The Directorate of Criminal Investigations (DCI) cannot institute criminal proceedings against an individual without the consent of the Director of Public Prosecutions (DPP)

The rejection of a nominee to a county executive committee for lack of experience and relation to another nominee does not violate the Constitution

The Constitution does not contemplate the withholding of salaries and allowances of commissioners of independent commissions in situations of illness.
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Kenya Law therefore welcomes scholarly work from legal scholars, judicial officers, legal practitioners, students, law and society scholars (including criminology, psychology, sociology, and other social sciences) to submit articles for consideration. The articles can be submitted through journal@kenyalaw.org. Further details about submission of articles can be accessed through Kenya Law Review - Call for Papers.

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Editor’s Note

Long’et Terer
CEO/Editor

The Bench Bulletin is the definitive intelligence briefing for Kenya’s judicial officers, the law practitioner, managers and the business people. It is a quarterly digest of recent developments in law, particularly, case law, new legislation in the form of Acts of Parliament, rules and regulations, pending legislation contained in Bills tabled before Parliament and selected Legal Notices and Gazette Notices.

In this issue, the Bulletin highlights various cases from varying areas of the law which is an indication of the development and evolution of Kenya’s jurisprudence. The feature case by the High Court in Geoffrey K Sang v Director of Public Prosecutions dealt with inter-alia the issue whether the Inspector General of Police or the Directorate of Criminal Investigation could undertake public prosecutions without the consent of the Directorate of Public Prosecutions and whether a constitutional petition could be heard in a court that was not within the territory in which the constitutional cause arose. According to the court, the mere fact that the investigators believed that there was a prosecutable case did not necessarily bind the Director of Public Prosecutions given that the powers and mandate of the two offices was well demarcated in the Constitution. Both the Director of Public Prosecutions and the Directorate of Criminal Investigations were independent and each ought to stay in its lane. Therefore, no public prosecution ought to have been undertaken by or under the authority of either the Inspector General of Police or the Director of Criminal Investigations without the consent of the Director of Public Prosecutions.

The Court of Appeal segment highlights an important decision of County Government of Garissa & another v Idriss Aden Muhtar where the court interprets the pleasure doctrine vis-a-vis the doctrine of due process in terminating appointees of a County Governor.

From the High Court we highlight the case of Law Society of Kenya v Attorney General & another & Kenya National Commission on Human Rights & another (Interested Parties) where the High Court in determining the question whether the impugned Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 were discriminatory in that the rules required all persons, including the poor, to wear masks when visiting public places. The court ruled that the Rules were not discriminatory in anyway. The Rules served the legitimate aim of protecting everyone equally from the threat of COVID -19.

These are just but a few of the excerpts of the exciting and insightful decisions from our superior courts of record highlighted in this issue which offers guidance on various areas of our laws and it is our hope that you find the Bulletin informative. Kenyalaw is committed to continue keeping pace with changes in legal developments both locally and internationally notwithstanding the global challenges that has affected many organizations due to the COVID -19 pandemic.

Long’et Terer
Editor/CEO

Delivered on 28th July 2020 at the Prosecutors Training Institute, Loresho Ridge, Nairobi

Hon. Dr. Fred Matiangi, Cabinet Secretary, Ministry of Interior and Coordination of National Security; Maj. Gen. Fatma Gaiti Ahmed, Assistant Chief of Defence Forces, Personnel and Logistics, KDF; Brig. Daniel Omondi Odeny, Chief of Legal Services, KDF; Mr. Hillary Mutyambai, Inspector General of the NPS; Maj. Gen. Philip Kameru, Director General NIS; Hon. Anne Amadi, Chief Registrar of the Judiciary; Hon. Judges and Magistrates; Amb. Kyle McCarter, USA; Amb. Simon Mordue, European Union; Mr. Ben Shamalla, Country Director, International Justice Mission-Kenya; Ms. Jessica Ryckman, Deputy Director, Lawyers Without Borders; Mr. Twalib Mbarak, The Chief Executive Office of the EACC; Ms. Anne Makori, Chairperson, Independent Police Oversight Authority; Mr. George Kinoti, The Director of Criminal Investigations; Mr. Nelson Havi, The President, Law Society of Kenya; All Development Partners present; Distinguished Guests; Ladies and gentlemen;

Good Morning!

It gives me great pleasure to join all of you today as we launch two very important instruments in the administration of justice that have been prepared by the Office of the Director of Public Prosecution (ODPP): the Electronic Case Management System and ODPP’s “Decision to Charge” Guidelines. Nearly a month ago, on the 1st of July, the Judiciary launched the e-Filing System for all courts in Nairobi Region, a significant milestone in the administration of justice in this country. These two digital systems complement each other and will significantly enhance service delivery for the Kenyan people.

As justice sector agencies, we are under an obligation to reengineer our procedures and processes in order to serve the Kenyan public better. We demonstrate our steadfast commitment to our constitutional duties, less by the mere muscular projection of power the Constitution vests in us, but more by the quality of the services we offer to the public; and the fairness we exhibit in the exercise of that power. Our continuous review and upgrade of our service culture, practices, and instruments - such as the ones the ODPP is launching today - help greatly in this effort.

The launch of the Judiciary E-Filing System last month, and of ODPP’s Electronic Case Management System today, is a powerful signal that the justice sector is getting into the digital age. It heralds a new and promising era of limiting human factor - and its attendant errors of inefficiency and corruption – in administrative
and decision-making processes. All other actors in the justice sector from the Bar, to Prisons, to Probation, to Police, to Ministry of Land and others need to embrace and generously invest in technological processes, for the future is digital. Digitization is going to be the new normal in the administration of justice and a rapid cultural change and mental shift is an urgent imperative.

The ODPP Case Management System enables prosecutors to move and dispense cases through document tracking, case tracking and e-filing. In this regard, I am happy to note that two systems at the Judiciary and ODPP have been successfully integrated, thus enabling the prosecution system to seamlessly access and use the Judiciary’s e-filing system.

The launch of the Electronic Case Management system is a watershed moment in the criminal justice system. It promises to eliminate long outstanding problems that characterise the justice system including: missing files, delay, a general lack of accountability and transparency.

While the digitization of the case management process does not solve all the challenges that face prosecution and the criminal justice sub-sector as a whole, it is an important beginning. First, technology addresses administrative inefficiencies and a lack of transparency in the case management process. Easy access and retrieval of information will facilitate effective decision-making in the process of prosecution, and thus enhance the quality and value of critical decisions required in the course of their work.

Secondly, as the old adage goes, “justice must not only be done, but must also be seen to be done”. With the implementation of this system, members of the public, the accused, and other persons who interact with the public prosecutions service can, and should, have a more reliable and trusted channel of getting information regarding the status and progress of their cases with ease.

Thirdly, and most importantly, the administration of justice is a chain or a wheel, with the different institutions and agencies each performing a distinct but mutually-reinforcing role. The digital platforms lend themselves more easily to collaboration and cooperation in service delivery than manual systems.

The ODPP’s Electronic Case Management System was developed in close collaboration with the Judiciary’s technical team in the Directorate of ICT. The two systems are integrated and this reflects the spirit of cooperation that should define relations between institutions in the entire justice sector. Indeed, the systems developed by the Judiciary and the ODPP have a great potential to streamline communication between the different agencies in the criminal justice sector.

I appreciate that we are diverse institutions in the justice sector with distinct respective mandates. However, the Constitution calls upon us to embrace cooperation and collaboration in the execution of our mandates, especially where there is mutual benefit in the pursuit of such cooperation. There is no doubt that information sharing in a timely and efficient manner will enhance our individual and overall efficiency in the administration of justice. One such area, for instance, is the verification of documents submitted as security for those standing as sureties in bail and bond applications.

The NCAJ, under the auspices of the National Committee on Criminal Justice Reforms (NCCJR) is working on a seamless integration between the court registries and the land registries in order to enhance the speed of processing bail applications. I have directed that this effort should, as far as possible, be expanded to include the possible integration and sharing of all information required across the criminal justice chain.
I say this cognizant of the fact that different institutions are at different levels of leveraging technology in their delivery of services. However, I strongly believe that developments, such as the launch of the ODPP’s system, and the Judiciary earlier, present us with an opportunity to reflect on how to digitize our processes. Thomson Reuters’, a company that works to assist courts and other government and business entities to remain relevant captured the demand for change in the justice sector thus:

“[W]e see increasing demands on people; tomorrow’s judges and their colleagues in the administration of justice will need a new approach to strategy, more empowered decision-making in the new digital world, and most of all the adaptability and agility to lead a court system that keeps pace with the rapidly changing demands of society”

This, inevitably, calls for commitment in terms of resources (human and financial) and effort to invest in technology. I call upon us all to embrace these changes in order to remain relevant in the performance of our mandate, and for overall and collective efficiency.

Ladies and Gentlemen

I have talked at length about technology because as I said earlier, the future of justice is digital. But I am aware that we are also launching the ODPP’s “Decision to Charge” Guidelines, which are intended to guide the prosecution in decision-making with regard to the filing of criminal cases. I want to laud the ODPP for developing these Guidelines.

Article 157 (10) of the Constitution requires the Office of the Director of Public Prosecutions to exercise the power and decision to commence prosecutions independently, without any influence or authorization. Further, Article 157 (11) requires the ODPP to have regard to public interest and the interests in the administration of justice. These provisions seek to ensure that prosecutorial power is not only exercised independently, but is also exercised in a manner that promotes constitutionalism and the rule of law.

This is an important step that is meant to add legitimacy to the use of prosecution powers in the country. Some of the immediate gains in the institutionalisation of the “Decision to Charge” Guidelines is the bringing to an end of arbitrary use of prosecution powers and the standardization (and therefore) legitimization of the prosecution function. The guidelines provide a basis and gauge against which the legitimacy of decisions taken can be measured. We must always remember that constitutional power is constrained power which must be exercised fairly and judiciously; and certainly not in a selective, imperious, and capricious manner.

It is not lost on me that the theme for today’s function is “Independence, transparency, and fairness in the prosecution service” and the Guidelines being launched today, directly relate to the chosen theme for the day. I, therefore, take this opportunity to congratulate the ODPP for this step and request the officers in charge to make active reference and use of the Guidelines in their work, for this is the only practical way that these guidelines can assist in improving the quality of justice.

The National Council on Administration of Justice (NCAJ), which I chair, and whose membership is represented here today in good numbers, is the embodiment of cooperation that exists in the justice sector. I therefore take this opportune moment to remind all of us of the need to continue seeking joint solutions to challenges that collectively affect the administration of justice. In this regard, I urge all agencies in the criminal justice sector to seek ways of integrating with the Judiciary’s e-filing system in order to ensure all round efficiency in the management of all criminal matters.
I recently extended the term of the National Committee for Criminal Justice Reforms (NCCJR) for a further period of two years. The Committee brings together all actors in the criminal justice and I believe that together with the Council, we can put effort and work towards strengthening the criminal justice by jointly undertaking initiatives similar to the initiatives we are launching today.

Ladies and Gentlemen:

Let me conclude by making some general remarks. The success of these progressive but granular reforms in the justice sector will only be achieved in an environment that respects the rule of law. We can only maintain and uphold the rule of law if we impune and impunge the culture of impunity. If we make the commission of crime very painful, or make manifestly unconstitutional conduct very expensive, then we shall have watered the deep roots of the rule of law, democracy and constitutionalism.

The Constitution entrenches the Doctrine of Separation of Powers and established four Arms of Government—The Judiciary, Legislature, Executive and Independent Commissions such as the Kenya Police Service and Independent Offices such as the ODPP. These institution must claim and be accorded their rightful constitutional space as important determinants of Kenya’s success as a constitutional democracy. In the exercise of their constitutional powers, donated to them by no other authority but the Kenyan public, they should neither flinch nor be reticent. They only need to act lawfully, fairly, and consistently. In consequence, the Police must thoroughly investigate crimes and the ODPP robustly prosecute them and get convictions to send the message that you cannot commit a crime, or brazenly disregard the Constitution, and get away with it, irrespective of who you are. That is the plain meaning of the rule of law.

Let me congratulate the entire office of the DPP, and the Director of Public Prosecutions, Mr. Nordin Haji, for his leadership in undertaking these two key reform initiatives. If public institutions continue to demonstrate a constant thirst for better service delivery to the public, and genuinely improve their standards, they shall not only win back flagging public confidence and support, but also restore their faith in the idea of government. I thank you all and wish you the very best as we innovate and improve our institutions in order to serve Kenyans better.

God bless!

HON. DAVID K. MARAGA, EGH,
CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT OF KENYA
CHAIR, NATIONAL COUNCIL ON THE ADMINISTRATION OF JUSTICE (NCAJ)
What they said

Court of Appeal Judges – W Karanja, H Okwengu and F Sichale, JJA, in County Government of Garissa & another v Idriss Aden Mukhtar & 2 others - Civil Appeal No 294 of 2019

“… the pleasure doctrine was not preserved under Section 31(a) of the CGA. Nor do we agree that the section allows the Governor to dismiss members of the county executive without observing any procedures or assigning any reasons. Section 31(a) merely gives the Governor the discretion to dismiss a county executive member for a reason and process other than that stated in Section 40 of the CGA, subject to due process being followed.”

