IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & KIAGE, JJ.A)

CIVIL APPEAL NO. 96 OF 2014

BETWEEN

THE LAW SOCIETY OF KENYA ..... APPELLANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT

THE HON. CHIEF JUSTICE..... 3RD RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Majanja, J), dated 19th March, 2013

in

Petition No. 318 of 2012)

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JUDGMENT OF THE COURT

The Law Society of Kenya (the appellant), is a body corporate established and incorporated under **section 3** of the **Law Society of Kenya Act**. Being a bar association with a current membership of over 10,000 advocates, it has a prodigious obligation to safeguard their interests and those of the general public. With that in mind we take cognisance of its objectives as provided for in **section 4** of the **Law Society of Kenya Act** which includes to:

(a) assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya;

(b) uphold the Constitution of Kenya and advance the rule of law and the administration of justice;

(h)represent, protect and assist members of the legal profession in Kenya in matters relating to the conditions of practice and

welfare;

(k)establish mechanisms necessary for the provision of equal opportunities for all legal practitioners in Kenya;

In line with its objectives, it lodged a Petition at the High Court when the Honourable Attorney General (the 1st respondent) on 10th May 2012 introduced Statute Law (Miscellaneous Amendments) Bill of 2012 in to Parliament. The same was passed by Parliament and assented to by the President of the Republic on 6th July 2012. The said Act came into force on 12th July 2012.

The Petition was filed under **Article 22 (2) (b)** and **(c)** of the Constitution on 25th July 2012 challenging the amendments attained in the Statute Law (Miscellaneous Amendments) Act of 2012. The same was brought under a certificate of urgency and was accompanied by a Chamber Summons seeking a temporary injunction against the implementation of the Statute Law (Miscellaneous Amendment) Act 2012 by the respondents jointly and severally.

In the Petition, the appellant urged that the 1st respondent had deviously passed substantive amendments to various Acts contrary to the ordinary usage of such Bill. It was its belief that a Statute Law (Miscellaneous Amendments) Bill is only used to make minor amendments to the Law, just as the long title of the Bill indicates, that is, **“An Act of Parliament to make minor amendments to Statute Law”**. This motivated the appellant to seek the intervention of the court to quash the enforcement of the substantive amendments.

The amendments made by the Act on the various Acts of Parliament relevant to the appellant and the sections thereof, in summary, are in the following manner;

(a) Advocates Act:

i) Section 2 - Delete the word "Committee" wherever it occurs in the definition of "Disciplinary Committee" and substitute therefore the word "Tribunal". The affected sections were s55, s57(2), (2)(a), (3) & (4), s58(1),(2), (3), (4) & (5), s59, s60(1), (2), (3), (4), (5), (6), (8), (9), (10) & (12), s61(1), (2) &

(3), s62(2), s64, s71, s72(1) & (3), s75, s76, s77, s78, s80(1) and s81(2).

ii) Section 12 (a) - Insert the words "Rwanda, Burundi" immediately after the word "Kenya’.

iii) Section 13 (1) - Insert the words "the High Court of Rwanda, the High Court of Burundi" in paragraph (d) immediately after the word "Uganda".

Insert the following new paragraph immediately after paragraph (d) –

(e) he is for the time being admitted as an advocate of the superior court of a country within the Commonwealth and-

(i) has practised as such in that country for a period of not less than five years; and

iv) Section 14, 20, 32 (1) - Insert the words "and the Director of Public Prosecutions" immediately after the expression

"Attorney-General" wherever it occurs.

v) The insertion of section 32B.(1) - The Chief Justice shall, on the recommendation of the Council of the Society, prescribe—

(a) the criteria for determining the Remuneration payable to an in-house counsel by an employer.

vi) S.57(1)Delete the introductory part and substitute therefor the following –

"(1) There is established a tribunal to be known as the Disciplinary Tribunal (in this Part referred to as "the Tribunal") which shall consist of –"

Insert the following new paragraph immediately after paragraph (a)-

(aa) the Director of Public Prosecutions;

(b) The Law Society of Kenya Act:

i) Section 2 - Delete the word "Committee" from the definition of "Disciplinary Committee" and substitute therefor the word "Tribunal".

