



REPUBLIC OF KENYA

TWELFTH PARLIAMENT - (FIFTH SESSION)

THE NATIONAL ASSEMBLY

COMMUNICATIONS FROM THE CHAIR

_____ (No. 46 of 2021) _____

***THE IMPORT OF THE JUDGEMENT OF THE COURT OF APPEAL IN CIVIL
APPEAL NO. E084 OF 2021 ON THE LEGISLATIVE FUNCTION OF THE
NATIONAL ASSEMBLY***

Honourable Members,

You will recall that last year, on 29th October, 2020, the High Court delivered a judgment that, among other things nullified twenty-three (23) Acts of Parliament that had been passed by this House. You will also recall that following the High Court Judgement, I did issue a Communication to this House to the effect that the National Assembly would appeal the High Court Judgment.

Honourable Members, to this end, I wish to inform you that last week on Friday, 19th November, 2021, the Court of Appeal in Civil of Appeal No. E084 of 2021 delivered its judgment on our appeal and set aside the judgment of the High Court. In particular, the Court of Appeal made several Orders. Allow me to highlight part of the Orders of the Appellate Court, point by point.

Honourable Members, firstly, in its decision, the Court of Appeal declared twenty-one (21) Acts of Parliament out of the twenty-three (23) which the High had declared as being unconstitutional for want of Senate Participation to be **constitutional and valid.**

It will be recalled that this House passed the said laws without Senate's participation on the strength that they did not concern county governments as they were dealing with functions of the national government under the Part I of the Fourth Schedule to the Constitution and/or were Money Bill that did not contain provisions affecting the county governments. The Court of Appeal in its judgment agreed with this interpretation of the National Assembly and consequently upheld the constitutionality and validity of the twenty-one Acts of Parliament.

In brief, the Laws that were declared to be constitutional are as follows -

- (1) The Public Trustee (Amendment) Act, No. 6 of 2018:** The Act amends the Public Trustee Act to provide for among other things a manager, an administrator, an executor or trustee, trustee and executor services to the public and the establishment of the Public Trustee Investment Board for purposes of investment.
- (2) The Building Surveyors Act, No. 19 of 2018:** The principal object of the Act is to provide for the registration and licensing of building surveyors, to regulate their practice and for connected purposes.
- (3) The Computer Misuse and Cybercrime Act, No. 5 of 2018:** The Act provides for offences relating to computer systems, to enable timely and effective detection, prohibition, prevention, response, investigation and prosecution of computer and cybercrimes, to facilitate international co-operation in dealing with computer and cybercrime matters and for connected purposes.

- (4) The Statute Law (Miscellaneous Amendment Act), No. 4 of 2018:** The Act makes amendments to various Acts of Parliament including the Pharmacy and Poisons Act, Cap. 244, the Clinical Officers (Training, Registration and Licensing) Act, No. 9 of 1998, the Occupational Therapists Training, Registration and Licensing Act, No. 31 of 2017, the Salaries and Remuneration Commission Act, No. 10 of 2011 and the Environmental Management and Co-ordination Act, No. 8 of 1999, among others.
- (5) The Kenya Coast Guard Service Act. No. 11 of 2018 :** The principal object of the Kenya Coast Guard Act, 2018 is the establishment of the Kenya Coast Guard Service and to provide for its functions, discipline organization and administration in the exercise of the exclusive function of the national government over the use of international waters and water resources, national defence and the use of national defence services, police services, marine navigation, fishing and water protection as outlined in the Fourth Schedule to the Constitution.
- (6) The Tax Laws (Amendments) Act, No. 9 of 2018:** The Tax Laws (Amendment) Act, 2019 amends the Income Tax Act, Cap 470, the Stamp Duty Act, Cap. 480 and the Value Added Tax Act, 2013 pursuant to the exclusive power granted to the national government to impose income tax, value added tax, customs duties and other duties on import and export of goods and excise tax under Article 209(1) of the Constitution.

- (7) The Statute Law (Miscellaneous Amendments) Act, No. 18 of 2018:** The Act makes amendments to various Acts of Parliament including the Land Act, No. 6 of 2012, the Wildlife Conservation and Management Act, No. 47 of 2013, the Registration of Persons Act, Cap. 107 and the Forest Conservation and Management Act No. 34 of 2016
- (8) The Supplementary Appropriation Act, No. 2 of 2018:** The Act sought to authorize the issue of certain sums of money out of the Consolidated Fund and their application towards the service for the Financial Year 2018/2019 for the National Government.
- (9) The Finance Act, No. 10 of 2018 :** The Act introduced various tax measures for purposes of financing the annual budget for the Financial Year 2018/2019.
- (10) The Appropriations Act, No. 7 of 2018 :**The Act was enacted to authorize withdrawal of funds by the national government from the Consolidated Fund for the Financial Year 2018/2019 for the National Government.
- (11) The Capital Markets (Amendments) Act, No. 15 of 2018:** The principal object of the Act is to create offences and further provides that every issuer of securities, licensed and approved person must devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in conformity with the International Financial Reporting Standards.

- (12) The National Youth Service Act, No. 17 of 2018:** The Act establishes the National Youth Service and provides for its functions, discipline, organization and administration.
- (13) The Supplementary Appropriations Act, No. 13 of 2018 :** The Act sought to authorize the issue of certain sums of money out of the consolidated Fund and their application towards the service for the Financial Year 2018/2019 for the National Government.
- (14) The Health Laws (Amendment) Act, No. of 5 of 2019, save for the amendments made to sections 3 and 4 of the Kenya Medical Supplies Authority Act:** The Act made various amendments to health-related statutes on matters relating to health policy including the Pharmacy and Poisons Act, Cap. 244, the Medical Practitioners and Dentists Act, Cap. 253, the Nurses Act, Cap. 257, the Kenya Medical Training College Act, Cap. 261 and the Nutritionists and Dieticians Act, No. 18 of 2007, among others.
- (15) The Sports (Amendment) Act, No. 7 of 2019:** The principal object of the Act is to repeal provisions and references to the National Sports Fund and the National Sports Fund Board of Trustees in the Sports Act, 2013 on account of the Cabinet Secretary for the National Treasury having established a Sports, Arts and Social Development Fund under regulations made pursuant to the Public Finance Management Act, 2012.
- (16) The National Government Constituency Development Fund Act, 2015: The** Act establishes the National Government Constituency Development Fund and provides for its administration and for connected purposes.

- (17) The National Cohesion and Integration (Amendment) Act, 2019:** The Act seeks to among other things, provide for the membership of the National Cohesion and Integration Commission which now excludes the chairpersons of the Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administrative Justice.
- (18) The Statute Law (Miscellaneous Amendment) Act, 2019:** The Act makes various amendments to various Acts of Parliament including the Districts and Provinces Act No. 5 of 1992, the Tourism Act No. 28 of 2011, the Public Finance Management Act No. 18 of 2012 and the Prevention of Terrorism Act, No. 30 of 2012.
- (19) The Supplementary Appropriation Act, No. 9 of 2019:** The Act sought to authorize the issue of certain sums of money out of the Consolidated Fund and their application towards the service for the Financial Year 2018/2019 with respect to the National Government.
- (20) The Appropriations Act, 2019:** The Act was enacted to authorize withdrawal of funds by the national government from the Consolidated Fund for the Financial Year 2018-2019 with respect to the National Government.
- (21) The Insurance (Amendment) Act, 2019:** The Act amends the Insurance Act (Cap 487) to provide for among other things index-based insurance, powers of the Commissioner of Insurance on group-wide supervision and alternative means of delivery of a policy to a policy-holder to include "email or other electronic or telecommunication modes" besides "post".

Honourable Members, as stated earlier, the Court of Appeal declared twenty-one (21) Acts out of the twenty-three (23) Acts **constitutional** and only two Acts, these being the Equalization Fund Appropriation Act, No. 3 of 2018 and the Sacco Societies (Amendment) Act, 2018 No. 16 of 2018 were declared unconstitutional. In terms of the objects of the two Acts, the Equalization Fund Appropriation Act, No. 3 of 2018 appropriated funds for expenditure by the national government for the direct use of monies from the Equalization Fund. It is therefore a "spent" law.

The Sacco Societies (Amendment) Act, No. 16 of 2018 on the other hand sought to provide that the Sacco Societies Regulatory Authority may establish and operate an electronic filing system for purposes of electronic filing of the statutory returns and documents or other information required to be furnished to the Authority.

Honourable Members, the Court of Appeal further declared the amendments made to sections 3 and 4 of the Kenya Medical Supplies Authority Act as contained in the Health Laws (Amendment) Act, No. of 5 of 2019 unconstitutional.

To this end, **Honourable Members,** in light of the Court of Appeal judgment, a pertinent question that arises **is how the House should proceed to re-enact the laws that have been nullified?** With respect to the Equalization Fund Appropriation Act No. 3 of 2018, the objectives of the long title of the law reads as follows-

"An ACT of Parliament to authorize the issue of a sum of money out of the Equalization Fund and its application towards the service of the year ending 30th June, 2018 and to appropriate that sum for certain public basic services and for connected purposes"

Honourable Members, You will agree with me that this particular Act, being an annual appropriations law cannot be resuscitated as it is a "spent" Law. However, the decision of the Court of Appeal will have to be adhered to by future Houses when enacting the annual Equalization Fund Laws. It is however worth observing that, under Article 204 of the Constitution, the Equalization Fund was meant to be a twenty-year measure to assist the marginalized areas cater for basic services such as water, roads, health services and electricity connectivity. The sad fact is that, whereas more than half of the statutory period has now lapsed, the Fund has been largely moribund since every step to actualize it has been met with endless litigation.

Honourable Members, With respect to the Sacco Societies (Amendment) Act, 2018 No. 16 of 2018, I direct that the Clerk moves with speed to facilitate the re-introduction of the Bill in the House, in the exact text as it was originally passed by this House in 2018 for reconsideration in an expeditious manner and forwarding to the Senate. However, with respect to the amendments made to sections 3 and 4 of the Kenya Medical Supplies Authority Act touching on the functions of the Authority as contained in the Health Laws (Amendment) Act, No. of 5 of 2019, I note that there is presently a Health Laws (Amendment) Bill, 2021 at Second Reading. Consequently, the amendments may be proposed to the Health Laws (Amendment) Bill, 2021 for consideration by the House at the Committee Stage. Subsequently, upon passage, the Bill shall be forwarded to the Senate for consideration also. **That way, this House will have discharged its legislative role on the two impugned laws in compliance with the findings and decision of the Appellate Court.**

Honourable Members, moving on to the other Orders of the Court of Appeal, the Court also made a declaration that the concurrence process envisaged in Article 110(3) **only** applies to all **Bills concerning counties** within the meaning of Articles 109 to 114 of the Constitution. Indeed as you are aware, Article 110(3) of the Constitution provides that *before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve a question as to whether the Bill is a Bill concerning counties, and if it is, whether it is a special or ordinary Bill.* This has been a major point of departure between the two Houses and as you are indeed aware, the High Court had made a declaration that **all** Bills must be subjected to the concurrence process, notwithstanding the distinct legislative mandates of both Houses and the **asymmetrical nature of our bicameral Parliament in which each House has distinct mandate with the Senate having limited legislative mandate** as indeed observed by the Court of Appeal in paragraphs 72 and 73 of its judgment. In their judgment , the distinguished judges held as follows, in paragraph 98-

"Therefore, it was an error by the High Court to find that it is a condition precedent that any Bill published by either House be subjected to the concurrence process".

Honourable Members, the finding of the Court of Appeal on this matter is that only Bills concerning county governments as espoused in Article 110(1) of the Constitution would be subject to the concurrence process. The Court rightly held that Article 110(3) can only be interpreted in the context of the law making roles and procedures of the Senate and National Assembly as specified in Articles 109 to 116 of the Constitution.

In this regard, the Court of Appeal has now settled that Article 110(3) of the Constitution **SHALL NOT** be applicable on any or every Bill that originates from the National Assembly but **ONLY** on Bills that concern county governments within the meaning of Article 110(1) of the Constitution. We applaud the Court for upholding the provisions of Article 110(3) of the Constitution and the distinct roles of the Houses of Parliament.

Honourable Members, with respect to the constant insistence by part of the Senate that the Speakers of the Houses of Parliament should form a mediation Committee akin to the one under Article 113 of the Constitution to offer advisory on the question of Bills concerning County governments, the distinguished judges held as follows, in paragraph 102 of the Judgment-

“We however need to point out and clarify that our interpretation of Article 110(3) leads to a conclusion that the mediation process under Article 113 of the Constitution is not applicable to the concurrence process in Article 110(3). The provisions of Article 113 are clear that they only apply when there is deadlock in the consideration and passing of ordinary Bills concerning counties by the National Assembly and Senate. The mediation process therefore applies during the enactment process of a Bill, and not before consideration of a Bill, which is when the concurrence process in Article 110(3) is relevant. In our opinion, the concurrence process under Article 110(3) is one that is solely and exclusively within the mandate, powers and control of the Speakers of the two Houses of Parliament, who must resolve any question arising as to whether a Bill is one concerning Counties or not, before its consideration”.

Honourable Members, further the Court of Appeal also made Orders touching on the legislative procedures and rules of this House. Firstly, the Court ordered that any Bill or delegated legislation that provides for, or touches on the mandate or powers of the Parliamentary Service Commission must be considered by the Senate as it directly affects the Senate's ability to undertake its constitutional mandate including its ability to consider Bills that affect counties. In this regard, moving forward in terms of the legislative procedures, any Bill that provides for, or touches on the mandate or powers of Parliamentary Service Commission shall be forwarded to the Senate after passage for consideration.

Honourable Members, secondly, the Court also did make orders in regard to our legislative procedures relating to the rules of this House and I quote-

"where the Speakers of the House concur that a Bill is one that concerns Counties, pursuant to Article 109(4), the Bill must be passed in accordance with Articles 110 to 113, 122 and 123 of the Constitution and the Standing Orders of both Houses and is not subject to Article 114 of the Constitution. "

Honourable Members, Article 114 of the Constitution is the provision on money Bills and the finding of the Court is that where the Speakers of the Houses agree that a Bill is one that concerns county governments, then such a Bill shall not be subject to Article 114 of the Constitution. The Court of Appeal however observed the following in paragraph 127 of the judgment with respect to money Bills, and I wish quote the distinguished judges-

"...It is instructive that, unlike Article 109 (4) of the Constitution where application of Article 110(3) of the Constitution is expressly required, in the case of enactment of money Bills, the Constitution is silent on the involvement of the Senate. As such, it is safe to conclude that all money Bills pass through the Speaker of the National Assembly whether commenced by the Senate or in the National Assembly for him or her ^{to} ascertain whether or not it is a money Bill, and all money Bills subjected to the Budgetary Committee, dependent upon their outcome, are passed by the National Assembly without reference to the Senate"

Honourable Members, I also note that the High Court in its judgment had also declared the National Assembly Standing Order 143 which requires Bills originating from the Senate to be subjected to the money Bill determination as offending the Constitution. The Court of Appeal did not however make any determination on Standing Order 143 as it was not part of the items that were set for determination at the Appeal. Indeed, the Court of Appeal also observed in paragraph 260 of its judgment as follows, and allow me to quote-

260. We note that there was no appeal in respect of Standing Order No. 143 (2) to (6) which was also declared unconstitutional by the High Court. This being the case, there was nothing for us to determine in this regard.

Honourable Members, in light of the going, the High Court judgment which declared the National Assembly Standing Order 143 unconstitutional still stands. Additionally, I also note that the Court of Appeal in its orders also declared that the provisions of Standing Order 121(2) of the National Assembly Standing Orders which provide for the procedure for consideration of Bills concerning county government is inconsistent with Articles 109(4) and 110 to 113 of the Constitution and is therefore null and void.

Honourable Members, to this end, it may be prudent that the Procedure and House Rules Committees which is currently undertaking a review of the Standing Orders does also undertake a review of Standing Order 121 and 143 with a view of aligning the Standing Orders with the Constitution as guided by the court decisions.

Honourable Members, finally, the Court of Appeal also did make a determination on our Cross-Petition which we had filed in the High Court. You will indeed recall that the National Assembly had also filed a Cross-Petition in the High Court seeking among other things the following declarations on a number constitutional questions which are of concern to the Members of this House:

- (1) A declaration that the Senate had a limited role of oversight of State and State organs under Article 145 of the Constitution limited to considering and determining any resolution to remove the President and the Deputy President;***
- (2) A declaration that, to the extent that the Senate has established committees duplicating the mandate of the committees of this House and purported to exercise oversight over matters that fall in the exclusive domain of this House, the Senate of Kenya is in violation of the Constitution;***
- (3) A declaration that the Senate purported action of establishing and facilitating and/or causing to be facilitated committees duplicating the mandate of the committees of the National Assembly and County Assemblies amounts to imprudent and irresponsible spending of public money contrary to Article 201 of the Constitution;***

- (4) A declaration that the National Assembly had the sole mandate of approving persons nominated by the President as State or Public Officers to serve in state office, and public office in the National Government;**
- (5) A declaration that Articles 95(4) and (5) confers the National Assembly the exclusive mandate of oversight of state officers; and**
- (6) A declaration that establishment of the offices of the Senate Leaders of the Majority and Minority through Senate Standing Order Nos. 19 and 20 is contrary to Article 108 of the Constitution as the offices are not created or established anywhere in the Constitution.**

Honourable Members, it is notable that the High Court converted the National Assembly's Cross Petition to a response to the Consolidated Petition and failed to consider the issues raised in it. In this regard, the Court of Appeal held that the Cross Petition raised significant constitutional issues and the court ought to have given procedural guidance on dispensing with the issues. To this end, the Court of Appeal in its judgement made the following Order and I quote:

"We hereby remit the Appellants' Cross Petition filed in Nairobi H.C Constitutional Petition No. 284 of 2019 back to the High Court for consideration and determination of Prayers nos. 7 to 22 of the Cross Petition."

Honourable Members, in light of the foregoing, I will be giving directions to the Clerk of the National Assembly and our Counsel on how to proceed as with respect to implementing the Order of the Court of Appeal.

Honourable Members, having highlighted the Orders of the Court of Appeal and even as we proceed as guided by the Court of Appeal, allow me to also note that there may be ensuing issues arising from the manner in which the Senate had applied the High Court Judgment which has since been set aside. One of the ensuing issues was the erroneous interpretation and application by the Senate of the High Court judgment where it did proceed to republish Bills when this House was already seized of similar Senate Bills which were undergoing consideration at different stages.

Honourable Members, as I have guided this House before, I shall stand guided by the Reports of the relevant Committees considering similar versions of Senate Bills on their determination on which of the Bills should be proceeded with and accorded **priority** in the House.

Honourable Members, the other ensuing issue arising from the erroneously application of the High Court judgment is in respect to the National Assembly Bills in the Senate whose consideration the Speaker of the Senate had halted on grounds that no resolution had been made between the two Speakers in terms of Article 110(3) of the Constitution. To this end and in light of the Court of Appeal judgment, I shall be consulting my distinguished colleague and counterpart in the Senate for reconsideration of the decision halting the consideration of the National Assembly Bills in the Senate. In this regard, I have in mind the Kenya National Library Service Bill, 2020, the Parliamentary Pensions (Amendment) (No.3) Bill, 2019, the Public Service (Values and Principles) (Amendment) Bill, 2019, the Cancer Prevention and Control (Amendment) Bill, 2020, and the National Youth Council (Amendment) Bill, 2019 whose consideration was stopped in the Senate.

Honourable Members, from what I have just highlighted, you will agree with me that the legal dispute between the two Houses and the different interpretations of the High Court Judgement adopted by both Houses was threatening to frustrate the legislative business of Parliament, its Committees, individual Members and the cordial relationship between the two Houses. It had also threatened to negate the legislative authority of the institution of Parliament as provided for in Articles 94, 95 and 96 of the Constitution.

Honourable Members, I must therefore commend the judges of the Court of Appeal for settling all the pertinent constitutional issues and more so for upholding the Constitution and the High Court decision in the famous *Pevans East Africa Case* by applying the “**pith and substance test**” to establish whether a Bill concerns County Governments. Please join me also in lauding the Members of this House who have been instrumental in offering counsel on the matter, the Clerk of the National Assembly, our internal and external Counsel for their contributions and enriching submissions to the case which made it a success.

Honourable Members, I am however cognizant of the fact that the judgment of the Court of Appeal does not call for celebrations as it is not a case of who has won or who has lost. It calls for sobriety. More so it should be seen as a learning lesson for both Houses to live in comity and restrain from taking each other to court. Indeed, when we drag each other to court, it is the people of Kenya who lose, yet they are the very reason that the two Houses were established. When legislative processes of either House stop, it only means that Parliament cannot use or exercise its legislative power to respond to the issues of concern to the people.

I therefore call on both Houses to work together and collectively serve our people, remembering that, in the end, whenever there is a court dispute between Houses, it shall never be a question of which House won, but rather-how did *Wanjiku* lose? Consequently, with the citizenry in mind, as Parliament, we must therefore always find ways of amicably settling our disputes outside the courts. To this end, I will continue engaging my distinguished colleague and Counterpart in the Senate with a view of unlocking any impasse that may arise.

Honourable Members, in summary, following the decision of the Court of Appeal my guidance is as follows –

- (1) THAT, the Leader of the Majority Party or the Departmental Committee on Trade, Industry and Cooperatives reintroduces, a Bill for an Act of Parliament to amend The Sacco Societies Act as contemplated in The Sacco Societies (Amendment) Act, No. 16 of 2018 which was declared unconstitutional by the Court of Appeal, for expeditious reconsideration by the House. To ensure expedited processing of the said Bill by the House, the republished Bill is not to contain any matters outside the impugned Act;**

- (2) THAT, in respect of the amendments made to section 3 and 4 of the Kenya Medical Supplies Authority Act as contained in the Health Laws (Amendment) Act, No. of 5 of 2019, the Departmental Committee on Health does consider proposing the amendments to the Health Laws (Amendment) Bill, 2021 at the Committee Stage for consideration by the House;**

- (3) THAT, the Bills which, after passage by this House and referral to the Senate, were stopped from proceeding at the Senate be resent to the Senate for its consideration and decision in light of the interim orders given by the Appellate Court on 2nd February, 2021 and the final orders given on 19th November, 2021. This includes the Kenya National Library Service Bill, 2020, the Parliamentary Pensions (Amendment) (No.3) Bill, 2019, the Public Service (Values and Principles) (Amendment) Bill, 2019, the Cancer Prevention and Control (Amendment) Bill, 2020, and the National Youth Council (Amendment) Bill, 2019 ;**
- (4) THAT, as part of the ongoing end-term review of the Standing Orders, the Procedure and House Rules Committees undertakes a review of Standing Order 121 and 143 with a view of aligning the provisions with the Constitution as guided by the Appellate Court. In the meantime, we will be guided by the text of the judgment of the Appellate Court; and,**
- (5) THAT, with respect to the Orders of the Court of Appeal regarding the Cross Petition (No. 284 of 2019) by the National Assembly, in which the National Assembly sought about sixteen Declaratory Orders against the Senate, I will be giving directions to the Clerk of the National Assembly and our Counsel on how to proceed to implement the Order of the Court of Appeal.**

The House is accordingly informed and guided.

I thank you.



THE HON. JUSTIN B.N. MUTURI, EGH, MP
SPEAKER OF THE NATIONAL ASSEMBLY
Tuesday, November 23rd, 2021