Court of Appeal Judges – MK Koome, SG Kairu and J Mohammed, JJA, in Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others - Civil Appeal No 13 & 10 of 2015

“The interpretation given by the Court in that case (United Airlines Limited vs. Kenya Commercial Bank Limited [2017] eKLR) that Article 50(4) of the Constitution applies only to criminal law and not civil law is, with respect, doubtful. Article 50 of the Constitution deals generally with “fair hearing”. In Article 50(1) for instance, reference is made to “every person” as having the right to a fair hearing. This is in contrast to Article 50(2) which is specific “every accused person”. In our view, under Article 50(4) if a court determines that admission of evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights would be detrimental to the administration of justice, the court may reject it irrespective of whether it is in connection with a civil or criminal trial.”

High Court Judge – GV Odunga, J, in Geoffrey K. Sang v Director of Public Prosecutions & 4 others - Petition No. 19 of 2020

“In my view, the discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. Therefore, the mere fact that the DPP’s decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157(11) of the Constitution as read with section 4 of the Office of Public Prosecutions Act, No. 2 of 2013.”

High Court Judge – RN Nyakundi, J, in In re Estate of Godana Songoro Guyo (Deceased)[2020] eKLR - Succession Cause No. 15 of 2018

“Generally, a gift in form of a parcel of land ought to be effected by way of a written memo or a transfer or declaration of trust in writing showing that the land was gifted to the sons of the deceased inter vivos or causa mortis. But, if a gift rests purely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise.”
High Court Judge – W Korir, J, in Charity Kaluki Ngilu v County Assembly of Kitui & 2 others [2020] eKLR - Petition No. 209 of 2020

"Indeed there is good reason why this Court should be very slow in interfering with an impeachment process. This is because once the Senate has had its say, parties are at liberty to approach the Court on the question of the constitutionality of the impeachment. At this stage the Court is required to consider both the procedural and substantive aspects of the impeachment. The question whether the impeachment met the constitutional threshold is one of the issues to be addressed in such proceedings. It would therefore be proper to approach the Court after the conclusion of the impeachment process by the County Assembly and the Senate. This is not to say that a party cannot approach the Court under Article 23 of the Constitution at any stage of the process.

High Court Judge – R Nyakundi, J, in Jones Nzioka & another v Republic [2020] eKLR - Criminal Appeal No. 18 & 19 of 2020

(Context: The appellants were charged, with two counts of contravening provisions, control or suppression of COVID -19 directions ; in particular the accused was arrested for selling alcoholic drinks in contravention of the directions. The appellants, on their own plea, of guilty were convicted and sentenced to a fine of Kshs.20,000/= each in default one (1) month imprisonment. Further, the trial court forfeited the inventory of exhibits which comprised of assorted soft and alcoholic drinks to the State for final destruction under the supervision of the court.)

"Moreover, the factors under COVID -19 pandemic taken together and non-compliance by the appellants must be considered against the adverse economic effect that the seizure and confiscation of the property would occasion the owners who had a legitimate expectation on return of investment.

In my opinion, such a deprivation of private property by way of a penalty is incompatible with the proportionality test in sentencing of an offender in this case. In this context where there is no fault at all on the part of the owner, it is fair that the goods be returned after conviction and sentence of the accused in a criminal case. On the basis of the above analysis, the discretion to impose both a fine of Kshs.20,000/= in default one year imprisonment and in addition an order for forfeiture of the property proven to be goods used for the commission of the crime was in the context of this appeal irregular, illegal and wrong exercise of discretion.

Employment and Labour Relations Court Judge – HS Wasilwa, J, in Okiya Omtatah Okoiti v Nairobi Metropolitan Service & 3 others; Mohamed Abdala Badi & 9 others (Interested Parties) - Petition 52 of 2020

"The County Government in this case consists not only of a Governor but also the County Assembly. In as far as this Deed of Transfer of functions of Nairobi County Government was done between the County Governor without involvement of the County Assembly, the Constitution was breached and the transfer was done without involvement of the entire County Government as envisaged by the Constitution."

Employment and Labour Relations Court Judge – HS Wasilwa, J, in Shadrack Mutia Muiu v National Police Service Commission & 2 others - Petition 115 of 2018

"The procedure for removal of a commissioner under Article 251 involves a petition to the parliament, which then petitions the President to appoint a Tribunal to investigate and make recommendations on the removal. In this case, it is a fact that a petition for removal of the petitioner was presented to the Parliament by a citizen, and parliament recommended to the president for appointment of a tribunal to investigate the case but that was never done. Instead the Head of Public Service wrote a letter to the petitioner imploring him to resign voluntarily but the said letter was never served on him. It follows that the petitioner served his entire term of 6 years and the appointing authority, who is the president, waived the right to remove him from office on ground of physical or mental incapacity to perform functions of his office. Consequently, I return that the respondents stopped the petitioner's salary and allowances without any legal basis."

High Court Judge – C Meoli, J, in In re Estate of Wilfred Koinange Gathiomi (Deceased) - Succession Cause No. 12 of 2018

"A valid will cannot fail on the basis merely that it includes amongst others, property not forming part of the deceased's free property."
The petitioner moved the court seeking declaration
orders against the manner in which he was
ousted from the position of CEO at the National
Water Harvesting and Storage Authority citing
discrimination and abuse of powers by the board.
The board failed to inform him of his intended
ouster and he was not invited to the meeting in his
capacity as an ex officio member (secretary to the
board).
The petitioner also sought orders prohibiting the
offices of the DCI and the DPP from investigating
and prosecuting the matter in question alleging
that the charges were malicious and an abuse of
the court process. The petitioner submitted that his
constitutional rights to a fair trial as well as a fair
administrative process were botched by the action of
the board colluding with the investigative agencies
to institute unsubstantiated charges against his
person so that he would be deemed unfit to hold
the position of CEO. In supporting his claim of
malicious prosecution, the petitioner submitted
that all appointments made during his tenure had
been above board and that one of the officers he
had allegedly hired unprocedurally was deceased
and the other officers not on the authority’s payroll.
Among the officers he was alleged to have hired
unprocedurally, only one was on the payroll.
As for the respondents, the DPP argued that it
was well within their mandate to decide upon
what matters to investigate and prosecute by dint
of Article 157. They also disputed the jurisdiction
of the High Court in Machakos to listen to and
determine the issues raised, seeing that the bone of
contention arose in Nairobi. The DCI, on its part,
argued that the petitioner had failed to demonstrate
specifically the constitutional rights violated against
his person and the manner in which they had been
violated.
The Board of Directors as well as the Chairman
relied chiefly on the Mwongozo principles of
corporate governance to defend the ouster of the
petitioner from the position of acting CEO. As
per the First Schedule to the Water Act, a properly
constituted meeting ought to have been attended by
a third of the members and that requirement had
been duly met. Additionally, the same had been
done to safeguard public interest in the construction
of Turkana Peace Dam (Naku’etum site) in Turkana
where the CEO was alleged to have misappropriated
some funds.
The issues for determination were whether the High
Court was clothed with the jurisdiction to hear
and determine a dispute about the termination of
a CEO’S employment contract and the institution
of a criminal suit against the CEO; whether the
Inspector General of Police or the Directorate of
Criminal Investigations could undertake public
prosecutions without the consent of the Directorate
of Public Prosecutions and whether a constitutional
petition could be heard in a court that was not within
the territory in which the constitutional cause arose.
The court held that it had constitutional jurisdiction
to hear the matter since the questions raised related
to constitutional interpretation. In appropriate
cases, the court could direct proceedings to be heard
and determined in a particular place. That, however,
was a different thing from alleging that the court
had no jurisdiction in the matter. Any provision
that purported to limit the jurisdiction of the High
Court to interpret constitutional questions ought to
derive its validity from the Constitution expressly
and not by implication.
The court noted that there had been a futile attempt
by the DCI to levy charges against the petitioner

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**Feature Case**

The Directorate of Criminal Investigations (DCI) cannot institute criminal proceedings against an individual without the consent of the Director of Public Prosecutions (DPP)

Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR

Petition No. 19 of 2020
High Court at Machakos
GV Odunga, J
July 16, 2020

_Reported by Longe’t Terer_
without the consent of the DPP. The discretion to be exercised by the DPP was not based on recommendations made by the investigative bodies and the mere fact that the DPP's decision differed from the opinion formed by the investigators was not a reason for interfering with his constitutional and statutory mandate. The DPP was allowed to exercise his mandate as long as he believed that he had in his possession evidence on the basis of which a prosecutable case could be mounted and as long as he took into account his mandate as per constitutional and statutory provisions.

The court held that the mere fact that the investigators believed that there was a prosecutable case did not necessarily bind the DPP given that the powers and mandate of the two offices was well demarcated in the Constitution. Both the DPP and the DCI were independent and each ought to stay in its lane. Therefore, no public prosecution ought to have been undertaken by or under the authority of either the Inspector General of Police or the Director of Criminal Investigations without the consent of the Director of Public Prosecutions.

Adherence to the rule of law was not optional. Every state officer from the top to the bottom and every state organ acquired his or its powers from the Constitution. He or it could not therefore purport to exercise powers outside the Constitution. Any action he or it undertook had to therefore be constitutionally underpinned.

The court found that it was clothed with the powers and the constitutional duty to supervise the exercise of the DPP's and DCI's mandate, whether constitutional or statutory as long as the discretion fell afoul of constitutional and statutory provisions. The DPP could not be allowed to arbitrarily exercise his constitutional mandate based on ulterior criminal motives. The essence of abuse of powers to prosecute was that the proceedings complained of had to have been instigated, instituted and/or maintained for a purpose other than that for which they were designed or exist or to achieve for the person instigating or instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process.

The court found that having failed to remove the petitioner from his position as a result of the court's intervention, the chairman and board colluded with the DCI to maliciously levy criminal charges against him with a view to having him step aside. The petitioner's arrest by officers of the DCI, his interrogation and subsequent decision to charge him with the offence of abuse of office was maliciously instigated by individuals at the authority who were colluding with officials of the DCI to have him take a plea as a public officer in order to remove him from office to pave way for a preferred candidate.

The court noted that there could have been some malicious reasons for the petitioner's removal from office. However, the court sat as a constitutional court as opposed to the Employment and Labor Relations Court and could not therefore determine that issue. The constitutional court was constrained to determine whether the decision makers in question had jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges went contrary to the applicant’s legitimate expectation and whether the respondents’ decision to charge the applicant was irrational.

The court finally found that allowing criminal proceedings to continue where it was clear that there was no evidence at all or where the prosecution's evidence even if it were to be correct would not disclose any offence known to law would amount to the court abetting abuse of the court process by the prosecution.

The court finally found that the respondents in their replying affidavit did not disclose any reasonable grounds to undertake investigations against the petitioner. The issue of the illegal and irregular ouster of the petitioner by the chair and board of the authority from his position as CEO was a matter which would be best dealt with by the Employment and Labor Relations Court as opposed to the constitutional court.

Orders:-

i. It was declared that the 2nd respondent, the Director of Criminal Investigations (DCI) had no power and authority to institute criminal proceedings before a court of law without the prior consent of the Director of Public Prosecutions (DPP) and any proceedings so commenced would be unconstitutional, illegal, unlawful, null and void ab initio.

ii. It was declared that the intended prosecution of the petitioner in the manner proposed by the 2nd respondent was ultra vires the powers of the 2nd respondent (DCI) and was therefore unconstitutional and unsustainable.

iii. The DCI, 2nd respondent, was issued with prohibitory orders against instituting criminal proceedings against the petitioner unless the same was instituted through the 1st respondent, the DPP.

iv. The costs of the petition were awarded to the petitioner against the DCI (2nd respondent).
Supreme Court

The rejection of a nominee to a county executive committee for lack of experience and relation to another nominee does not violate the Constitution

Moses Kiprotich Langat v Kericho County Assembly Committee on Appointments & 2 others [2020]

Petition No. 28 of 2019
Supreme Court of Kenya

PM Mwilu, DCJ & VP; MK Ibrahim, SC Wanjala, NS Ndungu & I Lenaola, SCJJ

August 6, 2020
Reported by Kakai Toili

Labour Law – employment – public appointments – procedure to be followed – where an applicant sought to be appointed a county executive committee member - where the county assembly rejected the nominee's name for appointment to the county executive committee for lack of experience and for being related to another nominee - what were the factors to be considered in making county government appointments – whether the decision of the county assembly to reject the nominee violated the Constitution - Public Appointments Act, 2011, sections 3, 5, 7 and 10; County Governments Act, 2012, section 35.

Jurisdiction – jurisdiction of the Supreme Court – appellate jurisdiction – where an appellant challenged the decision of a county assembly to reject his name for appointment to the county executive committee for lack of experience and being related to another nominee - whether the Supreme Court had the jurisdiction to determine the appeal – Constitution of Kenya, 2010, articles 160(1) and 163(4); Supreme Court Act, 2011, sections 15(1) and (2).

Brief facts
The County Government of Kericho by way of an advertisement invited suitable candidates to apply for various positions in the county executive committee. Following the advertisement, the appellant applied to be the member of the education, culture and social services committee. He was successful and his name, alongside nine others, was submitted to the 3rd respondent by the Governor of Kericho County (Governor) for vetting. During the vetting, the appellant’s name was rejected for appointment for two reasons: that he lacked the experience for management of ECDE and village polytechnics and that he was related to a nominee for finance and economic planning. Aggrieved by the decision, the appellant filed a petition before the Employment and Labour Relations Court terming the reasons for his rejection as unconstitutional.

The appellant sought for among others a declaration that the proceedings of the 3rd respondent (county assembly) rejecting his appointment was void and prohibitory orders against the Governor from presenting to the Speaker of the county assembly any fresh names of nominees for approval by the county assembly for appointment as members of Kericho County Executive Committee. The Employment and Labour Relations Court granted all the prayers sought by the appellant. Dissatisfied by that decision, the respondents filed an appeal at the Court of Appeal which allowed the appeal and set aside the Employment and Labour Relations Court orders. Aggrieved by the Court of Appeal’s decision the appellant filed the instant appeal.

