THE SUPREME COURT OF KENYA

THE SENATE & 3 OTHERS VS. THE SPEAKER OF THE NATIONAL ASSEMBLY & 10 OTHERS

SC PETITION NO. 19 (E027) OF 2021

DATE OF JUDGMENT: … ,2025

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court partially allows the appeal

Background

Following the promulgation of the 2010 Constitution and the establishment of a bicameral Parliament, disputes have arisen with respect to the extent of the legislative mandate of the two Houses of Parliament, that is, the National Assembly and the Senate. It was contended that during the 12th Parliament, the National Assembly curtailed Senate's legislative role in two significant ways. First, the National Assembly passed several Bills, which were subsequently enacted into law, without the participation of the Senate contrary to the Constitution. Second, the National Assembly declined to consider several Bills originating from the Senate, claiming they were money Bills that ought to originate in the National Assembly. Consequently, the appellants (the Senate) filed a petition in the High Court contending 23 statutes which had been passed by the National Assembly without its participation were unconstitutional. Secondly, Senate was apprehensive that the Parliamentary Service Bill No. 6 of 2018, which was then pending and originated by the National Assembly, would be passed into law without consideration by the Senate. The Council of Governors (COG) filed another petition in the High Court challenging the Health Laws Amendment Act of 2019 which amended Sections 4 of the Kenya Medical Supplies Authority (KEMSA) Act No. 20 of 2013. The amendments prescribe that County Governments procure drugs and medical supplies only from KEMSA as well as a penalty for non-compliance. The two petitions were consolidated and heard together.

In opposing the consolidated petition, the National Assembly filed a replying affidavit which also contained a cross petition. In addition, the National Assembly in its cross petition challenged the repealed Standing Order No. 35 Standing Orders of the Senate for not expressly setting out the required quorum for Senate to conduct it business, and the establishment of offices of the Leader of the Majority Party and the Leader of the Minority Party in the Senate.

The High Court (*Ngaah, A. Ndungu & Matheka, JJ.*) found that the Supreme Court had in Speaker of the ***Senate & another vs. Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)*** [2013] KESC 7 (KLR) (the Senate Advisory Opinion) rendered itself on the legislative mandate of the National Assembly and the Senate. More particularly, that the Supreme Court had unequivocally held that under Article 110 (3) of the Constitution, the joint resolution by the two Speakers of the National Assembly and the Senate on whether a Bill concerns County Government is a mandatory preliminary step in the legislative process. Therefore, that any law passed without compliance with Article 110 (3) of the Constitution is unconstitutional. It is on that basis that the High Court allowed the consolidated petition and found the 23 statutes were unconstitutional. Moreover, the High Court issued a declaration that any Bill or delegated legislation that provides for, or touches on, mandate or powers of 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. However, the High Court declined to pronounce itself on prayers (vii) to (xxii) in the National Assembly's cross petition, on the ground that they fell outside the scope of the consolidated petition.

Aggrieved with the High Court's decision, the National Assembly filed an appeal in the Court of Appeal. The Court of Appeal (*Murgor, Nyamweya & Lesiit, JJ.A*) held that the joint resolution or concurrence process by the two Speakers of Parliament under Article 110(3) of the Constitution only relates to Bills concerning County Government and not to every Bill. Therefore, the Court of Appeal only upheld three out of the twenty-three Statutes which were declared unconstitutional by the High Court, that is, the Equalization Fund Appropriation Act No 3 of 2018, the Sacco Societies (Amendment) Act, 2018 No 16 of 2018 and the amendments made to Sections 3 and 4 of the KEMSA Act by the Health Laws (Amendment)Act, No. of 5 of 2019. The Court also found that the High Court erred by failing to pronounce itself on all the prayers sought in the cross petition by the National Assembly and as a result, it remitted the cross petition back to the High Court for consideration.

