PAPER LAID BY THE L.O.M.
ON 06/07/2016
IBM

NATIONAL ASSEMBLY
RECEIVED
05 JUL 2016
SPEAKER'S OFFICE
P. O. Box 41842, NAIROBI.

RECEIVED
05 JUL 2016
CLERK'S OFFICE

06 JUL 2016

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MILIMANI LAW COURTS
JR APPLICATION NO. 258 OF 2016

IN THE MATTER OF: **ARTICLES 2, 3, 10, 19, 20, 23, 25, 27, 47,165(6), 258 AND 260 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: **CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2 (1), 3 (1) 10 (1) (2), 19 (2), 20 (2), 27 (1), 35 (1), 38(1) (2) & (3), 47 (1) (2), 48, 50 (1) (2), OF THE CONSTITUTION OF KENYA 2010**

PARLIAMENT OF KENYA LIBRARY

AND

IN THE MATTER OF: **SECTIONS 4 AND 5 FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

AND

IN THE MATTER OF: **STANDING ORDER NO.111 OF THE NATIONAL ASSEMBLY STANDING ORDERS**

BETWEEN

JAMES OPIYO WANDAYI..APPLICANT

AND

KENYA NATIONAL ASSEMBLY.......................................1ST RESPONDENT
THE SPEAKER OF THE NATIONAL ASSEMBLY ....2ND RESPONDENT
THE ATTORNEY GENERAL..3RD RESPONDENT

IN COURT ON 4TH JULY, 2016
BEFORE THE HON. MR. JUSTICE G.V. ODUNGA

ORDER

THIS MATTER coming up for Judgment on 4th July 2016 before Honourable Mr. Justice G.V. Odunga in the presence of counsel for the Applicant and in the presence of counsel for the Respondents.

IT IS HEREBY ORDERED:

1. That an order of stay be and is hereby issued staying the decision made by the 2nd Respondent. the Speaker of the National Assembly, on 31st March, 2016 suspending

1:20PM
J J

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MILIMANI LAW COURTS
JR APPLICATION NO.258 OF 2016

IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 23, 25, 27, 47,165(6), 258 AND 260 OF THE CONSTITUTION OF KENYA,

AND

IN THE MATTER OF: CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2 (1), 3 (1) 10 (1) (2), 19 (2), 20 (2), 27 (1), 35 (1), 38(1) (2) & (3), 47 (1) (2), 48, 50 (1) (2), OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTIONS 4 AND 5 FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: STANDING ORDER NO.111 OF THE NATIONAL ASSEMBLY STANDING ORDERS

BETWEEN

JAMES OPIYOWANDAYI..APPLICANT

AND

KENYA NATIONAL ASSEMBLY ....1ST RESPONDENT
THE SPEAKER OF THE NATIONAL ASSEMBLY ....2ND RESPONDENT

ORIGINAL COPY

THE ATTORNEY GENERAL ....3RD RESPOND

RULING

Introduction

1. The ex parte applicant herein, **James Opiyo Wandayi**, is the si elected Member of Parliament for Ugunja Constituency, a constitu within the Republic of Kenya.

2. According to the applicant, he was in attendance in a joint sitting parliament during the state of the nation address by H. E the Presiden the Republic of Kenya on 31st March 2016 pursuant to the provisions Article 132 of the Constitution 2010. In his view, in exercise of constitutional right of representation and airing the grievances of constituents and further pursuant to his constitutional right to picket envisaged under Article 37, he exercised that right and duty peaceful while in the National Assembly in an effort to draw the attention of tl President on the suffering of his people.

3. The applicant contended that the 2nd Respondent in utter disregard of th clear provisions of Article 201 of the Constitution unlawfully mentionec and ordered him out of the National Assembly without according him the slightest of opportunity to explain himself. According to him, his unwavering attempts to catch the attention of the 2nd Respondent and get

an opportunity to explain himself were unlawfully and unjustly construe as disobeying and resisting the order by the 2nd Respondent to leave th chambers.

4. Accordingly, the 2nd Respondent while arbitrarily invoking the evidentl unconstitutional provisions of the Standing Order No. 111 of the ***Nationa Assembly Standing Orders*** mentioned him for contempt and suspended him for the reminder of the session without regard to the unequivocal provisions of the Constitution and law of natural justice requiring any person to be accorded a right to fair hearing and administrative action. Further, the 2nd Respondent while discharging his duties on behalf f the 1st Respondent also publicly declared that his decision would not be rescinded and that the applicant would not be given any room to appeal the decision to suspend him for the reminder of the parliamentary Session.

5. The applicant contended that his attempts to explore internal remedial measures in order to get justice have all been frustrated hence the reason for the current petition (sic). According to the applicant, the irrational treatment by the 1st and 2nd Respondents have now been extended to the staff in the applicant's office who have effectively been locked out of their working stations unprocedurally. In addition, the applicant has been

effectively barred from accessing parliamentary precincts or chamber: cannot therefore discharge his constitutional duty of representation t prejudice of the constituents of Ugunja.

Respondents' Case

6. In response to the application, the respondents contended that on 31st March 2016, His Excellency, the President, **Honourable Uhuru Kenyatta** was set to address Parliament in a special sitting convened vi: Kenya Gazette Notices Nos. 2038 of 22nd March 2016 and 2039 of 21st March 2016. At the said special sitting of Parliament, some Members of Parliament including the Applicant disrupted the proceedings of the Hou thereby making it impossible for the President to address the House. It w contended that pursuant to the Standing Orders of both Houses and in lig of the powers conferred upon the Speakers of Parliament by Article 106 of the Constitution, both the Speaker of the National Assembly and the Senat sought to admonish the disorderly members of Parliament and restore order in the House. However, despite several and repeated warnings to the members, the Applicant continued to engage in disruptive behaviour.
7. The Respondents' position was therefore that having failed to heed the numerous warnings, the Speaker of the National Assembly ordered that the Applicant and other disorderly members to withdraw from the chamber

pursuant to Standing Order 107 of the ***National Assembly Standing Orders***. According to the Respondents, several Members other than the Applicant obeyed the orders of the Speaker with regard to their disorderly conduct and withdrew from the Chamber in full knowledge of the sanctions imposed by the Standing Orders of the House. However, the Applicant refused to heed the Speaker's directions and declined to withdraw from the chamber.

8. The Respondents maintained that the Applicant having failed to obey the direction of the Speaker to withdraw from the chamber, the Speaker of the National Assembly invoked Standing Order 111 of the ***National Assembly Standing Orders*** (hereinafter Standing Order 111) which provides that:

   If any Member shall refuse to withdraw when required to do so, by or under these Standing Orders, the Speaker or the Chairperson of Committee as the case may be, having called the attention of the House or Committee to the fact that recourse to force is necessary in order to compel such Member to withdraw, shall order such Member to be removed and such Member shall thereupon without question put be suspended from the service of the House during the remainder of the Session and shall during such suspension, forfeit the right of access to the precincts of Parliament and the Serjeant-at-arms shall take necessary action to enforce the order.

9. According to the Respondents, the Standing Orders of the Na Assembly were made by membership of the National Assembly fo orderly conduct of the proceedings of the House and its committe furtherance to the provisions of Article 124(1) of the Constitution and the same Standing Orders were adopted by the National Assembly o: January, 2013 during the Fourth Session of the Tenth Parliament. Tc Respondents, the Standing Orders regulate the proceedings of the Hc and its Committees and the Speaker's role is to enforce them in orde guide the proceedings of the House. It was further contended that un Standing Order 111, the Speaker of the National Assembly is empowered the rules of procedure made and adopted by the House to order the remo of a Member from the House after informing the House that recourse force is necessary in order to compel such a Member to withdraw from t House and restore order in the House. These implications are within tl knowledge of Members and were within the knowledge of the Applicant all material times.

10. The Respondents therefore were of the view that the actions of th Speaker of the National Assembly to order the removal of the Applican from the Chamber for grossly disorderly conduct were therefore lawfu pursuant to Article 124 of the Constitution and Standing Order 111 which

Standing Order incorporates due process as required under Articles 47 and 50 of the Constitution and the ***Fair Administrative Action Act, 2015***. This was explained by the Respondents as the Member first being cautioned for disorderly conduct and thereafter ordered to withdraw from the Chamber for the remainder of the sitting or such further period for gross disorderly conduct. If the Member refuses to withdraw and the Speaker informs the House that it shall require force to compel the withdrawal of the Member from the house, a final order for removal of the Member is made and the misconduct of the Member attracts suspension from the service of the House for the remainder of the Session.

