sworn by Michael Sialai, on 21st November, 2018. Its argument was that it has the sole constitutional mandate to approve and allocate funds to other organs of government; that it had enacted the Appropriation Act, 2018 in accordance with *akn ke act 2010 constitution the Constitution*; and that under Article 173 of *akn ke act 2010 constitution the Constitution*, the Judiciary budget, upon approval, was to be included in the Appropriation Act and thereafter could be drawn from the Consolidated Fund.

10. The 3rd respondent, the AG, supported the 1st respondent's position and opposed the petition on matters of law only. The 2nd and 4th respondents, the JSC and the Controller of Budget, did not respond to the petition or participate in any way during the proceedings before the High Court.

11. Upon hearing the petition, the High Court held that the inclusion of the Judiciary's budget in the Appropriation Act, 2018 was not unconstitutional, citing Article 221(6) of *akn ke act 2010 constitution the Constitution* which requires that, once approved, the estimates of expenditure for the Judiciary (and Parliament) "shall be included in an Appropriation Bill... to authorize the withdrawal from the Consolidated Fund". The court did not consider Article 221(7); which prohibits including expenditures charged on the Consolidated Fund in an Appropriation Bill; as, in its view, Article 221(6) justified the impugned inclusion. On the Judiciary Fund Act, the High Court found no contravention of *akn ke act 2010 constitution the Constitution*.

12. The court held that Article 173 did not require Parliament to fix an upfront percentage or amount for the Judiciary Fund in the Act, and that the appellant had not demonstrated how section 3 of the Act (which sets out the Fund's objectives) violated Article 173. Regarding public participation, the trial court was satisfied that the budget process met the constitutional threshold. The court held that the 1st respondent had produced evidence of invitations for public views and public hearings in 12 counties on the 2018 2019 budget estimates, and that it had also received written memoranda from the public, all of which fulfilled the duty to facilitate public participation in the enactment of the Appropriation Act, 2018.

13. The court did not address itself to the petitioner's contentions with respect to the underfunding of the Judiciary. It found no merit in the petition and dismissed it in its entirety, but with no order as to costs.

14. Aggrieved by the decision, the appellant filed the present appeal in which he raises, in the rather prolix memorandum of appeal dated 18th June 2019, some 20 grounds of appeal. He contends, among other things, that the trial court erred in: upholding the inclusion of the Judiciary's budget in the Appropriation Act, 2018, contrary to Articles 173(4), 206(2)(c) and 221(7) of *akn ke act 2010 constitution the Constitution*; failing to declare the Judiciary Fund Act, 2016 unconstitutional to the

extent that it lacks a guaranteed or 'predictable' allocation to the Judiciary Fund; finding that adequate public participation was conducted, despite alleged shortcomings in the budget-making process; failing to address the issue of underfunding of the Judiciary which undermines the Judiciary's independence and ability to discharge its constitutional mandate; and not determining all issues placed before the court, contrary to the principle in the Supreme Court decision in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) (2019] eKLR; rendering a decision that offends Article 163 (7) of *akn ke act 2010 constitution the Constitution*; deliberately suppressing or avoiding Articles 173 (4) as read with Article 221 (7) of *akn ke act 2010 constitution the Constitution* which categorically exempt the Judiciary budget from inclusion in the Appropriation Act; disregarding Article 206 (2) (c) of *akn ke act 2010 constitution the Constitution* which explicitly authorizes the withdrawal of Judiciary funds from the Consolidated Fund without inclusion into the Appropriation Act; failing to determine, on merit, the question of underfunding of the Judiciary which was at the heart of the petition; ignoring the 2nd respondent's "Statement on the State of the Judiciary in Light of Drastic Cuts in Budgetary Allocations"; failing to find that the Judiciary has been condemned to unreasonable financial distress by the 1st respondent; failing to find that there is arbitrariness, incongruence and perverse disparity in the judiciary's budget vis-a-vis the other two arms of government; failingCto find that it is irrational and unreasonable for the 1st respondent to keep slashing the Judiciary's budget against a rising demand for judicial services; failing to find that the token based funding of the Judiciary through supplementary appropriations is patently unconstitutional; by adopting a tortured and strangled interpretation of Articles 173, 221 and 259 of *akn ke act 2010 constitution the Constitution* in a manner that grants carte blanche to the 1st respondent to manipulate and meddle with the judiciary's budget at will; in finding that there was adequate public participation in the budgetary process yet no documentary evidence was produced to show that the budget estimates of the Judiciary were produced to the public; in finding that public participation was conducted in 12 counties yet the purported reports of public hearings for Nakuru, Marsabit, Mombasa and Nairobi Counties were undated and or unsigned; in finding that public participation can be undertaken by 'sampling', which is manifestly repugnant to the national values and principles enunciated under Article10, 201 and 221 of *akn ke act 2010 constitution the Constitution*; and exceeded jurisdiction by disregarding the binding public participation principles affirmed by the Court of Appeal in the matter of Kiambu CountyC

