



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MUSINGA & ODEK, J.J.A)

CIVIL APPEAL NO. 15 OF 2018

BETWEEN

ORANGE DEMOCRATIC MOVEMENT (ODM).....APPELLANT

AND

THE NATIONAL TREASURY....1ST RESPONDENT CABINET SECRETARY

FOR NATIONAL TREASURY2ND RESPONDENT

REGISTRAR OF POLITICAL PARTIES3RD RESPONDENT

THE NATIONAL ASSEMBLY4TH RESPONDENT

(Being an appeal from the Judgment of the High Court of

Kenya at Nairobi (Hon. Lady Justice R.E. Aburuli, J.) dated 31st October, 2017

in

MSC. CIVIL APPLICATION NO. 483 OF 2016)

JUDGMENT OF OTIENO-ODEK, JA

1. Public funding of political parties is a controversial and divisive issue in any democracy. There is a delicate balance between ensuring accountability and transparency and allowing political parties to be adequately resourced to carry out their mandate of representing citizens. The rationale for public funding of political parties is a policy, governance and political issue. The nature and extent of funding is determined politically and thereafter given legal foothold through legislative enactment. In Kenya, the **Political Parties Act** was enacted and assented to on 27th August 2011. Its commencement date is 1st November 2011. **Section 23** of the **Act** establishes a Political Parties Fund which is administered by the Registrar of Political Parties, the 3rd respondent herein.

3. **Section 24 (1) (a)** of the **Political Parties Act** stipulates, *inter alia*, that the Fund shall have such funds not being less than zero point three per cent of the revenue collected by the national government as may be provided by Parliament. (Emphasis provided).

4. **Section 25 (1)** of the **Act** deals with distribution of the Fund. It is provided:

“25(1) The Fund shall be distributed as follows:

(a) Ninety-five per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election and

(b) **Five percent for the administration expenses of the Fund.**” (Emphasis supplied).

5. In the 2013 general election, the **Orange Democratic Movement (ODM)** Party garnered 40% of the votes cast in the general election. Ensuing from this outcome, the appellant, ODM Party, asserts it is entitled to 40% of the sum of 95% from the monies due and owing to the Political Parties Fund as enacted under **Section 25 (1) (a)** of the **Political Parties Act**.

6. By Notice of Motion dated 19th January 2017, ODM filed an application before the High Court seeking an order of mandamus to compel the respondents to forthwith allocate, appropriate and disburse to it the sum of Ksh. 4,135,903,545/= or such other outstanding amount lawfully due to it from the Political Parties Fund and such amount not being less than 40% of 95% of not less than 0.3% of the total revenue collected by the national government during the fiscal year 2012 to 2016 less the sum of Ksh. 501,575,919/= which was received by the Party during the same period.

7. In a supporting affidavit deposed by the appellant's Executive Director, **Mr. Oduor Ongwen**, and dated 2nd November 2016, ODM claims the total revenue collected by the national government for the financial years 2012/13, 2013/14, 2014/15 and 2015/16 is approximately Ksh. 4,284,478,728, 351/=. It is contended that 0.3% of the aforesated national revenue translates to Ksh. 12,853,436,185/= which monies the Political Parties Fund ought to have received. It is from this money due and owing to the Fund that the applicant seeks 40% thereof, being the sum of Ksh. 4,135,903,545/= which is claimed as a liquidated amount due and owing to ODM.

8. The 1st, 2nd and 4th respondents filed grounds of opposition to the Motion. The 1st and 2nd respondents being the National Treasury and the Cabinet Secretary for National Treasury jointly opposed the Motion, maintaining there is no specific legal duty owed by them to the appellant and as such, an order of mandamus cannot issue; that the prayer sought by the appellant is too general and vague with no clear relief sought. It was asserted the prayer for mandamus as sought by the appellant contravene the doctrine of separation of powers.

9. The 3rd respondent, the **Registrar of Political Parties**, in a replying affidavit deposed by **Ms Juliet Murimi** and dated 1st February 2017 concedes that the 3rd respondent is under a statutory obligation to administer the Political Parties Fund. However, it is averred the Registrar of Political Parties has no constitutional or statutory duty to allocate and appropriate funds to the Political Parties Fund; it is asserted the 3rd respondent can only distribute and administer the Fund as appropriated by Parliament.

10. The 4th respondent, **the National Assembly**, in its grounds of opposition stated an order of mandamus cannot lie against Parliament because such an order is tantamount to the court usurping the role of Parliament to appropriate funds for expenditure; that appropriation of limited public resources is based on competing interests, including equitable sharing between the national and county governments, need for affirmative action and special considerations for marginalized areas; that judicial review is a remedy in administrative law challenging administrative actions of a public body while the instant application for mandamus is challenging the Appropriation Act of Parliament; that the instant application does not challenge any administrative action; the order sought if granted will be violation of the principle of separation of powers more particularly the independence of Parliament.

11. Upon hearing the parties, the learned judge issued the following orders:

(a) Judicial Review order of mandamus be and is hereby issued compelling the National Assembly to comply with the provisions of Section 24 of the Political Parties Act, namely to allocate and appropriate not less than 0.3% of the national government revenue collected to the Political Parties Fund for administration by the Office of Registrar of Political Parties for disbursement to qualifying parties in accordance with the legally established formula under the Political Parties Act, 2011.

(b) The Cabinet Secretary of the National Treasury is hereby ordered to ensure that in each financial year, the National Treasury shall make budgetary proposals and estimates that reflect the allocation of not less than 0.3% of the national revenue collected to be due to the Political Parties Fund for appropriate administration and disbursement to the eligible political parties in accordance with the established formula under the Political Parties Act, 2011.

(c) This Judgment and orders shall take effect from the 2018/19 financial year.

(d) The Deputy Registrar of this Court to ensure that this judgment is served upon the National Assembly, the Hon. Attorney General and the Cabinet Secretary of the National Treasury within the next ten days from the date of this judgment and an affidavit of service filed to that effect.

(e) Each party to bear their own costs..."

12. Aggrieved by the judgment, the appellant has lodged the instant appeal. The grounds urged are:

"(i) The judge erred in the determination that the appellant was not entitled to the order for payment of the sum of Ksh. 4,135,903,545/= as sought in the Notice of Motion.

(ii) The judge erred in contradicting herself that although the order of mandamus is not time bound, the appellant was not entitled to the order due to alleged delay in seeking the order sought.

(iii) The judge erred by taking into account extraneous matters.

(iv) The judge erred in her determination that the order for mandamus can only apply for the future.

(v) The judge erred by clawing back and denying the appellant the monies due and which monies had accrued to the appellant by fiat of the Constitution and the implementing legislation."

13. In its memorandum, the appellant prays for the setting aside of the judgment of the trial court to the extent that the judgment and orders are limited to take effect from the 2018/19 financial year; a further prayer is for judgment to be entered in favour of the appellant in the sum of Ksh. 4,135,903,545/= as sought in the Notice of Motion dated 19th January 2017.

14. At the hearing of this appeal, learned counsel **Ms Julie Soweto Aullo** appeared for the appellant. Learned counsel **Mr. Munene Wanjohi** appeared for the 1st and 2nd respondent; learned counsel **Mr. Bon Makolwal** appeared for the 3rd respondent and learned counsel **Mr. Sheriffsam Mwendwa** appeared for the 4th respondent. The 1st, 2nd, 3rd and 4th respondents filed written submissions.