(c) The Vetting of Judges and Magistrates Act:

i) S.23(2) Delete and substitute therefor the following new subsections –

(2) the Board shall be divided into three panels for purposes of vetting, and the three panels shall vet the judges simultaneously while the Judicial Service Commission shall vet the Magistrates,

It is important to note that the amendment to the Advocates Act section 57(1) (aa) which had included the Director of Public Prosecutions as part of the Disciplinary Tribunal was subsequently deleted via the Statute Law (Miscellaneous Amendments) Act, 20l4 No. 18 of 2014. In a nutshell the amendments; removed the responsibility of vetting magistrates from the Judges and Magistrates Board to the Judicial Service Commission; replaced the Advocates' Disciplinary Committee with an Advocates' Disciplinary Tribunal; empowered the Chief Justice to make recommendations on the remuneration of a category of lawyers known as in-house Counsel and permitted advocates practising within the East African community and the commonwealth to be admitted to practice law in Kenya.

According to the appellant, the effects of the amendments were as follows:

a) The transferring of the vetting of magistrates to the Judicial Service Commission undermines the independence of the Judiciary. That by allowing sitting judges and magistrates who are members of the Judicial Service Commission to sit in during the vetting of their colleagues violates the rule prohibiting conflict of interest as provided for in Article 73 and 75 of the Constitution for State and Public Officers.

b) Converting the Advocates Disciplinary Committee to a Tribunal "*judicializes"* the role of the appellant. Further, the creation was done without funding from the Judiciary or following the dictates of Article 169 of the Constitution.

c) Opening up Kenya's market for trade in legal services in favour of non-Kenyans without a reciprocal market access for the Kenyan advocates is an abuse of the legislative power vested in Parliament by the Constitution; a violation of relevant World Trade

Organization (WTO) and other agreements applicable to Kenya that call for market access on a reciprocal basis.

d) Finally, permitting the Chief Justice of Kenya to prescribe rules on the remuneration of in-house lawyers undermines the scheme of labour relations established in Article 41 of the Constitution and other labour related legislation which determine that pay is a contractual issue to be agreed upon between employers and employees.

The appellant urged that since the amendments were substantive and having a far-reaching effects on its members, the same ought not to have been brought via an omnibus Statute Law (Miscellaneous Amendments) Act, which is only intended to consolidate various minor amendments to remove anomalies and to repeal unnecessary enactments. That being said, the amendments ought to have been done according to the provisions of **Article 261 (4)** which demands that the 1st respondent tables the bills before Parliament in consultation with all organs engaged and concerned in constitutional implementation; the Commission for the Implementation of the Constitution, the Kenya Law Reform Commission and the Parliamentary Constitution Oversight Implementation Committee. Additionally, public participation, one of the core national values, ought to have been conducted by Parliament as provided for in **Article 10** as read together with **Article 118**. For that reason, Parliament acted contrary to the dictates of public office as provided for in respect of State and Public officers under the Constitution.

In conclusion, the appellant urged that its members stood to be greatly jeopardized, barring the intervention of the Court. The reliefs sought by the appellant among others were:

(a) A declaration that the amendments contained in the Statute Law (Miscellaneous Amendment) Act 2012, particularly those enumerated in paragraph 16 (a) – (d) of this Petition, are inconsistent with the Constitution and, are therefore null and void to the extent of the inconsistency.

(b) A declaration that the amendments contained in the Statute Law (Miscellaneous Amendment) Act 2012, particularly those enumerated in paragraph 20 (a) – (d) of this Petition, infringes on the fundamental rights and freedoms contained in Articles 27 and 41 of the Constitution;

(c) A declaration that the amendments contained in the Statute Law (Miscellaneous Amendment) Act 2012, particularly those enumerated in paragraph 20 (a) – (d) of this Petition, seek to introduce substantive amendments of the law in which case the Attorney General is obligated to consult with the other organs/agencies mentioned in Article 261 (4) of the Constitution, and in that case further, public participation enshrined in Article 10 (2) as read together with Article 118 of the Constitution must be respected.

In support of the Petition, an affidavit deposed by Apollo Mboya, who was then the Secretary/Chief Executive Officer of the Law Society was filed. The said affidavit merely reiterated most of the content of the Petition and we see no need in rehashing it.

In opposition, the 1st respondent filed grounds of opposition and denied the allegations contained in the Petition. The 1st respondent pointed out that **Articles 94** and **188** of the Constitution which the Petition is premised on, were suspended by dint of **section 2 (1) (b)** of the Sixth Schedule and as such were not applicable to the Parliament then subsisting. Most directly, the Statute Law (Miscellaneous Amendment) Act 2012 did not introduce substantive amendments to any Statute Law since; the conversion of the Advocates Disciplinary Committee into a Disciplinary Tribunal did not amount to creating a subordinate court under the Judiciary as not all Tribunals are funded by the Judiciary; since the legal profession plays a significant role in the rule of law, public interest demands that there be a mechanism for the regulation of the profession through state intervention; the amendments introducing foreign advocates was recognizing what had already been allowed under the regulation of the Council for Legal Education under the Advocates Act; specifically the amendments in relation to citizens of Rwanda, Burundi, Uganda and Tanzania

were in consonance with Kenya's treaty and obligation, under the treaty establishing the East African Community; the Chief Justice has always prescribed remuneration for advocates under **section 44** of the Advocates Act hence the amendments were simply making a provision for a specific cadre of Advocates and the same did not undermine any scheme of labour relations as alleged.

From the record, we have sighted the appellant's submissions together with submissions from an interested party, **Mr Maina Mwangi**, an advocate. His submissions were in support of the Petition specifically to highlight the plight of young lawyers. He also filed authorities. His submissions brought about factual arguments from the perspective of a practising advocate. He contended that opening up the profession to foreign advocates would have dire effects on the quality of advocacy in the country. That is because other jurisdictions have different qualification standards, some of which are not at par with the Kenyan system and yet such advocates would be allowed to practice in our jurisdiction. Moreover, multinationals would now have the luxury of importing legal services into the country indiscriminately. Finally, legal practice risked becoming congested to the detriment of the young, up-coming and inexperienced advocates.

Majanja, J. considered the Petition, submissions and authorities cited and delivered a judgment on 19th March 2013. He found the Petition unmeritorious, declined to grant the reliefs sought by the appellant and dismissed the Petition.

The appellant, being dissatisfied with that judgment preferred an appeal to this Court. The memorandum of appeal contains three (3) grounds, complaining that the learned judge erred in law and in fact by;

a) Misdirecting himself by not finding that the amendments contained in the Statute Law (Miscellaneous Amendment) Act 2012 particularly those enumerated in paragraph 19

(b) – 20 (b) – (d) of the Petition, are inconsistent with Articles 27,41 and 261 (4) of the Constitution.

b) Failing to appreciate that the amendments contained in the Statute Law (Miscellaneous Amendment) Act 2012 seek to introduce substantive amendments to the law.

c) Failing to appreciate the need for public participation as enshrined in Article 10 (2) as together with Article 118 of the Constitution before the enactment of the Statute Law (Miscellaneous Amendment) Act 2012.

When the appeal was listed for hearing, learned counsel **Ms. Julie Soweto Aullo**, **Mr. Rodgers Sekwe** and **Mr. Issa Mansur** appeared for the appellant, the 1st respondent and for the 2nd and 3rd respondents respectively. All the parties had filed written submissions. The appellant, 2nd and 3rd respondents furnished the Court with authorities.

Counsel for the appellant submitted that the objects and scope of a statute law miscellaneous amendments Act are to correct anomalies, inconsistencies and outdated terminologies or errors which are minor and non-controversial. However, the amendments complained of brought about significant changes to the law with far reaching implications and introduced wholly new concepts, even statutory offences. She illuminated that the conversion of the Advocates Disciplinary Committee into a Disciplinary Tribunal, effectively brought it under the control of the Judiciary, thereby undermining the appellant's core function, which is to regulate its own affairs and the conduct of its members.

She further argued that the introduction of the category of in-house counsel in the issue of the remuneration without giving a proper definition as to whom the sub-set of advocates are while creating an offence is unusual and contrary to common sense. Finally, she submitted, the learned judge erred in shifting the burden of proof of whether or not the public participation took place on the appellant whilst the same is an obligation of the Parliament with a duty to demonstrate compliance.

Mr. Sekwe on his part submitted that Statute Law (Miscellaneous Amendments) Act 2012 did not bring any substantive amendments to the various Acts mentioned therein. He argued that the mere replacement of the word "Committee" with "Tribunal" was not an affront on the independence of the legal profession, nor was is tantamount to unlawfully creating a subordinate court within the Judiciary. He pointed out that **section 11** of the **Advocates Act** had already allowed the practice of foreign Advocates appearing within our jurisdiction. Hence the amendment was merely a consequence of Rwanda and Burundi having joined the East African Community, and the inclusion of its citizenry alongside those of Uganda and Tanzania had to follow suit.

Counsel asserted that the appellant failed to provide any proof that public participation did not take place. Finally, he contended that **section 44** of the **Advocates Act** already provided for the Chief Justice to prescribe remuneration in respect of professional business, and the amendment simply specified the cadre within the professional business. He opined that this did not in any way undermine **Article 41** of the Constitution.

Mr. Issa held a similar view and contended that the Statute Law (Miscellaneous Amendments) Act 2012 introduced non-controversial amendments to the various Acts. He proceeded to reiterate the averments of the 1st respondent's counsel explaining why the amendments were not substantial as claimed by the appellant. Nonetheless, counsel urged the Court to uphold the finding of the learned judge at paragraph 53 of the judgment to the effect that none of the allegations made by the appellant was the doing of the 2nd and 3rd respondents and they therefore were not necessary parties to the proceedings. Consequently, he sought for the dismissal of the prohibition prayers sought by the appellant against the 2nd and 3rd respondents.

Having carefully read and considered those rival submissions in light of the entire record, we have distilled the following as the issues for determination; whether the amendments contained in the Statute Law Miscellaneous Amendments) Act, 2012, seek to introduce substantive amendments to the law; whether the amendments contained in the Statute Law (Miscellaneous Amendments) Act, 2012, are inconsistent with Articles 27, 41 and 261(4) of the Constitution and therefore null and void to the extent of their inconsistency; whether there was public participation as enshrined in **Article 10(2)** as read together with **Article 118** before the enactment of the Statute Law (Miscellaneous Amendments) Act, 2012 and whether the appellant is entitled to the prayers and relief sought.

It is imperative to dissect the issue of whether the amendments contained in the Statute Law Miscellaneous Amendments) Act, 2012, sought to introduce substantive amendments to the law. The issue turns on what is considered as substantive according to a reasonable man. It was the appellant's contention that the said amendments were substantive because; they altered the Disciplinary Committee into a Disciplinary Tribunal and effectively usurped the appellant's autonomy and function of regulating its own affairs when it comes to the conduct of advocates; they introduced a category of in-house counsel without properly defining who they are, whilst creating a different criteria for remuneration and standards of work for persons who were yet to be identified; they opened up of the Kenyan borders to foreign lawyers without reciprocity from the beneficial states.

From the judgment, it is clear that the learned judge concurred with the arguments put across by the 1st respondent and concluded that the amendments were not substantive. However, it is prudent to look at the ordinary usage of the Statute Law Miscellaneous Amendments) Bill. As was stated by the appellant and is clear from its long title, it professes and is meant to be **"An Act of Parliament to make minor amendments to Statute Law"**. From ordinary use of the word "minor" in this context, it means something that is of less importance, insignificant even. Indeed, the lexical meaning as obtained from the Concise Oxford English

Dictionary, Twelfth Edition at page 911 is ***"having little importance, seriousness or significance"***. The urging of the appellant is that the Statute Law (Miscellaneous Amendments) Bill is for correcting anomalies, inconsistencies, outdated terminologies or errors which are minor and non-controversial.

A quick look at Black's Law Dictionary, Eighth Edition at page 1470, describes substantive law as;

"The part of the law that creates, defines, and regulates the rights and duties, and powers of parties."

The Court must, therefore, satisfy itself that the amendments did not create, define, regulate or confer any powers to any parties, for if they did, they would not be said to be minor or inconsequential. As we consider the issue, we are cognisant of and do acknowledge that all lawful power derives from the people and must be exercised for them. In the case of judicial power, its derivation and vesting is provided for in **Article 159** of the Constitution;

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

Similarly, Parliament's legislative authority is neither innate nor self-authored. Rather, it is derived from and delegated to it by the people, is exercised on their behalf and must reflect their will in whom sovereignty resides. That is the unmistakable edict of the provision of the Constitution that all speak to the subject;

Article 1. Sovereignty of the people

(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the Judiciary and independent tribunals.

(4) The sovereign power of the people is exercised at—

(a) the national level; and

(b) the county level.

….

Article 94. Role of Parliament

(1)The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.

Whenever a question arises as to whether any arm of government has acted within the bounds of the Constitution, it remains the exclusive preserve of the Courts to make a determination thereon. The Supreme Court pronounced itself in this in **THE COUNCIL OF GOVERNORS AND 6 OTHERS VS. THE *SENATE* *[2015] eKLR***, Petition No. 413 of 2014.

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

On the questioned amendment made to the **Advocates Act** and the **Law Society of Kenya Act** essentially turning the Advocates Disciplinary Committee into a Disciplinary Tribunal, the learned judge held that;

"The change of the name of the Committee engendered by the amendment did not change the substance of the Advocates Act nor interfere with the powers of that body. The name was cosmetic and within the legislative authority and the use of the word "Tribunal" only established the fidelity of that body to the principles set out in Article 159. I find and hold that this ground of attack lacks merit and is dismissed."

It is the appellant's argument that although the Disciplinary Committee was a creation of the Advocates Act, it is given life, effect and functionality by all advocates acting together as a collective body to elect a majority of the members of the Committee. In as much as the overall functions may remain the same, as argued by the respondents, its essential character and exercise of power is greatly determined by the organisational structure and power balance.

According to Stroud's Judicial Dictionary of Words and Phrases, Sixth Edition, Volume 1: A-F, pg 449 defines a Committee as;

"an individual or a body to which others have committed or delegated a particular duty, or who have taken on themselves to perform it, in the expectation of their act being confirmed by the body they profess to represent or to act for."

While Black's Law Dictionary, Eighth Edition at page 1554, describes a Tribunal as;

"1. 6A court or other adjudicatory body. 2. The seat, bench, or place where a judge sits"

From the foregoing, it is clear that the term Committee signifies something part of and subordinate to a higher authority to which it reports. That was the case with the Advocate's Disciplinary Committee's relationship to the appellant. A Tribunal, on the other hand, has a more important, self-directive or autonomous adjudicative connotation to it. We are therefore of the view, with respect, that the learned judge erred in stating that the amendment was merely cosmetic. This is more so when consideration is given to the role of the Attorney General in determining remuneration for the members of the Tribunal so established. We think that the appellant's apprehensions regarding the appearance of the Tribunal being beholden to the Attorney General are not idle.

On the amendment to the Advocates Act which opened up the Kenyan market to foreign advocates, the learned judge held;

"I agree with the Attorney General's submission that section 11of the Advocates Act already provided for the practice and regulation of foreign advocates.

Section 12 of the Advocates Act is a consequence of Rwanda and Burundi joining the East African Community hence the inclusion of the citizens of Rwanda and Burundi in addition to those of Uganda and Tanzania being entitled to be admitted as advocates. The amendment is clear that the citizens of the Partner States of the East Africa Community must be duly qualified as advocates in accordance with section 13 thus the issue of different standards and entrenching discrimination against Kenyan advocates does not arise."

This was argued to be discriminatory, given the non-reciprocity from the benefiting States. The respondents argued that since the provision had already been made in the existing legislation to include Uganda and Tanzania, it was only in order that they include Rwanda and Burundi pursuant to joining the East African Community. The issue of non-uniformity was qualified by the provision of section 13 which provides;

"Provided that the Council may, in addition, require that a person to whom this paragraph applies undergo such training, for a period not exceeding three months, as the Council may prescribe for the purpose of adapting to the practice of law in Kenya."

While we take cognizance of that period provided for a foreigner to adapt to the Kenyan law, it may well be that all the controversy would have been avoided had the appellant been consulted. The respondents' Waterloo lies in their hiding behind existing laws and trying to piggyback on them in order to sneak in otherwise substantive legislation. The devil is in the details and we are of the considered view that the learned judge erred in not observing the finer details of the amendments and in not appreciating the text, context and effect that rendered them substantive. We accept the contention that the amendments have an effect on the business of the appellant and its membership. Moreover, they tend to undermine the independence of the appellant, as it complains, something this Court cannot countenance.

With respect, we read mischief in the 1st respondent's argument that the State needs to have some level of control over the discipline of Advocates. On this, we note the counter argument that it already has the Advocates Complaints Commission under its control. Is that not enough of State control" We see no legitimate purpose to be served by further control through legislative measures clearly cultivated to undermine the independence of the appellant.

Finally, on the issue of public participation, the learned Judge expressed himself as follows;

"The burden of showing that there has been no public participation or that the level of public participation within the process does not meet the constitutional standards is on the petitioner. I have scrutinised the affidavit of Mr Apollo Mboya, the Secretary of the LSK, sworn on 25th July 2012 and there is nothing to show or demonstrate that there was no public participation in the whole process. It has not been alleged that the LSK was denied or lacked an opportunity to provide input into the legislation by the Attorney General in coming up with the legislation or the legislative process was ineffective and contrary to the objects of the Constitution. There is also no allegation by Mr Mboya that the LSK was not consulted or that it did not participate in the formulation of the amendments to the Advocates Act. In the circumstances, I find no basis to hold that there was no public participation in formulation and enactment of the Statute Law (Miscellaneous Amendments) Act, 2012."

We think, with respect, that the judge failed to appreciate the mandatory provision in **section 5** of the **Statutory Instruments Act**;*"**5. Consultation before making statutory instruments***

(1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—

(a) have a direct, or a substantial indirect effect on business; or

(b) restrict competition; the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument."

He further failed to take heed to the pronouncement of this Court on the importance of Article 10 on good governance in **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017] eKLR**;

"80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

81. Consequently, in this appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate."

From the finding above, the learned judge ought to have found in favour of the appellant based on the claim made on the lack of public participation. It was an error for the learned judge to require the appellant to prove the negative, for once it states there was no public participation, the burden shifted to the respondents to show that there was. Much weight has been placed on public participation because it is the only way to ensure that the Legislature will make laws that are beneficial to the *mwananchi*, not those that adversely affect them.

Additionally, the onus is on the Parliament to take the initiative to make appropriate consultations with the affected people. It is therefore a misdirection for the learned judge to hold that the appellant had the responsibility to prove that the consultations did not happen. We believe that the principle behind the amendments is what must be interrogated. The 1st respondent is not possessed of an unfettered or carte blanche leeway to table legislation that is detrimental to the people of Kenya or a section of the citizenry. It must follow due process which includes consultation with stakeholders. The Constitution establishes that mechanism to enable the Legislature make laws that are reasonable, having sought and obtained the views of the people. That is the essence of an accountable limited Government and the shift from the supremacy of Parliament to the Sovereignty of the people birthed by the 2010 Constitution.

Given all we have said, we find and hold that the Legislature overreached in passing substantive amendments in an un-procedural non-participatory manner, through the Statute Law Miscellaneous Amendments) Act, 2012. We recall the words of Chief Justice Langa, in **HUGH GLENISTER VS. PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS CASE CCT 41/08; [2008] ZACC 19** at para 33: ***"It is a necessary component of the doctrine of separation of powers that courts***

have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds."

We have no difficulty holding that Parliament's passing of the challenged amendments was not in keeping with the Constitutional bounds of its power and the same must be struck down. In the end this appeal succeeds, the judgment of the High Court is set aside. We substitute therefor an order allowing the appellant's Petition as prayed.

We make no orders as to costs.

DATED and delivered at Nairobi this 27th day of September, 2019.

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR