



**Clerk of the National Assembly of Kenya & another v Njoya & 17 others & 3 others
(Civil Appeal 323 of 2019) [2024] KECA 524 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KECA 524 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 323 OF 2019
P NYAMWEYA, A ALI-ARONI & LA ACHODE, JJA
MAY 9, 2024**

BETWEEN

**THE CLERK OF THE NATIONAL ASSEMBLY OF KENYA 1ST APPELLANT
SPEAKER OF THE NATIONAL ASSEMBLY & 218 OTHERS ... 2ND APPELLANT**

AND

**REV DR TIMOTHY NJOYA & 17 OTHERS 1ST RESPONDENT
THE HON ATTORNEY GENERAL 2ND RESPONDENT
THE MINISTER FOR FINANCE 3RD RESPONDENT
HEAD OF PUBLIC SERVICE & SECRETARY TO THE CABINET HON.
FRANCIS MUTHAURA 4TH RESPONDENT**

*(An appeal from the Judgment and decree of the High Court of
Kenya at Nairobi (M. Warsame J.) (as he then was) delivered on 17th
January 2013 in Nairobi Constitutional Petition No. 137 of 2011)*

JUDGMENT

1. On 17th January 2013, the High Court of Kenya at Nairobi (M. Warsame J.) (as he then was) delivered a judgment allowing a petition filed in Nairobi Constitution Petition No. 137 of 2013 by Rev. Timothy Njoya, a member of Jukwaa La Katiba Forum, and 17 Non-Governmental Organisations operating under the banner of Jukwaa La Katiba Forum, which was a platform for Kenyans to participate in the implementation of *the Constitution*, and who are the 1st to 18th Respondents herein.
2. The effect was that the following orders that had been sought in the said petition were granted by the learned Judge:



- a. A declaration that under the Constitution all State Officers, including Members of Parliament are under an obligation to pay tax as per Article 210 as read with Article 201 and 230 of the Constitution and that the Head of the Civil Service and Secretary to the Cabinet or the Hon. Attorney General, the 1st Respondent herein or the President and the Prime Minister have no powers or authority to exempt any state officer from the payment of tax;
 - b. A declaration that neither the current Constitution nor the transitional clauses saves or exempts the members of Parliament from payment of Tax and that it is illegal and unconstitutional for the Government to settle the tax burden of the members of Parliament using public resources or monies drawn from the Consolidated Fund or from any other monies or and that it would be unconstitutional to divert or re-allocate funds derived from tax- payer's money to settle the tax obligations of the Respondent members of Parliament or any other state Officers;
 - c. A declaration under the new Constitution only the salaries and Remuneration Commission can review the salaries of 'state officers' and that it would be illegal and unconstitutional for Members of Parliament to review their salaries to offset the demand to pay tax;
 - d. A declaration that it would be illegal and unconstitutional for the Members of Parliament to sabotage or frustrate the process of debate or passage of bills necessary for the full implementation of the Constitution or passage of the National Budget or any motion or legislation of the government on account of the demand by the Kenya Revenue Authority to pay taxes.
 - e. An order of injunction permanently restraining the 1st, 2nd and 5th Respondents from implementing or enforcing the directive by the Head of Civil Service and Secretary to the Cabinet to Permanent Secretaries that all taxes of Members of Parliament demanded by the Kenya Revenue Authority, the 2nd Interested Party herein, be settled by the Government, and directing that all the deductions made upon their salaries be refunded by the respective Permanent Secretaries, further restraining the 3rd Respondent, the Minister of Finance herein, effecting or implementing the said directive to settle tax obligations of the Members of Parliament from the Consolidated Fund or any of the tax payers monies held or maintained by the Government for and on behalf of the people of Kenya;
 - f. An order compelling the Clerk of the National Assembly the 2nd Respondent herein and or the employer of the 6th to 209th Respondent to deduct and remit at source the salaries of the Respondents including arrears and to remit the same regularly to the 2nd Interested Party as required by law.
3. The claim by the petitioners in the said petition was that on or about the 17th of August 2011, the Head of the Public Service and Secretary to the Cabinet, the 21st Respondent herein, issued a directive vide a circular to the Permanent Secretaries of all ministries in the government to refund all taxes or deductions made on the salaries and payslips of all Cabinet Ministers and Assistant Ministers. The said circular further directed that all the taxes demanded from the Appellants by the Kenya Revenue Authority from September 2010 to June 2011, as well as any further taxes demanded in the period until December 2012, be settled by the Government.
 4. The petitioners alleged that the circular by the 21st Respondent was reported in the Saturday Standard newspaper dated 20th August 2021, and required permanent secretaries to stop further deductions from Ministers and Assistant ministers and extend the same treatment to Members of Parliament. The petitioners further contended that the cabinet at the time which was appointed from Members of