Subsequently, the Senate filed an appeal before the Supreme Court while the National Assembly filed a cross appeal, and the Institute for Social Accountability (6th respondent) and Katiba Institute (8th respondent) jointly filed a second cross appeal. The following issues arose for consideration by the Supreme Court:

i. *Whether the Constitution provides for the participation of the Senate in the consideration and enactment of a money Bill.*
ii. *Whether it is mandatory for every Bill published by either House of Parliament to undergo the joint concurrence process under Article 110(3) of the Constitution.*
iii. *Whether the impugned Acts and Bills are unconstitutional for want of Senate's participation in their enactment.*
iv. *What reliefs should issue?*

Upon consideration, the Supreme Court partially allowed the appeal and the National Assembly's cross appeal for the reasons that:

i. The Constitution excludes the Senate from the consideration and enactment of money Bills. The exclusion of Article 114 from the scope of Article 96(2) clarifies that the Senate does not participate in the enactment of money Bills. When a Bill falls within the category of a money Bill, it removes the power of the Senate to introduce and consider such a Bill.
ii. The requirement for joint resolution by Speakers of both Houses of Parliament as to whether a Bill is one concerning counties is triggered when a question arises as to whether a Bill is one concerning counties. However, a purposive interpretation of Article 110(3) of the Constitution leads to the conclusion that determining whether a Bill concerns County Government, and its nature, can only occur if the two Speakers who are central to the concurrence process are aware of and informed about Bills being

introduced in either House. This demands a proactive approach. The Speakers must ensure transparency and clarity at the outset of the legislative process by informing the Speaker of the other House of the introduction of a Bill and the view they have taken as to whether the Bill concerns counties.

iii.

a. The Supplementary Appropriations (No. 3) Act of 2018, the Appropriations Act of 2018, the Supplementary Appropriations (No. 2) Act of 2018, the Supplementary Appropriations (No. 13) Act of 2018, the Appropriations Act of 2019, the Supplementary Appropriation (No. 9) Act of 2019, the Tax Laws (Amendments) Act, 2018 (formally National Assembly Bill No. 11 of 2018), and the Finance Act, 2018 (formally National Assembly Bill No. 20 of 2018), and we find that all these statutes were in the nature of money Bills, which did not require the Senate's involvement in their enactment. Consequently, the 8 Statutes are constitutional.

b. The Public Trustee (Amendment) Act of 2018 (Act No. 6 of 2018; ii) the Capital Markets (Amendment) Act No. 15 of 2018; iii) the Insurance (Amendment) Act, No, 11 of 2019; iv); the National Youth Service Act, No. 17 of 2018; v); the National Cohesion and Integration (Amendment) Act, 2019; vi) the Kenya Coast Guard Act 2018; vii) the Computer Misuse and Cybercrimes Act, No. 5 of 2018; viii) the Building Surveyors Act No. 19 of 2018; ix) National Government Constituency Development Fund Act; x) the Statute Law (Miscellaneous Amendments) Act, 2018 (formally National Assembly No. 44 of 2017); xi) the Statute Law (Miscellaneous Amendments) Act 2018 (No. 18 of 2018); and xii) the Statute Law (Miscellaneous Amendments) Act, 2019 (National Assembly No. 21 of 2019) did not require consideration by the Senate hence were constitutionally enacted.

c. The Sacco Societies (Amendment) Act, 2018, No. 16 of 2018; and the amendments made to Sections 3 and 4 of the KEMSA Act by the Health Laws (Amendment)Act, No. of 5 of 2019 affected the functions and powers of counties hence ought to have been considered by the Senate hence are unconstitutional.

d. The Senate ought to have been involved in the consideration and enactment of the Equalization Fund Appropriation Act, No. 3 of 2018. Therefore, the action of excluding the Senate from the enactment of the Equalization Fund Appropriation Act, No. 3 of 2018 was unconstitutional.

e. The Court of Appeal erred in making a determination on the constitutionality of the Parliamentary Service Act, 2019 despite the fact that it was not an issue for consideration before the High Court. Therefore, the question of the constitutionality of the Parliamentary Service Act, 2019 was not properly before the Court of Appeal. Further, there is a pending case before the High Court concerning the Parliamentary Service Act, 2019 being ***Okoiti vs. National Assembly & 3 others; Senate (Interested Party)*** (Petition E469 of 2022) challenging, among other things, its constitutionality on ground that Senate was excluded from the process of its enactment.

f. The declaration by the superior courts below that any Bill or delegated legislation affecting the mandate or powers of the Parliamentary Service Commission must be considered by the Senate as it directly impacts the Senate's ability to fulfill its constitutional mandate, including its role in considering bills that affect counties, is closely tied to the constitutionality of the Parliamentary Service Act, 2019. Therefore, resolving this question at this stage would, to a large extent, determine the outcome of the matter currently pending before the High Court and could prejudice the ongoing judicial process. Therefore, it is prudent that the High Court first adjudicates this issue within the context of the matter pending before it.

Accordingly, the Court issued the following orders:

a) ***The Supreme Court's appellate jurisdiction under Article 163(4)(a) of the Constitution has been properly invoked by the appellants.***

b) ***The 6th and 8th respondents cross appeal dated 8th March, 2022 is hereby struck out.***

c) ***We uphold the following findings by the Court of Appeal:***

i. ***The declaration by the Court of Appeal that the underlisted Acts passed by the National Assembly did not require consideration and enactment by the Senate hence are constitutional:***

i) ***The Public Trustee (Amendment) Act, No. 6 of the 2018;***
ii) ***The Building Surveyors Act, 2018, No. 19 of 2018;***
iii) ***The Computer Misuse and Cybercrime, Act, No. 5 of 2018;***
iv) ***The Statute Law (Miscellaneous Amendment Act), No. 4 of 2018;***
v) ***The Kenya Coast Guard Service Act. No. 11 of 2018;***
vi) ***The Tax Laws (Amendments) Act, No. 9 of 2018;***
vii) ***The Statute Law (Miscellaneous Amendments) Act, No. 18 of 2018;***
viii) ***The Supplementary Appropriation Act, No. 2 of 2018;***
ix) ***The Finance Act, No. 10 of 2018;***
x) ***The Appropriations Act, No. 7 of 2018;***
xi) ***The Capital Markets (Amendments) Act, No. 15 of 2018;***
xii) ***The National Youth Service Act No. 17 of 2018;***
xiii) ***The Supplementary Appropriations Act, No. 13 of 2018;***
xiv) ***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;***
xv) ***The National Government Constituency Development Fund Act, 2015;***
xvi) ***The National Cohesion and Integration (Amendment) Act, 2019;***
xvii) ***The Statute law (Miscellaneous Amendment) Act, 2019;***
xviii) ***The Supplementary Appropriation Act, No. 9 of 2019;***
xix) ***The Appropriations Act, 2019; and,***
xx) ***The Insurance (Amendment) Act, 2019;***
xxi) ***The Sports (Amendment) Act, No. 7 of 2019.***

ii. ***The declaration by the Court of Appeal that the underlisted Acts passed by the National Assembly are in contravention of Articles 96, 109, 110, 111, 112 and 113 of the Constitution and are therefore unconstitutional, thus null and void;***

i) ***The Equalization Fund Appropriation Act, No. 3 of 2018;***
ii) ***The Sacco Societies (Amendment) Act, 2018 No. 16 of 2018; and***
iii) ***The amendments made to section 3 and 4 of the Kenya Medical Supplies Authority Act by the Health Laws (Amendment)Act, No. of 5 of 2019.***

d) ***We suspend the declaration of invalidity of the Sacco Societies (Amendment) Act, 2018 for a period of 18 months from the date of this judgment.***

e) The 1^{st} and 2^{nd} respondents' cross appeal dated 15^{th} March, 2023 is allowed to the extent that the Court of Appeal erred in making a determination on the constitutionality of the Parliamentary Service Act, 2019 despite the fact that it was not an issue for consideration before the High Court. In other words, the question of the constitutionality of the Parliamentary Service Act, 2019 was not properly before the Court of Appeal.

f) For avoidance of doubt, any relief not expressly granted is hereby dismissed,

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