**Kenya Human Rights Commission v Attorney General; Law Society of Kenya (Interested Party) (Constitutional Petition 87 of 2017) [2024] KEHC 2998 (KLR) (Constitutional and Human Rights) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2998 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**CONSTITUTIONAL PETITION 87 OF 2017**

**EC MWITA, J**

**MARCH 15, 2024**

**BETWEEN**

**KENYA HUMAN RIGHTS COMMISSION ........................................ PETITIONER**

**AND**

**ATTORNEY GENERAL ....................................................................... RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA ..................................................... INTERESTED PARTY**

**RULING**

1. On 9th November 2018, this Court delivered a judgment striking down the *Contempt of Court Act*, No. 46 of 2016 (the Act) for being constitutionally invalid. The petition was instituted against the Attorney General as the respondent while the Law Society of Kenya was joined as an interested party.
2. Following that judgment, the National Assembly took out a motion on notice application dated 23rd November 2018, seeking a review of the judgment so that the petition could be heard de novo.
3. The National Assembly argued that it had not been made a party to the petition even though the petition challenged the constitutionality of the Act it had enacted and, therefore, as the relevant House of Parliament responsible for enactment of the Act it was not heard before the decision was made.
4. The National Assembly argued that as the house responsible, it ought to have been made a party to the petition in order to defend its actions in passing the impugned Act. The Act was thus declared unconstitutional without according it an opportunity to be heard.

5. The National Assembly relied on several decisions to support this application. These included: JMK v NWM &another [2015] eKLR: Onyango v Attorney General (1986-1989) EA 456 and Mbaki & others v Macharia & another [2005] 2 EA 206.

6. The National Assembly further relied on the South African decision in Helen Suzman Foundation v President of the Republic of South Africa & others: Glenister v the Republic of South Africa and others [2014] ZACC 32 that national assembly should have been joined in the petition.

7. It is the position of the National Assembly, that the decision was also made without jurisdiction and ought to be reviewed and set aside. The National Assembly did not however explain why the court did not have jurisdiction and justify this assertion.

8. The petitioner opposed the motion through a replying affidavit and written submissions. The petitioner asserted that the Court cannot take up this matter since the Attorney General filed a notice of appeal dated 21st November 2018 which disentitled the Attorney General and even the National Assembly the right to apply for review of the judgment.

9. The petitioner relied on the decision in Mary Wambui Njuguna v William Ole Nambale & others [2016] eKLR that it is not open for an appellant to pursue an appeal and a review of the same orders at the same time.

10. The petitioner further argued that the National Assembly had not shown that the application would change the outcome given the findings of the Court in the judgment.

11. It was also the petitioner's case, that once Parliament enacts a law, it becomes functus officio and any challenge thereafter falls on the Attorney General.

12. The petitioner contended that there is no prayer in the application for the National Assembly to be made a party to the proceedings, thus the application will not serve any purpose or change anything National Assembly not being a party. It is also not clear what role National Assembly would play if the application was allowed.

13. The petitioner relied on several other decisions, including: Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR that there is no provision for review either in *the Constitution* or Mutunga Rules, and Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR on the jurisdiction for review.

14. The petitioner further cited the decision in Otieno Ragot & Company Advocates v National Bank of Kenya (Civil Appeal No. 60 and 62 of 2017) citing National Bank of Kenya Limited v Ndungu Njau [1997] eKLR that review may be granted to correct an error or omission but the error must be obvious and self-evident.

15. The petitioner urged the Court to decline the application and dismiss it with costs.

16. This application sought a review of the judgment delivered on 9th November 2018. That Judgment struck down the Act as constitutionally infirm. The application is opposed on grounds that the Court cannot review an application by someone not a party to the proceedings and that a notice of appeal having been filed against the impugned decision, an application for review cannot be accommodated.

17. There is no provision whether in *the Constitution* or *the Constitution* of Kenya (Rights and Fundamental Freedoms protection and Practice) Rules, 2013 (The Mutunga Rules) for review. That fact is not disputed by the National Assembly.

18. On the other hand, section 80 of the *[Civil Procedure Act](#)* confers on the Court general jurisdiction for review of its decisions. Further, Order 45 rule 2 through which the National Assembly has move the Court, provides as follows:

> A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

19. It is clear from the rule that if the ground for appeal by the party appealing and the party applying for review is common, an application for review may not be accepted where there is an appeal.

20. The position in rule (2) cited above notwithstanding, the main ground raised by the National Assembly is that it was not heard before judgment was issued striking down the Act. Indeed, the position in law is that no decision that would affect a party's rights should be made without giving that party an opportunity to be heard.

21. In Attorney General v Ryan (1980) 2 All ER 608, Lord Diplock had this to say:

> It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision -making authority.

22. In Dickson Ngigi Ngugi v Commissioner of lands (Civil Appeal No 297 of 1997(UR), the Court of Appeal also observed that the right to a hearing before any decision is taken, is a basic right and it cannot be taken away by the hopelessness of one's case.

23. The Supreme Court of India weighed in on the issue and stated in Sangrem Sing v Election Tribunal, Kotech AIR 1955 SC 664; 1955 AIR 425, 1955 SCR (2) 1:

> [T]here must be ever present in the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.

24. Further still, Nyarangi JA stated in Onyango Oloo v Attorney General [supra] thus:

> A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at. Denial of the right to be heard renders any decision null and void ab initio.

25. Similarly, in James Kanyita Nderitu v Maries Philotas Ghika & another [2016] eKLR, the Court of Appeal again stated that "the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

26. The jurisprudence emerging from the above decisions makes the point that the right to a hearing is a fundamental one that should not be derogated from where the decision to be made "would affect a person's rights," The emphasis, as I understand it, is that a decision should not be taken without hearing a party if that decision would affect the rights of the party not heard.

27. The petition challenged the constitutionality of the Act. In the judgment, the Court issued a declaration of invalidity, which was not a decision affecting the National Assembly's rights but a judgment in rem for the public good. The court not only found that there was no evidence of public participation, but also that the principal aim of the Act, as shown in the long title, was to limit the court's power to punish for contempt, a serious encroachment on the court's mandate to protect the rule of law and administration of justice. The Court further held certain provisions of the Act to be discriminatory.

28. The fact that the court held the Act to have encroached on the mandate of the Court and sections of the Act to be discriminatory, are not grounds for review, but appeal.

29. Second, the National Assembly not being a party to the petition, has not applied to be made a party in these proceedings. The National Assembly has, therefore, shown in what capacity it has filed this application and what role, as a non-party to proceedings, it is playing in seeking a review of the judgment, or what role it would play were the application granted.

30. In the circumstances, the National Assembly has not demonstrated that its fundamental rights were violated to justify a review of the judgemnt. For that reason, I am not satisfied that the application has merit given that the decision complained of was a declaration of invalidity, thus a judgment in rem.

31. The Attorney General filed a notice of Appeal which is on record. In terms of Order 45 rule 2, a party who is not appealing may apply for a review of judgment notwithstanding the fact that an appeal by another party is pending, save that the ground for such an appeal should not be common to the person applying for review and the party appealing.

32. In the context of this matter, the National Assembly is not a party to these proceedings and has not also shown that the grounds to be advanced by the Attorney General in the Court of Appeal are not common to both parties.

33. The upshot is that the application is declined and dismissed. I make no order on costs.

**DATED AND SIGNED AND DELIVERED THIS 15TH DAY OF MARCH 2024**

**E C MWITA**

**JUDGE**