- Parliament, comprised of 40 ministers with an equal number of Assistant ministers, and with some ministries having two assistant ministers, meaning that over 80 Members of Parliament were not only exempted from taxes but would be refunded tax deductions. Therefore, that the said decision by the Head of the Civil Service was in breach of *the Constitution* and in excess of his powers.
5. Additionally, the petitioners contended that representations were made by the Attorney General, and promissory notes or assurances issued by the Minister of Finance, the President and the Prime Minister to the Members of Parliament to the effect that the provisions of Article 210 of *the Constitution* did not apply to the current life of the then Parliament. The petitioners averred that the representation and promissory notes and assurances did not constitute any law, and if they did, Article 210 (3) clearly prohibited the making of any laws that would exclude or authorize the exclusion of any state officer from payment of tax. They asserted that they had a legitimate and rightful expectation that having appended their signatures to the new constitution and sworn allegiances to defend and protect it, the Members of Parliament not only had the duty but obligation to Kenyans and to *the Constitution* to make good their duty to pay taxes.
 6. It was thus the petitioners' claim that the refusal to pay the tax violated not only their rights under *the Constitution* but breached specific provisions of *the Constitution*, namely Articles 201, 210 and 230. Further, that any decision or intended deals to exempt, excuse or vary the obligation of Members of Parliament to pay tax, or to increase their salaries to help them offset their tax obligations would be discriminatory and unconstitutional and contrary to Article 27 of *the Constitution*. In addition, should the Members of Parliament resort to enforcing the implementation of the Akiwumi Report on salary increment, the National Assembly would be in express violation of Article 230 of *the Constitution* which made the review of salaries of state officers the exclusive of the Salaries and Remuneration Commission, which was then yet to be formed. Moreover, should the Members of Parliament choose to implement the said Report then the principle of public participation enshrined in Article 201 (a) as read with the principles of governance under Article 10 demanded that the same be opened to public input or at any rate be made to be effective in the next parliament as set out in Article 73 of *the Constitution*.
 7. The petitioners accordingly sought an interpretation from the High Court, following the promulgation of the new Constitution on 27th August 2010, as to whether the Members of Parliament were state officers contemplated under Article 210 of *the Constitution* and under an obligation to pay tax under the said Article as read together with Article 201 and Article 230 of *the Constitution*; if so whether the Head of Civil Service and Secretary to the Cabinet, the Hon. Attorney General the President, and the Prime Minister had the power or the authority to exempt any 'State Officer' from payment of tax; whether *the Constitution* or the transitional clause saved or exempted the Members of Parliament from payment of tax; whether it would be illegal and unconstitutional for the Government to settle the tax burden of the Members of Parliament using public resources or monies drawn from the Consolidated Fund or from any other monies or funds derived from tax payers' money; whether in the use of public resources and management of public finances state officers were bound by the provisions as well as the guiding principles of public finance set out in Article 201 (a), (b), (c), (d) and (e) of *the Constitution*; and whether any decision to increase salaries of the Members of Parliament prior to the establishment of the Salaries and Remuneration Commission or by any other entity other than that Commission was in breach of Article 230 of *the Constitution*.
 8. The petition was opposed by the Clerk, Speaker, and Members of the National Assembly by way of a replying affidavit sworn on 26th January 2012 by Peter Gichohi, in his capacity as the then Accounting Officer of the Parliamentary Service Commission and the National Assembly. The Attorney General also opposed the petition on his behalf, and on behalf of the Minister of Finance and Head of Public



Service, the 19th to 21st Respondents herein, in Grounds of Opposition dated 15th March 2012. Also opposing the petition was John Harun Mwau, a member of the National Assembly, who was the 83rd Respondent in the Trial Court and who swore a replying affidavit dated 7th September 2011.