15. The appellant faulted the trial court for refusing mandamus on the ground of delay. Counsel submitted that in the instant appeal, to determine whether there was undue delay, one must consider the nature of the remedy, when it can be sought, what the litigant has previously done and whether the respondents' failure to perform the duty owed was caused by the alleged delay. It was submitted the trial judge failed to appreciate the remedy of mandamus crystallizes after disobedience to perform the duty owed. In this matter, the question that begs consideration is whether the court would have ordered mandamus if the appellant had come to court any sooner. It was urged that at any point, the appellant would always be seeking what is owed to it. There is no time limit to enforce a statutory obligation and the trial court failed to appreciate the nature of mandamus is to ensure a remedy is available where there is no specific legal remedy to enforce a statutory duty and a right to statutory funds.

16. The appellant stressed that the trial court erred in ignoring past arrears due to the Political Parties Fund and further erred in ordering only the future performance of the legal obligation; the court in failing to order payment of arrears left the appellant without an effective remedy and sanctioned egregious violation of law by Parliament. In support of its submission, the appellant cited dicta from the case of **Republic vs. Permanent Secretary Ministry of State for Provincial Administration and Internal Security exParte Fredrick Manoah Egunza, HC Misc. App. No. 31 of 2012 [eKLR2012]**. In concluding its submissions on delay, the appellant urged it was not dilatory in seeking performance of the statutory duty owed to it among others by the respondents; that the appellant consistently and continuously took up the issue of non-payment and engaged with the Registrar of Political Parties on the subject.

17. Reiterating other grounds of appeal, the appellant submitted the trial judge erred in exercising her discretion injudiciously by stating it would not be in the interest of justice and public policy to order payment of arrears of the monies due under **Section 25 (1) (a) of the Political Parties Act** for doing so would be a paper judgment. It is contended in holding that payment of arrears would be a paper judgment, the trial court erred in signaling and sanctioning violation of law; it was urged the judge failed to appreciate the law remains the law whether or not it is obeyed. Citing **Shah vs. Attorney General (No. 3) [1970] EA 543**, it was submitted that an order or mandamus is used to compel public officers to perform duties imposed upon them by common law or statute and mandamus is also available when the duty is imposed by an Act of Parliament for the benefit of an individual.

18. In concluding its submission, the appellant urged that the judge erred in taking into account extraneous matters and stating which lawyers or advocates are members of the appellant party. It was urged that such a statement was extraneous and irrelevant to the issues before the trial court. In considering extraneous matters, the trial court expressed itself as follows:

“135. Delay defeats equity. Judicial Review orders/remedies are discretionary and although the orders of mandamus is not time bound, even where the remedy is available, this court has the discretion to decline to grant it in the manner sought where it is clear like in the instant case that the applicant who is endowed with superior legal minds/advisors in this country including Senior Counsels like Hon Senator James Aggrey Orenge who are seasoned members of Parliament and esteemed members of the exparte applicant's political party, Orange Democratic Movement(ODM) could wait for 4 financial years to elapse for them to ask for payment of lump sum of over 4 billion, while knowing very well that for such sums of money to be available, it has to be allocated and appropriated by the National Assembly. The final actual figure would of (sic) course depend on the actual revenue collected.”(Emphasis supplied)

19. Counsel for the 1st and 2nd respondents in opposing the appeal relied on submissions made before the trial court. In their submission, they urged that the respondents do not owe a specific duty to the appellant as pleaded in the Notice of Motion and as such, an order for mandamus cannot issue; that a court in considering a judicial review application does not consider the merits of the decision but the decision making process; that the appellant is seeking mandamus to compel the respondents to disburse the sum of Ksh. 4,135,903,545/= and or such other outstanding amount lawfully due; it was 0.3% of the total revenue collected by the National Government during the period between 2012 and 2016 is a matter that requires scrutinizing evidence before a civil court; that for mandamus to issue, the legal duty must be definite and should not be a matter of evidence. Counsel urged the respondents have carried out their statutory duty in accordance with the law and the orders sought should not be given.

20. Counsel for the 3rd respondent pressed that the Registrar of Political Parties has not failed to carry out the statutory duty of administering funds allocated and disbursed to Political Parties Fund; that the Registrar has no constitutional or statutory duty to allocate or appropriate funds to the Political Parties Fund; if there is any failure to allocate the minimum funds as stipulated under **Section 24(1) (a)** of the Act, the failure is not by the 3rd respondent.

21. The 4th respondent's counsel in opposing the appeal rehashed background facts and the written chronology of relevant events. Counsel submitted that there were two pivotal issues in the appeal: first, whether a court can grant an order for payment to the appellant of public funds that were neither budget for, allocated, appropriated nor set aside for disbursement; and second, whether mandamus can issue retrospectively to compel the National Assembly to allocate and appropriate funds to the appellant in arrears.

22. The 1st and 2nd respondents urged that by virtue of **Article 221** of the Constitution, the Cabinet Secretary responsible for Finance is required to submit to the National Assembly estimates of revenue and expenditure of the National Government for the next financial year; when the estimates are approved by the National Assembly, an Appropriation Bill is introduced to authorize withdrawal from the Consolidated Fund and for appropriation of money. It was urged the appellant's claim for Ksh. 4,135,903,545/= is for monies neither budgeted for nor appropriated nor allocated by the National Assembly. It was further urged that the trial court correctly declined to award the

appellant the sum claimed in respect of unbudgeted funds.

23. On the issue of arrears, counsel urged the trial court correctly held that mandamus can only apply to the future and the appellant was indolent in pursuing its claim. The dicta from the case of **Kenya Engineering Workers Union vs. Reliance Industries Limited [2000] eKLR** was cited to support the submission that demand for retrospective effect of an award cannot be claimed as of right because the fixation of an effective date from which an award should operate is discretionary.

ANALYSIS AND DETERMINATION

24. This is a first appeal. I have considered both the oral and written submissions by the parties as well as authorities cited. The suit before the trial court was determined by way of affidavit evidence and written submissions. No witnesses were called. It is my duty to reconsider the affidavit evidence, evaluate it and draw my own conclusions guided by the applicable constitutional principles and the law as stipulated in the **Political Parties Act 2011**. As was stated by Sir Kenneth O'Connor, JA in **Peters vs. Sunday Post Limited [1958] EA 42**, the duty of an appellate court entails bearing in mind that:

“... An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

25. The first issue for my consideration is jurisdictional in nature. Can an order of mandamus issue against the National Assembly? The 4th respondent contends that an order of mandamus cannot lie against the National Assembly because such an order is tantamount to the court usurping the role of the Assembly to appropriate funds for expenditure.

26. An order of mandamus lies against a public body that has duty to perform a certain act and has failed to do so. **Section 24 (1) (a)** of the **Political Parties Act** specifies that the Political Parties Fund shall have such funds not being less than zero point three per cent of revenue collected by the national government as may be provided by Parliament. **Section 25 (1) (a)** of the **Act** enacts, legalizes and provides the formula for distribution of the Fund. The Fund shall be distributed ninety-five per cent proportionately by reference to the total number of votes secured by each political party in the preceding general election.

27. In the instant matter, the first question is: upon whom is the statutory duty vested to implement **Sections 24 (1) (a)** and **25 (1) (a)** of the **Political Parties Act**? A literal reading of **Article 221 of the Constitution** as read with **Section 24 (1) (a)** of the **Political Parties Act** undoubtedly demonstrates that Parliament is under an obligation to allocate and appropriate monies to the Political Parties Fund. In addition, the Cabinet Secretary responsible for Finance is under a constitutional obligation to submit to the National Assembly estimates of revenue and expenditure of the national government for the next financial year.

28. A literal reading of **Section 24(1) (a)** of the **Political Parties Act** demonstrates that the allocation of 0.3 % of the national revenue to the Political Parties Fund is mandatory. It is provided that there shall be allocated to the Fund not less than zero point three per cent of the revenue collected by the national government. It is manifest that the duty to table revenue and expenditure estimates before the Assembly as well as the duty to allocate and appropriate is a both a constitutional and statutory duty bestowed upon the Cabinet Secretary responsible for Finance and the National Assembly respectively.

29. The next issue is whether the discharge of the duty under **Section 24 (1) (a)** of the Political Parties Fund by the Cabinet Secretary and National Assembly is discretionary. Whereas **Section 24 (1) (a)** use both words “shall” and “may”, the use of the “shall” connote mandatory nature of the duty to allocate and appropriate a minimum of 0.3 %. The use of the word “may” in the Section denotes the discretionary nature of the National Assembly to determine the upper limit of allocation and appropriation of monies for the Political Parties Fund. The Section gives the Assembly discretion and latitude to determine the upper limit of allocation and appropriation every financial year. The lower limit, the minimum allocation and appropriation, has been set by statute at 0.3% of the total revenue collected by the national government and it being a statutory obligation is not negotiable.

30. In this appeal, the prayer by the appellant is for the enforcement of the statutory duty to allocate, appropriate and disburse the minimum 0.3% of the revenue collected by the national government. I find that the National Assembly has a statutory obligation under **Section 24 (1) (a)** of the Political Parties Act in each financial year to allocate, appropriate and disburse to the Political Parties Fund a minimum of 0.3% of the revenue collected by the national government. The minimum amount is a statutory obligation that is mandatory, not discretionary.

31. Re-agitating the jurisdictional issue, the 4th respondent argued that mandamus cannot lie against the National Assembly as this would be contrary to the doctrine of separation of powers. In **Commission for the Implementation of the Constitution vs. National Assembly of Kenya & 2 others [2013]**, it was stated that a court must restrain itself in order not to trespass onto that part of the legislative field which has been reserved by the Constitution, and for good reasons, to the Legislature. I am also cognizant of the dicta in **Peter O. Ngoge vs. Francis Ole Kaparo & Others (2007) eKLR** for the proposition that it is not the function of the court to interfere with the internal arrangements of Parliament unless it can be shown that it has violated the Constitution. I affirm the holding in **Kenya Youth Parliament & 2 Others vs. Attorney General & Another, Nairobi Petition No. 101 of 2011** where it was stated that courts would hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of State that has proceeded with due regard to procedure.

32. In the instant matter, the appellant is seeking an order of mandamus. For mandamus to issue, the applicant must have a legal right to the performance of a legal duty. The legal duty must be of a public nature. In the Indian case of **Dr. Rai Shivendra Bahadur vs. Governing Body of the Nalunda College, A.I.R. 1962 S.C. 1210**, it was held:

“In order that mandamus may issue to compel the respondents to do something, it must be shown that statute impose a legal duty and the appellant has a legal right under the statute to enforce its performance.”

33. Mandamus will not issue where to do or not to do an act is left to the discretion of the authority. In **Union of India -v- Shree Gajanan Mahanaj Sansthan** (2002) 5 SCC 44, the Indian Supreme Court expressed:

“When enforcement of a provision in a statute is left to the discretion of the Government without laying down any objective standards, no writ of mandamus could be issued directing the Government to consider the question whether the provision should be brought into force and when it can do so.”

34. In **Choteyal -v- State of U.P.** (AIR 1951 All 228) it was stated mandamus will not issue to a legislature to forbid it from passing legislation repugnant to fundamental rights.

35. Notwithstanding the foregoing, in **Comptroller and Auditor General of India -v- K.S. Jeggannathan**, AIR 1987 SC 537 at paragraph 89 it was stated mandamus is a remedy against defects of justice and “it will issue that justice may be done in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

36. In **Kalyan Singh -v- State of U.P.** AIR 1962 SC 1153 it was stated:

“For mandamus to issue, the right to be enforced must be subsisting on the date of the petition. If the interest of the petitioner has been lawfully terminated before that date, he is not entitled to mandamus.”

37. In the instant case, the appellant’s right to the monies stipulated under **Section 25 (1) (a)** of the **Political Parties Act** existed on the date the petition was filed before the High Court; its right to the monies continue to subsist on the date of this judgment. Further, both the Cabinet Secretary responsible for Finance and the National Assembly have a constitutional and statutory duty enacted and bestowed upon them by virtue of **Article 221** of the Constitution and **Section 24 (1) (a)** of the **Political Parties Act**. The appellant is the one of beneficiaries of the statutory funds to be distributed pursuant to **Section 25 (1) (a)** of the **Political Parties Act**. I am satisfied that the allocation, appropriation and distribution of Political Parties Fund is a duty of a public nature and the appellant not only has a right to performance of the public duty but is also a beneficiary of performance thereof. I find the appellant has *locus standi* and is well suited to demand enforcement of the provisions of **Sections 24** and **25** of the Political Parties Act.

38. Comparatively, in the South African case of (**Speaker of National Assembly vs. De Lille MP & Another** 297/98 (1999) (ZASCA 50) it was stated no Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. No parliament, no official and no institution is immune from judicial scrutiny in such circumstances. (See also **Doctors for Life International vs. Speaker of the National Assembly and Others** CCT 12/05) [2006] ZACC 11 at para 38).

39. On the contestation whether mandamus can issue against the National Assembly, presently, there are several authorities which show that under the doctrine of separation of powers, a court shall not interfere with internal affairs and procedural issues in Parliament. For instance, in **Tockdale vs. Hansard** (1839) 9 A2 &E, the Court accepted the exclusive jurisdiction of Parliament over its internal proceedings, stating, however, that it was for courts to determine whether or not a claim of privilege fell within that category. In **Bradlaugh vs. Gosset** (1884) 12 QBD 271, the Court upheld the exclusive jurisdiction of the House of Commons in matters found to relate to the management of internal proceedings of the House. In the Zimbabwe case of **Biti and Another vs. Minister of Justice, Legal and Parliamentary Affairs and Another** [2002] ZWSC 10, the Supreme Court was called upon to resolve a conflict between fundamental rights and privileges of Parliament; the Court held that where a claim to parliamentary privilege violated constitutional provisions, the Court’s jurisdiction would not be defeated by the claim to privilege.

40. Comparatively in India, no mandamus will lie against an officer or Member of Parliament or an officer or member of the legislature in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business or for maintaining order in Parliament or the State legislature. Mandamus will not issue to a legislature to forbid it from passing legislation repugnant to the fundamental rights. (See **Choteyal vs. State of U.P.**, A.I.R. 1951 All 228).

41. In **Shah vs. Attorney General** (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543, it was expressed as follows:

“It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose.

The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is preemptory...”

42. In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants** [2007] 2 EA 441, it was held:

“The orders are issued in the name of the Republic and in the case of a mandamus order its officers are compelled to act in accordance with the law. The State so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State.”

43. In **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others**, Civil Appeal No. 266 of 1996 [1997] eKLR it was expressed as follows:

“.....an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

44. In the instant appeal, the issue at hand is not about parliamentary internal affairs or parliamentary privileges and immunity; the issue is not a claim for procedural irregularity in Parliamentary proceedings but a claim founded on substantive procedural illegality in failing to allocate, set aside, appropriate and distribute monies as obligated under **Sections 24 (1) (a)** and **25 (1) (a)** of the **Political Parties Act**.

45. It is trite a court cannot inquire into and issue a judicial review order in relation to internal parliamentary affairs or procedural irregularities. However, in my view, a judicial review order including mandamus can issue when it is proven that Parliament involved itself in a substantive statutory illegality or unconstitutionality.

46. The contestation in this matter is illegality in the failure, refusal or neglect by the National Assembly and Cabinet Secretary responsible for Finance to perform their constitutional and statutory duty imposed vide **Article 221** of the Constitution as read with **Section 24 (1) (a)** and **Section 25 (1) (a)** of the **Political Parties Act** to set aside, allocate and appropriate a minimum of 0.3% of the revenue collected by the national government to the Political Parties Fund.

47. Noting the appellant's claim is founded on an illegal violation of **Section 25**

(1) (a) of the **Political Parties Act**, it is manifest all the judicial decisions to the effect that a court cannot issue mandamus or injunctive orders against the National Assembly are distinguishable and inapplicable to the instant matter because the contestation in this matter is founded on illegality and failure to perform a statutory duty.

48. In this matter, a specific statutory duty has been bestowed upon the National Assembly and in my considered view, it is within the jurisdiction of a court of law to pronounce and declare the law as it is. If the law is couched in mandatory terms, as it is in this matter, mandamus can issue against the National Assembly. In such an event, the order of mandamus compels the National Assembly to do that which it is already enjoined by statute to do. The unique and mandatory statutory obligation under **Section 25 (1) (a)** of the **Political Parties Act** requiring the National Assembly to allocate not less than 0.3% of national revenue to Political Parties Fund confers competence and jurisdiction to this Court to issue mandamus against the National Assembly.

49. The next issue for my consideration is whether the trial court erred in holding that the appellant was guilty of delay in filing suit for its claim for Ksh. 4,135,903,545/=. The trial court in declining to grant the order of mandamus

expressed itself as follows:

“134. Furthermore, the exparte applicant had all along been aware that Parliament had not been allocating and appropriating the correct amount to the Political Parties Fund since 2012 but waited until after 4 financial years that it came to court to seek for arrears.

135. Delay defeats equity.....”

50. The appellants in taking issue with the above statement submitted that the court erred as it did not consider the appellant had persistently and continuously raised the issue of non-payment of the sums due with the Registrar of Political Parties. The judge also ignored that the Registrar of Political Parties had raised the issue with the Justice and Legal Affairs Committee of the National Assembly. The respondents in opposing this ground submitted that the trial court did not err because, in any event, the monies had not been allocated and appropriated by the National Assembly.

51. I have considered the rival submissions on the issue of delay. **Section 25 (1)**

(a) of the **Political Parties Act** imposes a statutory duty on the part of the National Assembly to allocate and appropriate a minimum of 0.3% of the revenue collected by the National Government to the Political Parties Fund. There is no limitation period for enforcement of this statutory duty. There is evidence on record that as from the financial year 2012/13, the statutory duty to allocate the minimum of 0.3% has not been fully complied with. There is a continuing failure by Parliament and National Treasury to implement the statutory duty enacted and imposed by **Section 25 (1) (a)** of the **Political Parties Act**.

52. The continuing failure to allocate and appropriate the statutorily mandated 0.3% is evident through consecutive failure each financial year to allocate and appropriate the minimum stipulated amount of money. In this regard, I find that there is a continuing failure to perform the statutory obligation and the concept of delay does not apply. I am satisfied that the learned judge erred in finding that there was delay in instituting the suit against the respondents. I am also satisfied that the failure on the part of the trial court to find the 1st, 2nd and 4th respondents have violated statutory duty on account of delay is tantamount to condoning and legalizing statutory violation. This cannot be overlooked.

53. I also find that in this matter, the judge erred in invoking the equitable principle “delay defeats equity.” The issue in this matter is implementation and obedience to an express statutory duty stipulated in **Section 25 (1) (a)** of the **Political Parties Act**. Equity cannot override an express statutory duty. If any exception, excuse or exculpatory defence is to be invoked to explain or justify non-performance of

a statutory obligation, such an exception must expressly be provided in the statute creating the obligation. In this matter, there is no statutory exception to the obligation to abide by **Section 25 (1) (a)** of the **Political Parties Act**.

54. My reasoning and finding on the issue of delay applies *mutatis mutandis* to the ground that the trial court erred in failing to find the appellant was entitled to arrears of the monies due under the Political Parties Fund from 2012/13 financial year to 2017/18 financial year.

55. The duty of the 1st, 2nd and 4th respondent to comply with **Section 25 (1) (a)** of the **Political Parties Act** started to run from the financial year subsequent to the commencement date of the **Political Parties Act**. The commencement date of the Act is 1st November 2011 and the subsequent financial year is 2012/13. The continuing duty of the National Assembly to allocate the stipulated 0.3% is a duty which shall subsist every financial year unless and until Parliament amends the Section. Accordingly, I find that the appellant is entitled to all the monies including any arrears due under **Section 25 (1) (a)** of the Act from the fiscal year 2012/13 which is the subsequent fiscal year after commencement of the Political Parties Act. In so finding, the order of mandamus issued herein is not essentially retrospective, it merely affirms that the statutory duty bestowed under **Section 25 (1) (a)** of the Act should be implemented and enforced from the date when Parliament stated it should be implemented.

56. I am convinced that **Section 25 (1) (a)** of the **Political Parties Act** provides a formula to ascertain and determine the specific amount of monies to be allocated and appropriated to the Political Parties Fund. Pursuant to the Section, what appears to be an uncertain sum is made certain by the two criteria stipulated in the Section. The first criterion is the minimum 0.3%; and the second criterion is revenue collected by the National Government. These two criteria make the monies due to the Political Parties Fund ascertainable. It makes what is uncertain certain.

57. In my view, the criteria set out in **Section 25 (1) (a)** of the **Political Parties Act** is a formula for distribution and payment in arrears of monies in the Political Parties Fund. It is an arrears formula because the revenue must first be collected by the National Government and then allocated, appropriated and disbursed in the following fiscal year. One cannot determine the exact amount of revenue collected until the end of the financial year. It is this reality that makes the formula in **Section 25 (1) (a)** be an arrears formula. Being an arrears formula, the trial court erred in holding that arrears are not payable under **Section 25 (1) (a)** of the Act.

58. Another issue for my consideration is whether the trial court erred in failing to enter judgment in favour of the appellant for the sum claimed of Ksh. 4,135,903,545/=. In its memorandum of appeal, the appellant prayed for judgment against the respondents in the said sum of Ksh. 4,135,903,545/=.

59. I have considered whether in law, a judgment for a liquidated sum can be entered in a judicial review application, more particularly whether an order for mandamus can be issued to compel payment of a sum certain or ascertainable. I am conscious that judicial review proceedings are concerned with the process, not merits of a decision and above of all, judicial review is not generally concerned with liquidated claims. (See **Municipal Council of Mombasa vs. Republic and Another 2002 eKLR 223 Civil Appeal No 185 of 2001**). Ordinarily, liquidated sums are claimed by way of Plaint. Even in claims for violation of constitutional principles or fundamental rights, it is declaratory orders that issue and not judgment for liquidated claims. A separate suit by way of a Plaint must be filed to claim compensation for damages for violation of a constitutional right.

60. In **Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996**, this Court cited, with approval, *Halsbury's Law of England, 4th Edition. Vol. 7 p. 111 para 89* thus:

"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

61. In this matter, one of the issues is whether a writ of mandamus can or should issue for a claim of money judgment simpliciter. The *sine qua non* for issuance of a writ of mandamus is the existence of a statutory or a public duty devolving upon the person or the body against whom the said writ is directed. Equally settled along with a public duty there must coexist a corresponding right in the petitioner which would entitle him to claim the enforcement of the said statutory public duty by way of mandamus. In a contentious claim for a liquidated sum, it can hardly be said that there devolves on one a statutory or a public duty to pay money or that there is an unequivocal right to receive a disputed sum. (See **Daulat Ram Trilok Nath and Others vs. The State of Punjab and others on 15 April, 1976**).

62. In the instant matter, the foundation of the appellant's claims for Ksh. 4,135,903,545/= is breach of a specific statutory obligation which sets out the formula to ascertain the specific sum due and payable into the Political Parties Fund. In my view, the monies to be allocated and appropriated by the National Assembly and to be paid into the Political Parties Fund is neither a claim for damages in tort nor a claim for breach of contract. The sums due under **Section 25 (1) (a)** of the **Political Parties Act** are statutory funds. A claim for payment of statutory funds due from a person with the specific statutory obligation to pay need not necessarily be by way of Plaint. If the sum is certain, ascertainable and indisputably due and owing, judgment can be entered and mandamus can issue for the undisputed liquidated sum.

63. However, the scope of mandamus to enforce a liquidated claim is limited. The function of mandamus is to command and execute; not to inquire and adjudicate. Mandamus is not to establish a legal right but to enforce one; mandamus is not to be issued when the liquidated claim is first to be established and then adjudicated upon before it can be enforced.

64. In the instant case, the appellant asserts the monies due and owing to it for the fiscal year 2012/13 to 2017/18 is the liquidated sum of Ksh. 4,135,903,545/=. Conversely, the 1st and 2nd respondent in their grounds of opposition alleged the total revenue collected by the Government is not Ksh. 12,853,436,185/= from which the appellant derived the sum of Ksh. 4,135,903,545/= as the alleged percentage due

and owing to it. The appellant retorted that the figures asserted as the total sum collected as the national revenue was not controverted by way of affidavit by any respondent.

65. I note that the figures stated by the appellant came into record by way of affidavit evidence deposited by **Mr. Oduor Ongwen**. In the verifying affidavit, it is stated the source of the figures for national revenue collection are reports of the Auditor General.

66. I have compared and contrasted the figures quoted in the verifying affidavit and the figures mentioned in the various Auditor General's reports. The correlation between the tabulated figures in paragraph 10 of **Mr. Ongwen's** verifying affidavit and the Summary of the Reports by the Auditor General is not demonstrated. For instance, there is no demonstrable relationship between the national revenue collected as Appropriation-in-Aid for the financial year 2012/13 as stated in Item 2.1.1 of the Auditor's Summary for 2012/13 as Ksh. 246,324,086,619/= and as contrasted with the sum mentioned in paragraph 10 of **Mr. Ongwen's** verifying affidavit as total revenue for the same fiscal year as Ksh. 813.2 billion. The absence of clear correlation between the Auditor General's figures and the figures mentioned in the verifying affidavit leads me to conclude the sum of Ksh. 4,135,903,545/= as prayed for in memorandum of appeal is not undisputedly due and owing.

67. Noting that the total revenue collected by the national government is a disputed amount in this matter, I find that judgment cannot be entered in favour of the appellant in the sum of Ksh. 4,135,903,545/= as claimed. Notwithstanding this finding, I make a finding that the appellant is entitled to payment in arrears of all sums due and owing under the provisions of **Section 25 (1) (a)** of the **Political Parties Act** with effect from the 2012/13 financial year and in each subsequent fiscal year. The actual amount due and owing is easily ascertainable from the figures submitted by the 2nd respondent for the National Assembly as the revenue collected by the national government over the financial years in question.

68. For the avoidance of doubt, I have analyzed the provisions of the Political Parties Act and established there is no statutory duty imposed on the 3rd respondent to allocate and appropriate any monies into the Political Parties Fund. I am also satisfied that the Registrar of Political Parties has not failed to discharge the duties of the Registrar in relation to **Sections 24** and **25** of the **Political Parties Act**. Accordingly, I decline to issue an order for mandamus against the 3rd respondent.

69. Finally, the 4th respondent urged that issuance of an order of mandamus in the instant appeal is usurpation of the role of the National Assembly to pass an Appropriation Act. It was also urged that issuance of mandamus is tantamount to interference with Parliamentary proceedings. I disagree. **Section 25 (1) (a)** of the **Political Parties Act** enacts and imposes a mandatory obligation and the duty to abide by the same is upon the National Assembly and National Treasury. It is Parliament itself through its enactment of **Section 25 (1) (a)** of the **Political Parties Act** that has fettered its discretion in exercising its power to appropriate monies for national expenditure. Parliament by enacting the 0.3 per cent minimum allocation and appropriation to the Political Parties Fund tied its own hands. By issuing a mandatory injunction against the National Treasury and National Assembly, this Court is simply reminding and compelling the National Treasury and Parliament to perform their statutory duties as enacted; the Court is obligating them to perform that which all along has been their statutory obligation. In this regard, an order of mandamus issued to compel performance of the obligation under **Section 25 (1) (a)** of the **Political Parties Act** is not an interference with legislative process but an affirmation and application of the law as it is. An order of mandamus is hereby issued directing the implementation of **Section 24 (1) (a)** and **25 (1) (a)** of the **Political Parties Act** as enacted.

70. In totality, my re-evaluation of the affidavit evidence on record and consideration of the relevant applicable law leads me to conclude that this appeal has partial merit and to that it is hereby allowed. I make the final order that the judgment of the trial court dated 31st October 2017 be and is hereby varied as follows:

(a) An order of mandamus be and is hereby issued compelling the National Assembly to comply with the provisions of Section 24 of the Political Parties Act, namely to allocate and appropriate not less than 0.3% of the national government revenue collected to the Political Parties Fund for administration by the Office of Registrar of Political Parties for disbursement to qualifying parties in accordance with the legally established formula under the Political Parties Act, 2011.

(b) The appellant is entitled in arrears to all monies due pursuant to Section 25 (1) (a) of the Political Parties Act from the financial year subsequent the effective date of the Act i.e. arrears from the 2012/13 financial year.

(c) This Judgment and orders shall take effect from the effective date of the Political Parties Act, 2011 namely, 1st November 2011.

(d) The Deputy Registrar of this Court to ensure this judgment is served upon the National Assembly, the Hon. Attorney General and the Cabinet Secretary of the National Treasury within the next ten days from the date hereof and an affidavit of service filed to that effect.

(e) Each party to bear its own costs before the trial court and in this appeal.

Dated and delivered at Nairobi this 7th day of June, 2019

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF D.K. MUSINGA, JA

I have had the advantage of reading, in draft, the judgment of Otieno-Odek, JA and I agree with his reasoning and findings. I have nothing useful to add.

Dated and delivered at Nairobi this 7th day of June, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

JUDGMENT OF GITHINJI, JA

[1] This is an appeal against the judgment of the High Court (**R.E. Aburili, J.**) declining to grant an order of mandamus to compel the respondents herein to allocate and distribute to the appellant Kshs.4, 135, 903,545/00 allegedly due to the appellant under the Political Parties Fund.

[2] By a Notice of Motion dated 19th January, 2017, brought, *inter alia*, under **Order 53 Rule 3(1)** of the Civil Procedure Rules, section **8(2)** and **9** of Law Reform Act, the appellant sought a judicial review order of mandamus

“compelling the respondents to forthwith allocate, appropriate and disburse to the applicant the sum of Kshs.4, 135, 903, 545/00 or such other outstanding amount lawfully due to the applicant under the Political Parties Fund; such amount being not less than 40% of 95% of not less than 0.3% of total revenue collected by the national government during the period between 2012 and 2016 less the sum of Kshs. 501, 575, 919/00 which has been received by ODM during the same period.”

The application was supported by an amended statutory statement and the verifying affidavit of **Oduor Ong’wen**, the Executive Director of the appellant and the annexed documents.

[3] **Article 92** of the Constitution empowers the Parliament to enact legislation on political parties to provide, amongst other things, for the establishment and management of Political Parties Fund. The envisaged legislation, the Political Parties Act was enacted in 2011 (*Act*). **Section 23** of the Act establishes a Political Parties Fund to be administered by the Registrar of Political Parties. **Section 24(1)** stipulates one of the two sources of Political Parties Fund thus:

“Such funds not being less than zero point three per cent of the revenue collected by the national government as may be provided by Parliament.” (Underlining supplied) **Section 25(1)** stipulates the formula for distribution of the fund to political parties as follows:

(a) Eighty per cent of the fund proportionately by reference to the total number of votes secured by each political party in the preceding general election.

a(a) Fifteen per cent of the fund proportionately to political parties qualifying under (a) based on the number of the candidates of the party from special interest groups elected in the preceding general election; and

(b) Five per cent for administration expenses of the fund. Section 25(2) of the Act provides:

“Notwithstanding subsection (1), a political party shall not be entitled to receive funding from the fund if:

(a) The party does not secure at least three per cent of the total number of votes at the preceding general election; or

(b) More than two thirds of its registered office bearers are of the same gender;

b (a) the party does not have, in its governing body, representation of special interest groups.

(c) The party does not have at least –

(i) Twenty elected members of the National Assembly; and

(ii) Three elected members of the Senate; and

(iii) **Three elected members who are Governors; and**

(iv) **Forty members of County Assemblies.”**

And Section 25(3) provides;

“For purposes of sections 1(a) and 2(a), the total number of votes secured by a political party shall be computed by adding the total number of votes obtained in the preceding general election by a political party in the election for the President; member of parliament; county governors and members of county assemblies.”

[4] The verifying affidavit of **Oduor Ongwen** shows the process by which the sum of Kshs. 4,135,903,545/00 has been computed.

First, he extracted the total revenue collected by the national government for each of five financial years from the summaries of the reports of the Auditor-General. He annexed the summaries of the Auditor General to the affidavit in support of the total revenue collected by the national government in each of the five financial years.

Secondly, he extracted the amount released to the Political Parties Fund in each of the five financial years from the records of the Registrar of the Political Parties. According to his computation, the total amount allocated to the Fund in the five financial years was 0.03% of all the revenues collected by the National government.

Thirdly, he computed the sums received by the appellant in each of the five financial years and the estimated amount the appellant should have received in each financial year.

The estimated amount that the appellant should have received in each financial year was arrived at on the basis that the total amount was to be shared amongst three political parties and the appellant was entitled to receive 40% of the funds. The computation shows that the appellant received a total sum of Shs. 501,575,919/100 in the five financial years in issue and that the estimated outstanding amount was Shs. 4,135,903,545/00.

The appellant's case was essentially that the Political Parties Fund is by law required to receive at least 0.3% of all the revenue collected by the National government and that the respondents had acted in contravention of the Political Parties Act by failing to allocate and disburse the funds to the political parties in accordance with the law.

[5] The application in the High Court was opposed by all the respondents. The 1st and 2nd respondents contended that the application raised issue of merit and not process; that the correct amount owed, if any, required proof in a civil court; that the sum claimed is not definite; that the total revenue collected by the national government during the five financial years required proof in a civil court.

The 3rd respondent contended that it had no mandate to appropriate funds for expenditure and, that its duty was to distribute and administer funds as appropriated to it by the national government.

On its part, the 4th respondent raised various issues including that the application sought to direct Parliament on appropriation of public funds; the court cannot usurp the role of the National Assembly to appropriate funds; the court cannot encroach on the legislative function of the National Assembly; the appellant had not demonstrated the unconstitutionality of the relevant Appropriation Acts; the appellant had not demonstrated that it was entitled to 40% of the Political Parties Fund; the order, if granted, would violate the principle of separation of powers; the application seeks the review of budgeting process, and, that the court lacks the tools to engage in political matters.

[6] Upon consideration of the application, the High Court made findings, *inter alia*, that; the National Assembly had no discretion in allocating not less than 0.3% of the national government revenue to the Political Parties Fund; the power to allocate and appropriate is given to the National Assembly which has failed to allocate and appropriate the correct amount; the National Assembly had not denied the figures in the summary of the Auditor-General's Report nor given alternative figures; the remedy of juridical review was available as the appellant had demonstrated that it had a legal right to a share of the Political Parties Fund; that there was a legal duty on part of the National Assembly to allocate and appropriate national revenue to the Political Parties Fund and that the appellant was entitled to the order of mandamus to compel the National Assembly to comply with the Political Parties Act to allocate and appropriate not less than 0.3% of the national revenue to the office of the Registrar of Political Parties. Nevertheless, the High Court made a finding that the appellant was not in the circumstances of the case entitled to the order for payment of the sum claimed for the reasons that:

(i) The sum of money were not budgeted for, allocated and appropriated or set aside for disbursement to the ex parte applicant or even to the political parties' fund.

(ii) The sums are due in respect of unbudgeted for, unallocated and unappropriated funds and therefore they are not available for disbursement.

(iii) The appellant while aware that correct amounts have not been allocated to Political Parties Fund since 2012 waited until after 4 financial years to seek for arrears.

(iv) It would not be in the interest of justice and public policy and would be a paper judgment to order for payment of arrears of monies which were never allocated, appropriated and disbursed to Political Parties Fund for distribution to all eligible political parties using the legally established formulae.

However, the court granted an order of mandamus against the National Assembly compelling it to allocate not less than 0.3% of the national government revenue collected to Political Parties Fund with effect from 2018/2019 financial year and other ancillary orders.

[7] The appeal is based on the grounds, *inter alia*, that: the learned judge erred in dismissing the claim on ground of delay; in failing to exercise discretion correctly; in taking into account extraneous and irrelevant factors and in finding that an order for payment would be a paper judgment.

The appellant's written submissions extensively address those grounds of appeal. The positive relief sought in the appeal is that judgment be entered in favour of the appellant in the sum of Shs.4,135,903,545/00. The appeal is opposed by the four respondents essentially on the same respective grounds advanced in the High Court.

[8] As already stated, the order of mandamus sought was to compel the respondents to allocate, appropriate and disburse to the appellant the sum of Kshs.4,135,903,545/= (*over Kshs. 4 billion*). The sum claimed is the accumulative arrears of five financial years, namely, 2011/2012; 2012/2013; 2013/2014; 2014/2015; 2015/2016. I have already indicated the process by which the sum claimed was computed by the appellant.

[9] Firstly, the computation process is founded on the provisions of **section 24(a)** of the Political Parties Act – that, Parliament should have provided not less than 0.3% of the revenue collected by the national government in each of the five financial years to the Political Parties' Fund. The appellant's case was that it is mandatory for Parliament to provide for the fund an allocation of not less than 0.3% of the national government revenue in each financial year. The High Court made a finding to that effect and said that the Parliament had no discretion.

The phrase used in **section 24(a)** of the Act is-“**as may be provided by Parliament.**”

That phrase indicates *ex facie* that Parliament had a discretion whether or not to provide for the funds in the annual budget.

Article 92(f) of the Constitution gives Parliament power to enact a legislation to establish the political parties fund but does not itself establish the fund or provide the percentage of the national government revenue which should be allocated to the fund. It is clear therefore that the fund is not established by the Constitution unlike, for instance, the Equalization Fund established under **Article 204(1)** or Equitable share of national revenue under **Article 202(1)** and **202(2)**. In respect of Equitable share of revenue between national and county governments, **Article 202(2)** provides that the equitable share shall not be less than fifteen per cent of all revenue collected by the National government (*underlining added*)

As regards the Equalization Fund, **Article 204(1)** provides that one half per cent of all revenue collected by national government shall be paid into the fund (*underlining added*).

The word “*shall*” is not used in **section 24(a)** of the Act. However, the respondents have not filed a cross-appeal against the finding of the High Court. In the absence of a cross-appeal, the occasion has not arisen for the conclusive judicial interpretation of **section 24(a)**. Nevertheless, as I have endeavoured to show, it is doubtful, from the wording of the section, whether or not a mandatory legal duty is cast on the Parliament to provide 0.3% of the national government revenue every year to the political parties Fund.

[10] The next stage in the computation was to show the national government revenue collected in each of the five financial years. To prove this, the appellant annexed a summary of the report of Auditor General on the financial statements for ministries and other government entities for each of the five years in question.

Those summaries of reports are bulky documents from which the appellant extracted the national government revenue for each financial year. The 1st and 2nd respondents contended that the revenue collected by the national government required proof in a civil court. The High Court relied on the figures provided by the appellant for the reasons that the contents of the summaries of reports by Auditor-General were not disputed and the respondents had not provided alternative figures. With due respect, it is not the function of a judicial review court in an application brought under the Order 53 of Civil Procedure Rules, like the application which was before the Court, to resolve disputed complex issues of fact by deep analysis of documents. Where an order of mandamus is sought to enforce payment of a specific statutory debt, the debt should be ascertainable from the provisions of the statute itself. It is not sufficient for a court to say that the statutory debt is not disputed or to presume as it did in this case, that the sum was correct. Furthermore, the figures of the revenue collected by the national government derived from the summaries of reports of the Auditor-General do not seem to have taken into account the equitable share of revenue between the National and County Government which by **Article 202(2)** of the Constitution is not less than 15% of all revenue collected by the National government (*underlining mine*). In other words, the appellant in computing the statutory debt does not seem to have deducted the 15% of the revenue payable to the county governments from the revenues in the summaries of the Auditor General.

[11] The other factors which the appellant took into account in computing the amount claimed was the sums released to Political Parties Fund in each of the five financial years and the money paid to the appellant by the Registrar of Political Parties in each of the five financial years. These sums were extracted from the records of the Registrar of Political Parties and there is no doubt that the amounts paid into the fund and to the appellant in each of the five financial years are accurate. However, the percentage of 0.03% as the total amount allocated to the fund in the five financial years is based on the appellant's own computation. Similarly, the total sum that should have been paid to the fund for the five financial years being the 0.3% of the revenue collected by the national government in the five financial years is similarly based on the appellant's own computation. The appellant's computation in respect of two matters are not based on computation by an expert such as an accountant or auditor. In my view, the computations by the appellant are matters of fact and evidence which are outside the sphere of judicial review.

[12] Finally, the sum claimed was admittedly the sum total of the estimated amount outstanding in each of the five financial years calculated on the basis that the appellant would have received 40% of the funds from the Registrar of Political Parties. The duty to administer the fund is conferred on the Registrar of Political Parties.

Upon receipt of the funds in each financial year, the Registrar of Political Parties determines the political parties which qualifies for the funding and the entitlement of each according to the statutory criteria. As **section 24(2)** of the Act provides, a political party which is otherwise eligible can be denied the funds if it does not meet the additional criteria stipulated therein. To that extent, the claim that the appellant would have been entitled to the estimated sum claimed is speculative. Furthermore, the money if allocated would have been paid into the Political Parties Fund and not to the appellant directly.

[13] The main reason why the High Court made a finding that the appellant was not entitled to the sum claimed was that the money was not budgeted for, allocated and appropriated for disbursement to the appellant. **Article 95(4) (b)** gives the National Assembly the power to appropriate funds for expenditure by the national government and other national State organs.

Article 221 of the Constitution summarizes the budget process thus: the estimates of revenue and expenditure of the national government for the next financial year are submitted to the National Assembly by the Cabinet Secretary responsible for finance; a committee of National Assembly discusses and reviews the estimates and seeks representations from the public; takes into account the recommendations of the public and makes recommendations to the National Assembly and upon approval of the estimates by the National Assembly an Appropriation Bill is introduced to the National Assembly to authorize the withdrawal from the consolidated fund and for the appropriation of the money.

By **Article 206(2) (a)**, money may be withdrawn from the Consolidated Fund only in accordance with an appropriation by an Act of Parliament. By **Article 228 (4)**, the Controller of Budget oversees the implementation of the budget by, *inter alia*, authorizing withdrawals from the Consolidated Fund. The detailed stages in the budget process for the national government are provided in the **sections 35 to 41** of the Public Finance Management Act, 2012 (*PFMA*). As provided in **section 6** of *PFMA*, the Act prevails in case of any inconsistency between the Act and any other legislation in various matters including, the preparation and submission of budget estimates, raising of revenue and making expenditure.

[14] **Section 24(1) (a)** of the Political Parties Act clearly provides, *inter alia*,

that the source of the Political Parties Fund are such monies as may be provided by Parliament. The only procedure as authorized by the Constitution and *PFMA*, for providing funds by the Parliament is through the budget process. At the end of the budget process, the National Assembly enacts the Appropriation Act to authorize the withdrawal of the fund from the Consolidated Fund for appropriation of the money for purposes mentioned in the Appropriation Act. Unless and until the political parties funds are provided in the budget, approved by the National Assembly and appropriated through the Appropriation Act and received by the Registrar of political parties, the funds, in my view, do not exist for disbursement to eligible political parties. This did not happen. It follows, as the High Court correctly found, that the money claimed was not available for disbursement to the appellant. It had not accrued to the fund. In so far as the appellant sought by an order of mandamus to compel the respondents to allocate, appropriate and disburse the specific sum claimed *post facto*, the application was incompetent. That is not to say that money due under an Act cannot be recovered. Such money is recoverable through appropriate proceedings and subject to the other laws such as limitation of actions. Indeed, paragraph 1362 of **Halsbury's Laws of England Fourth Edition – Re issue** provides:

“Where an Act imposes an obligation on a person to pay another a sum of money, the amount can be recovered by action as a debt if no other remedy is provided by the Act and no provisions to the contrary is contained in it.”

The two authorities relied on by the appellant namely **Shah v. Attorney General (No 3) [1970] EA 543** and **Republic v. Permanent Secretary Ministry of State for Provincial Administration and Internal Security, exparte Fredrick Manoah Egunza – High Court at Nairobi Misc. Application No. 31 pf 2012 (2012 eKLR)** are clearly distinguishable from this appeal. In both cases, an order of mandamus was issued to enforce a judgment debt arising from a decree awarded by court which is not the case in the instant appeal.

[15] The other reasons why the High Court declined to grant an order of mandamus were delay and public policy. In respect of public policy, the High Court was of the view that an order for payment of arrears would be a paper judgment. Although the remedy sought in this appeal is the entry of judgment for the sum claimed, I reiterate that the order sought in the High Court was an order of mandamus to compel the respondents to allocate, appropriate, and disburse the specific sum claimed to the appellants. The appellant contends that there was no unreasonable delay and that a paper judgment is valuable to a political party as contempt of court order can be sought in event of failure to comply. In finding that there was delay, the High Court took into account that the claim was made after expiry of four financial years and that the appellant has seasoned members of parliament including senior lawyers. The fact that the appellant lays claim to 40% of the fund indicates that it has had many members of parliament. Both **Article 221(5)** of the Constitution and **section 39(2)** of *PFMA* provide for the views of the public to be sought and the recommendations taken into account.

The National Assembly has a budget office (*section 9(1) of PFMA*) and a budget committee (*section 7 of PFMA*). It is the Parliamentary Budget Committee which scrutinizes the budget and makes recommendation to the National Assembly. It is also the budget committee which introduces the Appropriation Bill in the National Assembly (*section 7(h) of PFMA*)

The High Court exonerated the 1st, 2nd and 3rd respondents and held that it is the National Assembly which has a legal duty to appropriate the funds.

[16] It is clear from the foregoing that the appellant and its Members of National Assembly had opportunity in each of the five financial years to make recommendation or even lobby for appropriation of sufficient funds for the Political Parties Fund. The law serves the vigilant and acquiescence may amount to a waiver of statutory rights. The **Halsbury's Laws of England, Fourth Edition, Re-issue** states at paragraph 1364:

“Persons for whose benefit statutory duties have been imposed may waive their right to the performance of these duties,

unless to do so would be contrary to public policy or to the provisions or policy of the Act imposing the particular duty or the duties are imposed in the public interest. Waiver of this kind may be implied from acquiescence.”

In the circumstances, delay was a relevant consideration. So also is the impracticability of the enforcement of an order of mandamus against the National Assembly which consists of 349 Members (*Article 97(1) of the Constitution*).

The contempt of court proceedings suggested by the appellant’s counsel against the National Assembly would not be a practicable and effective remedy.

[17] In summary, the appellant through an application for judicial review brought under Civil Procedure Act sought an order of mandamus to compel the respondents to allocate, appropriate and disburse to the appellant a specific sum of money being the arrears from the provisions of Political Parties Fund that the appellant would have been entitled to had the respondents appropriated the money in each of the five financial years in question in accordance with the Political Party Act. The claim was in essence a statutory debt. The sum claimed is not directly derived from the provisions of the Political Parties Act. The specific sum was not allocated and appropriated in the budget of the respective years. It was not even computed by the Registrar of Political Parties Act whose responsibility is to administer the political parties’ fund. The sum is computed by the appellant through analysis of documents which the appellant annexed to the supporting affidavit. The court was called upon to construe the documents and make several findings including, that, the sums appropriated to the Political Parties Fund in each of the five financial years was less than 0.3% of the revenue collected by the national government in each of the five financial years; and that had the full funds been appropriated, the appellant would have been entitled to 40% of the funds and to compute the exact amount comprising 40%. It seems to me that the appellant was asking the judicial review court to perform the function of civil court that of analyzing the evidence and adjudicating on the merits of the claim with a view of ultimately determining that a statutory duty indeed existed in terms stated and was breached by the respondent.

I find that the judicial review proceedings as brought were not the appropriate proceedings for such task. In my view, **Article 206(2)(a)** of the Constitution and the **PFMA (as provided in Section 6 of the latter)** override the provisions of the Political Parties Act in matters concerning the appropriation and disbursement of public funds except for the Funds specifically created by the Constitution. In the absence of compliance with the Constitution and PFMA, the facts had not sufficiently developed to such a state as to warrant or permit an intelligent and reasonable finding, that the respondents had a legal duty to pay the appellant the specific sum claimed and that they had breached that duty. For that reason, mandamus did not lie by dint of the doctrine of ripeness.

[18] For the foregoing reasons, I find that the High Court exercised its discretion judicially and that there are no valid reasons for interfering with the exercise of discretion. However, I would not have granted the order of mandamus and other ancillary orders in terms made by the High Court or in terms proposed by the majority in this appeal for the reasons that they were not sought in the application and are also of a different genre and a drastic departure from the nature of order of mandamus sought in the application in the High Court.

The High Court ordered each party to bear its own costs. I would make the same order in relation to this appeal.

In the premises, I would dismiss the appeal and order each party to bear its own costs.

[19] I have had the advantage of reading the judgment of Otieno-Odek, JA in draft with which Musinga JA agrees. My brethren have determined that judgment cannot be entered in favour of the appellant for the sum of Kshs. 4135,903,545/- for the reason that the total revenue collected by the national government is a disputed amount. Thus, the Court is unanimous that the appeal is unsuccessful in so far as it relates to an order of mandamus to compel the respondents to pay the specific sum of Ksh. 4,135,903,545/-.

[20] However, the judgment of the majority is that the appeal be partially allowed in terms of the orders proposed by Otieno-Odek, JA at paragraph 70 of the judgment.

[21] Accordingly,

2. By unanimous decision of the Court, the appeal is dismissed in so far as it relates to an order of mandamus to compel the respondents to allocate, appropriate and disburse to the appellant the specific sum of Ksh. 4,135,903,545/00.

3. By judgment of the majority (Musinga & Otieno-Odek, JJA), the appeal partially succeeds and the judgment of the trial court dated 31st October 2017 be and is hereby varied as follows:

(a) An order of mandamus be and is hereby issued compelling the National Assembly to comply with the provisions of Section 24 of the Political Parties Act, namely to allocate and appropriate not less than 0.3% of the national government revenue collected to the Political Parties Fund for administration by the Office of Registrar of Political Parties for disbursement to qualifying parties in accordance with the legally established formula under the Political Parties Act, 2011.

(b) The appellant is entitled in arrears to all monies due pursuant to Section 25 (1) (a) of the Political Parties Act from the financial year subsequent the effective date of the Act i.e. arrears from the 2012/13 financial year.

(c) This Judgment and orders shall take effect from the effective date of the Political Parties Act, 2011 namely, 1st November 2011.

(d) The Deputy Registrar of this Court to ensure this judgment is served upon the National Assembly, the Hon. Attorney General and the Cabinet Secretary of the National Treasury within the next ten days from the date hereof and an affidavit of service filed to that effect.

4. Each party to bear its own costs before the trial court and in this appeal.

Dated and Delivered at Nairobi this 7th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL