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Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Judgment
Judge:	David Shikomera Majanja
Citation:	JAYNE MATI & Another v ATTORNEY GENERAL & 2 Others [2011] eKLR
Advocates:	-
Case Summary:	-
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Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 108 OF 2011

BETWEEN

JAYNE MATI.....1ST
PETITIONER

DAVIS ADIENO.....2ND
PETITIONER

AND

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

THE DEPUTY PRIME MINISTER

AND MINISTER FOR FINANCE2ND
RESPONDENT

JUDGMENT

Introduction

1. This petition raises important questions of compliance with certain provisions of the Constitution. The Constitution, 2010 brought with it an entire super structure of legal and political processes superimposed on an old system. In this respect, the budget process of 2011 brought to fore the problems of transition from the old system to the new one. I am asked in this case to pronounce on the constitutionality of these events.

Petitioner's Case

2. Two public spirited Kenyans, Jayne Mati and Davis Adieno, have brought this petition dated 30th June 2011 seeking the following prayers;-

*(1)The Court be pleased to issue a declaration that the National Assembly contravened **Articles 114, 206, 221 and Article 222** of the Constitution of the Republic of Kenya by permitting debate, approving and passing the motion authorising the withdrawal of Kshs.368,316,172,339/= from the Consolidated Fund brought before the House on the 14th June 2011 and passed by Parliament on the 16th June 2011 and is therefore null and void.*

*(2)The Court be pleased to issue a declaration that it is unconstitutional for any person, state organ and/or any state authority to withdraw any money under **Article 222** from the Consolidated Fund without passing of an Appropriation bill and/or Act by the National Assembly.*

(3)The Court be pleased to issue a conservatory order restraining any person, state organ and/or authority from withdrawing any money from the Consolidated Fund without an Appropriation Bill and/or Act by the National Assembly.

(4)Costs

(5)Any other relief that the Court deems fit.

3. The petition is supported by the affidavit of Jayne Mati sworn on 30th June 2011. The facts in the affidavit are supported by extracts from the Hansard of the National Assembly for the proceedings of 14th June 2011 and 16th June 2011. There is also an extract of the Bill Tracker which shows the schedule of all the bills introduced or debated in the National Assembly in the year 2011 as at 16th June 2011.

4. The basic facts are uncontested and where the matters concern specific provision of the law or general course of proceedings in Parliament, I am entitled to take judicial notice by virtue of **sections 60(1)(a) and (b)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**.

5. The undisputed facts forming the basis of the petitioner's claim are as follows;

(1) On 16th June, 2011, the National Assembly passed a motion authorizing the withdrawal of Kshs.368,316,172,939/= from the consolidated fund.

(2) The motion brought before the National Assembly by the Minister of Finance was expressed to be under **Article 222** of the Constitution.

(3) At the material time, there was no appropriation bill for the financial year 2011/2012 published or introduced in Parliament and passed by parliament.

(4) There was no Appropriation Act pending before the President for his assent and none had been placed before him for assent.

6. The petitioners aver that the introduction of the motion and subsequent approval by the National Assembly of the motion are *ultra vires* **Articles 114** and **222** of the Constitution and is therefore a violation of the Constitution.

Respondent's Case

7. The respondents opposed the petition on the grounds set out in their grounds of opposition dated 27th July 2007 as follows;-

(1) The petition is frivolous, incompetent and lacks merit as there is no violation of **Articles 114, 206, 221** and **222**. The subject authorization known as Authorization of Vote on Account is indeed specifically provided for and was done under and in total compliance with **Articles 206** and **222(1)** of the Constitution.

(2) The petition is fatally defective and bad in law for material non joinder of the National Assembly. The orders sought cannot issue in so far as the petitioners allege that they are aggrieved by the decision of the National Assembly. In particular the decision by the temporary Deputy Speaker permitting debate, approval and the subsequent passage of the Motion authorizing the withdrawal of the one half of the total estimates of Recurrent and Development Expenditure from the Consolidated Fund.

(3) Declaratory order or conservatory order cannot issue in view of the foregoing and under the circumstances. A Declaratory Order and or Conservatory order if issued in the manner prayed or at all will amount to contravention of **Articles 220, 221, 222, 223, and 224** of the Constitution and in particular the provisions dealing with Authorization of Vote on Account, and Supplementary appropriation whose necessity cannot be overstated.

(4) The petitioners have not demonstrated in any way or all the alleged violation of **Article 114** and or **Article 221** of the Constitution.

(5) The alleged violation of the right of public participation in the budget making process is premature and unwarranted.

(6) In view of the foregoing, the 1st and 2nd respondents pray the application and the petition be dismissed with costs.

The Submissions

8. Mr. Kabugu, who prosecuted the petition on behalf of the petitioner, submitted that the withdrawal of the money from the consolidated fund was contrary to **Articles 114, 206, 221 and 222** of the Constitution as such money was withdrawn from the Consolidated Fund without following the procedure provided by the Constitution. He further submitted that the Minister overran the relevant Parliamentary Committee and the general public was denied the opportunity to participate in the budget process. He urged me to allow the petition as there was a clear contravention of the Constitution.

9. Mr. Bitta, for the respondent, argued that the petition was misconceived. He submitted that the provisions of **Articles 114** of the Constitution are suspended by virtue of **section 2(1)(b)** of the **6th Schedule** of the Constitution thus the current law on financial legislation is applicable. He asserted that **Article 206(2) (b)** allows money to be withdrawn in accordance with **Articles 222 or 223**. The operative words in **Article 222** are *“has not been assented to, or is not likely to be assented to.”* These entitled the legislature to act the way it did in the absence of a bill or Appropriation Act. The limitations as to the amount set in **Article 222(2)** were complied with. He urged me to dismiss the petition.

General Principles of Interpretation

10. Before proceeding to determine the issues in the matter, it is important to consider the principles applicable in interpreting the Constitution.

11. **Article 259(1)** provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights, permits development of the law and contributes to good governance.

12. More recently the Supreme Court in **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011] eKLR** at *para. 51* adopted the words of **Mohamed AJ** in the Namibian case of **S v Acheson 1991(2) S A 805 (page 813)** where he stated that, *“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the processes of judicial interpretation and judicial discretion.”*

13. The court also adopted, the words of the Namibian Supreme Court in **Minister of Defence, Namibia v Mwandighi 1992 (2) SA 335** (page 362) where it was stated that, “*The Namibian Constitution must therefore be purposively interpreted, to avoid the ‘austerity of tabulated legalism.’*”

14. I shall also have regard to the principle of harmonization which was given full expression in the case of **Tinyefuza v. The Attorney General Constitutional Appeal No. 1 of 1997(Unreported)** where the Supreme Court of Uganda stated, “*....the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the Constitution.*”

15. The tenor of the petitioners’ case is once there is a breach of a mandatory provision of the Constitution, such as that concerning the budget process; it follows that I must make a declaration of invalidity. In my view, all the provisions of the Constitution must be read as a whole to promote the purposes set out in **Article 259(1)**. It is against this background that I will consider the provisions of **Article 114, 206, 221 and 222** of the Constitution.

Provisions of Articles 206, 221 and 222 of the Constitution

16. **Articles 206, 221 and 222** of the Constitution provide as follows;

Consolidated Fund and other public funds

206.(1) *There is established the Consolidated Fund into which shall be paid all money raised or received by or on behalf of the national government, except money that-*

(a) is reasonably excluded from the Fund by an Act of parliament and payable into another public fund established for a specific purpose; or

(b) may, under an Act of parliament, be retained by the State organ that received it for the purpose of defraying the expenses of the State organ.

(2) *Money may be withdrawn from the Consolidated Fund only-*

(a) In accordance with an appropriation by an Act of parliament;

(b) In accordance with Article 222, or 223; or

(c) As a charge against the Fund as authorised by this constitution or an Act of parliament.

(3) *Money shall not be withdrawn from any national public fund other than the Consolidated Fund, unless the withdrawal of the money has been authorised by an Act of Parliament.*

(4) Money shall not be withdrawn from the Consolidated Fund unless the Controller of Budget has approved the withdrawal.

Budget estimates and annual Appropriation Bill

221 (1) at least two months before the end of each financial year, the Cabinet Secretary responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly.

(2) The estimates mentioned in clause (1) shall-

(a) include estimates for expenditure from the Equalisation Fund; and

(b) be in the form, and according to the procedure, prescribed by an Act or parliament.

(3) The National Assembly shall consider the estimates submitted under clause (21) together with the estimates submitted under clause (1) together with the estimates submitted by the parliamentary Service Commission and the Chief Registrar of the Judiciary under Articles 127 and 173 respectively.

(4) Before the National Assembly considers the estimates of revenue and expenditure, a committee of the Assembly shall discuss and review the estimates and make recommendations to the Assembly.

(5) In discussing and reviewing the estimates, the committee shall seek representations from the public and the recommendations shall be taken into account when the committee makes its recommendations to the National Assembly.

(6) When the estimates of national government expenditure and the estimates of expenditure for the Judiciary and Parliament have been approved by the National Assembly, they shall be included in an Appropriation Bill, which shall be introduced into the National Assembly to authorise the withdrawal from the Consolidated Fund of the money needed for the expenditure, and for appropriation of that money for the purposes mentioned in the Bill.

(7) The Appropriation Bill mentioned in clause (6) shall not include expenditures that are charged on the Consolidated Fund by this Constitution of an Act of Parliament.

Expenditure before annual budget is passed

222(1) If the Appropriation Act for a financial year has not been assented to, or is not likely to be assented to, by the beginning of that financial year, the National Assembly may authorise the withdrawal of money from the Consolidated Fund.

(2) Money withdrawn under clause (1) shall –

(a) Be for the purpose of meeting expenditure necessary to carry on the services of the national government during that year until such time as the Appropriation Act is assented to;

(b) Not exceed in total one-half of the amount included in the estimates of expenditure for that year that have been tabled in the national Assembly; and

(c) Be included, under separate votes for the several services in respect of which they were withdrawn, in the Appropriation Act.

17. **Article 114** defines a “Money Bills” as a bill dealing with taxes, imposition of charges on a public fund, appropriation, receipt, custody, investment or issue of public money, raising or guaranteeing of any loan or its repayment. By virtue of **section 2(1)(a)** of the **6th Schedule, Transitional and Consequential Provisions**, the contents of Chapter Eight of the Constitution, of which **Article 114** is part, are suspended until the final results of the first elections for Parliament under the Constitution. I shall therefore not refer to **Article 114** for purposes of this decision.

18. The provisions of **Articles 206, 221** and **222** of Chapter Twelve of the Constitution deal with public finance. A key principle set out in **Article 201(a)** is that there shall be openness and accountability including public participation in financial matters. These provisions represent a departure from a past where public financial matters were a preserve of the executive and the legislature was expected to rubber stamp the outcome of decisions made in the opaque rooms at the Treasury.

19. Under **Article 206** money may be withdrawn from the Consolidated Fund only in accordance with an appropriation by an Act of Parliament, in accordance with **Article 222** or **223** of the Constitution or as a charge against the Fund as authorised by the Constitution or Act of Parliament.

20. According to **Article 221**, the separate estimates are required to be submitted to the National Assembly by the Cabinet Secretary responsible for finance. These are;

- (i) Estimates of revenue and expenditure of the national government for the next financial year.
- (ii) Estimates for expenditure from the Equalisation Fund established under **Article 204**.
- (iii) Estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary.

These estimates must be submitted at least two months before the end of each financial year which by virtue of **Article 260** is the period of twelve months ending on the thirtieth day of June.

21. The estimates are thereafter considered by the relevant committee of the National Assembly which shall discuss and review the estimates and make recommendations to the Assembly. **Article 221(5)** requires public participation by requiring the Committee to seek representations from the public which

shall be taken into account while making its recommendation to the Assembly.

22. Once the estimates of the national government, judiciary and Parliament have been approved by the National Assembly, they are included in the Appropriation Bill introduced in Assembly to authorise withdrawal from the Consolidated Fund.

23. The Constitution anticipates that the process outlined in **Article 221** may take longer than expected therefore **Article 222** sets out the terms upon which money may be withdrawn without the Appropriation bill being passed.

Failure to pass the Appropriation Act

24. The petitioner's complaint is that there was no Appropriation Bill or Act in place to trigger the application of **Article 222**. In my view, **Article 222** flows from **Article 221**. **Article 221(6)** provides for matters which shall be included in the Appropriation Bill. It is noteworthy that upto the time the Appropriation Bill is put in place the Constitution contemplates that there will have been exhaustive Committee and public discussions to give effect to the values set out in **Articles 10** and **201(a)** of the Constitution.

25. **Article 222** contemplates the existence of an Appropriation Bill hence the reference to the words in **Article 221(1)** "*If the Appropriation Act for the financial year has not been assented to, or is not likely to be assented to*" These words import the existence of a bill that is within the legislative process or a bill which has been passed but is awaiting Presidential assent.

26. A "*Vote on account*" or "*Motion*" does not comply with the provisions of **Article 222** of the Constitution. The process set out in **Article 221** and **222** is not intended to give the budget and appropriation process a perfunctory legislative seal of approval but to promote the values of the Constitution I have already alluded to.

27. I therefore hold that for there to be compliance with **Article 222**, there must be an Appropriation Act or Bill in place and it was in breach of the Constitution to proceed to withdraw money from the Consolidated Fund without the existence of an Appropriation Act or Bill. This finding though does not end the matter.

Proceedings in the National Assembly and ruling by the Speaker

28. Both Counsel who appeared before me, did not draw my attention to the proceedings of the National Assembly on 7th June 2011. These proceedings are important and I will set out the pertinent parts. In his communication dated 7th June 2011, the Speaker of the National Assembly stated as follows;

Hon. Members, pursuant to the provisions of Article 173(3) and Article 221 of the Constitution, the Estimates of the Parliamentary Service Commission, the Judiciary and the National Government are submitted to the National Assembly for approval and on submission tabled in the House. By practice, reports and official documents from the Government are tabled in the House by the responsible ministers. In view of the fact that we are in a transitional period, and upon reflection, I do direct that estimates of the National Government and for the Judiciary be tabled by the Deputy Prime Minister and Minister of Finance and the Minister for Justice, National Cohesion and Constitutional Affairs, respectively, in similar fashion as was the case with the Estimates for the Parliamentary Service Commission which were tabled by the Vice Chairperson of the Commission.

29. In the same breath when the issue of the procedure to be followed under the Constitution arose in the National Assembly, the Speaker of the House, addressed these issues in a considered ruling. I shall set out the pertinent parts of the ruling;

Hon. Members, on issue No.1 on whether or not Chapter 12 of the Constitution of Kenya, 2010 is in force and in operation and whether in particular Article 221 of the Constitution is applicable to the current budget process, these two issues can be collapsed into one and disposed of together.

The general proposition, I think, is that unless a provision of the Constitution has been expressly or by absolutely necessarily implications suspended, it is in force and applicable. Sections 2 and 3 of the Sixth Schedule to the Constitution do not suspend the operation of Chapter 12 except in so far as it relates to devolved Government.

Hon. Members, Chapter 12 of our Constitution relates to public finance. Sections 2 and 3 of the Sixth Schedule to the Constitution do not suspend the operation of Chapter 12 except in so far as it relates to devolved Government. Accordingly, I take the position that the Chapter is in force inclusive of Article 221 and, therefore, to the extent that the Estimates of Revenue and Expenditure for the next financial year were not submitted to the National Assembly, at least, two months prior to the end of this financial year, this provision of the Constitution has been breached.

It follows that any requirement of Article 221 which under the Constitution ought to have been met, such as that on public participation at Article 221(5) and requirement for discussion and review of the Estimates by a Committee of the Assembly prior to their consideration by the Assembly at Article 221(4), must be complied with. The argument that it is impossible to comply with Article 221 or other provisions of Chapter 12 on the grounds that there is not at present a Cabinet Secretary for Finance is not correct.

Pursuant to Section 31(2) of the Sixth Schedule to the Constitution, provision is made for the position of Cabinet Minister to be regarded as the position of Cabinet Secretary in terms of the application of Article 221 of the Constitution.

I will repeat that the spirit, letter and intent of the new Constitution as set out at Chapter 12 on Public Finance completes the transition of our Parliament from a budget approving legislature to a budget making one. It brings openness and accountability to the budget process, strengthens the separation of powers and ensures fiscal parity between the three arms of Government.

.....

In a period of transition, it needs to be recognized that it is possible to see that delay can be occasioned by the dynamics of socializing the new constitutional order. The question naturally arises: What should be done when a delay occurs in a matter where constitutional timelines are expressly stipulated and further where as in the circumstances of Article 221(1); no person or authority has been mandated to extend the period within which the Estimates may be submitted to the House" A delay in such a situation is highly regrettable and must be strenuously avoided.

But if, despite every effort, it does occur, I think that the obligation at Article 3 on every person to respect, uphold and defend the Constitution would demand that the person responsible for the delay or other failure seizes every available means to repair and mitigate that delay or failure. It is gratifying that in the present matter, the delay in submitting the Estimates of Revenue and Expenditure has at least been mitigated by the fact that as we speak, these Estimates have already been submitted to the House

Hon. Members may wish to note now that the doctrine of separation of powers has played out in recent days, as the Executive, Legislature and Judiciary have all been seized of the matter of the Budget process concurrently, each feeling at liberty to deal with it in its own right and according to its

constitutional limitations. It is also useful to observe that the decision of the Cabinet, the Minister and Treasury about how to proceed in this matter was based on their interpretation of the Constitution and its application to the matter. They did not go to court to seek the interpretation of the court as to how they should proceed. The court, for its part, at the insistence of a citizen, has proceeded to deal with the matter as it considers appropriate. Parliament now needs to interpret the Constitution and determine how it wishes to proceed. This is as it should be. There is neither contradiction nor conflict in these concurrent processes. However, if there is discordance between these interpretations or if a person is aggrieved by any of these interpretations, that person still has recourse to the courts for a judicial interpretation and determination

I am satisfied that in the present matter, perhaps more than ever, there is need for recourse to Article 259(1) of the Constitution –and I am sure the Minister for Justice, National Cohesion and Constitutional Affairs , the Attorney-General and the rest of us will agree – which requires the Constitution to 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.”***

Hon. Members, if upon this interpretation it is conceded, as I think it must be, that the regime of the new Constitution, in respect of the Public Finance Chapter of the Constitution is applicable, it must follow that every effort must be made to abide by the provisions of that Chapter. In a matter as important as the Budget process, the good will of everyone is required and expected. In this respect, the Chair notes with concern that this entire controversy was avoidable in the first place. It has been claimed with evidence provided that the Treasury had, in fact, correctly understood the constitutional obligation imposed on it and had issued Treasury Budget Circular No.2 of 2011 dated 17th March, 2011, to all Accounting Officers. The contents whereof were categorical that the Circular was “intended to guide Ministries, departments and other Government Agencies (MDAs) on planning for the Financial Year 2011/2012 Budget which would be presented to Parliament in accordance with Article 221 of the new Constitution”. That is a circular issued by the Treasury on 17th March, 2011, emphasizing that the Treasury was aware that Article 221, in fact, applied. It is unclear at what point there was departure from this thinking and it must be hoped that this will not recur.

It also emerges that as the constitutional deadline for submission of Estimates in April approached, the Treasury sought, and apparently obtained from the relevant Parliamentary Committee, a one month extension of the period for the submission of the Estimates. It should be

quite clear that no person or organ has the authority to enlarge constitutional deadlines and any such purported extension is a nullity in law for all purposes. It must similarly be hoped that this will not recur.

Everything notwithstanding and arising from all the foregoing, hon. Members, I wish to now give the following directions:-

1. That the Minister for Finance shall be given an opportunity on Wednesday, 8th June, 2011, at 3.30 p.m. to give a Ministerial Statement outlining an overview of his measures for tax proposals and other measures to finance the Budget. The Minister shall thereafter lay the necessary documents on the Table of the House on a Motion that the measures be referred to the Budget Committee. The debate on this Motion shall proceed in terms of the Standing Order No.148(2).

2. The Estimates submitted by the National Government together with the Estimates submitted by the Parliamentary Service Commission and the Judiciary shall be referred to the Budget Committee and the Departmental Committees in accordance with Standing Order No.152 while the Ministerial Statement and any document laid by the Minister for Finance shall be referred to the Budget Committee. All the Departmental Committees should review the Estimates as has been the case before and submit a summary of key issues to the Budget Committee as well as detailed reports on the Estimates to the House within 21 days. In conformity with the provisions of Article 221(5) of the Constitution, all the concerned Committees will be required to seek and receive representation from the public.

3. Upon the tabling of the reports of the Departmental Committees on the Estimates, the Committee of Supply will commence as per the provisions of Standing Orders No.153 to 155 and based on the Supply resolutions, the Minister for Finance will be required to introduce an Appropriations Bill in the House to give legal effect to those resolutions.

4. In view of the fact that the Appropriations Act for the incoming financial year will not have been enacted by the beginning of the next financial year, it is expected that the Minister for Finance shall move a Motion of Vote on Account pursuant to Article 222 of the Constitution and Standing Order No.155(7) on or before 26th June, 2011

5. The Finance Bill that will have been published following the Financial Statement shall be referred to the Departmental Committee on Finance, Planning and Trade for consideration and necessary action.

Hon. Members, these directions will continue to be in place during the life of this Parliament along with the relevant Standing Orders and in conformity with other financial statutes governing the Budget process as provided for in the Constitution.

30. In his decision, the Speaker recognised a breach of the Constitution had occurred in so far as there was no compliance with the provisions of Article 221. He directed his mind to the breach and gave directions for compliance in line with **Article 259(1)** of the Constitution.

31. At this juncture I must emphasise that separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution.

32. *In the Matter of the Interim Independent Electoral Commission (Supra at para 54)* the Supreme Court stated, *“The Effect of the Constitution’s detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that non of the several government organs functions in splendid isolation.”*

33. These sentiments, in my view, apply with equal force to the legislature and legislative processes. For the Constitution has ushered in a new era, not of Parliamentary supremacy but one of supremacy of the Constitution. The superintendents of the Constitution are the courts of law which recognise that each organ in its own sphere working in accordance with law not only strengthens the Constitution but ensures that the aspirations of Kenyans are met.

34. The collective effect of **Articles 3, 10(1) and 20(4)** is that every person has the obligation to respect, uphold and defend the Constitution and that the Constitution binds every state organ, state officer, public officer, person, or authority. In the day-to-day running of the affairs of state, the court will hardly intervene nor be called upon to give guidance of certain aspects of the Constitution. It is neither expected nor required that the Courts will be involved in the minutiae of running government.

35. The principle of the separation of powers is at the heart of the structure of our government; each organ is independent of each other but acting as a check and balance to the other and also working in concert to ensure that the machinery of the state works for the good of Kenyans. The role of the Judiciary within this framework is to state what the law is and to ensure that every authority conforms to the dictates of the Constitution when called upon to do so.

36. The budget and appropriation process is within the competence of the legislature. The Speaker of the National Assembly, who was alive to these breaches, gave guidance as is required of any officer of state acting in accordance with the Constitution. In my view, the Speaker’s decision was guided by provisions and values of the Constitution. In other words, the ruling by the Speaker, the procedures adopted and directions given were made in good faith, they were not calculated to undermine the Constitutional bedrock of the budget process and the Constitution itself.

Public Participation

37. The petitioners have complained that the violation takes away the rights, hopes and expectations of Kenyans citizens to an open transparent and verifiable system of public finance management. The provisions of **Article 221** and **222** provide a new level of openness and accountability in the management of the financial affairs of the state consistent with the values set out in **Article 10** and **251(a)**. This level of transparency is achieved through open scrutiny of the budget by the committees of the National Assembly and by public participation through expression and presentation of views.

38. I find that the values of transparency were given effect by the Speaker's directions particularly direction (2) in his ruling of 7th June 2011 which allowed Departmental Committees to review estimates.

39. I have also seen the Communication from the Chair on 15th June 2011 where the Deputy Speaker directed the Departmental Committees as follows:-

I do urge all committees to accord this exercise the highest priority. The House will consider the Report thereof in the Committee of Supply. Hon. Members, Article 221(5) of the Constitution provides that:

“In discussing and reviewing the estimates, the Committee shall seek representations from the public and the recommendations shall be taken into account when the Committee makes its reports to the National Assembly”

To adhere to this provision, the following procedures will be followed.

(a)Public hearings will be held in eight centres in the country. Seven of the hearings will be held simultaneously next week. The following are the centres; Mombasa, Nakuru, Embu, Kisumu, Nyeri, Garissa and Kakamega.

(b)As from Tuesday, 28th June 2011, public hearings on the Annual Estimates and Budget Statement will be carried out in Nairobi at the Kenyatta International Conference Centre (KICC).

(c) The Budget Committee will take the lead in this exercise and will host all the hearings.

(d)As to the public hearings, the various committees will scrutinise the Estimates of Ministries assigned to them. Thereafter, the Committees will compile reports and table them in the House.

(e) The Committee of Supply will commence on 20th of July 2011 using the same procedure as what has been used in the past with Ministers initiating debate on programmes and policies amplified under the watch of their respective Ministries.

40. I did not hear the petitioners to argue that these directions were not followed or that members of the public were denied access to the Departmental Committees to present their views, either orally or in writing or that the schedule of events did not take place subsequent to the vote.

41. I find that the National Assembly made every effort to give effect to the values of accountability, transparency, good governance and public participation.

Harm and Prejudice

42. Every failure to follow the letter of the Constitution harms the Constitution itself, breeds cynicism and encourages impunity particularly where such failure stems from a deliberate effort to undermine the Constitution. The responsibility of the court is to weigh the facts of the breach against the letter and spirit of the Constitution and determine whether relief should be granted to protect the Constitution.

43. From the facts presented, I do not detect any prejudice or harm suffered by any party or the public at large. The appropriation of money as provided under **Articles 221** is a mandatory annual event ordained by the Constitution. The procedures set out in **Article 221** and **222** are intended to achieve a specific purpose, the appropriation of money, once a year, for the general welfare of the citizens of Kenya in a manner consistent with the values I have alluded to.

44. The effect of failure to pass the appropriation would have substantial negative effects and indeed undermine the very purpose for which we collectively pool our resources to meet the common good. If I grant the declaration sought in the petition and as consequence annul the effect of the proceedings of the National Assembly on 14th June 2011, I would set into action a chain reaction whose effects would be grave and more harmful to the implementation of the Constitution.

Enforcement of the Constitution under Article 258

45. The petitioners seek to invoke the last word on the interpretation of the Constitution. **Article 258** of the Constitution provides that every person has a right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention. **Article 258** does not provide for specific relief to be granted to the applicant or give the court any guidance on how its jurisdiction should be exercised. Unlike a similar provision in **Article 23** respecting the enforcement of fundamental rights and freedoms, the Constitution does not require that the court grants relief when an application is brought under **Article 258**. It is the responsibility of the court to consider the nature of the contravention and frame appropriate relief that is necessary to ensure that the Constitution is protected.

46. The petitioners have sought certain declarations. The issuing of a declaration or any other relief under **Article 258** of the Constitution is a matter of discretion for the court dependent on the circumstances of each case. While a right is granted to every person to institute proceedings claiming that the Constitution has been contravened or is threatened, it is not in every case that the court will grant relief. What constitutes a threat to the Constitution will of course be dependent of on the facts of each particular case.

47. What is clear to me is that Court must exercise its role in a manner that promotes constitutionalism and supports state organs, authorities and state and public officers to work together in concert to realise the dream of a new Kenya. Granting the declarations sought will only sow seeds of confusion and undermine government processes, policies and programmes that are planned in accordance with the annual budgetary cycle.

48. In coming to this conclusion I have also considered that since the process of the budget was initiated, six months have now elapsed and the country is in the middle of a financial year. Reversing, annulling or setting aside the entire process as I have stated would cause more harm than overall good. Preparations should now be made to comply with the provisions of the Constitution in the next financial year.

49. In the case of ***Center for Rights Education and Awareness (CREAW) & 7 Others v The Attorney General Nairobi Petition No. 16 of 2011 (Unreported)***, the court, in an action for the enforcement of fundamental rights and freedoms, had no hesitation in stopping the unconstitutional appointment of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget midstream. These appointments could be set aside and further appointments made without difficulty. In this case, the matters which the petitioners seek to impugn have already occurred as the legislature has acted upon the guidance given by the Speaker. This case also concerns the budget cycle which is a one-time annual mandatory occurrence under the Constitution.

Conclusion

50. My examination of the proceedings in the National Assembly, the Ruling and Directions of the Speaker and taking into account the provisions of the Constitution together with the underlying values, I find that there was substantial and good faith compliance with the Constitution. The Constitution and its values were not threatened and in the circumstances I am unable to grant the declarations sought in the petition. To grant the declarations would be to insist on the *“austerity of tabulated legalism.”*

51. My declining to issue the declarations sought in the petition should not be seen as a licence to openly disregard the provisions of the Constitution. Each officer of state and public officer is sworn to protect the Constitution and each officer is expected to uphold it in letter and spirit and anything less would attract court sanction.

52. I thank the petitioners for their public spiritedness in filing this petition. It is their right and it is one way in which our citizens can ensure that the reality of the Constitution is achieved.

53. I dismiss this petition.

54. As I was not addressed on the issue of costs, I will not award costs.

DATED and **DELIVERED** this 23rd day of December, 2011.

D.S. MAJANJA

JUDGE

Mr Kabugu instructed by Alex Karanja & Company, Nairobi for the Petitioners.

Mr Bitta, Litigation Counsel, instructed by the State Law Office for the Respondents.



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