9. The position of the National Assembly was that the petition was a direct challenge to the validity and legality of *the Constitution* of Kenya which was prohibited by Article 2 (3) of *the Constitution*, and there was no legal basis for the orders sought therein, which would impose a tax burden that was not provided for in the law. While conceding that the Members of the National Assembly were indeed state officers within the meaning of Article 260 of *the Constitution*, it was averred that the taxation regime and the tax burden in place at the time of promulgation of the new Constitution was preserved until the expiry of the term of the National Assembly then in office, by virtue of the transitional provisions in Articles 117 (2), 262, 264, Section 3 (2) and 10 of the Sixth Schedule of *the Constitution* of Kenya and the provisions of the then *National Assembly Remuneration Act*, and National Assembly (Powers and Privileges) Act in force before the promulgation of the new Constitution, which remained the legislation regulating the remuneration and taxation of Members of the National Assembly and also confers the exemption from tax. Further, that although the review of allowances and benefits had now been vested in the Salaries and Remuneration Commission by Article 230 of *the Constitution*, the said Commission was not in existence. Therefore, compelling Members of the National Assembly to pay additional tax was tantamount to altering the integrity, privileges and immunities of the National Assembly, and contravened Article 262 of *the Constitution*.
10. The Attorney General opposed the petition on the grounds that the alleged directive by the Head of the Public Service was not annexed and the petition was founded on speculation and suspicion; the petition was incompetent, devoid of merit, premature, misplaced and misdirected since the provisions relating to payment of tax by members of Parliament was clear and there was nothing for constitutional interpretation by the Court; and that the petition did not disclose any cause of action neither did it disclose any constitutional violation or breaches.
11. John Harun Mwau on his part deponed that he held the office of an elected Members of Parliament which could only be challenged under section 44 of the repealed Constitution read together with section 22 of the National Assembly and Presidential Election Act. He deponed that a new Parliament was to be established under Article 93 of *the Constitution* of Kenya and the then current Parliament established under section 31 of the repealed Constitution was saved under Article 3 (2) of the Sixth Schedule dealing with the Transitional and Consequential provision, and Articles 99, 101, 103, 104 and 105 of the new Constitution were suspended by Article 2 (1)
 - (b) of the Sixth Schedule until the final announcement of all results of the first election of the Parliament under the new constitution. Mr. Mwau also contended that as a Member of Parliament he was not an officer in Public Service and thus could not be called a state officer, and that section 45 of the Repealed Constitution made it clear that only the Clerk of the National Assembly and the members of his staff were in public service and this did not include the members of the National Assembly. Lastly, that under the new Constitution, it was only after the announcement of the first general election held thereunder that Members of Parliament would be state officers under Article 260 of *the Constitution*.
12. The learned trial Judge (M. Warsame J.) (as he then was) after considering the pleadings, the submissions, and hearing the witnesses, held that the petition involved the interpretation of the transitional and consequential provisions in *the Constitution* of Kenya, 2010 in relation to taxation. The learned Judge identified the question for determination to be whether the National Assembly as saved under Section 10 of the Sixth Schedule to *the Constitution* implied that its members would be exempted from paying taxes on their allowances. After considering the purpose of transitional provisions in



- legislation and the nature of taxation legislation, the learned Judge made the following key findings. Firstly, that the *National Assembly Remuneration Act* must, by virtue of section 7 of the Sixth Schedule, be brought into conformity with *the Constitution*, and that it was not therefore possible to claim that Members of the National Assembly have a right not to pay taxes on their allowances.
13. Secondly, that exemption from taxation is a privilege and not part of the rights envisaged by section 6 of the Sixth Schedule, and Article 210 of *the Constitution* is clear that a waiver or exemption from taxation must be legislated and must also be reported to the Auditor General. Thirdly, Members of the National Assembly were aware of the contents of the new Constitution, and there was thus no legitimate expectation that Members of the National Assembly would be exempted from payment of taxes. Fourthly, Members of Parliament fall within the definition and import of Article 210
- (3) (a) and 260 of *the Constitution* in that it is mandatory for all state officers to therefore comply with Article 201 (b) and (d). Fifthly, that Article 210 calls for equality of treatment of everyone, including state officers, when it comes to the application and implementation of taxation under the new Constitution. Lastly, that any provision of the *National Assembly Remuneration Act* in conflict with Article 210 of *the Constitution* of Kenya, 2010 was unconstitutional and in breach of the sovereign will of the people of Kenya.
14. The Appellants, being aggrieved by the decision of the High Court, lodged the instant appeal in which they seek an order that the said decision be set aside, and have raised thirteen (13) grounds of appeal in their Memorandum of Appeal dated 17th July 2019 namely:
1. The Learned Judge erred in law and in fact in failing to find that the petition as drawn and filed was prohibited direct and/ or indirect challenge to validity or legality of provision of *the Constitution* (and its transitional and consequential provisions) or of powers exercise by Parliament in pursuance of the said provision of *the Constitution*.
 2. The Learned Judge erred in law and in fact in failing to find and hold that the salaries and allowances of the Appellants and the taxation of the same were fixed by the *National Assembly Remuneration Act*, Chapter 5 of the Laws of Kenya and the *Income Tax Act* Chapter 470 of the Laws of Kenya, which statutes were expressly saved by the transitional and consequential provisions of *the Constitution* until the first general elections under *the Constitution* the validity of both which the petitioners had not challenged.
 3. The Learned Judge misdirected himself in failing to take into account the fact that the Salaries and Remuneration Commission had not made an determination regarding, or conducted any review of the salaries and allowances of the Appellants before the first general election under *the Constitution* after the effective date, and proceeded in error to declare the *National Assembly Remuneration Act* inconsistent with *the Constitution*.
 4. The Learned Judge erred in law and in fact in holding that the Appellants derived constitutionally mandated and legally enforceable rights to the preservation of their income from the *National Assembly Remuneration Act* and the *Income Tax Act* so long as they remained in the office or until the next general elections being March 2013.
 5. The Learned Judge erred in law in not holding that the salaries and allowance payable to the Appellants under the *National Assembly Remuneration Act* were saved by Constitution and constitute obligations of the State that were preserved as such in the transitional period after enactment of *the Constitution*.
 6. The Learned Judge erred in law and in fact in failing to find that the salaries and allowances payable to the Appellants and taxable under the *National Assembly Remuneration Act* and the



Income Tax Act, conformed with *the Constitution* so long as they remained in office before the first elections under *the Constitution* after the effective date, in the absence of any review of the same or contrary determination by the Salaries and Remuneration Commission.

7. The Learned Judge erred in law in failing to appreciate that there is no principle of equality in taxation in Kenya.
8. The Learned Judge erred in law and in fact in failing to hold that the principles of public finance under Article 201 of *the Constitution* had no application to, and were not justiciable in the specific situation of the taxation of the Appellants' salaries and allowance under the *National Assembly Remuneration Act* and the *Income Tax Act*.
9. The Learned Judge erred in law and in fact in failing to appreciate that the Appellants' rights to, interests in, or expectation of their fixed salaries and allowances and under the *National Assembly Remuneration Act* as read together with the *Income Tax Act* constituted 'property' within the meaning of Article 40 of *the Constitution*.
10. The Learned Judge erred in law and in fact in failing to find that the Appellants were entitled to equal protection and equal benefit of the law including the full and equal enjoyment of all their rights to the salaries and allowances as fixed by the *National Assembly Remuneration Act* as long as they remained in office prior to the general elections held in March 2013.
11. The Learned Judge erred in law and in fact in failing to uphold the Appellants' legitimate expectations that the State would fulfil its obligations as regards their salaries and allowances as fixed by the *National Assembly Remuneration Act* as long as they remained in office.
12. The Learned Judge erred in law in failing to hold that in the absence of any clear and unambiguous statute imposing a tax upon the Appellants' allowances, no such tax would be due or payable and any apparent conflict or ambiguity in respect of the same was to be interpreted in favour of the Appellants as the tax subjects.
13. The Learned Judge erred in law and in fact in failing to uphold the Government's wide margin of appreciation as regards tax matters generally and specifically to heed the requirement of Article 210(1) that establishes the principles of legality in relation to the imposition of tax upon the Appellants.
15. We heard the appeal on this Court's virtual platform on 4th December 2023. Learned counsel Ms. Akama holding brief for Learned counsel Mr. Njoroge appeared for the Appellants; learned counsel Mr. Victor Obondi appeared for the 1st to 18th Respondents; learned counsel Ms. Kirimana, appeared for the 19th to 23rd Respondents; while learned counsel Mr. Muhoro appeared for the Kenya Revenue Authority, which is named as an Interested Party in the appeal. The Appellant's counsel highlighted written submissions dated 28th August 2020, while Mr. Obondi informed us that he had inadvertently not filed written submissions and was permitted to make oral submissions. Ms. Kirimana and Mr. Muhoro likewise did not file written submissions, with Ms Kirimana supporting the position taken by the Appellants, while Mr. Muhoro indicated he would not take any position, and would abide the outcome of the appeal.
16. As we commence our determination, we reiterate the duty of this Court as a first appellate Court as set out in the decision of *Selle & Another vs Associated Motor Boats Co. Ltd & Others* (1968) EA 123, which is to reconsider the evidence, evaluate it and draw our conclusions of the fact and law. We will depart from the findings by the trial Court only where they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as held in *Jabane vs Olenja*



(1968) KLR 661 or where its discretion was exercised injudiciously as was held in *Mbogo & Another vs Shah* (1968) EA 93.

17. Ms Akama in her submissions collapsed the grounds of appeal to two issues, after we queried whether the appeal was still live as the term of the 10th Parliament has since come to an end. The first was whether the evidence relied on by the High Court in reaching its decision was of probative value. Ms. Akama in this regard submitted that the petitioners failed to produce the circular dated on or about 17th August 2011 that they relied on, and that the High Court without confirming the truthfulness and factual basis of the petition went ahead to adopt the issues framed by the petitioners. In addition, that the petitioners largely relied on newspaper articles which were inadmissible under section 35 of the *Evidence Act*. It was thus the counsel's contention that the alleged circular could not be proved based on mere allegations in newspaper cuttings, that the learned Judge erred by not making reference to the burden of proof requirements of sections 107 and 109 of the *Evidence Act* that 'he who alleges a fact must prove', and placed the responsibility on the Appellants to prove their case which finding was improper.
18. Mr. Obondi on his part submitted that it was common ground at the time that the Members of Parliament were not paying taxes and that they wanted this status to continue, and that this was an uncontroverted fact. In addition, that this fact was not an issue in the High Court, and the Appellants specifically challenged the constitutional provisions requiring them to pay tax. Lastly, that the circular which was cited by the petitioner, was in the government's custody and they were not able to access it.
19. The Appellants in this respect have taken issue with the non-production of the circular relied upon by the 1st to 18th Respondents in the trial Court, and their reliance on newspaper articles as proof of the existence of the circular and its contents. Section 1 of the *Evidence Act* defines evidence as "the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity". The pertinent question however, is what fact did the circular and newspaper articles seek to prove? In this regard, the *Evidence Act* defines a "fact" to include (a) anything, state of things, or relation of things, capable of being perceived by the senses; and
 - (b) any mental condition of which any person is conscious. The 1st to 18th Respondents in this respect alleged that the said circular and newspaper reports contained directives to refund tax deductions, and stop further deductions of tax from the salaries of Ministers, Assistant Ministers and Members of Parliament.
20. The Appellants specifically rely on section 35 of the *Evidence Act* which requires documents to be produced by their makers, and section 109 which provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts and who wishes the court to believe in its existence, has the burden of proving that those facts exist, unless by any law that the proof of that fact shall lie on any particular person. Therefore, for the burden of proof to arise, a fact must be in issue, that is it must be a fact from which, either by itself or in connexion with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suitor proceeding, necessarily follows. Secondly, the evidence adduced must be sufficiently useful to prove the fact in issue, that is, it must be of probative value.
21. In the present case, it was not in issue in the trial Court that the Appellants were seeking not to pay tax, and in effect their case and response was that there was no legal basis for them to pay tax, as Article 210 of *the Constitution* was not yet applicable, and that the previous taxation regime as well as privileges and immunities of the members of the National Assembly was preserved until expiry of the term of



the National Assembly. Section 61 of the *Evidence Act* in this respect provides that any facts which are admitted by parties or which are deemed to have been admitted by their pleadings, need not be proved in any civil proceeding, and we find that the Appellants in this respect did not take issue with the facts set out in the newspaper reports in their pleadings. We also note that the admissibility of the newspaper reports was never raised by the Appellants in the trial Court.

22. The second issue as identified by Ms. Akama, was whether the High Court undertook a proper analysis of the transitional provisions of the Sixth Schedule to *the Constitution* in its application to the Members of Parliament. The counsel's submissions were that the learned trial Judge failed to appreciate that the privileges and immunities of the Members of the National Assembly of the 10th Parliament and its committees were extended until the expiry of the term of the 10th Parliament, because of the existence and correlation of the various transitional legislation, namely:
- a. By virtue of Article 262 of *the Constitution* of Kenya, the Sixth Schedule to *the Constitution* preserved certain privilege and immunities of the Members of the National Assembly of the 10th Parliament until expiry of their terms took effect on *the Constitution*'s effective date in August 2013
 - b. In terms of Article 264 of *the Constitution* of Kenya, such provisions of the former Constitution and legislation enacted pursuant thereto which were preserved by the Sixth Schedule to *the Constitution* of Kenya remained in force until the expiry of the term of the 10th Parliament in August 2012
 - c. Section 3 (2) of Schedule Six to *the Constitution* of Kenya preserved section 30 to 40, 43 to 46 ad 48 to 58 of the former Constitution until the first general elections held under the present constitution and operationalized inter alia section 57 of the Repealed Constitution of the Republic of Kenya which remained in force despite the repeal of the former Constitution and therefore part and parcel of the present constitution for the time being;
 - d. Section 10 of the said Schedule Six expressly provides that the National Assembly existing immediately before the effective date shall continue as the National Assembly for the purpose of this Constitution for its unexpired term;
 - e. Section 57 of the repealed constitution, which was therefore part and parcel of the present Constitution and in exercise of section 57 parliament inter alia passed the following legislation; *National Assembly Remuneration Act*, Chapter 5 of the Laws of Kenya and the National Assembly (Power and Privileges) Act Chapter 6 of the Laws of Kenya before the promulgation of the present Constitution of Kenya
 - f. The *National Assembly Remuneration Act* was the legislation dedicated to providing the financial privileges and immunities of the Members of Parliament. Besides providing from remuneration, at section 5 of the Act, remuneration, exempts from taxation allowances under the Act.
 - g. The same law that prescribed the amounts of allowances for members of the National Assembly also conferred the exemption from tax. The 1st to 18th Respondent while acknowledging legitimacy of the *National Assembly Remuneration Act*, Chapter 5 of the Laws of Kenya, only challenged section 5 thereof and they were approbating and reprobating.
 - h. The substance and wording and therefore effect and purport of section 57 of the Repealed Constitution of Kenya had been retained and replicated as Article 117 (2) of *the Constitution* of Kenya. The provision on review of allowance and benefits of the Members of 10th Parliament



however, had been vested in the Salaries and Remuneration Commission, Article 230 for *the Constitution* of Kenya. The Commission was not in existence in the repealed constitution and the jurisdiction to review salaries of Members of the National Assembly was properly exercised through the *National Assembly Remuneration Act*, Chapter 5 of the laws of Kenya.

23. Therefore, through operation of Articles 117 (2), 262 and 264 of *the Constitution* of 2010, and sections 3 (2) and 10 of the Sixth Schedule to the said Constitution, section 57 of the repealed Constitution and the provisions of the *National Assembly Remuneration Act* including section 5 thereof had the force of law until expiry of the term of the National Assembly in the 10th Parliament, notwithstanding the provisions of Article 2 (4) and 210 of the new Constitution. Reliance was placed on the High Court’s decision in the case of John Harun Mwau & Others vs The Honourable Attorney General & Others, Nairobi High Court Petition Nos. 65, 123 and 185 of the 2011 (consolidated) where a 3-Judge Bench held that:

“The intention of the transitional provisions is to ensure a seamless and less disruptive transition from the old order to the new one. This means existing institution, offices, appointments and laws are validated by the new Constitution until such time as that new Constitution takes full effect.”

24. In addition, the effect of sections 3 (2), 7 and 10 of the Sixth Schedule to *the Constitution* preserving the National Assembly and its integrity beget a legitimate expectation on the Members of the National Assembly in the 10th Parliament not to lose the existing privileges and immunities, including the privileges of insulation from paying taxes until the expiry of their terms. Lastly, that the legitimate expectation sealed as such in *the Constitution* constitutes an actual and vested right to property, guaranteed under Article 40 of *the Constitution*, which the High Court was equally enjoined to protect under the Bill of Rights in the new Constitution for the unexpired term of the 10th Parliament. Reliance was also placed on the decision by the Court of Appeal in *Katiba Institute vs The National Assembly & Others, Civil Appeal No. 99 of 2019* that a statutory provision is not inconsistent with *the Constitution* for replicating what *the Constitution* provides, and that the test of unconstitutionality is whether the provision blatantly contradicts *the Constitution* or where it is impossible to rationalize or reconcile it with *the Constitution*.
25. Mr. Obondi in reply submitted that under section 7 of the Sixth Schedule to the 2010 Constitution, the existing laws were to be construed with necessary modifications, and the *National Assembly Remuneration Act* therefore had to be construed in conformity with *the Constitution*. In addition, that the right to property does not exempt anyone from the payment of taxes, and there was no basis for the legitimate expectation on the part of the Members of Parliament not to pay taxes. On the contrary, that the legitimate expectation under Article 201 of *the Constitution* was that taxes are to be paid fairly by all Kenyans.
26. The nature of transitional provisions is explained in Bennion on Statutory Interpretation, Fifth Edition by Francis Bennion at pages 314-315 as being the provisions which spell out precisely when and how the operative parts of an instrument are to take effect. Further, that transitional provisions serve the purpose of facilitating the change from one statutory regime to another, and of making special provisions for the application of a new legislation to the circumstances which exist at the time when that legislation comes into force. In terms of their interpretation, it is noted in the said text that the effect of transitional provisions is to modify the plain meaning of a substantive enactment, and that their operation is temporary. Therefore, they become spent when all the past and existing circumstances with which they are designed to deal with have been dealt with.



27. Article 262 of *the Constitution* of 2010 in this respect provides that the transitional and consequential provisions in the Sixth Schedule shall take effect on the effective date, which was 27th August 2010, and Article 264 provides that *the Constitution* in force immediately before the effective date shall stand repealed on the effective date, subject to the Sixth Schedule. The provisions of the repealed Constitution whose operation was saved by the Sixth Schedule until the first general elections that were to be held under the 2010 Constitution were sections 30 to 40 and 43 to 46, which provided for the National Assembly’s composition, the exercise of its legislative power, qualifications of its members, resolution of disputes as regards its membership, and for the Parliamentary Service Commission. Sections 48 to 58 of the repealed Constitution on the conduct of proceedings in the National Assembly were also saved, and it is notable in this respect that section 57 provided that Parliament could, provide for the powers, privileges and immunities of the Assembly and its committees and for purposes of the orderly and effective discharge of the business of the National Assembly (Added emphasis ours).
28. Therefore, a plain reading and contextual interpretation of the saved provisions leads to the conclusion that they were limited to those necessary for the purposes of the discharge of the business of the National Assembly, including any corresponding provisions in the *National Assembly Remuneration Act* and National Assembly (Powers and Privileges) Act. This interpretation likewise applies to the provisions of section 10 of the Sixth Schedule on the saving of the National Assembly. As regards the saving of rights and obligations of the Government by section 6 of the Sixth Schedule, it is notable that the repealed Constitution in sections 1 and 1A provided that Kenya was a sovereign Republic which shall be a multiparty democratic state, while *the Constitution* of 2010 defines the Republic as the Republic of Kenya and the state as the “collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution”. It is again evident that the rights and obligations envisaged to be saved under the section are not private rights as alleged by the Appellants, but the collective rights and obligations of the state, arising from the need for the continuity of governmental or state functions.
29. Lastly, we also need to point out that if the intention was to exclude the application of Article 210(3) of *the Constitution* of 2010 pending the holding of the first general elections under the new Constitution, it would have been expressly provided for in the Sixth Schedule, which on the contrary provided in section 7 that all existing laws were to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with *the Constitution*, and that in the event of any conflict, *the Constitution* would prevail.. It is also settled that there can be no legitimate expectation that is contrary to the law. Article 210(3) of *the Constitution* of 2010 in this respect provides as follows:
- “No law may exclude or authorise the exclusion of a State officer from payment of tax by reason of—
- a. the office held by that State officer; or
- b. the nature of the work of the State officer.”
30. We emphasize that the purpose of transitional provisions is to modify the application of the substantive provisions and not to exclude or replace the substantive provisions of the law, and even then, the said modification operates for a limited period. We therefore find that the learned Judge of the High Court did not err in his interpretation of the provisions of the Sixth Schedule in so far as they related to the Members of the National Assembly of the 10th Parliament, and particularly with respect to the payment of tax.



31. We accordingly find that this appeal has no merit, and it is hereby dismissed. In light of its public interest nature, we make no order as to costs.

32. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024

P. NYAMWEYA

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JUDGE OF APPEAL

A. ALI- ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR

