



Case Number:	Petition 120 of 2017
Date Delivered:	23 Feb 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Enock Chacha Mwita
Citation:	Josephat Musila Mutual & 9 others v Attorney General & 3 others [2018] eKLR
Advocates:	-
Case Summary:	<p style="text-align: center;"><b><u>Constitutionality of Sections 3(3) and 11(2) of the Auctioneers Act</u></b></p> <p style="text-align: center;"><b>Josephat Musila Mutual &amp; 9 others v Attorney General &amp; 3 others [2018] eKLR</b></p> <p style="text-align: center;"><b>Petition No 120 of 2017</b></p> <p style="text-align: center;"><b>High Court at Nairobi</b></p> <p style="text-align: center;"><b>E.C. Mwita, J</b></p> <p style="text-align: center;"><b>February 23, 2018</b></p> <p style="text-align: center;"><b>Reported by Kakai Toili</b></p> <p><b><i>Constitutional Law</i></b> – interpretation of the Constitution - what were the principles to be applied in the interpretation of the Constitution – Constitution of Kenya, 2010, article 259 (1)</p> <p><b><i>Constitutional Law</i></b> – fundamental rights and freedoms – equality and freedom from</p>

*discrimination – membership to the Auctioneers Board - exclusion of persons appointed to be judges - whether exclusion of persons appointed to be judges from being members of the Auctioneers Board amounted to discrimination and therefore unconstitutional – Constitution of Kenya, 2010, article 24 (1) & 27 (4); Auctioneers Act section 3 (3)*

**Constitutional Law** – *fundamental rights and freedoms – equality and freedom from discrimination – retirement of auctioneers - whether the mandatory requirement for licensed auctioneers to retire at the age of 70 years amounted to discrimination and therefore unconstitutional - Constitution of Kenya, 2010, articles 4 (2), 10, 27 & 57; Auctioneers Act section 10, 11(2)*

**Constitutional Law** - *national values and principles of governance - public participation – public participation in amending statutes - what was the standard to be applied in determining whether Parliament had met its obligation of facilitating public participation - Constitution of Kenya, 2010, article 10 & 118*

**Statutes** - *Statute Law (Miscellaneous Amendments) Acts – purpose - making substantial amendments to a statute - whether Statute Law (Miscellaneous Amendments) Acts could be used to make substantial amendments to a statute – Auctioneers Act, section 3(3) & 11(2)*

**Brief Facts:**

In 2016, the National Assembly through the Statute Law (Miscellaneous amendment) Act 2017, amended various statutes one of them being the Auctioneers Act (No. 5) of 1996(the Act). Various provisions of the Act were amended including introduction of section 3(3) which prohibited persons appointed to be judges from being members of the Auctioneers Board and section 11(2) which made it mandatory for licensed auctioneers to retire at the age of 70 years. The Petitioner alleged that the amendments were discriminatory and therefore unconstitutional.

It was also alleged that there was no public participation in the process leading to the amendment of the Act.

**Issues:**

- i. What were the principles to be applied in the interpretation of the Constitution?
- ii. Whether section 3 (3) of the Auctioneers Act prohibiting persons appointed to be judges from being members of the Auctioneers Board amounted to discrimination and therefore unconstitutional.
- iii. Whether section 11(2) of the Auctioneers Act on the mandatory requirement for licensed auctioneers to retire at the age of 70 years amounted to discrimination and therefore unconstitutional.
- iv. What was the standard to be applied in determining whether Parliament had met its obligation of facilitating public participation.
- v. Whether Statute Law (Miscellaneous Amendments) Acts could be used to make substantial amendments to a statute.

**Relevant Provisions of the Law:**

**Constitution of Kenya, 2010**

**Article 4 - Declaration of the Republic**

*(2) The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.*

**Article 10 - National values and principles of governance**

*1. The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—*

- a. applies or interprets this Constitution;*
- b. enacts, applies or interprets any law; or*

*c. makes or implements public policy decisions.*

*2. The national values and principles of governance include—*

*a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*

*b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*

*c. good governance, integrity, transparency and accountability; and*

*d. sustainable development.*

#### **Article 24 – Limitation of rights and fundamental freedoms**

*1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*

*a. the nature of the right or fundamental freedom;*

*b. the importance of the purpose of the limitation;*

*c. the nature and extent of the limitation;*

*d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*

*e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

#### **Article 27- Equality and freedom from discrimination**

*1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.*

*2. Equality includes the full and equal enjoyment of all rights and fundamental*

*freedoms.*

3. *Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*
4. *The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*
5. *A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*
6. *To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*
7. *Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.*
8. *In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.*

#### **Article 57 - Older members of society**

*The State shall take measures to ensure the rights of older persons—*

- a. *to fully participate in the affairs of society;*
- b. *to pursue their personal development;*
- c. *to live in dignity and respect and be free from abuse; and*
- d. *to receive reasonable care and assistance from their family and the State.*

#### **Article 118 - Public access and participation**

1. *Parliament shall—*

- a. *conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and*
  - b. *facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*
2. *Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.*

#### **Article 259 - Construing this Constitution**

1. *This Constitution shall be interpreted in a manner that—*
  - a. *promotes its purposes, values and principles;*
  - b. *advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*
  - c. *permits the development of the law; and*
  - d. *contributes to good governance.*

#### **Auctioneers Act**

##### **Section 3 - Establishment and membership of the Board**

2. *Where a member of the Board nominated under section 3(1)(a), (b), (c) or (d) is nominated to the position of High Court, Court of Appeal or Supreme Court of Kenya, the appointee shall cease to serve as a member of the Board immediately upon assumption of office or elevation.*

##### **Section 10 - Eligibility for licence**

1. *Subject to subsection (2) of this section and to section 11, a person who satisfies the Board that he—*
  - a. *is a Kenyan citizen;*
  - b. *has obtained sufficient knowledge and experience for a continuous period of not less than three years under or from a reputable licensed auctioneering firm;*

- c. has not been convicted in the ten years immediately preceding the application of an offence involving fraud, dishonesty or immorality and is otherwise of good character and reputation;*
- d. is not disqualified under the provisions of this Act from obtaining or holding a licence, may, on application to the Board, be licensed to carry on the business of an auctioneer.*

*2. Notwithstanding the provisions of subsection (1), a person who—*

- a. is a judge or a magistrate or is employed in any capacity as an executive or subordinate officer of a court; or*
- b. deleted by Act No. 2 of 2002, Sch.;*
- c. is an advocate deemed under section 30A of the Advocates Act (Cap. 16) to be practising in his professional capacity or is employed in any capacity by such advocate; or*
- d. is a public officer or an officer or employee of any local authority, statutory body or state corporation,*
- e. shall not be eligible to be licensed under this Act.*

*3. A person who is a Member of the National Assembly, Senate or County Assembly shall be entitled to hold a general licence enabling him to realise securities and carry out repossessions in such parts of the country as may be specified therein.*

*4. A person who obtains or holds a licence contrary to any of the provisions of this section commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding two years, or to both.*

#### **Section 11 - Issue of licence in special circumstances**

*(2) A licensed auctioneer shall retire at the age of seventy years.*

**Held:**

1. Article 259(1) of the Constitution provided for the manner in which the Constitution was to be interpreted. The entire Constitution had to be read as an integrated whole with no particular provision destroying the other but each sustaining the other. That was the rule of harmony, the rule of completeness and exhaustiveness and not one provision destroying another. The Constitution had to be given a holistic interpretation and read as one entity to give value to the aspiration of the people, constitutional provisions ought to have been interpreted broadly or liberally and give values and aspirations of the people.
2. The Court had to look at both purpose and effect to ascertain the constitutional validity of a statute or statutory provision. A statute or provision of a statute challenged had to be laid against the constitutional provision said to have been violated to enable the Court determine whether that was the Case.
3. A constitutional provision containing a fundamental human right was a permanent provision intended to cater for all times to come and therefore had to be given a dynamic, progressive, liberal and flexible interpretation keeping in view the ideals of the people, their socio economic and political, cultural values so as to extend the same to the possible maximum.
4. It was not clear why a person required to have qualification for appointment as a judge had to relinquish his position in the Auctioneers Board (the Board) once appointed a judge. The Chief Magistrate and even members of the Law Society all qualified for appointment as judges and there was a possibility that all members of the Board under that bracket could easily be appointed as judges at the same time which would render the Board non-functional. It was not clear the mischief the Legislature intended to cure through the amendment.
5. A law requiring a member of the Board in



to leave his position because he or she had been appointed a judge on the face it appeared discriminatory based on status or class. However, it was not the Court's duty to inquire into the policy or Parliament's wisdom in enacting a particular legislation. The Court's duty was to determine whether the law squared with the Constitution. There could be underlying reasons or justification but which the Respondent postulated. There could be reasons such as conflict of interest, busy schedule among others.

6. There was no serious conflict between section 3 (3) of the Auctioneers Act (the Act) and article 27 (4) of the Constitution. Excluding judges from being members of the Board of Auctioneers could not be said to be unconstitutional for reasons of discrimination. The Chief magistrate, the member appointed by the Chief Justice and the member representing the Law Society were capable of discharging the duties the persons appointed judges would have performed.
7. It was not every little violation that could be declared unconstitutional. Article 24(1) of the Constitution allowed limitation of rights so long as the limitation was by law and was reasonable and justifiable in an open and democratic society. The limitation introduced by section 3 (3) of the Act was by law and was reasonable and justifiable. It could have been that judges were busy, often transferred to places and they could face challenges in attending Board meetings. A statute carried with it a presumption of constitutionality, such presumption extended in relation to a law which had been enacted for imposing reasonable restrictions in the fundamental right.
8. There was no constitutional invalidity with regard to section 3 (3) of the Act. The only problem was with section 3(3) (b) of the Act. One person who was to join the Board by virtue of position in government was the Permanent (cabinet) Secretary in the Office of the President for the time being responsible for matters relating to National

Security or his representative. The section stated that even that person had to relinquish his position in the Board on being appointed to the position of judge. It was not clear if the National Assembly really realized the oversight.

9. There was no serious conflict between section 3 (3) of the Act and the Constitution to render it unconstitutional. There was an element of discrimination but it was not a grave violation to warrant a declaration of invalidity. It was a reasonable limitation and was justifiable to avoid burdening judges with administrative matters of the Board. Moreover, decisions of the Board especially those of auctioneers' discipline being *quasi-judicial* were appealable to the Court and thereafter to the Court of Appeal. It was only reasonable that judges be exempted from sitting on the Board.
10. Section 10 of the Act provided for qualifications for one to be licensed as an auctioneer, he had to be a Kenyan citizen, experienced, of good moral character, not convicted of a criminal offence and not disqualified from holding a licence. Section 11(2) of the Act however provided that a licensed auctioneer had to retire at the age of 70 years.
11. Article 27(1) of the Constitution guaranteed equality and freedom from discrimination. It provided that every person was equal before the law and had the right to equal protection and equal benefit of the law, equality included the full and equal enjoyment of all rights and fundamental freedoms. The import of article 27 (1) was that human rights and fundamental freedoms were guaranteed to all persons by virtue of being human and had to be enjoyed without limitation. Rights and fundamental freedoms were guaranteed by the constitutions and had to be enjoyed by all human beings in equal measure and to the fullest extent.
12. Article 27(4) of the Constitution was clear that the state could not discriminate directly or indirectly against any person on any ground. The Constitution therefore

prohibited all forms of discrimination and grounds of discrimination were not exhaustive. Discrimination was that act of subjecting a person to different treatment from the others on any of the grounds stated in article 27(1) of the Constitution. When a person was subjected to a different standard of treatment because of his age that was open discrimination.

13. A person alleging a violation of article 27 of the Constitution had to establish that because of the distinction made between the Claimant and others the Claimant had been denied equal protection or benefit of the law. It did not necessarily mean that different treatment or inequality would *per se* amount to discrimination and a violation of the Constitution.

14. Auctioneers were human beings, they carried out business just like any other person for purposes of earning a living. They were in private business as opposed to public engagement. Although they served clients, theirs was private business which they did as individuals. The fact that they had to retire on attaining the age of 70 years was not based on any sound legal logic. They had offices, staff and clientele to serve. They were in private business and not public. They earned what they made in their private business. There was no justification to require them to fold their businesses simply because they had attained the age of 70 years.

15. Article 4(2) of the Constitution declared Kenya a multi-party democratic state founded on the national values and principles of governance referred to in article 10. Any government founded on national values and principles of governance such as the rule of law, human equality, social justice and non-discrimination could not legislate to discriminate against a section of its citizens on account of age and that they could not pursue private business engagement through which they earned a living simply because they had attained a certain age. That was an obvious violation of clear constitutional provisions and such

legislation would be null.

16. Article 57 of the Constitution behooved the Government to take measures to ensure the rights of older persons to fully participate in the affairs of society, pursue their personal development and to live in dignity and respect and be free from abuse. Auctioneers were citizens in private business working to earn a living. They engaged in personal development and wanted to live in dignity by earning a decent and reasonable income to enable them sustain their dignity. They required respect and not discrimination. They were not a bother to society and least of all the Government regulated their conduct while they were in business. Unless one had violated the law that governed the business of auctioneers, there could be no reason to prescribe age limit for persons engaged in private business such as auctioneers. Section 11(2) violated the auctioneers right under both articles 27(4) and 57 of the Constitution. A statute or statutory provisions that violated rights and fundamental freedoms was unconstitutional to the extent of the inconsistency.
17. Public participation and stake holder engagement during legislative process was a constitutional requirement. Laws were enacted to serve the society and therefore members of the public had a right to participate and give their input prior to legislation. That was a constitutional requirement and could not be overlooked since it was one of the values and principles of the Constitution.
18. Article 10 of the Constitution was clear that the national values and principles of governance bound all state organs, state officers, public officers and all persons wherever they applied or interpreted the Constitution, enacted, applied or interpreted any law or made or implemented public policy decisions. The national values and principles of governance under article 10 of participation of the people could not be undermined.

19. In undertaking its legislative mandate, the National Assembly was required to follow the principles articulated in article 10(2) (b) of the Constitution on public participation. Article 118(1) (b) of the Constitution was mandatory that Parliament had to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
20. Public participation was not an option when it came to legislative matters. The National Assembly was under a constitutional obligation to facilitate public participation. No evidence was produced to show that there had been public participation. There was evidence to show that the Committee of the Board of Auctioneers was still engaging with stake holders and was yet to finalize deliberations when it noticed that amendments had been done.
21. Public participation was a fact and not by name. Anyone who alleged that there was public participation had the solemn duty to show through evidence that indeed there was such public participation. The National Assembly had a broad measure of discretion on how it would achieve the object of public participation and how it was to be affected would vary from case to case but it had to be clear that a reasonable level of participation was afforded to the public.
22. The standard to be applied in determining whether Parliament had met its obligation of facilitating public participation was one of reasonableness. The reasonableness of Parliament's conduct depended on the peculiar circumstances and facts at issue. When determining the question whether Parliament's conduct was reasonable, some deference had to be paid to what Parliament considered appropriate in the circumstances as the power to determine how participation in the legislative process would be facilitated rested upon Parliament. The Court had to have regard to issues like time constraints and potential expense. It had to be alive to the importance of the legislation in question

and its impact on the public. The amendments were made without public's involvement in violation of article 118 as well as the values and principles of the Constitution.

23. The amendments were made through Statute Law (Miscellaneous Amendments) Act, (No 11 of 2017). The preamble to the Act stated that it was an Act of Parliament to make minor amendments to statute law. Statute Law (Miscellaneous Amendments) Acts were omnibus legislations involving several statutes used to correct minor anomalies, inconsistencies and errors that had no significant effects or change to the meaning and import of the Statute.
24. Omnibus amendments in the form of Statute Law Miscellaneous legislations both on policy and good governance, which was one of the values and principles of governance in article 10 of the Constitution, which values and principles formed the foundation of the State and Nation as decreed in article 4(2) of the Constitution, ought to have been confined only to minor non-controversial and generally house-keeping amendments..
25. Statute Law (Miscellaneous Amendments) Act could not be used to make serious or substantial amendments to a statute or legislation as Parliament did in the instant case. The amendments effected through the Statute Law (Miscellaneous Amendments) Act were quite substantial and affected the composition of the Auctioneers Board at any one time circumstances necessitated change of status of a member or members of the Board as contemplated by section 3(3) of the Act. The introduction of section 11(2) in particular, affected rights and fundamental freedoms of citizens yet it was done as though it was a minor and inconsequential amendment and without engaging the public and more so those who would be affected by the new sub section.
26. Sections 3(3) and 11(2) could only be introduced through a normal Bill and after being subjected to public participation. The National Assembly could not introduce

substantive amendments that violated rights of individuals in the manner it was done to the Act. They were not correcting an error, inconsistency or anomaly. The amendments were critical and affected rights and fundamental freedoms of auctioneers who were not consulted as the class of persons to whom the amendment was directed. They needed to give their input before the amendment was effected.

27. The amendments and more particularly section 11(2) of the Act limited the right of auctioneers in violation of article 24(1) of the Constitution. The amendment was not only unreasonable but also unjustifiable in an open and democratic society based on human dignity, equality and freedom.
28. Both the Petition and Responses only targeted the amendments in the Act. It was not possible to fault the other statutes that were affected by the Statute Law (Miscellaneous Amendment) Act because they were not the focus of both Pleadings and Submission. The Court was not told to what extent if at all, amendments to those statutes violated the Constitution to enable it make a sound decision. The invitation was therefore declined.
29. Section 11(2) of the Act violated the Petitioners' rights and fundamental freedoms it was inconsistent with the Bill of Rights and was therefore unconstitutional. The amendments to the Act though substantive, were introduced through a Statute Law (Miscellaneous Amendments) Act and without the involvement and benefit of Public participation in violation of the values and principles in the Constitution.

*Petition allowed*

- i. *A declaration issued that sections 3 (3) and 11 (2) of the Auctioneers Act (No. 5 of 1996) were inconsistent with and in contravention of the Constitution and were*

*therefore unconstitutional.*  
ii. *Costs to the Petitioners.*

## **Cases**

### ***East Africa***

1. *Attorney General of Tanzania v Rev Christopher Mtikila* [2010] EA 13 – (Mentioned)
2. *Attorney General v Kituo cha Sheria & 7 others* Civil Appeal No 108 of 2014 – (Mentioned)
3. *Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission*, Petition No 294 of 2013 – (Mentioned)
4. *Law Society of Kenya v the Attorney General*, Constitutional Petition No 3 of 2016 – (Followed)
5. *Munyendo, Moses & 908 others v Attorney General and Minister for Agriculture* Petition No 16 of 2013 – (Mentioned)
6. *Mwau, John Harun v Independent Electoral and Boundaries Commission & another* Petition No 26 of 2013 – (Explained)
7. *Njoya & 6 others v Attorney General & another* [2004] 1 KLR 232-(Mentioned)
8. *Nyarangi & 3 others v Attorney General* [2008] KLR 688 – (Explained)
9. *Olum & another v Attorney General* [2002] 2 EA 508 – (Mentioned)
10. *Saleh Kamba v Attorney General & 4 others* (Const Applic No 14 of 2013) [2013] UGCC 6 (6 September 2013) – (Mentioned)
11. *Tinyefuze v Attorney General of Uganda*, Constitutional Petition No 1 of 1997



[1997]3 UGCC –(Mentioned)

### **South Africa**

1. *Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces & others* [20016] ZAACC22 – (Explained)

### **India**

1. *PUCL v Union of India* [2004] 2 SCC 476 – (Explained)

### **Statutes**

#### **East Africa**

1. Constitution of Kenya, 2010 articles 4(2); 10(2)(b); 24(1); 27(4); 57; 118 (1)(b) – (Interpreted)

2. Auctioneers Act (No 5) of 1996, Amended (Act No 11 of 2017) sections 3(3); 4; 10;11(2) – (Unconstitutional)

3. Statute Law (Miscellaneous Unconstitutional) Act 2017 – (Interpreted)

### **Advocates**

1. Apollo Mboya for the Petitioners

2. Miss Mwangi for the Respondent

### **Cases**

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1. *Attorney General of Tanzania v Rev Christopher Mtikila* [2010] EA 13 – (Mentioned)

2. *Attorney General v Kituo cha Sheria & 7 others* Civil Appeal No 108 of 2014 – (Mentioned)

3. *Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission*, Petition No 294 of 2013 – (Mentioned)

4. *Law Society of Kenya v the Attorney General*, Constitutional Petition No 3 of 2016 – (Followed)
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2. Auctioneers Act (No 5) of 1996, Amended (Act No 11 of 2017) sections 3(3); 4; 10;11(2) –

(Unconstitutional)

3. Statute Law (Miscellaneous Unconstitutional) Act 2017 – (Interpreted)

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1. *Attorney General of Tanzania v Rev Christopher Mtikila* [2010] EA 13 – (Mentioned)

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3. *Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission*, Petition No 294 of 2013 – (Mentioned)

4. *Law Society of Kenya v the Attorney General*, Constitutional Petition No 3 of 2016 – (Followed)

5. *Munyendo, Moses & 908 others v Attorney General and Minister for Agriculture* Petition No 16 of 2013 – (Mentioned)

6. *Mwau, John Harun v Independent Electoral and Boundaries Commission & another* Petition No 26 of 2013 – (Explained)

7. *Njoya & 6 others v Attorney General & another* [2004] 1 KLR 232-(Mentioned)

8. *Nyarangi & 3 others v Attorney General* [2008] KLR 688 – (Explained)

9. *Olum & another v Attorney General* [2002] 2 EA 508 – (Mentioned)

10. *Saleh Kamba v Attorney General & 4 others* (Const Applic No 14 of 2013) [2013] UGCC 6 (6 September 2013) – (Mentioned)

	<p>11. <i>Tinyefuze v Attorney General of Uganda</i>, Constitutional Petition No 1 of 1997 [1997]3 UGCC –(Mentioned)</p> <p><b>South Africa</b></p> <p>1. <i>Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces &amp; others</i> [20016] ZAACC22 – (Explained)</p> <p><b>India</b></p> <p>1. <i>PUCL v Union of India</i> [2004] 2 SCC 476 – (Explained)</p> <p><b>Statutes</b></p> <p><b>East Africa</b></p> <p>1. Constitution of Kenya, 2010 articles 4(2); 10(2)(b); 24(1); 27(4); 57; 118 (1)(b) – (Interpreted)</p> <p>2. Auctioneers Act (No 5) of 1996, Amended (Act No 11 of 2017) sections 3(3); 4; 10;11(2) – (Unconstitutional)</p> <p>3. Statute Law (Miscellaneous Unconstitutional) Act 2017 – (Interpreted)</p> <p><b>Advocates</b></p> <p>1. Apollo Mboya for the Petitioners</p> <p>2. Miss Mwangi for the Respondent</p>
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-

Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO 120 OF 2017**

**JOSEPHAT MUSILA MUTUAL.....1<sup>ST</sup> PETITIONER**

**ELAM NGASE LUMWANGL.....2<sup>ND</sup> PETITIONER**

**JAMES ONYANGO JOSIAH.....3<sup>RD</sup> PETITIONER**

**DICKSON MATHI KINGOLI.....4<sup>TH</sup> PETITIONER**

**FELIX APOLLO OWUOR.....5<sup>TH</sup> PETITIONER**

**SAMUEL MUTAHI GATHOGO.....6<sup>TH</sup> PETITIONER**

**JOHN MBLIWE.....7<sup>TH</sup> PETITIONER**

**JUSTUS MATUNDURA.....8<sup>TH</sup> PETITIONER**

**STEPHEN JUMA ONYANGO.....9<sup>TH</sup> PETITIONER**

**GEOFFREY KANGETHE .....10<sup>TH</sup> PETITIONER**

**VERSUS**

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

**AND**

**AUCTIONEERS LICENSING BOARD.....1<sup>ST</sup> INTERESTED PARTY**

**KENYA NATIONAL SOCIETY OF**

**PROFESSIONAL AUCTIONEERS.....2<sup>ND</sup> INTERESTED PARTY**

**NATIONAL ASSOCIATION OF**

**KENYA AUCTIONEERS.....3<sup>RD</sup> INTERESTED PARTY**

**JUDGMENT**

1. In 2016, the National Assembly through the Statute Law (Miscellaneous amendment) Act 2016, amended various statutes one of them being *The Auctioneers Act* (No. 5) of 1996. Various provisions of the Auctioneers Act were amended including introduction of subsection (3) to section 3, section 4 11(2) which made significant changes to the Act which have caused disquiet within the Auctioneers fraternity who feel aggrieved and contend that the amendments are unconstitutional.

### **Petition**

2. The petitioners who are registered Auctioneers, filed a petition dated 28<sup>th</sup> March 2017 against the **Attorney General** as the principal advisor to the National Government and one mandated to represent the Government in Civil litigation with the duty to promote, protect and uphold the rule of law and defender of Public interest. Also enjoined in the petition as 1<sup>st</sup> interested party is the **Auctioneers licensing Board**, established under section 5 of the Auctioneers Act with the mandate to supervise and control the business and practice of Auctioneers, **Kenya National Society of Professional Auctioneers**, the 2<sup>nd</sup> interested party, a professional Auctioneers company which deals with private investigations process servers, repossessions and executions; and **National Association of Kenya Auctioneers**, the 3<sup>rd</sup> Interested party, a professional Association of Licensed Auctioneers in Kenya.

3. The petitioners averred that a committee of the Auctioneers Licensing Board was formed to review the Auctioneers Act and rules which it did after taking views for various stake holders. It resolved to have the draft report circulated to stakeholders identified by the Board including the Law Society of Kenya among others.

4. It was stated that the 1<sup>st</sup> interested party received proposals from various Auctioneers Associations which it intended to consolidate but while consolidation of those views was in progress, the respondents published the impugned Statute Law (Miscellaneous Amendments) Bill to amend among other statutes, the Auctioneers Act introducing section 3(3) and section 11(2).

5. The petitioners averred that the process leading to the amendment of the Auctioneers Act contravened the principle contained in Article 10 of the Constitution including that of public participation thus the amendments were effected in violation of Articles 10 and 118 of the Constitution.

6. The petitioner further averred that introduction of sub section 3 to section 3 is discriminatory and a violation of Article 27 of the Constitution and that the introduction of subsection (2) to section 11 is unconstitutional. Sub section 2 requires that a licensed auctioneer retires on attaining the aged 70 years. The petitioners averred that the provision is discriminatory on account of age and that it violates the principle of protection of the marginalized contrary to Article 10.

7. The petitioners further stated that the section 11 (2) violates and undermines the constitutional right of older members of society contrary to Article 57 of the Constitution hence violates the values and principles of the Constitution.

8. Based on the above facts, the petitioners sought the following reliefs:-

*i. A declaration be made that the new subsection (3) to Section 3 and new subsection (2) to Section 11 of the Auctioneers Act are inconsistent with and contravene the Constitution of Kenya as set out in paragraphs 19 – 27 hereinabove and therefore unconstitutional.*

*ii. Pursuant to the declaration in prayer (i) above, the said sections of the Auctioneers Act to wit subsection (3) to Section 3 and new subsection (2) to Section 11 of the Auctioneers Act are inconstant with and contravene the Constitution be declared invalid and struck off forthwith.*

*iii. A declaration that the Respondents exceeded their powers and mandate under Article 118 of the Constitution of Kenya thereby vitiating the process of making amendments to the auctioneers Act and rendering the amendments enacted invalid.*

*iv. A declaration that The Statute Law (Miscellaneous amendments) Bill, 2016 (National Assembly Bill No 45 of 2016) is invalid because the process of making it was flawed.*

*v. Any other relief or such other orders as this Honourable Court shall deem fit and just to grant.*

*vi. Costs of tis petition be awarded to the petitioners.*

### **Respondent's Response**

9. The respondent filed grounds of opposition dated 4<sup>th</sup> May 2017 and filed in Court on 10<sup>th</sup> May 2017. The responded contended

that the petition does not plead with precision constitutional violations or breaches to sustain a constitutional petition, that the respondent acted within the law, while drafting the Statute Law (Miscellaneous Amendment) Act No. 45 of 2016, that the rights provided for under Article 57 are not absolute and are subject to limitation within the confines of the law and that subsection 2 of section 11 was not meant to discriminate against any person on any ground but was introduced for the purpose maintaining efficiency among auctioneers for the benefit of the public seeking services of auctioneers.

10. The respondent further contended that the process leading to the enactment of the Statute Law (Miscellaneous Amendment) Act was lawful since it was circulated to stakeholders who represented the public seeking their input before publication, debate and enactment. It was contended that the petition is not only frivolous and unmeritorious but also incompetent and misconceived.

#### ***Petitioners Submissions***

**11. Mr. Apollo Mboya**, learned Counsel for the petitioners, submitted both through oral and written submissions first, that the process leading to the amendment of the Auctioneers Act was unlawful. Mr. Mboya pointed out annexures SH 3 and 4 to the affidavit in support of the petition to show that the Auctioneers Board was still in the process of discussing the views collected from its members when the Bill was published to confirm that the amendments were done without the input of the Auctioneers Board.

12. Second, learned counsel contended that **sub section 3** of section 3 to the Act is discriminatory since it requires that if the chair of the Board is appointed a judge, he/she has to relinquish the position. According to learned counsel, there is discrimination which offends the provisions of Article 27 of the Constitution. Counsel contended that prior to the amendment, the chair had to be a judge or one qualified to be a judge, hence the new provisions is discriminatory and therefore, unconstitutional.

13. Lastly learned counsel contended that **section 11(2)** is unconstitutional for requiring auctioneers to retire at age of 70 from the profession of auctioneers. Learned counsel contended that auctioneers are self-employed who do not retire from private business. He argued therefore that section 11(2) is unconstitutional for going against Article 27(4) and also offends Article 57 of the Constitution. Counsel further argued that by virtue of Article 57, the state is required to take measures to ensure that rights of old people fully participate in the affairs of society and pursue personal development.

#### ***Respondents Submissions***

**14. Miss Mwangi**, learned counsel for the respondent, submitted that the Act was meant to regulate the Auctioneers profession and protect the general public from rogue auctioneers. Regarding the process leading to the amendments, learned counsel contended that there was public participation and pointed out to the annexures in the petitioners' affidavit to show that there was public participation.

15. On the contention that the amendments introduced discrimination, learned counsel submitted that Article 24(1) of the Constitution permits limitation of rights where justified. Counsel contended that the limitation introduced by section 11(2) is justifiable in the circumstances.

16. On the alleged violation of Article 57 of the Constitution on the right of older members of society to participate in national affairs, learned counsel argued that the right can also be limited and was thus limited. And on the fact that section 3 (3) prohibits a judge from sitting on the Board, counsel submitted that this would not cause any prejudice, hence there is nothing unconstitutional about it. Learned counsel concluded that the petition is not merited and should be dismissed.

#### ***Determination***

17. I have considered this petition, the response, submissions by counsel for the parties and the authorities relied on. This petition raises two questions for determination. Whether **sections 3(3)** and **11(2)** of the Act are unconstitutional, and whether there was public participation before the enactment of the impugned provisions.

18. Before addressing the issues raised in this petition, it is important to remind ourselves the principles of constitutional interpretation. First, Article 259(1) states that the **Constitution should be interpreted in a manner that (a) promotes its purposes, values and principles, (b) advances the rule of law and the human rights and fundamental freedoms in the Bill of rights, (c) permits the development of the law and (d) contributes to good governance.**



19. Second, that the entire Constitution has should be read as an integrated whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and not one provision destroying another. That is the Constitution should be given a holistic interpretation and read as one entity to give value to the aspiration of the people, that constitutional provisions ought to be interpreted broadly or liberally and that constitutional provisions must be read to give values and aspirations of the people. (*Tinyefuze v Attorney General of Uganda*, Constitutional Petition No 1 of 1997 [1997]3 UGCC, *Attorney General of Tanzania v Rev Christopher Mtikila* [2010] EA 13 and *Njoya & 6 Others v Attorney General & another* [2004]eKLR)

20. Third, the Court should look at both purpose and effect to ascertain the Constitutional validity of a statute or statutory provision (*Olum and another v Attorney General* [2002] 2 EA 508.) That is a statute or provision of a statute challenged should be laid against the constitutional provision said to have been violated to enable the Court determine whether that is the Case.

21. Fourth, a constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic, progressive, liberal and flexible interpretation keeping in view the ideals of the people, their socio economic and political, cultural values so as to extend the same to the possible maximum. (*Saleh M.W. Kamba & another v Attorney General & others* Petition No. 16 of 2013 (Constitutional Court of Uganda,), *Attorney General v Kituo cha Sheria & 7 others* [2017] eKLR

#### ***Whether Section 3(3) and 11(2) are Constitutionally Invalid***

22. The petitioners have contended that sections 3(3) and 11(2) are constitutionally invalid for introducing an element of discrimination Contrary to Article 27(4). Section 3 as amended now reads;

***1) There is established a Board to be known as the Auctioneers Licensing Board which shall consist of—***

***(a) One person qualified for appointment as a judge of the High Court or the Court of Appeal under Chapter 10 of the Constitution appointed by the Chief Justice, who shall be chairman;***

***(b) the Permanent Secretary in the Office of the President for the time being responsible for matters relating to National Security, or his representative;***

***(c) one Chief Magistrate to be appointed by the Chief Justice;***

***(d) two advocates, of not less than ten years' standing to be nominated by the Council of the Law Society;***

***(e) four auctioneers of not less than five years' standing, nominated by the Chief Justice on the recommendation of the association;***

***(g) one person nominated by the National Chamber of Commerce and Industry;***

***(h) one person nominated by the Kenya Bankers Association, to represent financial institutions.***

***(2) A member of the Board other than an ex officio member shall hold office for three years but shall be eligible for re-appointment for one further term of three years.***

***(3) Where a member of the Board nominated under section 3(1) (a), (b), (c) or (d) is nominated to the position of High Court, Court of Appeal or Supreme Court of Kenya, the appointee shall cease to serve as a member of the Board immediately upon assumption of office or elevation."***

23. The section provides that if a member of the Board appointed under section 3(1) (a), that is a person qualified to be appointed as judge of the High Court or Court of Appeal appointed by the Chief Justice, (b) permanent Secretary in the Office of the President in charge of National Security,(c) a Chief Magistrate appointed by the Chief Justice, and (d) two advocates representing the Law Society is appointed to the position of judge, he/she should relinquish his/ her membership to the Board. Prior to the amendment

there was no such provision which meant one would continue serving in the Board despite having been appointed a Judge. Indeed Mr. Mboya submitted that the current chair is a serving Judge. He therefore argued that section 3(3) introduced discrimination against persons who may be appointed to the Board but who end up becoming Judges and have to relinquish their membership to the Board.

24. Article 27 (4) of the Constitution provides that:-

***“The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”***

25. The law as it stands now is that once a person appointed under section 3 (1) (a), (b), (c) or (d) to the Auctioneers Board, is appointed to the position of Judge, he/she should relinquish that position. Whereas the section still requires that a person qualified to be a judge of the High Court or Court of Appeal be appointed to the Board, one Chief Magistrate, and two advocates of not less than 10 years standing, any of these members or all of them would have to leave the Board if any or all of them were appointed to the position of Judge.

26. It is not clear why a person required to have qualification for appointment as a judge should relinquish his position in the Board once appointed a judge. The Chief Magistrate and even members of the Law Society all qualify for appointment as Judges and there is a possibility that all members of the Board under this bracket could easily be appointed as Judges at the same time which would render the Board non-functional. It is not clear the mischief the Legislature intended to cure through this amendment.

27. The respondent did not offer any justification for these changes except saying that there was no discrimination. A law requiring a member of the Board in to leave his position because he/she has been appointed a Judge would on the face it appear discriminatory based on status or class. However, it is not the Court’s duty to inquire into the policy or parliament’s wisdom in enacting a particular legislation. The Courts duty is to determine whether the law squares with the Constitution. There may be underlying reasons or justification but which the respondent did postulate. There may be reasons such as conflict of interest, busy schedule among others.

28. To my mind I do not see a serious conflict between section 3 (3) and Article 27 (4) of the Constitution. Excluding Judges from being members of the Board of Auctioneers cannot be said to be unconstitutional for reasons of discrimination. The Chief magistrate, the member appointed by the Chief Justice and the representing the Law Society are capable of discharging the duties the persons appointed judges would have performed.

29. In any case, it is not every little violation that should be declared unconstitutional. Article 24(1) of the Constitution allows limitation of rights so long as the limitation is by law and is reasonable and justifiable in an open and democratic society. The limitation introduced by section 3 (3) is by law and in my view, it is reasonable and justifiable. It may be that Judges are busy are often transferred to places and they may face challenges in attending Board meetings. As stated by the Supreme Court of India in ***PUCL v UNION OF INDIA [2004] 2 SCC 476;***

***“A statute carries with it a presumption of constitutionality. Such presumption extends also in relation to a law which has been enacted for imposing reasonable restrictions in the fundamental right”***

30. In the circumstances, I see no constitutional invalidity with regard to section 3 (3) of the Act. The only problem I find is on ***section 3(3) (b)***. One person who is to join the Board by virtue of position in government is the ***Permanent*** (now cabinet) ***Secretary in the Office of the President for the time being responsible for matters relating to National Security, or his representative***. The section states that even this person should relinquish his position in the Board on being appointed to the position of Judge. It is not clear if the National Assembly really realized this oversight.

31. All in all, I really do not see any serious conflict between this section and the constitution to render it unconstitutional. Yes there is an element of discrimination but I do not think it is a grave violation to warrant a declaration of invalidity. It is a reasonable limitation and in my view, it is justifiable to avoid burdening judges with administrative matters of the Auctioneers Board. Moreover, decisions of the Board especially those of auctioneers discipline being quasi- judicial are appealable to the High Court and thereafter to the Court of Appeal. It is only reasonable that Judges be exempted from sitting on the Board.

32. Regarding *section 11(2)*, the petitioner argued that it not only discriminates against older members of society but also violates their right to work and earn a living thus a violation contrary to both Articles, 27 and 57 of the Constitution. The respondent however saw nothing wrong with this section and submitted that the section was intended to protect members of the public who are auctioneers' clients....

33. Section 10 of the Act provides for qualifications for one to be licensed as an auctioneer. He has to be a Kenyan citizen, experienced, of good moral character, not convicted of a criminal offence and not disqualified from holding a licence.

34 Section 11(2) of the Act however provides that *a licensed auctioneer shall retire at the age of seventy (70) years*, a provision that has been challenged for being discriminatory and a violation of rights and fundamental freedoms.

35. Article 27(1) guarantees equality and freedom from discrimination. It provides that *every period is equal before the law and has the right to equal protection and equal benefit of the law* – equality includes the full and equal enjoyment of all rights and fundamental freedom. The import of this Article is that human rights and fundamental freedom are guaranteed to all persons by virtue of being human and must be enjoyed without limitation. That is rights and fundamental freedoms are guaranteed by the Constitutions and must be enjoyed by all human beings in equal measure and to the fullest extent.

36. Article 27(4) is clear that the state shall not discriminate directly or indirectly against all person on any ground, including, race, sex pregnancy, marital status, ethnic or social origin colour, *age* disability religion, conscience belief, culture, dress language or birth.

37. The constitution therefore prohibits all forms of discrimination and grounds of discrimination are not exhaustive. The petitioners have argued that barring auctioneers from practicing on attaining 70 years of age is discriminatory. Discrimination is that act of subjecting on person to different treatment from the others on any of the grounds stated in Article 27(1) of the Constitution. When a person is subjected to a different standard of treatment because of his age that is open discrimination.

38. In the case of *Nyarangi & 3 Others v Attorney General [2008] KLR 688*, the Court discrimination was defined as-

*“The effect of law or established practice that confers privilege on a class or that denies privileges to a certain class because of race, age, sex, nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when reasonable distinction can be found between those favoured and those not favoured.”*

39. In *John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR*, the Court stated referring to Article 27 of the Constitution;

*“[i]t must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the constitution.”*

40. Auctioneers are human beings. They carry out business just like any other person for purposes of earning a living. They are in private business as opposed to public engagement. Although they serve clients, theirs is private business which they do as individuals. The fact that they should retire on attaining the age of 70 was not based on any sound legal logic. They have offices, staff and clientele to serve. They are in private business and not public. They earn what they make in their private business. I do not therefore see any justification to require them to fold their businesses simply because they have attained the age of 70 years.

41. Article 4(2) of the Constitution declares the Republic of Kenya as *a multi-party democratic State founded on the national values and principles of governance referred to in Article 10*. These values and principles of governance include; (a) *patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people*; (b) *human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized*

42. In that regard therefore, any government founded on national values and principles of governance such as the rule of law, human equality, social justice and non-discrimination, cannot legislate to discriminate against a section of its citizens because on account of age and more so that they should not pursue private business engagement through which they earn a living simply because they have attained a certain age. That is an obvious violation of clear constitutional provisions and such legislation would

be null.

43. Furthermore, Article 57 of the constitution behooves the government to take measures to ensure the rights of older persons to fully participate in the affairs of society, pursue their personal development and to live in dignity and respect and are free from abuse. Auctioneers are citizens in private business working to earn a living. They engaged in personal development and want to live in dignity by earning a decent and reasonable income to enable them sustains their dignity. They require respect but not discrimination. They are not a bother to society and least of all the government regulates their conduct while they are in business. Unless one has violated the law that governs the business of auctioneers, there should be no reason to prescribe age limit for persons engaged in private business such as auctioneers. Section 11(2) obviously violates the auctioneers right under both Article 27(4) and 57 of the Constitution. A Statute or statutory provisions that violate rights and fundamental freedoms is unconstitutional to the extent of the inconsistency.

***Whether the procedure adopted in introducing the amendments was faulty.***

44. Lastly the petitioners contended that procedure leading to the amendments to the Auctioneers Act violated Articles 118 and 10 of the Constitution on public participation. According to the petitioners, there was no consultation and that the amendments were effected while the Board was still conducting stakeholders' engagement.

45. Public participation and stake holder engagement during legislative process is a constitutional requirement. Laws are enacted to serve the society and therefore members of the public have a right to participate and give their input prior to legislation. This is constitutional requirement that cannot be overlooked since it is one of the values and principles of our Constitution.

46. Article 10 is clear that these national values and principles of governance bind all state organs, state officers, public officers and all persons wherever they apply or interpret the Constitution, enact, apply or interpret any law, or make or implement public policy decisions. The national values and principles of governance under Article 10 of participation of the people cannot be undermined.

47. The Constitution outlaws all forms of discrimination and makes it one of the national values and principles of governance. In undertaking its legislative mandate, the national Assembly is required to follow the principles articulated in Article 10(2) (b) of the Constitution on public participation. Article 118(1) (b) of the Constitution is mandatory that parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

48. Public participation not an option when it comes to legislative matters. The national Assembly was under a constitutional obligation to facilitate public participation. In their submissions, the respondent's counsel stated that there had been public participation but there was no evidence to that effect from them. Moreover the petitioners attached evidence to show that the committee of the Board of Auctioneers was still engaging with stake holders and was yet to finalize deliberations when it noticed that amendments had been done.

49. Public participation is a fact and not by name. Anyone who alleges that there was public participation like the respondents did has the solemn duty to show through evidence that indeed there was such public participation. I agree with the Court's observation in the case of Moses Munyendo & 908 Others v The Attorney General and Minister for Agriculture [2013] eKLR, that the National Assembly has a broad measure of discretion on how they achieve the object of public participation and that how it is affected will vary from case to case but that it must be clear that a reasonable level of participation was afforded to the public.

50. In the case of Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) vs. Salaries and Remuneration Commission, Petition No. 294 of 2013, the Court observed:

**“Public participation as a national value is recognized under Article 10 of the Constitution. The Constitution at Article 94 has vested legislative authority of the people of Kenya in Parliament and Article 118 has provided for public participation and involvement in the legislative business.”**

51. And in the South African case of Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others [20016] ZAACC22 the Constitutional Court observed with regard to the standard of participation;-

*“The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament’s conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament’s conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public.”(emphasis)*

52. From the exposition of the law above and considering the record, there is no evidence that there was any public participation. The amendments were made without public’s involvement in violation of Article 118 as well as the values and principles of our Constitution.

53. Finally, the amendments were made through Statute Law (Miscellaneous Amendments) Act, (No 11 of 2017). The preamble to the Act states that it is an Act of Parliament to make minor amendments to statute law. Statute Law (Miscellaneous Amendments) Acts are omnibus legislations involving several statutes used to correct minor anomalies, inconsistencies and errors that have no significant effects or change to the meaning and import of the statute. This position was affirmed in the case of Law Society of Kenya v the Attorney General, Constitutional Petition No. 3 of 2016, where the Court stated;

**[234]. It is therefore clear that both on policy and good governance, which is one of the values and principles of governance in Article 10 of the Constitution, which values and principles form the foundation of our State and Nation as decreed in Article 4(2) of the Constitution, omnibus amendments in the form of Statute Law Miscellaneous legislations ought to be confined only to minor non-controversial and generally house-keeping amendments.”**

54. In that regard therefore, statute Law (Miscellaneous Amendments) Act, cannot be used to make serious or substantial amendments to a statute or legislation as parliament did in the case of the Auctioneers Act, (No.5 of 1996.) Looking at the amendments effected through this Statute Law (Miscellaneous Amendments) Act, they were quite substantial and affected the composition of the Auctioneers Board at any one time should circumstances necessitate change of status of a member or members of the Board as contemplated by section 3(3) of the Act. The introduction of section 11(2) in particular, affected rights and fundamental freedoms of citizens yet it was done as though it was a minor and inconsequential amendment, and without engaging the public and more so those who would be affected by the new sub section.

55. Sections 3(3) and 11(2) could only be introduced through a normal Bill and after being subjected to public participation. The National Assembly could not introduce substantive amendments that violate rights of individuals in the manner it was done to the Auctioneers Act. They were not correcting an error, inconsistency or anomaly. The amendments were critical and affected rights and fundamental freedoms of auctioneers who were not consulted as the class of persons to whom the amendment was directed. They needed to give their input before the amendment was effected.

56. To that extent, the amendments and more particularly section 11(2) limited the right of auctioneers in violation of Article 24(1) of the Constitution. The amendment is not only unreasonable but also unjustifiable in an open and democratic society based on human dignity, equality and freedom.

57. The petitioners asked the Court to declare the entire Statute Law (Miscellaneous Amendment) Act 9 No. 11 of 2017 unconstitutional. However, both the petition and responses only targeted the amendments in the Auctioneers Act. I am therefore unable to fault the other statutes that were affected by the Statute Law (Miscellaneous Amendment) Act the subject of this petition because they were not the focus of both pleadings and submission. The Court was not told to what extent if at all, amendments to those statutes violated the Constitution to enable the Court make a sound decision. This invitation is therefore declined.

58. In conclusion, having carefully considered this petition, the evidence on record and submissions by counsel, I am satisfied that the section 11(2) violates the petitioners’ rights and fundamental freedoms, is inconsistent with the Bill of Rights and is therefore unconstitutional. Furthermore, the amendments to the Auctioneers Act (No.5 of 1996) though substantive, were introduced through a Statute Law (Miscellaneous Amendments) Act and without the involvement and benefit of Public participation in violation of the values and principles in the Constitution.

59. For that reasons therefore, the petition dated 28<sup>th</sup> March 2017 is allowed as follows;

*i. A declaration is hereby issued that Sections 3 (3) and 11 (2) of the Auctioneers Act (No. 5 of 1996) are inconsistent with and in contravention of the Constitution and are therefore unconstitutional.*

*ii. Costs to the petitioners.*

**Dated, Signed and Delivered at Nairobi this 23<sup>rd</sup> Day of February 2018**

**E C MWITA**

**JUDGE**



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