Government & 3 others v Robert N. Gakuru & OthersC(2017) eKLR.

15. The appellant further impugns the decision on the ground that the trial court violated his right to equal protection and equal benefit of the law as provided under Article 27 of *akn ke act 2010 constitution the Constitution* by overlooking the fundamental legal issues that he had raised; failing to judiciously consider the appellant's case as mandated under various constitutional provisions, thereby occasioning a miscarriage of justice; that the decision is incompatible with the tenets of good governance enshrined under Article 259 (1) of *akn ke act 2010 constitution the Constitution* and is a complete mockery of the judicial arm of government; and in failing to find that the Judiciary Fund Act as currently enacted is moribund and does not accord with the requisite legal standards, specifically Article 173 of *akn ke act 2010 constitution the Constitution*.

16. At the hearing of the appeal on 27th November 2024, the appellant, Mr. Kamotho, appeared in person; learned counsel Mr. Kuiyoni appeared for the 1st respondent, while learned counsel Ms. Robi held brief for learned counsel Mr. Marwa for the 3rd respondent. There was no appearance for the 2nd and 4th respondents.

17. The appellant filed submissions dated 4th October 2019, while the 1st and 3rd respondents, both of whom opposed the appeal, filed submissions dated 2nd December 2019 and 24th June 2024 respectively.

The 2nd and4th respondents did not file submissions, nor did they appear at the hearing of the appeal. The appellant indicated that he would rely on his written submissions, without highlighting, as did counsel for the 1st and 3rd respondents.

18. As a first appellate court, we are under a duty to analyse and evaluate the evidence and pleadings before the trial court and reach our own conclusion- see Selle v. Associated Motor Boat Co. [1968] EA 123.

19. We have set out above a summary of the appellant's petition before the trial court. In his affidavit in support of the petition, the appellant, who described himself as, among other things, a public spirited and an ardent defender of *akn ke act 2010 constitution the Constitution*, averred that the 1st respondent had enacted the Appropriation Act, 2018, without an iota of legality; that the enactment of the said Act was done in utter disregard of stipulations of Articles 10, 95, 173, 201, and 221 of *akn ke act 2010 constitution the Constitution*, and was therefore manifestly unlawful; that the formulae used by the respondents to arrive at the allocations to the Judiciary in the Act is unknown; that the actions of the 1st respondent constituted a menacing affront to the proper administration of justice; that in light of Articles 160 and 173 of *akn ke act 2010 constitution the Constitution*, the 1st respondent had no jurisdiction to meddle with the budget of the judiciary; failed to facilitate public participation and involvement in the enactment of the Appropriation Act, 2018 as mandatorily stipulated under Articles 118 and 221 of *akn ke act 2010 constitution the Constitution*; that the unlawful slashing of the Judiciary's budget by the 1st respondent undermines the functional integrity of this critical arm of government; that the unconstitutional failure by the 1st respondent to avail resources to the Judiciary has stalled the establishment and or upgrading of new courts, thus stifling access to justice underpinned by Article 48 of *akn ke act 2010 constitution the Constitution*; that the unlawful denial of funds to the Judiciary has impeded the programmes of the Judiciary and heavily curtailed the operations of tribunals housed under the Judiciary despite the ever increasing workload; and that viewed from a constitutional lens, the Appropriation Act, 2018 is a sham and amounts to abuse of legislative authority by the 1st respondent.

20. The appellant averred, finally, that the country is staring at a phenomenal judicial crisis due to the unconstitutional actions of the 1st respondent. In support of this averment, the appellant relied on a statement by the JSC, which he averred was based on a considered analysis of the catastrophic judicial outlook the impugned Appropriation Act, 2018, portends to the country. He urged the Court to exercise its constitutional jurisdiction to intervene and arrest the constitutional breaches being perpetrated by the 1st respondent.

21. In his submissions before us, the appellant identified two issues as flowing from the grounds of appeal in his memorandum of appeal: whether the decision of the trial court accords with *akn ke act 2010 constitution the Constitution* and the law; and what the appropriate remedies or reliefs are in light of the what he terms the glaring constitutional and legal errors in the High Court decision.

22. With regard to the first issue, the appellant submits that the trial court deliberately suppressed or avoided Articles 173 (4) as read with Article 221 (7) of *akn ke act 2010 constitution the Constitution* which categorically exempted the Judiciary budget from inclusion in the Appropriation Act. Citing Article 173 of *akn ke act 2010 constitution the Constitution*, he submits that under the said Article, the Chief Registrar is required to prepare estimates of expenditure and submit them to the National Assembly for approval; that once approved by the National Assembly, the expenditure of the Judiciary becomes a charge on the Consolidated Fund and the funds ought to be paid directly into the Judiciary Fund.

23. It is his submission that the inclusion of the Judiciary expenditure in the Appropriation Act is patently offensive to Article 221 (7) of *akn ke act 2010 constitution the Constitution* which categorically exempts the Judiciary budget from inclusion into an Appropriation Bill. He further cites Article 221 (6) and (7)

of *akn ke act 2010 constitution the Constitution*, as well as Article 173 (4) of *akn ke act 2010 constitution the Constitution*, to submit that the latter provision recognises the budget of the Judiciary as a charge on the Consolidated Fund, while Article 221 (7) of *akn ke act 2010 constitution the Constitution* absolutely proscribes the inclusion of the Judiciary budget in the Appropriation Bill on account of being a charge on the Consolidated Fund.

24. The appellant submits that there is no dispute that the Judiciary budget was included in the Appropriation Act, 2018; that whereas the trial court made reference to Article 221(6) of *akn ke act 2010 constitution the Constitution*, it did not give any consideration whatsoever to Article 221 (7) of *akn ke act 2010 constitution the Constitution*, despite the appellant having drawn the said provision to the attention of the trial court. It is his submission that by failing to draw a finding of unconstitutionality in such glaring circumstances, the trial court made a grave error.

25. The applicant submits, further, that the trial court disregarded Article 206 (2) (c) of *akn ke act 2010 constitution the Constitution* which explicitly authorizes the withdrawal of Judiciary funds from the Consolidated Fund without inclusion into the Appropriation Act. It is his submission that the constitutional language is specific with respect to the procedure for the withdrawal of funds from the Consolidated Fund; and that subjecting funds whose withdrawal is prescribed under Article 206 (2) (c) to the mechanism under Article 206 (2) (a) is unlawful. It is his contention therefore that at no point should approved Judiciary estimates form part of the Appropriation Act; that they should, rather, be directly remitted to the Judiciary Fund, and any other procedure is unconstitutional.

26. The appellant submits further that the trial court erred in law and fact in failing to consider and determine the question of underfunding of the Judiciary, which was at the heart of his petition. He contends that central to his petition is the perennial question of underfunding of the Kenyan Judiciary; that as a result of the underfunding, the Judiciary has been perpetually deprived of the ability to forecast and plan its activities or to undertake its core mandate of administering justice; and that its capacity to perform its functions under Article 1 (3) of *akn ke act 2010 constitution the Constitution* has been tremendously undermined.

27. The appellant submits that he comprehensively illustrated the diminishing nature of the allocations to the Judiciary in the face of rising clamour for justice but was ignored by the trial court. It is his submission that had the trial court paid regard to the budgetary figures and the trend in fiscal allocations, it would have easily established the arbitrariness and unreasonableness of the apportionments made by the 1st respondent to the Judiciary. The appellant submits that while the 1st respondent continually decreases the allocations to the Judiciary, it has been allocating itself a lion's share of the budget, yet its mandate, personnel and operational demands are minimal when juxtaposed against those of the Judiciary.

28. The appellant further impugns the decision of the trial court for what he terms its failure to consider or even make reference to the 2nd respondent's statement which he had annexed to his affidavit. He observes that the 2nd respondent is mandated under Article 172 (1) of *akn ke act 2010 constitution the Constitution* to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice, and submits that its statement is emblematic of the frustrations the Judiciary has to contend with in serving the public in light of its dire financial straits.

29. According to the appellant, it is inconceivable that the trial court would disregard such a valid warning bell on the prospect of the Judiciary grinding to a complete halt on account of financial strangulation, given the provisions of Article 172 (1) (e) which mandates the 2nd respondent to advise the national government on improving the efficiency of the administration of justice; and *akn ke act*

2010 constitution the Constitution does not envisage a situation in which the 1st respondent is allowed to paralyze the Judiciary without consequences.

30. The appellant further submits that the trial court erred in law and fact in failing to find that the Judiciary has been condemned to unreasonable financial distress by the 1st respondent. He submits that subsequent to the filing of his petition, the 1st respondent, in an attempt to sway the court, hurriedly published the Supplementary Appropriation Bill on 20th September 2018, allocating a further sum of Kshs. 1.5 billion to the Judiciary budget. While submitting that it is clear that the budget estimates of the Judiciary should never feature in an Appropriation Bill, his submission is that purporting to allocate a paltry Kshs. 1.5 billion when the 1st respondent had actually slashed over Kshs.10 billion from the Judiciary's budget is extremely spiteful.

31. The appellant charges the trial court's decision, finally, with offending Article 163 (7) of *akn ke act 2010 constitution the Constitution* and the binding Supreme Court decision in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) (supra). He submits that under the principle enunciated in that decision, any court whose decisions are subject to appeal is required to determine all issues placed before it.

32. The appellant submits that the trial court erred in failing to find that the Judiciary Fund Act as currently enacted is moribund and inconsistent with the requisite legal standards, specifically Article 173 of *akn ke act 2010 constitution the Constitution*. He submits that Article 173 of *akn ke act 2010 constitution the Constitution* establishes the Judiciary Fund, to be administered by the Chief Registrar of the Judiciary; that the Fund is intended for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary; that it is on the basis of resources designated to the Judiciary Fund that the Chief Registrar is supposed to prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval.

33. According to the appellant, under the current set of affairs, the Chief Registrar draws a budget with literally no information on the amount of funds at the disposal of the Judiciary; that the Chief Registrar therefore has the unbearable task of drawing budget estimates based on conjecture, considering that the National Assembly, through its self-professed 'exclusive power of the purse', may whittle down the Judiciary's budget to any figure in a flamboyant show of might; that it is for this reason that the framers of *akn ke act 2010 constitution the Constitution* imposed a requirement for solid legislation to provide for the regulation of the Judiciary Fund; and that 'regulation' includes setting out in succinct terms the proportion of funds in the national budget to be designated to the Judiciary Fund.

34. The appellant invites this Court to take judicial notice that the 1st respondent has designated for itself a 2.5 % allocation of the National budget to the National Government Constituency Development Fund, on top of the humongous apportionments to the Parliamentary Service Commission. His case is that the piecemeal allocations to the Judiciary through Appropriation Bills have no constitutional anchorage whatsoever; and the Judiciary Fund Act, in its current form, is a hollow statute that does not accord with the spirit, intent and purpose of *akn ke act 2010 constitution the Constitution*. It is the appellant's contention further that, contrary to the requirements of Article 261 (1) of *akn ke act 2010 constitution the Constitution* as read with the Fifth Schedule to *akn ke act 2010 constitution the Constitution*, the Judiciary Fund Act should have been enacted within two (2) years of promulgation of *akn ke act 2010 constitution the Constitution*, with a possible one (1) year extension as provided under Article 261 (2) of *akn ke act 2010 constitution the Constitution*; that it should have been enacted, at the latest, by 27th August 2013; that it was only assented to on 23rd May 2016; that having been enacted out of the prescribed constitutional timeline and being riddled with incurable defects, the Judiciary Fund Act cannot legally stand.

35. The appellant submits, finally, that the decision of the trial court is incompatible with the tenets of good governance enshrined under Article 259 (1) of *akn ke act 2010 constitution the Constitution* to the extent that it affirms financial oppression of the judicial arm of government by the Executive and Parliament; that without the requisite fiscal capacity to sustain its operations, judicial independence is severely compromised; and that the decision of the trial court not only runs counter to fundamental constitutional principles but also compromises the independence of the judiciary by nurturing legislative mischief.

36. The appellant prays that his appeal be allowed; that the judgment dated 30th April 2019 be set aside; that the prayers sought in his petition dated 25th July 2018 be allowed; and the costs of the petition and the appeal be provided for.

37. In its submissions, the 1st respondent identified three issues for determination. The first is whether the decision of the trial court accords with *akn ke act 2010 constitution the Constitution* and the law, and specifically, whether the trial court deliberately suppressed or avoided Articles 173 (4) as read with Article 221 (7) of *akn ke act 2010 constitution the Constitution*. The 1st respondent submits that the power of the purse is the exclusive preserve of Parliament, and the 1st respondent is the only body mandated to approve withdrawal of funds from the Consolidated Fund. Further, that under Article 206(2) of *akn ke act 2010 constitution the Constitution*, it is the government organ exclusively mandated to determine allocations of revenue and appropriate funds for expenditure by the national government and other national state organs as provided under Article 95.

38. The 1st respondent makes several other averments with respect to the appropriation of funds as provided under Article 221 (6) of *akn ke act 2010 constitution the Constitution* and their inclusion in an Appropriation Bill, which shall be introduced at the National Assembly to authorize the withdrawal from the Consolidated Fund of the money needed for expenditure. The 1st respondent submits that if the drafters of *akn ke act 2010 constitution the Constitution* intended that the expenditure of the Judiciary becomes a charge on the Consolidated Fund, nothing would have stopped them from saying so as they did under Articles 151 and 160 (3) on the remuneration and benefits payable to the President, Deputy President and judges respectively. The 1st respondent submits therefore that *akn ke act 2010 constitution the Constitution*, under Article 173 (4), mandates the National Assembly solely to approve funds for the Judiciary; and that the said Article does not create a charge on the Consolidated Fund as alleged by the appellant.

39. The second issue relates to the appellant's contention that the trial court ignored the question of underfunding of the Judiciary which was at the heart of his petition. The 1st respondent submits that, on the contrary, the trial court considered the question and found that it lacked merit. It observes that the issues that the trial court had identified as falling for determination were whether the 1st respondent complied with *akn ke act 2010 constitution the Constitution* in enacting the Appropriation Act, 2018; whether the Judiciary Fund Act is unconstitutional and, by extension, whether the Judiciary is underfunded; and whether the appellant was entitled to the orders sought in the Petition.

40. The 1st respondent submits that the issue of underfunding of the Judiciary in the financial year 2018 2019, which had ended, was moot and a mere academic exercise. In the 1st respondent's view, a consideration of this appeal based on estimates of a year that has passed is a mere academic exercise. The 1st respondent relied on the case of Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] KEHC 5536 (KLR) in support of its submission that the present appeal is moot.

41. The 1st respondent further submits that, in any event, Article 95(4) (b) of *akn ke act 2010 constitution the Constitution* as read with Article 221 thereof, provides that the roles of the National Assembly

include appropriation of funds for expenditure by the National Government and other national state organs, and accordingly, the question as to what is an adequate appropriation to the judiciary is to be determined by the National Assembly.

42. To the question whether there was adequate public participation in enacting the Appropriation Act 2018, the 1st respondent submits that the budget making process is a long drawn-out process, taking over a year, and involving consultation with many sectors. The 1st respondent sets out the provisions of Article 221 of *akn ke act 2010 constitution the Constitution*, the steps taken in ensuring public participation and the existing jurisprudence on what is required to satisfy the requirements for such participation to submit that the budget estimates of the Judiciary do not violate the principle of public participation under *akn ke act 2010 constitution the Constitution* as alleged or at all.

43. On its part, in its submissions dated 24th June 2024, the 3rd respondent addresses itself to two issues: whether the decision of the trial court is consistent with *akn ke act 2010 constitution the Constitution*; and whether the Judiciary Fund Act is unconstitutional. With respect to the first issue, the 3rd respondent echoes the submissions of the 1st respondent that the decision of the trial court was correct and rendered in accordance with the law and *akn ke act 2010 constitution the Constitution*. Noting that the appellant's appeal is anchored on Articles 173 and 221 of *akn ke act 2010 constitution the Constitution*, the 3rd respondent asserts that it is the sole mandate of the 1st respondent to approve funds for the Judiciary; that even the estimates prepared by the Chief Registrar are still subject to the National Assembly's approval; and that Article 173(3) is couched in unequivocal terms that leave no room for ambiguity or misinterpretation.

44. It is its submission that the appellant's appeal is premised on a lack of appreciation of the purpose and effect of mandatory provisions in *akn ke act 2010 constitution the Constitution* as set out in Article 173; and that the appellant's contention that the inclusion of the Judiciary expenditure in the Appropriation Act contravenes Article 227(1) of *akn ke act 2010 constitution the Constitution* is fundamentally flawed as it neglects to take into consideration the principle of constitutional interpretation, which mandates that *akn ke act 2010 constitution the Constitution* must be read as a whole, and that under Article 206(2)(a) of *akn ke act 2010 constitution the Constitution*, funds may only be withdrawn from the Consolidated Fund as authorized by an Act of Parliament.

45. The 3rd respondent further calls in aid Articles 95(4) and 221

    (6) of *akn ke act 2010 constitution the Constitution* with respect to the mandate of the 1st respondent to approve and allocate revenue between the different levels of government, which shall be included in an Appropriation Bill and introduced into the National Assembly in order to authorise the withdrawal of the funds from the Consolidated Fund.

46. The 3rd respondent also agrees with the 1st respondent that the trial court properly found that there had been adequate public participation carried out prior to the enactment of the Appropriation Act, 2018.

47. Regarding the constitutionality of the Judiciary Fund Act, the 3rd respondent submits, on the authority of Ndyanabo V. Attorney General [2001] 2 EA 485 and the decision of the Supreme Court of India in Hamdard Dawakhana v. Union of India (AIR 1960 SC 554) that there is a rebuttable presumption of constitutionality of Acts of Parliament, with the onus of proving otherwise being placed on the person who alleges to the contrary. Its submission is that the appellant had not adequately demonstrated the unconstitutionality of the Judiciary Fund Act; there was no basis for impugning the decision of the trial court; and the appeal should be dismissed with costs.

48. At the hearing of this appeal, the Court inquired from the appellant whether there were any developments since the judgment on the matters at issue before the trial court that would render

the appeal an academic exercise. His response was that since delivery of the judgment, there were developments that affected his appeal as his petition had challenged the constitutionality of the Appropriation Act of 2018. Since then, other appropriation Acts had been passed, and he was therefore abandoning his prayers with respect to the Appropriation Act, 2018. He maintained, however, that there were still justiciable issues outstanding, relating to the constitutionality of the Judiciary Fund Act and the adequacy of budgetary allocation to the Judiciary.

49. In its submissions, the AG referred us to the decision in Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] KEHC 5536 (KLR) with regard to the question of justiciability and mootness. In this decision, the High Court stated as follows:

> " Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.
>
> Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much sought judicial time. The exception it must be noted exists where the court is allowed by law to offer advisory opinions. A good example is Article 163(6) of *akn ke act 2010 constitution the Constitution* on powers of the Supreme Court of Kenya to give advisory opinions at the request of the national government on matters concerning county governments." (Emphasis added).
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> See also Coalition for Reform and Democracy (CORD) & 2 Others -v- Republic of Kenya & Another HCCP 628 of 2014 [2015] eKLR.

50. As we have noted above, the appellant conceded that his appeal in relation to the Appropriation Act, 2018 had been overtaken by events, at least six other Appropriation Acts having been enacted by the time the appeal came up for hearing. The question for our consideration is whether, once the appellant's contestations with respect to the Appropriation Act, 2018, fall by the wayside, the issues relating to the funding of the Judiciary as raised in the petition do not suffer the same fate.

51. We have set out the parties' respective cases with respect to the Appropriation Act and the funding and budgetary allocation for the Judiciary. As is apparent from these averments and submissions, the two issues as presented in the appellant's petition are inextricably intertwined. The appellant's case before the trial court with respect to the funding of the Judiciary centred around Article 173 of *akn ke act 2010 constitution the Constitution*. His argument was that the 1st respondent was under an obligation to assign a specific allocation of funds to the Judiciary Fund, and thereafter, approve budget estimates prepared by the Chief Registrar of the Judiciary.

52. Secondly, that as it was then enacted, the Appropriation Act, 2018, contradicted the provisions of Article 173 of *akn ke act 2010 constitution the Constitution* as read with Article 160 of *akn ke act 2010 constitution the Constitution* which safeguard the financial and operational independence of the Judiciary; and further, that it was inconsistent with the provisions of the said Article 173 under which the 1st respondent is under an obligation to ensure that the Judiciary has adequate resources for its functions.

53. As is obvious from these arguments, a consideration of the question whether the 1st respondent provided the Judiciary with adequate funds, or failed to do so, cannot be undertaken without an inquiry into the provisions of the Appropriation Act, 2018. In the absence of evidence demonstrating

what funds were allocated, and whether they were allocated in accordance with Article 173 and 221 of *akn ke act 2010 constitution the Constitution*, we have no basis for making such an inquiry into the budgetary allocation to the Judiciary. Once the issues pertaining to the Appropriation Act, 2018, are overtaken by events, everything else premised on it becomes moot.

54. A further reason for finding the appellant's appeal moot is that, while none of the parties drew this to the attention of the Court, there were significant developments relating to the funding of the Judiciary. The Court takes judicial notice of the fact that subsequent to the judgment impugned in this appeal, The Judiciary Fund Regulations were enacted by Legal Notice No. 33 of 2019, while the Judiciary Fund was operationalised in 2022. These were developments, we believe, that significantly alter the nature and tenor of the appellant's case before us in so far as the funding of the Judiciary is concerned.

55. The appellant also complains that the trial court did not address itself to his contentions that the Judiciary Fund Act is unconstitutional. He submits that the Act fails to comply with Article 173 and the Fifth Schedule of *akn ke act 2010 constitution the Constitution*; that Article 173(5) required Parliament to enact a law to provide for the regulation of the Judiciary Fund within two years of *akn ke act 2010 constitution the Constitution*'s promulgation (by August 2013, or 2015 at the latest), yet the Act was only passed in 2016; that aside from the late enactment, the Act is 'hollow and 'moribund' and does not stipulate any formula or minimum allocation to be paid into the Judiciary Fund; while section 4 thereof instead lists the Fund's sources to include 'monies as may be appropriated by the National Assembly', which effectively leaves the Judiciary's funding at the discretion of the National Assembly.

56. According to the appellant, this defeats the purpose of Article 173, which was to ensure predictability and adequacy of resources for the Judiciary; and that *akn ke act 2010 constitution the Constitution* envisaged that the Judiciary Fund Act would provide a 'specific allocation', for instance, a defined percentage of the national budget or Consolidated Fund. It is his contention that by omitting such guarantee and merely reflecting the status quo of annual appropriations, the Act violates the spirit and letter of *akn ke act 2010 constitution the Constitution*. He therefore urges this Court to find that section 3 of the Act, which contains the Act's statement of objectives, and indeed the entire Act, is inconsistent with Article 173 of *akn ke act 2010 constitution the Constitution*.

57. In response, the 1st respondent submits that contrary to the appellant's contention, the Judiciary Fund Act is consistent with *akn ke act 2010 constitution the Constitution*; that it provides the necessary framework for the administration of the Fund by the Chief Registrar and outlines the sources and uses of the Fund; that no constitutional provision requires Parliament to prescribe a specific amount or percentage for the Judiciary Fund in the Act; that Article 221(3) and (5) envisage that the Judiciary, like other arms of government, will submit estimates and go through the budget process annually; and that fixing an immutable percentage in the Judiciary Fund Act could fetter this constitutional budget process and even undermine the Chief Registrar's role in preparing realistic estimates each year.

58. The respondents echo the High Court's reasoning that had *akn ke act 2010 constitution the Constitution* intended a guaranteed minimum share for the Judiciary, it would have said so explicitly, but it did not.