11. It was contended that Standing Order No. 1 of the National Assembly Standing Orders allows the Speaker to provide guidance to the House on any procedural matters that arise which are not covered within the text of the Standing Orders, such as the issue of reviewing or appealing any orders made pursuant to Standing Order Nos. 107 to 111 and that had the Applicant challenged the decision of the Speaker with regard to Standing Order 111, the Speaker would have had no option but to present the appeal to the House for resolution.

12. The Respondents denied that the Speaker publicly declared that the decision now challenged by the Applicant could not be rescinded or

reviewed. The Respondents asserted that as a consequence of application of Standing Order 111, the question of the Applicant's disch from the service of the House is one of privilege as it relates to the lo: his privileges and immunities for the remainder of the session of the Hc To them, in accordance with Parliamentary precedent and practic House of Parliament ought to be allowed adequate opportunity to res and determine any question touching the rights of the House collecti its safety, dignity and integrity of its proceedings as well as the rig reputation and conduct of its Members. Further in accordance v parliamentary precedents and practice, a question such as that of the los a Member's privileges and immunities is given the first priority before other business, save for preliminary items, whenever it is brought bef House. In addition, in accordance with parliamentary precedents a practice,it is possible should the Applicant chose to seek redress availed the conventional parliamentary practice, his appeal would be considered the House as a matter of priority as espoused in *Jefferson's Manual Rules and Practice,* (originally prepared by Thomas Jefferson to guide t rules and procedure of the Congress of the United States and a leading te on widely adopted parliamentary practice and procedure) that-

"A resolution reported as a question of the privileges of the House or offered from the floor by the Majority Leader or the Minority Leader as a question of the privileges of the House, or offered a privileged d under clause 1, section 7, article 1 of the Constitution shall have precedence of all other questions except motions to adjourn. A resolution from the floor by a Member, Delegate or Resident Commissioner other than the Majority Leader or the Minority Leader as a question of the privileges of the House shall have precedence of all other questions except motions to adjourn only at a time or place, designated by the Speaker, in the legislative schedule within two days after the day on which the proponent announces to the House his intention to offer the resolution and the form of the resolution". (p.410).

13. The Respondents averred that the aforesaid parliamentary usage reflects the nature of the priority given to questions of privilege by Houses of Parliament whereby the Speaker of a House of Parliament is obliged to accord priority consideration to such a question. However, despite the leeway afforded to the Applicant under Standing Order No. 1 to move the Speaker and the House for a review of or an Appeal against the sanctions imposed on him, and the priority given to dispensing with questions of privilege before transacting other parliamentary business, the Applicant has made no effort to avail himself the opportunity and instead has elected to move this Honorable Court prematurely.

14. The Respondents reiterated that the Standing Orders of the Nat Assembly afford a Member a fair hearing both during the proceedin the House and in the event that one is dissatisfied with a directive fror Speaker during proceedings. It was accordingly averred that the legiti expectation of the Applicant had not been breached as he willfully faile avail himself to existing avenues of reviewing the decision made aga and sanctions imposed on him. To the Respondent, in accordance accepted parliamentary precedent and practice, the issue of disciplir proceedings by a House of Parliament against its Member, being a quest of privilege, ought to be first handled and dispensed with in finality by House to guard against arbitrary and unreasonable encroachment into affairs of the House which ought to have complete authority concerning procedure.

15. The Respondents contended that the Applicant has now cone to th Honourable Court aggrieved by the decision made by the Speaker of th National Assembly on the floor of the House during a sitting of Parliamen Based on legal advice, the Respondents contended that in law, that th Application seeks orders which, if granted, would be a breach of Article 12 of the Constitution which provides for Parliament to establish its committees and make Standing Orders for the orderly conduct of its

proceedings. Further, the orders sought by the Applicant violate the provisions of Article 117 of the Constitution which provides that Parliament may, for the purpose of the orderly conduct of its committees, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members. Additionally, the Application lacks any basis in law as the orders sought violate the constitutional power granted to Parliament to regulate its internal rules of procedure as well as the ***National Assembly (Powers and Privileges) Act***. To the Respondent, the orders sought in the Application violate the principle of separation of powers as they seek for this Honourable Court to interfere with the internal management of Parliament. In their view, each of the three arms of Government ought to be allowed to conduct its affairs without undue interference from the other arms of Government hence this Application is a violation of the principle of separation of powers as it seeks that the Court delves into matters of internal procedure of the Legislature. The Respondents adopted the position that the conduct of business in Parliament is the exclusive reserve of the Speaker as provided under Article 107 of the Constitution and the Application herein seeks orders that violate the independence of the legislature which conducts its affairs in accordance

with the Constitution, its Standing Orders and its customs and traditions procedure. The National Assembly makes its Standing Orders and can, resolution of a majority of members; suspend, either temporarily permanently, the application of any particular Standing Order.

16. To the Respondents, the Applicant had not demonstrated to this Cou that the grounds, upon which judicial review can be sought, have been m and therefore this Honourable Court ought to decline to exercise its powe of judicial review. In their view, this Honourable Court can only be invok in the event of an excess of jurisdiction by way of breach of the Constituti and there has been no violation of the Constitution. Further, judicial revie is strictly limited to a review of the procedure of a public body; however tl Application herein seeks for this Honourable Court to delve into the meri of the decision of the Speaker of the National Assembly and therefore th Honourable Court ought to decline from sitting as an appellate court fro the decision of the Speaker of the National Assembly.

17. The Respondent's position was that on the question of internal procedu and the conduct of parliamentary business, the Supreme Court of Kenya, i **Speaker of the Senate & another vs. Attorney General & 4 Othe** **[2013] eKLR**, held that the Court cannot supervise the workings (Parliament and the institutional comity between the three arms (

the workings of one arm by another. Further, the High Court has also declined to interfere with the internal business of the legislature in its recent decision in **Republic vs National Assembly Committee of Privileges & 2 Others ex-parte Ababu Namwamba; JR Case No. 129 of 2015.**

18. The Respondents were of the view that the provisions of Article 103(1)(b) of the Constitution do not apply in respect of Standing Order 111 as the Applicant cannot be deemed to be absent without the written permission of the Speaker. Standing Order 111 was enforced by the Speaker and the Applicant cannot allege that its enforcement results in the loss of his seat as a Member of Parliament.

19. It was therefore the Respondnets' case that the application herein lacks merit they urged this Court to decline to exercise its discretion by granting leave to the Applicant or stay as sought in the Application.

Leave

20. On 14th June, 2016, after hearing the application for leave, I was satisfied that the applicant had disclosed a *prima facie* case for the purposes of leave. The applicant contended that he was named and banished from the

House without being afforded a hearing. To this the Respondents answere that a decision made pursuant to Standing Order 111 is similar to one mad by the Court where there is contempt on the face of the Court. Even if tha were so, section 36(4) of the ***High Court (Organisation & Administration) Act***, No 27 of 2015 provides as follows:

> ***In exercise of its powers under this section, the Court sha observe the principles of fair administration of justice set out i Article 47 of the Constitution.***

21. So that even where the Court is exercising the power to punish for contemp in the face of the Court, the procedure to be adopted must be fair and mus not be arbitrarily exercised. As to whether the procedure adopted by th Speaker met the threshold of fairness or not is a matter which will have t await the hearing.

22. Again there is the issue as to whether the decision which was taken b the Speaker violated the principles of proportionality or no Proportionality has been defined by **De Smith, Woolf and Jowe *Judicial Review of Administrative Action***, Fifth Edition (pp.594 596) as:

"a principle requiring the administrative authority, when exercisin discretionary power to maintain a proper balance between an

adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues."

23. It was contended that The Speaker ought to have considered the ramifications of his decision not only to the Applicant but also to those whose interests the applicant represented. This was the position adopted in **The Indian Borough of Newham vs. Khatun-Zeb and Iqbal [2004] EWCA Civ. 55** where it was held that:

> **"Clearly a public body may choose to deploy powers it enjoys under Statute in so draconian a fashion that the hardship suffered by the affected individuals in consequence will justify the court in condemning the exercise as irrational or perverse...At all events it is plain those oppressive decisions may be held to repugnant to compulsory public law standards."**

24. In my view the issue of proportionality ought to be seen in the context of rationality. This position is the one prevailing in England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532** where it was held that: (1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests

and considerations; and (3) Even the heightened scrutiny test is necessarily appropriate to the protection of human rights.

25. In my view Article 47 of the Constitution is now emphatic on the fairn of administrative action. The purpose of judicial review is to check tl public bodies do not exceed their jurisdiction and carry out their duties i manner that is detrimental to the public at large. It is meant to uplift t quality of public decision making, and thereby ensure for the citiz civilised governance, by holding the public authority to the limit defined the law. Judicial review is therefore an important control, ventilating host of varied types of problems. The focus of cases may range fro matters of grave public concern to those of acute personal interest; fro general policy to individualised discretion; from social controversy t commercial self-interest; and anything in between. As a result, judici review has significantly improved the quality of decision making. It ha done this by upholding the values of fairness, reasonableness an objectivity in the conduct of management of public affairs. It has als restrained or curbed arbitrariness, checked abuse of power and ha generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

26. The Court of Appeal has recently dealt with the issue in **Sucha Investment Limited vs. Ministry of National Heritage & Cultur & 3 others [2016] KLR,** at paras 55-58 as hereunder:

> **"An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic**

society, in the sense of meeting a pressing social need and whetl interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative actioı *Section 7 (2) (f)* of the Act identifies one of the grounds for reviev to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a grounc for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was takeN and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to

substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act."

27. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

28. More importantly is the contention by the Respondents that the decision taken by the Speaker met the principles under the ***Fair Administrative Action Act***. Section 5 of the said Act provides that:

(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-

(a) issue a public notice of the proposed administrative action inviting public views in that regard;

(b) consider all views submitted in relation to the matter be
taking the administrative action;
(c) consider all relevant and materials facts; and
(d) where the administrator proceeds to take the
administrative action proposed in the notice-
(i) give reasons for the decision of administrative action
taken;
(ii) issue a public notice specifying the internal mechanis
available to the persons directly or indirectly affected by
or her action to
appeal; and
(iii) specify the manner and period within the which such
appeal shall be lodged.

29. That the ***Fair Administrative Action Act***, is an Act of Parliam enacted pursuant to the provisions of Article 47 of the Constitution is cle Therefore it is arguable whether the failure to comply with the provisions the said Act may by extension be construed to amount to a violation of t spirit of the Constitution. If that were to be the position, even t Respondents admit that this Court has the power to investigate actio which amount to a violation of the Constitution. As this Court held in **Th Council of Governors and Others vs. The Senate Petition No. 41 of 2014:**

"this Court [is] vested with the power to interpret the Constitutio and to safeguard, protect and promote its provisions as provide

for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court".

30. In arriving at the said decision the Court cited with approval the decision **Kasanga Mulwa, J** in **R vs. Kenya Roads Board exparte John Harun Mwau HC Misc Civil Application No.1372 of 2000** wherein the learned Judge stated that:

"Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution."

31. Subsequently, the Supreme Court in **Speaker of National Assembly vs. Attorney General and 3 Others (2013) eKLR** stated as follows:

"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary

supremacy does not commend itself to nascent democracies as ours. Where the Constitution decrees a specific procedure followed in the enactment of legislation, both House Parliament are bound to follow that procedure. If Parliai violates the procedural requirements of the supreme law oi land, it is for the courts of law, not least the Supreme Cour assert the authority and supremacy of the Constitution. It woul different if the procedure in question were not constitution mandated. This Court would be averse to questior Parliamentary procedures that are formulated by the Houses regulate their internal workings as long as the same do not bre the Constitution. Where however, as in this case, one of the Hou is alleging that the other has violated the Constitution, and mo the Court to make a determination by way of an Advisory Opini it would be remiss of the Court to look the other way. Understo in this context therefore, by rendering his Opinion, the Court dc not violate the doctrine of separation of powers. It is simp performing its solemn duty under the Constitution and tl Supreme Court Act."

32. The Court went on to state as follows:

"Whereas all State organs, for instance, the two Chambers (Parliament, are under obligation to discharge their mandates a described or signaled in the Constitution, a time comes such a this, when the prosecution of such mandates raises conflict touching on the integrity of the Constitution itself. It is ou perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a solution in plebiscite, is only the Courts."

33. This was the position adopted by the Supreme Court in **Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 others [2014] eKLR** where it was held that:

> **"Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker."**

34. **Nyamu, J** was even more blunt in his opinion in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** where he expressed himself as follows:

"To exempt a public authority from the jurisdiction of the Cou law is, to that extent, to grant doctorial power. It is exaggeration, therefore, to describe this as an abuse of pow Parliament speaking constitutionally. This is the justificatior the strong, it might even be rebellious, stand which the courts l made against allowing Acts of Parliament to create pocket uncontrollable power in violation of the rule of law. Parliamer unduly addicted to this practice giving too much weight temporary convenience and too little to constitutional princi The law's delay together with its uncertainty and expense, tem governments to take short cuts by elimination of the Courts. Bu the courts are prevented from enforcing the law, the rem becomes worse than the disease."

35. **Professor Sir William Wade** in his authoritative wo ***Administrative Law***, 8th Edition at page 708 properly captured t failure of Parliamentary draughtsman as hereunder:

"Parliament is mostly concerned with short term consideratio and is strangely indifferent to the paradox of enacting lawand the preventing courts from enforcing it. The Judges, with their eye o the long term and the rule of law, have made it their business t preserve a deeper constitutional logic, based on their repugnanc to allowing any subordinate authority to obtain uncontrollabl power."

36. **Lord Green** in **<u>Associated Provincial Picture Houses Ltd vs Wednesbury Corporation [1948] 1 KB 223</u>** that:

"In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account."

37. It was accordingly held by **Rawal, J** (as she then was) in **<u>Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331</u>** that:

"Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."

38. I agree and would add that when any of the state organs steps outside its mandate, this Court will not hesitate to intervene.

39. This Court will therefore be called upon to determine whether the interests of the people who the ex parte applicant represent in the National Assembly ought to have been taken into consideration before the impugned decision was arrived at and whether the same were considered.

40. Where therefore it is alleged that an organ of the State has acte matter that violates the Constitution, the doctrine of separation of p will not avail the Respondent. Whereas at this stage of the proceedings Court cannot make a definitive finding, the issue cannot be summ dismissed at this stage offhandedly as being frivolous.

Stay

41. Having found that the case presented by the *ex parte* applicant canno termed as frivolous, the next issue for determination is whether in circumstances of this case, this Court ought to direct that the leave granted ought to operate as a stay of the Speaker's decision pending t hearing and determination of the Motion.

42. The principles that guide the grant of an order that the leave do opera as stay of the proceedings in question have been crystallised over a peric of time in this jurisdiction. Where, the decision sought to be quished ha been implemented leave ought not to operate as a stay since where decision has been implemented stay is nolonger efficacious as there may be nothing remaining to be stayed. It is only in cases where either thedecision has not been implemented or where the same is in the course of implementation and its implementation has not come to an end that stay

may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

43. In this case, the period of suspension of the applicant is still running. In other words the act complained of is not complete and has not come to an end. Accordingly, this Court is still seized of the jurisdiction to arrest the same from being completed. This was the position adopted by **Dyson, LJ** in **R (H) vs. Ashworth Hospital Authority [2003] WLR 127** at 138 where the Lord Justice held that:

> **"The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell, LJ said that the phrase "stay of proceedings" must be given wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in *Vehicle and Supplies*, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review...Thus it is common ground that "proceedings" includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to**

prevent the implementation of a decision that has been mad not yet carried into effect, or fully carried into effect." [Underl mine].

44. What I understand the Court to be saying is that stay of proceedings include stay of the decision itself where the circumstances pe However, whereas this Court appreciates that in certain cases a stay ma granted even where its effect may be to temporarily reverse the decis that remedy may only be resorted to in exceptional cases and the onu upon the applicant to prove that such exceptional circumstances exist. I in this light that this Court understands the decision of **Gladwell LJ Republic vs. Secretary of State for Education and Science, parte Avon County Council (No. 2) CA (1991) 1 All ER 28**2 where said that:

> **"An order that a decision of a person or body whose decisions a open to challenge by judicial review shall not take effect until th challenge has been finally determined is, in my view, correctl described as a stay."**

45. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister fo Local Government & Others Mombasa HCMISCA. No. 158 o 2006** was of the view that:

> **"...as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review**

jurisdiction...I also want to state that in judicial review application like this one the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application. Therefore where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction? The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process *(if it has not yet been completed)* being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body *if it has been taken*. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex parte Applicant's case is deserving of a stay order. The Ex-parte Applicant seeks:

"THAT the grant of leave do operate as a stay stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councilor in the Municipal Council of Mombasa."

Can I grant this prayer in view of the scope and purpose of th order as stated above? I think not. Not as it is framed. To gran prayed would be compelling the Respondents to reinstate th parte Applicant to his position as Mayor before hearing them. in the cases cited by Mr. Orengo stay orders were not granted i circumstances and terms as sought in this case. As I have alr said, however, when dealing with applications like this the c should always ensure that the applicant's application is rendered nugatory. Having considered all the circumstances of case I am satisfied that the Ex-parte Applicant is deserving of a order but not as prayed in the application. What I think is appropriate order to make in the circumstances of this case is direct, which I hereby do, that the leave granted shall operate a stay to restrain the Respondents jointly and severally fr nominating or causing to be nominated another councilor or hold the elections or elect the Mayor of Mombasa until this matt is heard and determined." [Emphasis added].

46. In addition, it is trite that in giving effect to the rights the courts mu balance fundamental rights of individual against the public interest in th attainment of justice in the context of the prevailing system of leg administration and the prevailing economic, social and cultural conditions See **Bell vs. DPP [1988] 2 WLR 73.**

47. As appreciated by **Francis Bennion** in ***Statutory Interpretation*** 3rd Edition at page 606:

"it is the basic principle of legal policy that law should serve the public interest. The court...should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".

48. Further, in **Kenya Anti-Corruption Commission vs. Deepak ChamanlalKamani and 4 Others, [2014] EKLR** it was held that:

"...a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large".

49. As is appreciated in ***Black's Law Dictionary, 9th Edn.*** 'public interest" is the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.

50. The role of public interest in applications for conservatory orders was appreciated by the Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors [2014] eKLR** where the highest Court in the land held:

"'Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the *public interest*. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in

the applicant's case for orders of stay. Conservatory **consequently, should be granted on the *inherent merit* of the bearing in mind *the public interest, the constitutional values the proportionate magnitudes, and priority levels attributa the relevant causes.*"**

51. Article 1(1) of the Constitution provides that all sovereign power belon the people of Kenya and shall be exercised only in accordance with Constitution while under Article 1(3)(c) sovereign power under Constitution is delegated *inter* alia to the Judiciary and indepen tribunals. Dealing with a similar provision in **Rwanyarare & Others Attorney General [2003] 2 EA 664**, it was held with respect to Uga that Judicial power is derived from the sovereign people of Uganda an to be administered in their names. Similarly, it is my view and I so h that in Kenya under the current Constitutional dispensation judicial pow whether exercised by the Court or Independent Tribunals is derived fr the sovereign people of Kenya and is to be administered in their name a on their behalf. It follows that to purport to administer judicial power in manner that is contrary to the expectation of the people of Kenya would contrary to the said Constitutional provisions. I therefore associate myse with the decision in **Konway vs. Limmer [1968] 1 All ER 874** th there is the public interest that harm shall not be to the nation or publ

and that there are many cases where the nature of the injury which wou or might be done to the Nation or the public service is of so grave character that no other interest public or private, can be allowed to preva over it.

52. It is therefore my view and I so hold that in appropriate circumstances Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interes in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

53. The case before this Court is unprecedented both in terms of its ramifications and effects. The suspension of the applicant from the National Assembly and its functions though expressed to be for the "remaining session" runs to almost a whole year. The decision in question does not just affect the *ex parte* applicant but also affects the people of Ugunja Constituency who elected the ex parte applicant to represent them

in the National Assembly. These interests are by no means trivi inconsequential. To the contrary they revolve around the sovereign r of the people of Ugunja Constituency as decreed in Article 1.

53. It is my view that our Constitution is partly crafted based on the *Lock* social contract theory. This is so when it is appreciated that Article 1(the Constitution, the very first Article, provides that "all sovereign po belongs to the people of Kenya". It is further important to appreciate t according to the same document at Article 1(2), that sovereign power n be exercised directly or through the people's democratically elect representatives. When it comes to the exercise of such power through t said representatives, it is important to note that under Article 1(3) t peoples' representatives only exercise a "delegated" function. In oth words, the Members of Parliament only exercise delegated authorit Whereas the people can exercise their sovereign power directly, when comes to the exercise of legislative power their participation therein directl is limited and highly restricted hence the role of a Member of Parliamen cannot be underestimated. The people cannot for example participate ir and influence debates in the National Assembly and they cannot vote o matters affecting them.

54. The role of the National Assembly where the *ex parte* applicant sits i outlined in Article 95 of the Constitution as follows:

> ***(1) The National Assembly represents the people of th constituencies and special interests in the National Assembly.***
>
> ***(2) The National Assembly deliberates on and resolves issues o concern to the people.***
>
> ***(3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.***
>
> ***(4) The National Assembly—***
>
> ***(a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;***
>
> ***(b) appropriates funds for expenditure by the national government and other national State organs; and***
>
> ***(c) exercises oversight over national revenue and its expenditure.***
>
> ***(5) The National Assembly—***
>
> ***(a) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and***
>
> ***(b) exercises oversight of State organs.***
>
> ***(6) The National Assembly approves declarations of war and extensions of states of emergency.***

53. Clearly therefore the role of a Member of the National Assembly are onerous. His or her role transcends his own personal interests.

54. In this case the consequences of the decision of the Speaker are tha people of Ugunja stand to be locked out from being represented and interests articulated in the National Assembly for almost a year. cannot for example determine the manner in which their taxes are t expended. The necessity for representation in Parliament in matter collection of revenue and expenditure cannot be better put than in phrase "no taxation without representation", phrase that reflected resentment of American colonists at being taxed by a British Parliamen which they elected no representatives and became an anti-British slo before the American Revolution; in full, "Taxation without representatio tyranny." In our case Article 210(1) of the Constitution which provides tha

> ***No tax or licensing fee may be imposed, waived or varied exce as provided by legislation.***

54. The question is then whether this Court ought to suspend the suspensi of the Applicant from the National Assembly pending the hearing an determination of these proceedings or not. In other words where is highe risk of injustice? Article 124(3)(b) of the Constitution provides that th proceedings of either House are not invalid just because of the presence o participation of any person not entitled to be present at, or to participate in the proceedings of the House. The Constitution itself therefore recognises

that the participation of "a stranger" to the proceedings of the House is n of such a serious nature as to nullify the proceedings. Accordingly, even the applicant's application were to fail, *prima facie* his participation in th House proceedings may not likely to render the decision passed by hi participation null. On the other hand if the application was to succeed an yet as a result of his lack of participation, decisions which could have possibly carried the day did not see the light of the day, the Constitution does not provide for a cure for such scenario. In other words the success of the applicant's application would not be of any value to him or his constituents in respect of those proceedings in which he ought to have participated but did not. As held by the High Court in Kaduna in **Econet Wireless Limited vs. Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208]** the decision to grant a stay involves:

> **"a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court...a situation of complete hopelessness or render nugatory any order of the...Court or paralyse in one way or the other, the exercise by the litigant of his constitutional right...or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds...there would be no return to the status quo."**

55. I therefore agree that parties who have invited the Court to adjudica a matter which they are disputing over ought not to create a situ: whereby the decision to be made by the Court would be of no use. In event as held by the Nigerian Court of Appeal in **United Cen Company of Nigeria versus Dangote Industries Ltd & Ministe Solid Mineral Development [CA/A/165/2005]**, the Court ough ensure that:

> **"appropriate orders are made to prevent acts which will dest the subject matter of the proceedings or foist upon the cour situation of complete helplessness or render nugatory a judgement or order."**

56. The Respondents raised issues which go to the merits of these proceedings. Those are matters which this Court will have to investigate during the hearing of the substantive Motion. At this stage the Court's ma concern is to see to it that the outcome of these proceedings, if favourable the applicant, will not be pyrrhic.

Finding

55. Having considered the issues raised herein, it is therefore my view and find that the applicant's application seeking that the leave granted herei ought to operate as a stay of the decision in question is merited.

Disposition

56. Accordingly, in the public interest I issue an order staying the decisio made by the 2nd Respondent, the Speaker of the National Assembly, on 31 March, 2016 suspending the applicant from the remainder of the Session o the House pending the hearing and determination of these proceedings o further orders of this Court.

57. The costs of this application will be in the cause.

58. Orders accordingly.

Dated at Nairobi this 4th day of July, 2016

G V ODUNGA
JUDGE

Delivered in the presence of:

Mr Oluoch and Hon. Kaluma for the applicant
Mr Njoroge for the Respondents
Cc Mwangi

ORIGINAL COPY

the Applicant from the remainder of the Session of the House pending the hearing and determination of these proceedings or further orders of this Court.

2. That the costs of this application will be in the cause.

3. That orders accordingly.

GIVEN under my hand and seal of this court at Nairobi this 4th July, 2016

ISSUED at **Nairobi** this........5th........day of........July........2016

DEPUTY REGISTRAR

HIGH COURT OF KENYA, NAIROBI

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL
DATED:....5/7/16....
....
DEPUTY REGISTRAR
HIGH COURT OF KENYA
NAIROBI