    Instead, the constitutional design balances independence with accountability by requiring legislative approval of the Judiciary's budget, followed by an obligation to pay the approved funds into the Judiciary Fund for autonomous management. In the respondents' view, the appellant has not shown how section 3 or any provision of the Judiciary Fund Act contravenes Article 173, and the Act enjoys the presumption of constitutionality.

59. We have considered the respective submissions of the parties on this issue. The Judiciary Fund Act (No. 16 of 2016) was enacted to give effect to Article 173(5), which required Parliament to pass legislation

to provide for the regulation of the Judiciary Fund, established under Article 173(1). Section 3 of the Act, which is the target of the appellant's censure, sets out the objectives of the Act as being:

a. safeguard the financial and operational independence of the Judiciary;

b. ensure accountability for funds allocated to the Judiciary; and

c. ensure that the Judiciary has adequate resources for its functions.

60. Section 4 of the Act provides that there shall be paid into the Fund:

a. such monies as may be appropriated by the National Assembly outof the Consolidated Fund;

b. any grants, gifts, donations or bequests;

c. such monies as may be allocated for that purposes from investments, fees or levies administered by the Judiciary; and

d. moneys accruing to or received by the Judiciary from any other Source.

61. Sections 5-10 of the Act provide, inter alia, for the administration of the Fund by the Chief Registrar of the Judiciary in accordance with the *akn ke act 2012 18 Public Finance Management Act*, with audit oversight by Auditor-General.

62. From our reading of the appellant's petition and submissions, we note that he has not alleged unconstitutionality with respect to these provisions, the crux of his argument being that the Act does not specify any guaranteed allocation or formula for funding the Judiciary, leaving the matter entirely to the National Assembly's appropriations.

63. A reading of the constitutional provisions relating to the establishment of the Judiciary Fund does not indicate a specific financial commitment, such as a minimum percentage of the national budget, for the Judiciary. Article 173 provides as follows:

173.

(1) There is established a fund to be known as the Judiciary Fund which shall be administered by the Chief Registrar of the Judiciary.

2. The Fund shall be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary.

3. Each financial year, the Chief Registrar shall prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval.

4. On approval of the estimates by the National Assembly, the expenditure of the Judiciary shall be a charge on the Consolidated Fund and the funds shall be paid directly into the Judiciary Fund....

(Emphasis added)

64. The appellant does raise a critical issue that has been the subject of discussion and debate for a while: how to achieve the financial independence of the Judiciary. It was a critical subject of consideration during *akn ke act 2010 constitution the constitution*-making process that culminated in the 2010 Constitution. The report, Republic of Kenya Final Report of the Taskforce on Judicial Reforms July 2010 (The Ouko Report) which recommended the establishment of the Judiciary Fund, had also recommended that 2.5% of the national budget be allocated to the Judiciary. While the recommendation for the establishment of the Fund was adopted and enacted in Article 173, no

minimum allocation was accepted and included in *akn ke act 2010 constitution the Constitution*, and the trial court did not, therefore, err in not granting the orders sought with respect to the constitutionality of the Judiciary Fund Act.

65. One critical question that the appellant raises, and which we are not able to address in this appeal in view of the concession by the appellant that the issues relating to the Appropriation Act, 2018 are now moot, is whether the budgetary funds for the Judiciary, once approved by the National Assembly, should be included in an Appropriations Bill as the 1st respondent argues in reliance on Article 221(6) of *akn ke act 2010 constitution the Constitution*; or whether it should, as argued by the appellant in reliance on Article 221(7), an argument that appears to find support in Article 173 (4), be 'a charge on the Consolidated Fund' and the funds paid, without inclusion in the Appropriations Bill, 'directly into the Judiciary Fund'. That, however, is a matter for consideration in a different matter and a different forum.

66. With respect to the present appeal and while we appreciate the appellant's public-spirited desire to see that the Judiciary is properly funded in order for it to properly execute its constitutional mandate, we find that the issues that the appeal raises are either moot, not capable of determination in this appeal, or not established. Accordingly, the appeal is hereby dismissed, but with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 28 TH DAY OF NOVEMBER 2025.

MUMBI NGUGI

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

Signed

DEPUTY REGISTRAR.

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