Issues
i. Whether the Supreme Court had the jurisdiction to determine an appeal challenging the decision of a county assembly to reject the name of a nominee to a county executive committee?
ii. What was the procedure to be followed in making public appointments?
iii. What were the factors to be considered in making county government appointments?
iv. Whether the decision of the County Assembly of Kericho to reject a nominee to the county executive committee for lack of experience and relation to another nominee violated the Constitution.

Relevant provisions of the law
Constitution of Kenya, 2010

Article 163

(4) Appeals shall lie from the Court of Appeal to the Supreme Court –

a. As of right in any case involving the interpretation or application of this Constitution; and

b. In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)

(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.

Supreme Court Act, 2011

Section 15 - Appeals to be by leave
1. Appeals to the Supreme Court shall be heard only with the leave of the Court.

2. Subsection (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.

**Held**

1. The test to evaluate the jurisdictional standing of the court in handling the appeal was whether the appeal raised a question of constitutional interpretation or application, and whether the same had been canvassed in the superior courts and had progressed through the normal appellate mechanism so as to reach the court by way of an appeal as contemplated under article 163(4)(a) of the Constitution. The issue of the constitutionality of the respondents’ decision in rejecting the name of the appellant in the County Executive Committee was consistent from the Employment and Labour Relations Court to the Court of Appeal and to the court. Consequently, the appeal fell within the ambit of article 163(4)(a) of the Constitution.

2. Article 176(2) of the Constitution mandated every county government to decentralize its functions and the provision of its services to the extent that it was efficient and practicable to do so. County executive committees thus comprised members appointed by the county governor, with the approval of the assembly, and who were not members of the assembly as provided for under article 179(2)(b) of the Constitution.

3. The procedure for public appointments was governed by the Public Appointments Act No. 33 of 2011. Section 3 of the Public Appointments Act provided that all appointments under the Constitution or any other law for which the approval of Parliament was required would not be made unless the appointment was approved or deemed to have been approved by Parliament. Section 5 of the Act set the procedure for nominating a candidate for a public appointment, upon nomination, under section 5, a candidate whose position required approval by Parliament had to undergo the approval hearing as set out in section 6 of the Act. Accordingly, section 7 of the Act provided that an approval hearing had to focus on a candidate’s academic credentials, professional training and experience, personal integrity and background. When approving a candidate, the House of Parliament had to be guided by the procedure used to arrive at the nominee; any constitutional or statutory requirements to the office in question; and the suitability of the nominee for the appointment proposed having regard to whether the nominee’s abilities, experience and qualities met the needs of the body to which nomination was being made.

4. On rejection of a nomination, section 10 of the Public Appointments Act provided that where the nomination of a candidate was rejected by Parliament, the appointing authority could submit to the relevant House the name of another candidate, and the procedure for approval was specified in the Act. In the context of county government appointments under section 35 of the County Governments Act No. 17 of 2012, the governor should, when nominating members of the executive committee, ensure that to the fullest extent possible, the composition of the executive committee reflected the community and cultural diversity of the county; and took into account the principles of affirmative action as provided for in the Constitution. The county assembly was mandated to ensure that all nominations for appointments to the executive committee took into account two thirds-gender rule, representation of minorities, marginalized groups and communities and cultural diversity recognized in Kenya among other considerations.

5. A county assembly could reject the name of a nominee if it failed the test set out in section 35 of the County Governments Act and the provisions of the Public Appointments Act. The appellant did not fault the vetting process (which the constitutional and statutory threshold required) but the outcome. There was no reason to depart from the Court of Appeal’s finding.

6. Separation of powers was an integral principle in the Constitution: for instance, chapter 8 was devoted to the Legislature; chapter 9 to the Executive and chapter 10 on the Judiciary provided (article 160(1)) that: in the exercise of judicial authority, the Judiciary as constituted by article 161 was subject only to the Constitution and the law and was not to be subject to the control or direction of any person or authority. If courts decided only those cases that met certain justiciability requirements, they respected the spheres of their co-equal branches and minimized the troubling aspects of counter-majoritarian judicial review in a democratic society by maintaining a duly limited place in government.

7. The respondent’s decision to reject the appellant’s appointment did not flout any constitutional or statutory provisions. There was no reason to interfere with the manner in which the county assembly exercised its powers on the issue.

**Appeal dismissed; each party to bear their own costs of appeal.**
Court of Appeal

The pleasure doctrine *vis-a-vis* the doctrine of due process in terminating appointees of the county governor.

County Government of Garissa & another v Idriss Aden Mukhtar & 2 others

[2020] eKLR

Civil Appeal No 294 of 2019

Court of Appeal at Nairobi

W Karanja, H Okwengu and F Sichale, JJA

July 10, 2020

Reported by Beryl Ikamari & George Kariuki

 Allegedly for failure to implement key policy decisions relating to his department, including provision of adequate supervision.

The respondents were successful in making their claim for unlawful termination. They were not reinstated but they were awarded a decretal sum which was subjected to amendments and it amounted to Kshs.15,736,562/50.

Aggrieved by that judgment, the respondents moved the court of appeal. Their main grounds of appeal were that the trial judge misinterpreted and misapplied the Employment Act, the learned judge misdirected himself in finding that section 31(a) of the County Governments Act was unconstitutional, that the petition did not meet the threshold set in the Anarita Karimi case and on who should bear the costs of a suit in an Employment and labor relations matter.

Issues

i. Whether the termination of the employment contract of members of the county executive committee by the governor allegedly unprocedurally violated the constitutional rights of those employees.

ii. Whether the Employment Act and the County Government Act were applicable to state officers, including members of the county executive committee.

iii. Whether a governor had power to dismiss members of the county executive committee under the pleasure doctrine.

iv. When would the Court of Appeal interfere with a decision of the Employment and Labour Relations Court to award damages?

Held

1. The appellants and the respondents had an employer-employee relationship. The respondents opted to anchor their petition on
the Constitution rather than the employment contract. The fundamental rights and freedoms enshrined in the Constitution included the right to fair labour practices and the right to fair administrative action both of which the respondents sought to enforce. In enforcing those rights, they had to set out their claim with a reasonable degree of precision. They had to set out what they complained of including the constitutional provisions infringed and the manner in which they were alleged to be infringed.

2. The drafting of the petition, particularly, paragraphs 11, 12, and 13 left a lot to be desired. However, the appellants could not claim that they did not understand the facts complained of and the provisions of law upon which the respondents’ cause was anchored.

3. The question as to whether a county governor could dismiss from employment members of the county executive committee under the pleasure doctrine, lay in a proper interpretation of section 31(a) of County Governments Act and the interpretation had to conform to the spirit and letter of the Constitution. All laws had to be interpreted and applied in accordance with the supreme law of the land.

4. On the interpretation of section 31(a) of the County Governments Act as to whether it allowed the county governor to dismiss a member of a county executive committee at his pleasure, they were different views offered by the Court of Appeal. One was that the power to dismiss such an appointee could be exercised at the governor’s pleasure but it had to be done reasonably and not arbitrarily or capriciously and the other was that the pleasure doctrine was not compatible with the spirit and letter of the existing Constitution.

5. The governor misinterpreted his powers under section 31(a) of the County Governments Act, as giving him a free hand to dismiss the respondents at his pleasure, and he therefore did not give them any hearing before terminating their employment contracts.

6. In the termination of their employment contracts, there had been a clear breach of the respondents’ rights to fair labor practices under article 41(2) of the Constitution and right to fair administrative action under article 47 of the Constitution. There was also a breach of natural justice and therefore, the respondents’ dismissal from employment was unfair termination.

7. The pleasure doctrine was not compatible with the spirit and letter of the Constitution of Kenya 2010. The doctrine was inimical to the national values of human rights, good governance, transparency and accountability which were the hallmark of the delegated sovereign power and position of public trust as recognized in the Constitution. Therefore, the appointment of state officers ought to be insulated from political or any untoward interference.

8. If section 31(a) of the County Governments Act was interpreted as a provision that gave a governor the unfettered discretion to dismiss a county executive member at any time, if they so wished, the yardstick would be personal and without transparency or accountability and that would be contrary to the principles and values espoused in the Constitution.

9. The governor was the political leader of the county, and he was therefore aligned to a specific political party. It was therefore natural that he would identify for appointment as members of his county executive committee, persons who were committed to his cause and whom he had confidence in. Section 31(a) of the County Governments Act would therefore come in handy where the Governor had reason to lose confidence in an executive committee member due to sabotage or such like activity that would hamper proper governance of the county.

10. There ought to be reasons upon which it could be concluded that the powers of the governor had been exercised in good faith and for proper reasons and not arbitrarily or capriciously, in order for the termination to be procedural. A governor was not entitled to fire county executives at will without any reason and without due process.

11. The trial court had correctly expressed itself on the issue of the pleasure doctrine as enshrined under section 31(a) of the County Governments Act. The section was deemed repugnant to the Bill of Rights in relation to employment and therefore unconstitutional.

12. The issue of unregulated foreign trips as well as other unregulated expenditure which informed the termination of the respondents’ employment was before the Garissa County Assembly and it was therefore irregular for the governor and the county to short-circuit a process that was before the County Assembly, by purporting to act under section 31(a) of the County Governments Act.

13. The award of damages by the trial court was not improper. It was done under section 49 of the Employment Act. In terms of the award itself, counsels for both sides had been in agreement
on the decretal amount as evidenced by records of the trial court.

Orders:

i. The appeal failed and was dismissed for lack of merit.

ii. The decision of the trial court was upheld.

iii. The petitioners were ordered to pay costs of the appeal.

Principles of public procurement and admissibility of illegally obtained evidence

Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR
Civil Appeal No 13 & 10 of 2015
Court of Appeal at Nairobi
MK Koome, SG Kairu and J Mohammed, JJA
June 19, 2020
Reported by Beryl Ikamari & George Kariuki

Evidence Law – admissibility of evidence – admissibility of relevant yet illegally obtained evidence in criminal and civil matters – procedures to be followed while accessing public documents – whether information evidencing a flawed public procurement process, despite being illegally obtained, was admissible - Constitution of Kenya 2010, articles 31, 35, 50(2) and 50(4); Evidence Act (cap 80), sections 79 and 80; Civil Procedure Rules, 2010, order 19, rule 3.

Civil Practice and Procedure - institution of suits - mootness - claim that a suit had been overtaken by events - where a petition was filed to stop the construction of a railway line whose construction was complete - whether the suit was moot or academic.

Procurement Law - principles of procurement law - choice of a procurement method - exemption from the provisions of statute and the Constitution on procurement, including competitiveness - claim that a procurement process was based on an international government to government agreement which was an exempt process under section 6 of the repealed Public Procurement and Disposal Act (repealed) - Constitution of Kenya 2010, articles 227(1)(c) and 227(1)(d); Public Procurement & Disposal Act (Repealed), No 3 of 2005; sections 6(1) and 29.

Brief facts

The consolidated appeals arose from a decision wherein the High court ruled that despite a substantial segment of the Standard Gauge Railway (SGR) being completed and operational, the procurement process for its construction continued to generate public interest due to huge expenditure. At trial, the construction was yet to commence and the petitioner-appellants sought conservatory orders against the supply and installation of facilities, locomotives and rolling stock for the railway arguing that the procurement process was in contravention of both statute and the Constitution. They further argued that despite the railway being important and necessary, its procurement and implementation was devoid of the values laid down under article 227 of the Constitution. In particular, the single outsourcing of the China Road and Bridge Construction Company (CRBC) was unconstitutional, irregular, illegal, invalid, null and void. Additionally, the petitioners argued that the award for supply and installation of diesel-powered engines that were outdated and that would pollute the environment violated the Constitution.

In their defense, the respondents argued that proper feasibility studies had been conducted from as early as 2009 and 2012 by the CRBC at its own cost and the Government of Kenya was duly advised. Consequently, a Railway Development Fund was formed and a budgetary allocation set aside for phase 1 of the SGR from Mombasa to Naivasha. The plans were approved on June 26, 2012 by Kenya Railways Corporation (KRC) and teams appointed by CRBC and KRC to negotiate terms of the procurement and installation of the SGR. Additionally, the Ministry of Transport entered into agreement with CRBC for the supply of facilities, locomotives and rolling stocks for the railway. They further argued that the SGR Procurement process was exempt from article 227’s interpretation as an exempted procurement contract since it was a government to government contract which qualified it to be a negotiated international agreement as was contemplated by section 6(1) of the Public Procurement and Disposal Act (repealed).

The Attorney General and the PPOA on their part opposed the petition on grounds that the evidence relied upon by the petitioners had been illegally obtained, that a feasibility study had been conducted and approved and that neither statutory provisions nor the Constitution had been violated.

In his ruling, the High Court rejected the appellants’ invitation to the court to stop the construction
of the Standard Gauge Railway alleging that its procurement and construction violated the Constitution of Kenya and other laws. Additionally, the trial court found that the documents tendered by the petitioners had been obtained illegally as a result of which the court ordered that they be expunged from the court’s records. Further, the court found that there were neither breaches of statute or of the Constitution in the procurement process and that Parliament had duly conducted its oversight role and given financial approval for the project. Lastly, the court also found that the project was exempt from competitive bidding as it was a government to government project under section 6 of the Public Procurement and Disposal Act (repealed).

Aggrieved by that decision, the petitioners/appellants lodged two separate appeals, Civil Appeals 10 and 13 of 2015 which were consolidated by an order of the Court of Appeal on November 8, 2016. The appeal was opposed by the respondents on the grounds that it was an academic/ moot exercise since the Railway line from Mombasa to Naivasha was complete and already operational and the trial court had correctly ruled on the issues raised at trial.

Issues

i. Whether the appeal was moot or academic as it sought to stop the construction of a railway line that had already been constructed on grounds that the procurement process undertaken for its construction was flawed.

ii. Whether illegally obtained evidence was admissible in court and whether relying on that evidence would be detrimental to the administration of justice.

iii. When would a procurement process not require competitive bidding as a procurement process that fell within the terms of section 6(1) of the Public Procurement & Disposal Act (repealed) and entailed a loan or grant under an international agreement?

Held:

1. The reliefs sought to stop the construction of the SGR had been overtaken by events and were unavailable considering that the railway line from Mombasa to Naivasha was complete and operational. A moot case was a matter in which a controversy no longer existed; a case that presented only an abstract question that did not arise from existing facts or rights, and as a verb, it meant to render a question as of no practical significance. A matter was moot if further legal proceedings relating to it had no effect, or events placed it beyond the reach of the law. Thereby the matter had been deprived of practical significance or rendered purely academic. Mootness arose when there was no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.

2. The contract had already been executed by dint of construction and operationalization of the SGR line from Mombasa to Naivasha. Injunctions to restrain the implementation of the impugned contract or to quash the award of the contract were no longer within reach.

3. The issue of illegally obtained evidence brought to the fore the tension between the need for the court to be able to consider and have access to evidence which would enable it to fairly and effectively determine a dispute on the one hand and the need to avoid irregularity or impropriety in the way in which evidence was obtained or secured.

4. The sources of the petitioners’ documents were not disclosed in the petitioners’ affidavits and neither were they aware that those documents consisted of certified public documents. It was upon the filing of the cross petition seeking orders for those documents to be expunged that the appellants disclosed that the documents were supplied by conscientious citizens and whistleblowers. That was in contravention of articles 31 and 35 of the Constitution on right to privacy and right of access to information, respectively.

5. In considering the issue of the admissibility of the illegally obtained evidence, the principles of a fair hearing as contemplated under article 50 of the Constitution and the rules of adducing illegally obtained evidence under sections 79 and 80 of the Evidence Act, were relevant.

6. Section 80 of the Evidence Act guaranteed the authenticity and integrity of documents relied upon in the court. Where the documents in question did not meet the criteria of admissibility set in section 35 of the Evidence Act, allowing the documents in question to remain on record would be detrimental to the administration of justice. Regardless of whether the respondents had made a complaint to law enforcement agencies regarding theft of documents, the appellants could not rely on information obtained in unclear circumstances and while a citizen was entitled to information held by the State, there was no need or room to use irregular methods in obtaining information.

7. It would be detrimental to the administration of justice and against the principle underlying
article 50(4) of the Constitution to, in effect, countenance illicit actions by admission of irregularly obtained documents. However well-intentioned conscientious citizens or whistleblowers were in checking public officers, there could be no justification, for not following proper procedures in the procurement of evidence. Therefore, there was no basis for interfering with the decision of the High Court to expunge the documents in question.

8. Under article 227 of the Constitution when a State organ or any other public entity contracted for goods or services, it had to do so in accordance with a system that was fair, equitable, transparent, competitive and cost-effective. Article 227 of the Constitution should be interpreted in a manner that promoted its purposes, values and principles as article 259 of the Constitution demanded and also holistically. Article 227(1) of the Constitution ought to be read together with 227(2) of the Constitution which stated that an Act of Parliament would prescribe a framework within which policies relating to procurement and asset disposal would be implemented. The legislation that gave effect to that provision was the Public Procurement and Asset Disposal Act. Under that legislation’s transitional provisions, procurement proceedings commenced before the commencement date of the Act had to be continued in accordance with the law applicable before the commencement date of the Act. Therefore, the statute applicable to the proceedings was the repealed Public Procurement and Disposal Act.

9. Although statute recognized alternative methods of procurement, the default procurement method was open tendering. Section 29(1) of the Public Procurement and Disposal Act (repealed) provided that for each procurement, the procuring entity had to use open tendering. Other procurement procedures recognized under the repealed Act that were subject to prescribed safeguards included restricted tendering, direct procurement, request for proposals, request for quotations, and procedure for low value procurements, among others. With regarding restricted tendering or direct tendering, the safeguards under section 29 (3) of the repealed Act included obtaining the written approval of the procuring entity’s tendering committee and recording in writing the reasons for using the alternative procurement procedure.

10. Sections 6 and 7 of the Public Procurement and Disposal Act (repealed), contained provisions with respect to conflict between requirements under the Act with any obligations of the country arising from treaties or agreements. Parliament recognized that there could be instances when conditions imposed in instances of negotiated grants or loans or by donor funds could conflict with the provisions of the Public Procurement and Disposal Act (repealed). In that case, such conditions would prevail thereby removing procurement from the purview of the Public Procurement and Disposal Act (repealed).

11. The engagement of CRBC was not an obligation arising from a negotiated grant or loan agreement for purposes of section 6 of the Public Procurement and Disposal Act (repealed). That was because as indicated, the contract with CRBC as the contractor was procured long before the financing agreement was entered into.

12. Under the circumstances section 6(1) of the Public Procurement and Disposal Act (repealed), did not exempt the procurement from the provisions of the statute. Kenya Railways Corporation, as the procuring entity, was therefore under an obligation to comply with the requirements of the Public Procurement and Disposal Act (repealed) in the procurement of the SGR project.

Appeal dismissed.

Orders:-

i. The decision of the trial court ordering to be expunged from the record documents that had been presented by the appellants as evidence in support of the petitions was upheld.

ii. Part of the judgment of the High Court that the procurement of the SGR was exempt from the provisions of the Public Procurement and Disposal Act, 2005 by reason of Section 6(1) thereof was set aside. It was substituted with an order declaring that Kenya Railways Corporation, as the procuring entity, failed to comply with, and violated provisions of article 227 (1) of the Constitution and sections 6 (1) and 29, of the Public Procurement and Disposal Act, 2005 in the procurement of the SGR project. The appeals succeeded to that extent only.

iii. Each party had to bear its own costs of the appeal, as the suit was a matter of public interest.
Civil Practice and Procedure – orders – conservatory orders – requirements for issuance of conservatory orders – where conservatory orders were sought against a county assembly from debating an impeachment motion - principles to be considered in granting applications seeking conservatory orders against legislative bodies - whether a court was required to do a bit of analysis on the merits of a petition to determine whether an applicant seeking conservatory orders had established a prima facie case.

Devolution – county governments – impeachment of county governors – where the impeachment motion for the Kitui County Governor was yet to be debated by the Kitui County Assembly -where the governor claimed that the impeachment motion was not subjected to adequate public participation - what was the procedure to be followed by the governor – Constitution of Kenya, 2010, articles 23 and 94(4); County Assembly of Kitui Standing Orders, standing orders 60 and 63.

Brief facts

The applicant filed the instant suit seeking among others orders that pending the hearing and determination of the petition and the application inter-partes, the court issues interim conservatory orders suspending the tabling, debating and considering and/or acting upon the applicant’s impeachment motion. The applicant averred that the constitutional threshold on public participation was not met and that the 2nd respondent contravened standing order 60 and 63 of the Standing Orders of the County Assembly of Kitui (Standing Orders) when processing the impeachment motion hence violating the applicant’s rights on fair administrative action and fair hearing under articles 47 and 50 of the Constitution of Kenya, 2010 (Constitution).

The 2nd respondent further averred that if the orders sought in the application were granted, it would amount to an attack on the doctrine of separation of powers and an encroachment on the assembly’s powers by the court.

Issues

i. What was the procedure to be followed by a county governor facing an impeachment motion where the governor claimed that public participation was not adequate?

ii. Whether a court was required to do a bit of analysis on the merits of a petition to determine whether an applicant seeking conservatory orders had established a prima facie case.

iii. What were the principles to be considered in granting applications seeking conservatory orders against legislative bodies?

Held

1. The principles guiding the grant of conservatory orders in Kenya were well established. The determination of the question whether an applicant seeking conservatory orders had established a prima facie case was a dicey one in that the court was required to do a bit of analysis on the merits of the petition. A perusal of the pleadings and documents placed before the court would on a preliminary basis disclose that the respondents had not violated the provisions of standing orders 60 and 63 on the procedure for removal of governor by impeachment and the right to be heard respectively. The court restrained itself from analysing the evidence by the parties in regard to the applicant’s claim that the said standing orders were not followed by the respondents.

2. The ex-parte interim orders were granted based on the applicant’s assertion that the respondents had not conducted qualitative and quantitative engagement of the public on the question of her impeachment. Whether or not sufficient public participation had been conducted was a matter
of fact. There was an advertisement in a daily newspaper with national circulation inviting views from the residents of Kitui County on the impeachment of the applicant. Indeed, there was a questionnaire developed and issued to the residents of Kitui County. There was also an averment by the leader of majority that he had directly and indirectly engaged with the residents of his ward on the impeachment motion and was aware that the other members of the assembly had engaged with the residents of their wards. Therefore there was public participation on the motion.

3. The court avoided going into details or making further determinations on the issue of public participation for the reason that the impeachment of a governor was a process that passed many stages. The impeachment of a governor was a process that was well insulated by the law. During the debate at the assembly, the applicant could raise the issue of public participation as one of the grounds necessitating the termination of the impeachment motion. If the motion against her was successful at the assembly, she could raise the issue of lack of public participation at the Senate. If the Senate agreed with the assembly, the applicant could approach the High Court on the same issue.

4. Article 94(4) of the Constitution commanded Parliament, which was made up of the National Assembly and the Senate, to protect the Constitution and promote democratic governance. In dealing with the question of the impeachment of a governor, the Senate should ensure that the impeachment had complied with the provisions of the Constitution and statute which included the requirement for public participation.

5. The respondents had a duty to comply with the Constitution, statutory provisions and the Standing Orders. Nevertheless, the issue of impeachment of a governor was anchored in the Constitution. The organs mandated to drive that process were the county assemblies and the Senate. Although the court was mandated to intervene in the process where there was alleged denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, the court should only engage its powers where there was clear and imminent threat to the Constitution. Impeachment was a tool used to oversee the county executive and a county assembly was carrying out its constitutional mandate in debating an impeachment motion.

6. The principles to guide the court in applications seeking conservatory orders against legislative bodies were as follows:
   a. each arm of Government had an obligation to recognize the independence of other arms of Government.
   b. Each arm of Government was under duty to refrain from directing another organ on how to exercise its mandate.
   c. Courts were the proper judge of compliance with constitutional edict, for all public agencies; but that was attended with the duty of objectivity and specificity, in the exercise of judgment.
   d. For the due functioning of constitutional governance, the courts were to be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances and the objective needs and public interests attending each case.
   e. In the performance of the respective functions, every arm of Government was subject to the law.

7. The integrity of court orders stood to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocated specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under the Constitution, was essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signaled that the judicial organ had to practice the greatest care, in determining the merits of each case.

8. There was good reason why the court should be very slow in interfering with an impeachment process. That was because once the Senate had had its say, parties were at liberty to approach the court on the question of the constitutionality of the impeachment. At that stage the court was required to consider both the procedural and substantive aspects of the impeachment. The question whether the impeachment met the constitutional threshold was one of the issues to be addressed in such proceedings. It would therefore be proper to approach the court after the conclusion of the impeachment process by the assembly and the Senate. That was not to say that a party could not approach the court under article 23 of the Constitution at any stage of the process.
9. The doors of the court were open to all those who believed that their constitutional rights had been violated or were threatened with violation. However, it was the duty of the person who alleged violation of the Constitution to demonstrate such violation. The applicant had not discharged that onus. She would also not suffer any prejudice if the process was allowed to proceed to conclusion since she would have another opportunity at the end of the day to approach the court for the appropriate remedy.

10. Nobody knew when the covid-19 pandemic would be contained and new ways had to be designed for achieving constitutional requirements. Legislative business could not stall because of a disease that was at the moment beyond human control. Ultimately, it was the responsibility of the respondents to ensure that the impeachment met the constitutional threshold both procedurally and substantively. Failure by the respondents to discharge that duty and failure by the Senate to correct the anomaly by rejecting the impeachment would render the impeachment an exercise in futility since any legal challenge would lead to the quashing of the impeachment by the court for failure to adhere to the Constitution and statute.

11. Impeachment of a governor is akin to an election petition. Any person desirous of filing a court case in respect of an impeachment process should approach the High Court within the County in which the impeachment is taking place. Where there is no High Court in the county, then the nearest High Court should be approached. I say so because it is important for the residents of the affected county to have access to the court where such proceedings are taking place.

Application dismissed; costs for the application to abide the outcome of the petition.

Validity of an oral will not made in the continuous presence of two witnesses.

In re Estate of Wilfred Koinange Gathiomi (Deceased) [2020] eKLR
Succession Cause No. 12 of 2018
High Court at Kiambu
C Meoli, J
June 12, 2020
Reported by Chelimo Eunice

Law of Succession – wills – oral wills – requirements for a valid oral will – whether an oral will had to be recorded on one occasion and be completed in one sitting – whether an oral will was invalid if not made in the continuous presence of two witnesses – whether a valid will could fail on the basis merely that it included amongst others, property not forming part of the deceased’s free property - Law of Succession Act, sections 8 and 9.

Law of Succession – wills – testamentary capacity - who had the legal capacity to make a will – soundness of mind of a testator – who bore the burden of proving that the testator was not of sound mind when making a will and when did that burden shift – Law of Succession Act, section 5.

Law of Succession – wills – attestation of wills - what amounted to attestation of wills – whether attestation applied to oral wills – whether a will could be considered to be insufficiently attested because one of the witnesses was also a beneficiary - Law of Succession Act, section 11.

Brief facts

The petitioner, a cousin to the deceased, petitioned for grant of letters of administration with terms of an oral will annexed as the deceased’s appointed executor of the will. The will was allegedly dictated to him on December 13, 21, 22 and 26, 2017 following which the deceased died on December 28, 2017. The petitioner deponed that when the deceased completed dictating the oral will on December 26, 2017, he witnessed the will together with one of the deceased’s sister who lived in the same homestead with and cared for the deceased in his last days.

After the petition was published, two other sisters of the deceased (the objectors) filed an objection to the making of the grant. They asserted, among others, that the oral will disposed of properties held in trust by the deceased on their behalf, that the oral will was insufficiently attested, that the deceased lacked testamentary capacity as he was very sick and that the deceased did not make a provision to his lawful dependents but majorly to the petitioner who was said to be a stranger to the deceased and thus, the will should be treated with suspicion as it was invalid.
Issues

i. Who had the legal capacity to make a will?

ii. Who bore the burden of proving that a testator was not of sound mind when making a will, and when did that burden shift?

iii. What amounted to attestation of wills and whether it applied to oral wills.

iv. Whether a will could be considered to be insufficiently attested because one of the witnesses was also a beneficiary.

v. Whether an oral will was invalid if not made in the continuous presence of two witnesses.

Held:

1. Regarding persons with legal capacity to make wills, section 5 of the Law of Succession Act (the Act) provided that any person making or purporting to make a will was deemed to be of sound mind and that the burden of proof that a testator was, at the time he made any will, not of sound mind, was upon the person who so alleged.

2. The onus lay with the objectors to satisfy the court that the deceased at the time of making the will was too ill or affected by medication to know what he was doing. No report by a medical officer or other professional witness on the score was proffered, save for the bare assertions by the objectors who, it seemed were even unable to recollect their last encounter with the deceased beyond asserting that they visited him at home and in hospital during his sickness, an assertion disputed by the petitioner and the deceased’s sister.

3. A testator ought to understand the nature of the act and its effects, the extent of the property of which he was disposing, comprehend and appreciate the claims to which he ought to give effect. No disorder of the mind ought to poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties. No insane delusion should influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.

4. As regards the testator’s mental and physical capacity to make the will, the law presumed that the testator was of sound mind and the burden of proof that the testator was not of sound mind was upon the person alleging lack of sound mind. However, paragraphs 903 and 904 of volume 17 of Halsbury’s Laws of England showed that, where any dispute or doubt of sanity existed, the person propounding a will had to establish and prove affirmatively the testator’s capacity, and that where the objector had proved incapacity before the date of the will, the burden shifted to the person propounding the will to show that it was made after recovery or during a lucid interval.

5. The above treatise further showed that the issue of testator’s capacity was one of fact which could be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity was one of degree, the testator’s mind did not have to be perfectly balanced and the question of capacity did not solely depend on scientific or legal definition. It seemed that, if the objector produced evidence which raised suspicion of the testator’s capacity at the time of execution of the will which generally disturbed the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof and the burden then shifted to the person setting up the will to satisfy the court that the testator had the necessary capacity.

6. The deceased was aged 70 years at death. A copy of his death certificate indicated that the deceased died on December 28, 2017. The cause of death was stated in the copy of death certificate to be gastric adenocarcinoma, a type of cancer of the stomach which was diagnosed in May 2017 after several treatments in 2016. The deceased was admitted five times in hospital in 2017 and that upon learning of his cancer diagnosis, he had commenced preparations to write a will by making notes and discussing these matters with the petitioner.

7. The petitioner and the deceased’s sister testified that the deceased had remained lucid and of sound mind despite his illness, and more particularly on the day when the record of the oral will was signed by the said witnesses. It was their evidence that from December 13 to 26, 2017 the deceased dictated his will to the petitioner because though lucid, his hand had tremors hence he could not write. The witnesses did not waver during cross-examination. It was evident from the objectors’ evidence, particularly the 2nd objector, that prior to the illness of the deceased, the trio had fallen out, arising from disputes relating to the property now disputed in the instant case, and that matters came ahead after the signature of the deceased was forged and the objectors were subsequently charged in court with 3 counts of forgery and uttering a false document.

8. The objectors’ relationship with the deceased was
at an all-time low in the material period. The 2nd objector admitted that the deceased would not admit the objectors to his home. Significantly, neither objector could state any specific dates when they visited the deceased at home or in hospital. Thus, the objectors’ contention that the deceased lacked testamentary capacity at the material period was based on surmises premised on his illness and treatment but not from any observation they made.

9. It was incorrect that the deceased did not will away his entire estate as the will indicated instructions concerning his Kiambaa home. In contrast, the deceased’s sister was close to and cared for the deceased, as she lived in the same homestead as him. Similarly, the petitioner related with the deceased closely and also cared for him during the period of ailment until his death. Not only was he a cousin to the deceased and his siblings, he was a confidant to the deceased.

10. The deceased did make provision for the objectors even though there was no evidence that they depended on him and were his dependents as envisaged in section 29 of the Act. Thus, the objectors failed to discharge their burden of proof in relation to the challenge to the testamentary capacity of the deceased. Their claims were found to be unsupported by evidence and were dismissed. Based on the petitioner’s evidence, it was evident that though ailing during the material period, the deceased remained lucid. The detailed contents of the will document left no doubt concerning the acuity of his mind at the time.

11. The assertion that a will could be considered to be insufficiently attested because one of the witnesses was also a beneficiary was misplaced since attestation of wills only applied to written wills. Attestation of written wills as required in section 11 of the Act involved the witnessing of the testator’s signature on the will which was signified by the witnesses signing or witnessing the will in the presence of the testator. The will in the instant case was an oral will. Section 8 of the Act recognized both oral and written wills and section 9 of the Act provided in respect of the latter that no oral will would be valid unless it was made before two or more competent witnesses and the testator died within a period of three months from the date of making the will.

12. The deceased began to make preparations to make his oral will and held discussions with the petitioner and also prepared notes. He dictated his will over the period of between December 12 and 26, 2017. The objectors appeared to fault that fact, asserting that the two witnesses were not present on all occasions. The petitioner’s evidence was that after the deceased had made preparations by making notes and held discussions with the petitioner, he had given his instructions. Both the petitioner and the deceased’s sister agreed that the deceased dictated those matters which the petitioner recorded over the period. In some instances, such as December 13 and 26, 2017, the witnesses were both present.

13. From the accounts given, the will was completed on December 26, 2017 and the deceased briefed his sister about the will and asked that it be read out by the petitioner who had recorded the wishes of the deceased. There was no requirement that a will be recorded on one occasion and be completed in one sitting. The dictation and discussions between the deceased and the petitioner, sometimes witnessed by the sister, were recorded and culminated in the final document which the deceased gave assent to and had read by the petitioner in the presence of the sister, acknowledging those words to constitute his final wishes.

14. The oral will acknowledged by the deceased and read out in the presence of his sister by the petitioner could be said to have been completed and witnessed by the two persons on December 26, 2017, two days before the death of the deceased. The deceased had given instructions which culminated in the record made by the petitioner and adopted and acknowledged by the deceased in the presence of the petitioner and his sister as his oral will on December 26, 2017. There was no merit in claims that the said will was invalid as it was not made in the continuous presence of two witnesses. The evidence by the petitioner and the deceased’s sister showed the contrary.

15. The deceased and the petitioner were close friends in addition to being cousins. Further, outside his immediate family, the deceased did not make bequests to the petitioner alone. The will indicated bequests to his worker and to two other young men, none of whom were his own sons in that sense of the word, as well as to a niece, who was a daughter to the 1st objector, and a nephew, all in appreciation of various favours and arising from the beneficiaries’ relationship with the deceased. The deceased was unmarried and had no family. He relied heavily upon his sister and the petitioner in his last days. In spite
of his frosty relationship with the objectors, the deceased made several bequests to them and if the petitioner and his sister got more than the objectors did, then the explanation laid not in the mischief of the petitioner as suggested by them, but in their troubled relationship with the deceased.

16. There was no basis for suspicion that the petitioner somehow procured the will in his favour through craft or fraud. It was not difficult, reading the document to notice the thread running through it that reflected how the deceased’s relationship corresponded with the bequest to specific beneficiaries. That was hardly unusual in human affairs. The deceased was at liberty to dispose of his free property as he desired.

17. The objectors neither filed an answer to petition nor cross-application as required under rule 17 of the Probate and Administration Rules.

18. A valid will could not fail on the basis merely that it included amongst others, property not forming part of the deceased’s free property. Nonetheless, the court had considered the evidence laid before it in that regard and was of the view that that question could not be conveniently determined in the instant proceedings. If the objectors’ claim was based on trust, they ought to have filed an independent suit. The objectors’ assertion of a trust was based on the fact of their common father with the deceased and that the disputed assets formed part of the share that was due to their father as a son.

19. It was questionable, on the basis of the evidence before the court, whether the 2nd objector was even a daughter of the said father, having been born, according to official records, two years after his death. The objectors’ claim appeared to be based on or related to the estate of their late father, and not themselves necessarily as direct beneficiaries of their deceased brother’s estate. Thus, the question relating to whether or not the disputed property was held in trust by the deceased on behalf of their family could not and ought not to be agitated or determined in the instant proceedings. It was upon the objectors to take the next legal step that they deemed fit in the circumstances.

Objection dismissed, grant in respect of the oral will issued to the petitioner. Parties to bear own costs.

Factors to consider in establishing a gift in contemplation of death (donation mortis causa)

In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR
Succession Cause No. 15 of 2018
High Court at Malindi

RN Nyakundi, J
July 29, 2020
Reported by Kakai Tooili

Law of Succession – gifts causa mortis (gifts in contemplation of death) vis a vis gifts inter vivos (gifts between living people) - distinction between a gift inter vivos and a gift causa mortis - factors required to establish a donation mortis causa - where it was alleged that the deceased had gifted two of his children certain parcels of land orally before he passed on and the children were in occupation of the land - how was the estate supposed to be distributed - whether there were circumstances that would necessitate the court to depart from equal sharing of the estate as between the spouse of the deceased and their children - Constitution of Kenya, 2010, article 27(4); Law of Succession Act, Cap 160, section 11.

Law of Succession – administration of estates – distribution of a deceased’s estate – where a deceased died intestate and was survived by a spouse and children – factors to consider - where it was alleged that the deceased had given two of his children certain parcels of land before he passed on and the children were in occupation of the land - how was the estate supposed to be distributed - whether there were circumstances that would necessitate the court to depart from equal sharing of the estate as between the spouse of the deceased and their children - Constitution of Kenya, 2010, article 27(4); Law of Succession Act, Cap 160, section 29, 35, 36, 37, 38, 40 and 42; Matrimonial Property Act, 2013, section 7.

Law of Succession – administration of estates – administration of estates under the Constitution of Kenya, 2010 dispensation vis a vis under customary setting on entitlement of a deceased’s estate – where a
deceased died intestate and was survived by a spouse and children – what was the position of the deceased’s wife, under the Constitution and the customary setting, on entitlement of the deceased’s estate – Constitution of Kenya, 2010, article 27(4); Law of Succession Act, Cap 160, section 29, 35, 36, 37, 38, 40 and 42; Matrimonial Property Act, 2013, section 7.

Brief facts

The deceased passed on in April 2017 and was survived by 9 beneficiaries who included a widow, four sons and four daughters. The objector and the respondent applied for the letters of administration intestate before the High Court which were subsequently issued by consent in July, 2019. The deceased’s estate comprised of among other assets a piece of land measuring 4.5 hectares (suit property) and another piece of land which was not registered in the deceased’s name (unregistered property). The administrators had disagreed on the mode of distribution of the deceased’s estate and the same had protracted the confirmation of the grant.

The applicant filed the instant application seeking among others that the court orders the co-administrator (who was one of the deceased’s daughter) to produce and deposit to the court title deed documents for the suit property and another parcel of land held in her possession and that a deed for the suit property and another piece of land measuring 4.5 hectares (suit property) and another piece of land which was not registered in the deceased’s name (unregistered property). The suit property was registered in the name of the deceased and the other property in the deceased’s name (unregistered property).

The determination of the manner in which the suit property would be distributed would depend on whether the deceased had distributed some of his properties to some of his beneficiaries inter vivos or gift causa mortis. If indeed the deceased had indeed bequeathed some of his assets to some of his beneficiaries by way of gift inter vivos or causa mortis, the court would be compelled to honour the wishes of the deceased.

Held

1. The determination of the manner in which the suit property would be distributed would depend on whether the deceased had distributed some of his properties to some of his beneficiaries inter vivos or gift causa mortis. If indeed the deceased had indeed bequeathed some of his assets to some of his beneficiaries by way of gift inter vivos or causa mortis, the court would be compelled to honour the wishes of the deceased.

2. The suit property was registered in the name of the deceased and the other property in question was unregistered. The authenticity of its existence and ownership by the deceased or whether or not it formed part of the assets belonging to the deceased’s estate was not questioned by the competing parties to the suit. However, the court was tasked to investigate whether the applicant’s claim suffices to be gift inter vivos or causa mortis.

3. The concept of gifts was divided into two categories; gifts inter vivos and gifts causa mortis. Gifts inter vivos as contemplated in the Law of Succession Act (LSA) were such that the owner of the property or asset donated it to another without expectation of death. In any event the person who made such a gift had to have the capacity and competency to gift the property and the gift had to be perfected. In the case of inter vivos the gift had to go into immediate and absolute effect. Where the gift had been made, delivery to the beneficiary was necessary to consummate the gifts. Further, the intention of the parties and their acts done was fundamental.

Issues

i. What were the factors to consider in the distribution of a deceased’s property?

ii. What was the distinction between a gift inter vivos and a gift causa mortis?

iii. What were the factors required to establish a donation mortis causa and whether mere delivery for use of a deceased’s parcel of land amounted to a donation mortis causa.

iv. How was the estate of a deceased person, who had died intestate supposed to be distributed among the deceased’s spouse and children?

v. What was the position of the deceased’s wife, under the Constitution and the customary setting, on entitlement of the deceased’s estate?

vi. Whether there were circumstances that would necessitate the court to depart from equal sharing of the estate as between the spouse of the deceased and their children.

vii. Whether a gift in form of a parcel of land could be effected orally and if not, what were the exceptions.

viii. Whether mere occupation of the estate property in itself amounted to a gift inter vivos or causa mortis by a deceased or gave the person in occupation any or exclusive right of entitlement to the particular estate or property.

Relevant provisions of the law

Law of Succession Act

Section 42 - Previous benefits to be brought into account

Where-

a. an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

b. property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

The concept of gifts was divided into two categories; gifts inter vivos and gifts causa mortis. Gifts inter vivos as contemplated in the Law of Succession Act (LSA) were such that the owner of the property or asset donated it to another without expectation of death. In any event the person who made such a gift had to have the capacity and competency to gift the property and the gift had to be perfected. In the case of inter vivos the gift had to go into immediate and absolute effect. Where the gift had been made, delivery to the beneficiary was necessary to consummate the gifts. Further, the intention of the parties and their acts done was fundamental.
to establish the passing of the gift to the donee.

4. The test on a gift *causa mortis* was defined as a gift made in expectation of death. The donor caused the property or goods in his possession to be delivered to another. The general distinction between a gift *causa mortis* and a gift *inter vivos* was that its revocable by the donor and the capacity had to meet the requirements under section 11 of the LSA in the making of a will.

5. For effectual donation *mortis causa* three things had to combine;
   a. the gift or donation had to have been made in contemplation, though not necessarily in expectation, of death.
   b. There had to have been delivery to the donee of the subject matter of the gift.
   c. The gift had to be made under such circumstances as showed that the thing was to revere to the donor in case he should recover.

Therefore, the law required of the beneficiary that the deceased relinquished dominion over the title to the suit property in their favour. The evidence had to show that the deceased intended to make the gift of that particular property by taking steps to perfect delivery of it to the sons in exclusion of anyone else. Sometimes looked at from customary law perspective the father as the head of the family under parental executive order could permit any of his children use of the land without the necessity of giving up the title to pass to the user. The mere delivery for use was therefore not sufficient to qualify the property as a gift *causa mortis* or gift *inter vivos*.

6. It was inconceivable that from 2015, when the purported meeting giving the suit property and the unregistered property was held in the presence of PW1, to April 19, 2017 when the deceased died, the deceased did not voluntarily transfer possession to the two sons with an intention of never to leave it as free property of the estate as defined in section 3 of the LSA. When someone made a gift to another with the intention of vesting it wholly on that other person and would not be expected to revert back to himself, then such disposition arising there ought to be validated. Notwithstanding the evidence by the applicants attempt to persuade the court to admit such evidence on gift *inter vivos* or gift *causa mortis* there was no such gift over that disputed title in the legal sense.

7. Male authority assumed that husbands were the heads of households or legal representatives of households and possessed the authority to make decisions on behalf of the family or excessively administer property without consulting or seeking spousal consent. The irony of the situation before the court was that although the deceased was married, the deceased’s wife denied being involved in the decision making process of gifting part of the estate to the sons without her consent. Under Kenya’s constitutional and customary law setting, the deceased’s wife was automatically entitled to property that she could have assisted the deceased in acquiring through her labour, even though financial contribution was considered as a predominant factor.

8. Despite the deceased being aware that there were other lawful beneficiaries, he chose not to involve them on the issue of the suit property. A gift of the legal estate had to be made by a registered transfer, the same fashion as on a transfer for valuable consideration. A gift *inter vivos* or *causa mortis* in favour of the applicants failed because the deceased did not provide the means for putting the suit property under the two sons’ effective control. They would require further authority from the administrator of the estate to effect the donation and vest it in their actual possession.

9. The donor was no longer the owner of the property conveyed in gift *inter vivos* or mortis *causa*. It was essential to its validity that the donor had actual and irrevocably divested himself or herself of the property conveyed as a gift. The plausibility of that criterion was that property could not be both given and retained.

10. Generally, a gift in form of a parcel of land ought to be effected by way of a written memo or a transfer or declaration of trust in writing showing that the land was gifted to the sons of the deceased *inter vivos* or *causa mortis*. However, if a gift rested purely in promise, whether written or oral, or in unfulfilled intention, it was incomplete and imperfect, and the court would not compel the intending donor or those claiming under him to complete and perfect it, except in circumstances where the donor’s subsequent conduct gave the donee a right to enforce the promise. The applicant’s claim of gift *inter vivos* was merely based on a promise and or unfulfilled intention by the deceased since no written memo, declaration or transfer was placed before the court to show that the gift was indeed effected.

11. For a gift *inter vivos* or *causa mortis* to be completed or perfected, it had to be ascertained on the part of the applicant that there were circumstances where the donor’s succeeding
conduct provided the donee with a right to enforce the promise or unfulfilled intention. The fact that two of the deceased’s sons were residing on the unregistered land did not make the gift complete.

12. Mere occupation of the estate property did not in itself amount to gift inter vivos or causa mortis by the deceased or give the person in occupation any or exclusive right of entitlement to the particular estate property. In the absence of a transfer of the suit properties to the four sons of the deceased, there was a lack of intention by the deceased to make gifts inter vivos or causa mortis to his sons. There was no evidence that the deceased intended to make or made gifts inter vivos or causa mortis of the suit properties to any of his sons including the applicant. Therefore, the suit property and the unregistered property formed part of the deceased’s estate which was liable to equal distribution to all his beneficiaries.

13. The onus was on the applicants to prove on a balance of probabilities that the gift of the subject parcel of land was intended by the deceased to be transferred to the two of them for their gain and not the rest of the siblings. Based on the oral evidence from the deceased’s wife and the sister to the applicants (DW1), the intended specific gift was declared void for want of intention as no valid transfer occurred during the lifetime of the deceased. It was not clear or there was no sufficient evidence given by the applicant to pinpoint as to when the alleged gifts were made by the deceased to his sons. The only shred of evidence placed before the court was that the gifts were made by the deceased to his sons, in the presence of the Chief and some elders and that had been disputed by the respondent as a lie.

14. The applicant was not a credible witness; his evidence as to when and the circumstances which went into isolating the suit property from the rest of the estate were conflicting and materially unreliable. While the deceased wife was alive, it was intriguing no such mention was made to her in respect of the suit property or otherwise being given to his sons. The gift envisaged in terms of section 31 of the LSA was not applicable in the instant matter as no material had been put before the court to establish that the deceased made the gift inter vivos or causa mortis. The bequeathing could therefore be treated as invalid for it failed to meet the requirements of the law.

15. Intestate succession applied to estates of persons who died intestate or left no valid will disposing of their property, thereby requiring the descent and distribution of their property in accordance with the provisions under the LSA. Gifts did not form part of the estate property for distribution to other beneficiaries, for, it was no longer the free property of the deceased.

16. The Constitution of Kenya, 2010, (Constitution) as well as the LSA frowned upon the discrimination of women as far as their entitlements were concerned in inheritance matters. Reference to children did not distinguish between sons and daughters, neither was there distinction between married and unmarried daughters. The view that the approach which had been alleged to have been adopted by the deceased was a practical and equitable one aiming at giving the sons an advantage of enabling the sons to retain the land where they had been living on and developed on was untenable in law having in mind that the applicant failed to prove that such an approach was ever vended by the deceased.

17. No child came to the distribution table of the estate intestate with superior rights. Therefore, a situation whereby a male heir would be preferred to inherit more shares to a female heir of the same estate for purposes of inheritance could no longer withstand constitutional scrutiny. In the letter and spirit of the Constitution dependant daughters under section 29 of the LSA irrespective of age, or social status were entitled to inherit from their parents intestate equally like their brothers. The measure of differentiation on distribution that could occur should not be prejudicial or unjust along gender lines which article 27(4) of the Constitution specifically disallowed. Granting the two sons a set of preferential share in the suit property and further devolve the entire estate to other heirs equally would amount to discrimination.

18. If any person died wholly intestate his or her widow was left without adequate provision for her or his proper maintenance, the children of the deceased could not be in a position to provide adequate spousal/ wife maintenance envisaged to be fair and just. In the second instance on intestate estate the spouse should be entitled to a life interest in the remaining property of the deceased together with personal and household effects absolutely. The children would get the entire estate upon the termination of the life interest of the surviving spouse. Under section 29 of the LSA, the wife ranked high among the dependants of the deceased husband.
19. Section 35(1) of the LSA provided for a life interest in the residue of the net intestate estate. For purposes of that section a life interest granted the spouse the right to reside in the property of the deceased’s property until his or her own death, without necessarily owning the land. In making reference to those rights which were acquired by one spouse as a continuing life interest, substantial benefit of it as whole if anything imported indirect discrimination against women.

20. The law envisaged that the spouse of a deceased person could use the property that was subject to life interest and could retain any house during his or her lifetime but prohibited him or her from selling the assets. That meant that the family home left behind and all the deceased’s personal chattels were to be transferred to the deceased’s wife for the exclusive use during her life. The spouse had to not be bruised or disadvantaged by the death of the deceased and made to be in a worse situation had the deceased not passed on.

21. The second part of section 35 of the LSA was in regard to the differentiating features between widows and widowers around the question on the lapse of the life interest. If the surviving spouse was a woman such interest was to determine on her remarriage to any person. Whatever assets which fell within the provisions of section 35, 36, 37, 38 and 40 of the LSA were matrimonial assets under the Matrimonial Property Act No. 49 of 2013, the legal framework governing division of matrimonial assets leaned towards equal distribution taking into account the factors laid down in section 7 of the Act. On that score one of the principal objects of the LSA was to have regard to equal distribution of the intestate estate.

22. In the circumstances of the instant case, the court would depart from equal sharing of the estate as between the spouse of the deceased and their children. There were extra ordinary circumstances making equal sharing of the assets amongst the children and the spouse repugnant to justice for the following reasons:

a. the property had to have been acquired during the subsistence of the marriage before the demise of the deceased;

b. the spouse who was the mother to the heirs to that estate contributed or took all the responsibility for raising the children as the deceased was involved in wealth creation;

c. the dependant adult children means of survival and provisions ought to be taken into account to give sufficient weight to the importance to the intangible benefits of the marital bond and its primacy before the death of the deceased; and

d. as regards the deceased’s wife, the evidence and judicial notice taken by the court she was fairly aged and could require constant medical attention and other basic rights.

The fact of motherhood mandated the court to exercise such discretion in appropriate cases to deserving cases such as the instant one between the spouse and children of the deceased.

23. In exercising broad discretionary powers regarding the distribution of the assets of the estate, the deceased’s wife’s needs called on the court to depart from the equality principle to the extent of money held in the deceased’s bank account. That was to ensure that it helped the deceased’s wife’s ability to continue to live in the home while meeting her basic needs without over dependence or on account of the children. Therefore, the respondent and the other daughters of the deceased were justified in protesting the discrimination exhibited by the mode of distribution proposed by the applicant. The deceased’s assets were to be distributed equally among all the beneficiaries, that was the law in Kenya.

24. To channel the cash held in the deceased’s bank account in the counsels’ respective accounts for distribution would in effect be empowering them to be co-administrators to the estate of the deceased which was entirely untenable. Unless stated otherwise, the distribution of the deceased’s estate should be at par between his sons and daughters. The application on record offended the principles of natural justice, equity and good conscience if the method proposed was to be adopted.

Application dismissed.

Orders

i. The estate to be distributed as follows:-

a. Title deed number KILIFI/ TEZOMDUKANI/12- (4.5) Ha

   i. the deceased’s wife - 4.5 acres life interest

   The balance was to be shared in equal share amongst the children of the deceased.

ii. Title deed Number KILIFI/ NGERENYI/443-5 Ha to be distributed in equal shares among the deceased’s children.
Factors to be considered in determining the trigger date of an overdraft facility issued by a bank to a borrower

Virchand Virpal & Sons Limited v NIC Bank Limited & 4 others [2020] eKLR
Civil Case No. 636 ‘B’ of 2009 consolidated with HCCC No 419 of 2010
High Court at Nairobi
GL Nzioka, J
June 26, 2020
Reported by Kakai Toili

Banking Law – overdraft facilities – trigger dates for an overdraft facility – where the agreement for the overdraft facility provided that 60% of the current market value of listed shares held as security should exceed the overdraft facility and that the borrower was required to provide additional shares within 5 days of deterioration of the shares below the 60% of current market value – where the agreement provided that if no shares would have been provided or overdraft balance reduced within that period, that would trigger an immediate sale of shares to bring back cover to 60% - where the borrower defaulted in making payments and the value of the shares fell below 60% - where the borrower wrote to the bank to delay the selling of shares until the value of the shares rose - what were the factors to be considered in determining the trigger date of the overdraft facility - what was the effect of the correspondence by the debtor.

Banking Law – loan agreements – variation of loan agreements - what was the effect of the variation of a loan agreement by a bank on the debtor’s guarantors.

Brief facts

By a letter of offer, the defendant (bank) advanced to the plaintiff (principal debtor) an overdraft facility. At the request of the principal debtor, the bank enhanced the overdraft facility thrice to Kshs. 210,000,000. The parties executed a letter of offer dated September 15, 2008 (letter of offer), however, the facility amount remaining was retained at Kshs 210,000,000. The bank overdraft facilities were secured by the securities listed under annexure II of the letter as follows: lien over shares listed at the Nairobi Stock Exchange (NSE) at 60% of current market value and personal joint and several guarantees of the directors for Kshs. 210, 000, 000.00. Clause 1 and 2 of annexure I, of the letter of offer stipulated that: at all times 60% of the current market value of listed shares held as security should exceed outstanding on overdraft and that the borrower would be required to provide additional shares within 5 days should security cover deteriorate so as the 60% of current market value; if no shares would have been provided or overdraft balance reduced within that period, that would trigger an immediate sale of shares to bring back cover to 60%. All the borrowing was supported by the principal debtor’s board of directors’ resolution and the forms of acceptance of the facility signed by them. The bank claimed that the principal debtor defaulted in repayment of the debt, fell into arrears and that the bank in exercise of its rights under the letters of offer sold the shares. The bank claimed that it exercised its fiduciary duty to secure its interest delayed the sale of the shares, in view of the low share prices at the NSE. The principal debtor filed the instant suit seeking among others an order that a permanent injunction be issued to restrain the defendant from further selling, disposing of, or alienating the shares pledged as security or enforcing the personal guarantees executed.

Issues

i. What were the factors to be considered in
determining the trigger date of an overdraft facility issued by a bank to a borrower?

ii. What was the effect of correspondence by a debtor requesting the bank to delay the selling of securities where the letter of offer for an overdraft facility had indicated when to sell the security?

iii. What was the effect of the variation of a loan agreement by a bank on the debtor’s guarantors?

**Held**

1. The relevant terms to determine when the trigger point occurred were stipulated under clauses (1) and (2) of annexure I of the letter of offer. Clauses (1) and (2) revealed that the bank was covered at any given time, to the extent of only 60% of the value of the total shares held and/or pledged. The plain reading of the provisions of annexure II, to the letter of offer, did not indicate that the guarantors’ shares formed part of the security. The reference thereunder was made to personal joint and several guarantees.

2. The individual guarantors’ shares were pledged as security. The individual guarantors’ shares pledged were part of the security and to arrive at the total value of the shares pledged, and the 60% margin thereof, the value of those shares had to be taken into account. However, clause 11 of the letter of offer dealt with events of default and in particular clause 11.2.2 stated that in the event of default by the borrower, the bank would declare the security had become enforceable, whereupon all amounts payable would become immediately due and payable, without indulgence, presentation, demand for payment, protest or notice of any kind expressly waived by the borrower.

3. Clause 11 of the letter of offer had to be read together with the provisions of condition, 1 and 2 of annexure I. The conditions did not make provisions beyond five upon the overdraft limit bursting the 60% margin. The principal debtor did not maintain the limit of its overdraft within the margin of the 60% of the market value of the total pledged shares. The bank did not enforce its security as and when the margin clause was breached and/or when the trigger point occurred.

4. The total market value of all the shares pledged was critical in determining whether the outstanding overdraft facility was beyond the 60% margin or not, at any given time. It was determining the same that, one was able to determine when the trigger point occurred. In that regard the date of October 7, 2008 alluded to by the principal debtor’s 2nd witness as the trigger date was not sufficiently supported.

5. The bundle of document filed in court on the January 17, 2012, with a document entitled; V V & Sons Ltd—Share Holding Value analysis, revealed that as at October 7, 2008, the total holding value of the shares was 210,827,665; 60% of total holding value was 126,496,599 and the principal debtor’s bank overdraft balance was 213,935,286.95. Therefore, the gross safety margin as at October 7, 2008 was 3,107,621.95. However, the basis of the value of the shares on a daily was not supported by evidence from the NSE. In that case the analysis was insufficient to determine the trigger date.

6. To determine the trigger date, regard had to be held strictly first and foremost to the contractual terms of the contract as stipulated in the letter of offer and any other security documents; including the guarantee and indemnity forms signed by the guarantors and then the conduct of the parties as evidenced by the correspondences exchanged.

7. The terms of conditions 1 and 2 of annexure I, of the letter of offer required the bank to call upon the principal debtor to provide additional shares within 5 days or the 60% margin was breached and in default sell the shares immediately. The general rule was that, parties were bound by the terms of their contract and the court could not re-write the contract for them. However, the terms of a contract had to be considered as a whole and that oral evidence and/or conduct of the parties could not override the express terms of the contract. The correspondences between the bank and the principal debtor could not supersede or override the express terms of the letter of offer and in particular condition 1 of annexure I of the letter of offer. The letters dated January 30, 2009 and February 25, 2009, were written long after the bank had already written to the principal debtor on September 9, 2008 and October 7, 2008, indicating that the principal debtor had burst the 60% margin.

8. The bank could not argue that, by the principal debtors providing additional shares and/or depositing funds to regularise the account, it was justified in the delay to sell the shares. That was because the bank commenced sell of the shares on February 26, 2009, due to the principal debtor’s failure to make the first payment of the four proposed payments by installment, thus the additional shares and/or funds did not maintain the 60% margin. In fact, in the emails
sent by the 1st defendant's general manager, Coast Region, the bank indicated that even interest was in arrears. Therefore, the bank's argument that it indulged the principal debtor did not assist it; for it was strictly bound by the terms of the letter of offer. If the bank therefore suffered any loss as a result of its delay in selling the shares on the due date, then it had to bear and/or shoulder the loss.

9. The principal debtor could not run away from the letters written to the bank to delay the sale and that was where the doctrine of estoppel came in. From the correspondence therein, the principal debtor sought for indulgence because it was in default. It was therefore estopped from denying any liability that could arise as a result of delayed sale.

10. By virtue of giving additional shares and/or making deposits, after default, they led the bank to believe that, they would not challenge the bank's action to delay the sale of the shares. The principles of equity stated *inter alia* that; he who went to equity had to go with clean hands. The principal debtor could not have sought for indulgence if it was not in default and therefore it could not deny liability, unless it could prove that, had the bank sold the shares at the right time, it would have realised adequate funds to cover its debt.

11. If the bank materially varied its agreement with the principal debtor, such as granting time to the principal debtor to pay the debt then the guarantor would be discharged. However, that could be dealt with by suitably drafted clause to the contrary. The continuing clause in a contract of guarantee secured present and future loans especially in cases of a current account debt where the rule in the *Claytons* case could work to the disadvantage of the bank. However, a guarantor could only be asked to pay what the principal debtor owed, and if the principal debtor had a good defence to the bank's claim, the guarantor could also raise that as a defence.

If the court found that the principal debtor was liable, the guarantors would be equally liable.

12. The burden of proof in civil cases was beyond peradventure and the onus was on the party alleging to prove any fact that they alleged. The evidence adduced by either party was not conclusive on when the 60% margin trigger was reached and/or triggered.

13. The court was live to the fact that the suits therein were consolidated and were a test suit to other suits. Therefore, the findings were very important. Generally, when a claim was not proved it should be dismissed in favour of the opposite party. Both parties' claims were not supported by adequate evidence and none of the parties would benefit from the dismissal. Article 159 of the Constitution implored upon the court to promote substantive justice. Justice was done when it was seen to be done.

**Orders**

i. Within 30 days of the date of the order, the parties to engage an independent third party and supply the party with all the material information required to ascertain, *inter alia*, when the 60% trigger point occurred based on the terms of letter of offer and the value of the total shares pledged, the price of each share at the time and the outstanding balance on the overdraft facility at that time.

ii. If the parties did not agree on an independent party for the exercise, either party was at liberty to apply to the court for further orders or directions.

iii. If the parties agreed and provided a final report, the report would form the basis of the final orders therein.

iv. The cost of the report to be borne in equal proportion by the parties.

v. If the parties did not comply with the conditions, then the respective claims in the pleadings would stand dismissed with no orders as to costs at the expiry of the time set. The issue of interest and costs would await the final orders.
An order for forfeiture of goods cannot be issued automatically after conviction and sentencing of an accused
Jones Nzioka & another v Republic [2020] eKLR
Criminal Appeal No. 18 & 19 of 2020
High Court at Malindi
R Nyakundi, J
June 30, 2020
Reported by Kakai Toili

Criminal Procedure - forfeiture – forfeiture of property to the State – where the accused persons were convicted and sentenced for selling assorted alcoholic drinks in contravention of the Public Health Act and the directions issued by the Cabinet Secretary for Health on prevention, control or suppression of covid-19 – where the trial court forfeited the inventory of exhibits to the State for final destruction - where the property in question did not belong to the accused – whether an order for forfeiture of goods could be issued automatically after conviction and sentencing of an accused – whether it was mandatory for an accused to be heard before an order of forfeiture was issued - where the trial court forfeited the inventory of exhibits which comprised of assorted soft and alcoholic drinks to the State for final destruction under the supervision of the court.

Appeals – criminal appeals – role of appellate courts - role of a first appellate court in conducting a review of a trial court’s decision - circumstances in which a decision of a lower court could be reviewed - illegality, procedural impropriety and proportionality - nature of illegality, procedural impropriety and proportionality - what were the circumstances in which an appellate court could interfere with the exercise of a trial court’s discretion.

Brief facts
The appellants were charged, with two counts of contravening provisions, control or suppression of covid-19 directions issued by the Cabinet Secretary pursuant to section 36(m) as read with section 164 of the Public Health Act. The particulars of the indictments were that in March 2020 the accused was found selling assorted alcoholic drinks in contravention of directions issued by the Cabinet Secretary for Health (Cabinet Secretary) on prevention, control or suppression of covid-19. At the trial court the appellants on their own plea of guilty were convicted and sentenced to a fine of Kshs.20,000/= each in default one (1) month imprisonment. Further, the trial court forfeited the inventory of exhibits which comprised of assorted soft and alcoholic drinks to the State for final destruction under the supervision of the court.

Issues
i. Whether an order for forfeiture of goods could be issued automatically after conviction and sentencing of an accused?
ii. Whether it was mandatory for an accused to be heard before an order of forfeiture was issued?
iii. What was the role of a first appellate court in conducting a review of a trial court’s decision?
iv. What were the circumstances in which a decision of a lower court could be reviewed by an appellate court?
v. What was the nature of illegality, procedural impropriety and proportionality in an application seeking to review a trial court’s decision?
vi. What were the circumstances in which an appellate court could interfere with the exercise of a trial court’s discretion?

Relevant provisions of the law
Criminal Procedure Code
Section 389A
Where, by or under any written Law other than Section 29 of the Penal Code, any goods or things may be but are not obliged to be forfeited by a Court, and that Law does not provide the procedure by which forfeiture is to be effected, then, if it appears to the Court that the goods or things should be forfeited, it shall cause to be served on the person believed to be the owner notice that it will, at a specified time and place, order the goods or things to be forfeited unless good cause to the contrary is shown, and at that time and place or on any adjournment, the Court may order the goods or things to be forfeited unless cause is shown by the owner or some person interested in the goods or things provided that, where the owner of the goods or things is not known or cannot be found, the notice shall be advertised in a suitable newspaper and in such other manner if any as the Court thinks fit.

Held
1. In appeals against conclusions of a trial court, the first appellate court approach was by way
of a rehearing and examination of the evidence afresh, giving due regard to greater advantage, the trial court could have had as a primary court. The appeal court conducting a review of the trial court decision would not conclude that the decision was wrong simply because it was not the decision the appellate court would have made had he or she been called upon to make it in the court below. Something more was required than personal unease and something less than perversity has to be established.

2. The plea of guilty to the charges offered by the appellants for the respective offences and after the facts had been read was in consonant with the principles of entering a guilty plea. There was therefore no irregularity to render the plea of guilty and subsequent conviction and sentence defective. Furthermore, the grounds in each memorandum of appeal were not in any sense on the illegality of the plea of guilty, conviction or sentence. The appeals were mainly on the ground that the trial court misdirected itself in holding that the goods were liable for forfeiture and breach of the due process before the final order. A material irregularity could arise in the course of a trial where there had been misdirection or an erroneous decision by the court on a matter relating to the evidence.

3. The general principles on forfeiture should follow the procedure set out under section 389A of the Criminal Procedure Code. From the record, the trial court though seized of jurisdiction erred in not giving the appellants an opportunity to be heard before an order of forfeiture was made after conviction and sentence. That radical conclusion required the trial court to enter on the inquiry and to decide that particular issue distinctively with that of conviction and sentence. Furthermore, Covid -19 directions by the Cabinet Secretary pursuant to section 36(m) as read with section 164 of the Public Health Act did not provide automatic forfeiture of exhibits produced in support of the commission of the offence.

4. Even where there was automatic forfeiture on the proceeds of crime or a vessel and article used in the commission of the offence both sides should be heard to form a base for the decision. The trial court resolved that question without a fair hearing and due process of the law as contemplated in article 50 of the Constitution. Further, a conclusion on that point was ultimately disposed of without the duty of giving reasons by the trial court. A crucial issue to the resolution of issues between the parties ought to be founded on reasons in support or against the decision.

5. The duty to exercise jurisdiction called for the obligations on the part of the trial court to give reasons according to law. Though the appeal as the law stood was governed under the Criminal Procedure Code and the Public Health Act, the tide on its resolution could be deprived where a decision of an inferior court could be reviewed on grounds of illegality, irrationality and procedural impropriety.

6. Illegality meant that the decision-maker had to understand correctly the law that regulated his decision making power and had to give effect to it irrationality. Wednesbury unreasonableness applied to a decision which was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Procedural impropriety covered failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who would be affected by the decision, as well as failure to observe procedural rules that were expressly laid down even where such failure did not involve denial of natural justice.

7. The courts would quash exercise of discretionary power in which there was not a reasonable relationship between the objective which was sought to be achieved and the means used to that end or where punishment imposed by the administrative bodies or inferior courts were wholly out of proportion to the relevant misconduct. The principle of proportionality was well established in law and was regarded as one indication of manifest unreasonableness weighing the actual purpose that was identified by the trial court, the range of permissible alternatives ought to have been scrutinized before an order for forfeiture was determined in accordance with the law. There had to be a fair balance being struck between the rights of the appellants and the interests of society which was inherent in the whole Constitution.

8. Bearing in mind the facts and circumstances of the cases at the trial court as well as the State appreciation to control or suppression of covid-19, the trial court failed to achieve a fair balance between the sentence of Kshs.20,000/= in default one year imprisonment, and subsequent forfeiture of the goods seized from the scene of crime. Moreover, the factors under covid-19 pandemic taken together and non-compliance by the appellants had to be considered against
the adverse economic effect that the seizure and confiscation of the property would occasion the owners who had a legitimate expectation on return of investment.

9. Deprivation of private property by way of a penalty was incompatible with the proportionality test in sentencing of an offender in the case. Where there was no fault at all on the part of the owner, it was fair that the goods be returned after conviction and sentence of the accused in a criminal case. The discretion to impose both a fine of Kshs.20,000 in default one year imprisonment and in addition an order for forfeiture of the property proven to be goods used for the commission of the crime was in the context of the appeal irregular, illegal and wrong exercise of discretion.

10. An order of forfeiture was in contradiction with section 389A of the Criminal Procedure Code and to make them subject for forfeiture was inevitably against the principles of fairness or natural justice. The property seized could not be classified as property from the proceeds of crime obtained or derived directly or indirectly as a result of the commission of a designated offence under section 164 of the Public Health Act. To address that concern Parliament provided an avenue under section 389A which permitted any person with an interest in the property, including accused persons to apply for a restoration order or authorization of the release of the seized and forfeited property.

Appeal allowed; the goods and items identified by the appellants in the inventory attached to the record of appeal claimed as recoverable to be returned as a whole with no costs as to storage or handling charges.

The Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 are constitutional.

Petition No 132 of 2020
High Court at Nairobi
JA Makau, J
June 25, 2020
Reported by Beryl Ikamari

Constitutional Law - institution of a constitutional petition - doctrine of separation of powers, the principle of ripeness and the political question doctrine - constitutional challenge raised against subsidiary legislation which was under parliamentary scrutiny pending parliamentary approval - whether a constitutional petition was premature as it raised questions that were still under consideration by the relevant constitutional organs.

Constitutional Law - doctrine of judicial restraint - decisions involving merit and policy determinations - where a petition involved questions relating to the propriety of rules made on the basis expert opinion and the exercise of delegated legislative mandate by a Cabinet Secretary - whether the court should exercise restraint and decline to undertake a merit or policy review as related to the propriety or otherwise of those rules - Constitution of Kenya 2010, articles 94(5) and 94(6); Statutory Instruments Act, No 23 of 2013, section 11.

Statutes - subsidiary legislation - imposition of penalties under subsidiary legislation - extent to which penalties could be imposed under subsidiary legislation - whether imposition of penalties under the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 was ultra vires the Public Health Act - Public Health Act (cap 242), section 36; Statutory Instruments Act, No 23 of 2013, section 24(5).

Constitutional Law - fundamental rights and freedoms - right to equality and freedom from discrimination - whether subsidiary legislation which required all persons, including the poor, to wear masks when visiting public places was discriminatory - Constitution of Kenya 2010, article 27.

Constitutional Law - national values and principles of governance - public participation - circumstances under which public participation requirements would not be applicable in the making of legislation - rules made to contain the spread of COVID - 19 - whether subsidiary legislation made to contain the spread of COVID - 19 had to meet public participation requirements - Constitution of Kenya 2010, article 10; Statutory Instruments Act, No 23 of 2013, section 5A (2).

Brief facts

The petitioner challenged the constitutionality of the
Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 (the Rules) on various grounds. They said that the prescription that persons should wear masks or face penal consequences for failure to do so discriminated against the poor. They added that the proposition that the bodies of those that died of the virus should be cremated did not accord the deceaseds’ dignity or respect to their families. Further, they stated that the rules were not subjected to Parliamentary approval. Additionally, they said that section 36 of the Public Health Act did not allow the relevant Health Cabinet Secretary to create offences or prescribe penalties and doing so made the Rules ultra vires the Public Health Act.

The petitioners also contended that the Rules violated socio-economic recognized under article 43 of the Constitution as the omission to supply rations and face masks to persons affected by the disruption of the transport system was a violation of their right to food, adequate standard of living and health. Furthermore, the petitioner said that regulation 11 of the Rules violated the right to a fair trial as it set a penalty without creating or defining the offence. The petitioner also argued that the requirement that both private and public vehicles carry 50% of their licensed capacity was unclear and subject to misinterpretation by law enforcement officers.

**Issues**

i. Whether under the doctrine of separation of powers, the principle of ripeness and the political question doctrine, constitutional challenges raised against subsidiary legislation which was under parliamentary scrutiny, were justiciable.

ii. Whether under doctrine of judicial restraint, parliamentary immunity, and parliamentary privileges the court lacked jurisdiction to interfere with an ongoing parliamentary process of the scrutiny of statutory instruments.

iii. Whether the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 should be declared void for lack of public participation.

iv. Whether imposition of penalties under the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 was ultra vires the Public Health Act

v. Whether the impugned Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 were discriminatory in that they required all persons, including the poor, to wear masks when visiting public places

**Held**

1. Under article 259 of the Constitution, the Constitution should be interpreted in a manner that promoted its purposes, values and principles and advanced the rule of law and the human rights and fundamental freedoms in the Bill of Rights and contributed to good governance. Articles 3(1), 258 and 165(3) (d) which conferred upon the High Court jurisdiction to interpret the Constitution should be read together with articles 6(2), 94, 95 and 109 of the Constitution and section 11 of the Statutory Instruments Act. The national values and principles of governance recognized under article 10 of the Constitution were also of importance when interpreting the Constitution.

2. The power to legislate, in accordance with the constitutional doctrine of separation of powers, the preserve of the Legislature but it could also be delegated to persons or bodies in accordance with article 94 of the Constitution of Kenya which provided for the legislative authority of Parliament.

3. Where constitutional functions were bestowed on a certain institution or organ of the state, the court had to give that organ sufficient time of leeway to discharge its constitutional mandate and only accept an invitation to intervene when that organ or body had demonstrably been shown to have acted contrary to its constitutional mandate or in contravention of the Constitution.

4. Under articles 94(5) and 94(6) of the Constitution it was clear that the legislative mandate of the minister was a delegated authority and the minister had to exercise that delegated legislative mandate in accordance with articles 94(5) and 94(6) of the Constitution. The Statutory Instruments Act clarified the rationale and procedure for laying subsidiary legislation before Parliament. Section 11(4) of the Statutory Instruments Act provided that a statutory instrument only remained in force pending Parliament’s scrutiny, when it was laid before the relevant House of Parliament in accordance with the Act.

5. Within the prescribed timeframe, the impugned Rules were laid before the relevant Houses of Parliament. The Rules were also published in the Kenya Gazette as required by statute. The legal presumption of constitutionality was applicable to all pieces of legislation, including the impugned Rules.

6. At the time of filing the petition the impugned Rules were still under scrutiny by the relevant
constitutional organs. The questions raised in the petition had therefore not reached constitutional ripeness for adjudication by the court. There was no actual or live dispute for court determination.

7. By virtue of the concept of ripeness, separation of powers and political question doctrine, the court would not delve into the issues raised. The Rules were before Parliament which was the forum in which the petitioners and the ‘1st interested party had a chance to raise the issues in the petition.

8. Under the Statutory Instruments Act, the relevant parliamentary committee would consider issues as to whether the impugned Rules were constitutional, had any legal effect for lack of public participation or were vague in penal sanction or whether they complied with the Statutory Instruments Act.

9. The petition was premature; the court could not supervise the workings of Parliament. The relevant parliamentary committee was yet to have its deliberations and make its recommendations.

10. The court had jurisdiction to review the manner in which National Assembly could carry out the parliamentary scrutiny process in respect of the impugned Rules but in light of the doctrine of judicial restraint and lack of the conclusiveness of the process, the court would not intervene with an ongoing process nor question the parliamentary committee’s findings unless there was evidence that the National Assembly disregarded the Constitution and the law.

11. The Parliamentary Powers and Privileges Act underpinned the independence of the legislature and protected the appropriate speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in discharge of their functions of their office within the provisions of the law. Nonetheless, any person aggrieved by any contents of a report adopted by a parliamentary committee had the right in the instance to appeal against the recommendations of the House. The petitioner would not be prejudiced if the Rules went through parliamentary scrutiny as it had a right to appeal when the relevant report was finalized and tabled for adoption.

12. Section 5A(2) of the Statutory Instruments Act contemplated instances when statutory instruments could be made without prior public consultation. When the Rules were published COVID 19 infections were rapidly escalating with more people losing their lives and there was urgent need for immediate action to contain the spread of the virus, one of which was the formulation of legal regulations to restrict the movement of people in and out of infected zones, which was premised on the expert opinion of public health practitioners.

13. The issue of restriction of activities within an infected area generally had been subjected to public participation and the petitioner was one of the entities that had been consulted. Additionally, the Government had a right to put in place precautionary and restrictive measures in order to slow the spread of COVID - 19 in line with the precautionary principle and the Public Health (Prevention, Control and Suppression of COVID – 19) Rules.

14. Public participation was not always applicable as a blanket requirement. It had to be considered on a case to case basis and had to depend on the circumstances existing at the time in question. Public participation was not an applicable requirement at the time the Rules were made and the Rules could not be unconstitutional on public participation grounds.

15. Section 24(5) of the Statutory Instruments Act allowed for the imposition of a penalty for the breach of a statutory instrument not exceeding twenty thousand shillings or such term of imprisonment not exceeding six months, or both. Therefore, regulation 11 of the impugned Rules, which included the imposition of a penalty, was not ultra vires the enabling legislation, the Public Health Act.

16. Criminal sanction and penal policy were within the constitutional competence of the Legislature and the 2nd respondent while exercising delegated legislation mandate had that competence. The petitioner could not challenge it because it had a different view on appropriate sentences and penal sanctions.

17. The licensed capacity of a vehicle was capable of determination. The requirement that all vehicles should carry passengers at 50% of its capacity was also one that could be determined. Under section 3 of the Traffic Act as well as section 4(2) of the National Transport and Safety Act, 2012 the National Transport and Safety Authority (NTSA) was responsible for the registration and licensing of motor vehicles. The licensed capacity was therefore as approved by the NTSA during registration and licensing.

18. It was common knowledge that face masks helped protect against transmission of COVID - 19, particularly where infected persons were
pre-symptomatic but could still transmit the virus to others. For that reason, it was fundamentally important for people to wear masks when in public places so as to flatten the curve and eventually overcome COVID-19 altogether.

19. The Rules did not require Kenyans to purchase single use surgical masks or to wear a certain mask design. Kenyans had the alternative of wearing homemade masks of various types as long as they covered their mouth and nose when in public places.

20. The Rules were not discriminatory in any way. The Rules served the legitimate aim of protecting everyone equally from the threat of COVID-19.

21. It was not irrational to limit the number of persons being transported in private and public vehicles and also to require a lone driver in a vehicle to wear a mask to limit instances of transmission of virus with any subsequent person who come in contact with the subject vehicles. That restriction was proportionate and reasonable in an open and democratic society noting that the freedoms under the Constitution were enjoyed only to the extent that they did not pose a risk to others.

22. The public interest lay in saving the lives of Kenyans and protecting their wellbeing against COVID-19, and in effect, the priority level attributable to the relevant government cause in doing so should take precedents over the unsubstantiated allegations by the petitioner. The Rules were reasonable, proportionate and constitutional and were reflective of the steps taken world over in the fight against COVID-19. COVID-19, which entailed a pandemic covering the whole world with the resultant deaths in Kenya and several other countries.

23. The petition was based on general averments. The claim that the Rules negatively affected the transport business was unsupported and it was clear that the Rules did not completely ban or stop transport operations. Similarly claims of the petitioner that many people were stranded and could not travel were not supported by evidence. Further claims that the Rules were abused with respect to burials were not supported by relevant particulars. Claims of abuse of the Rules did not render the Rules unconstitutional as abuse was unlawful.

24. Considering the question as to whether a lone driver should wear a mask was a merit question. The petitioner in seeking such a merit and policy review had not provided evidence and was wrongfully asking the court to substitute its views with those of the 2nd respondent, who had the mandate to consider such issues.

25. The court could not sit on appeal on the question of the merits or otherwise of an opinion by health experts in steps needed to contain a pandemic. The court could not even substitute its own judgment for that of experts in the relevant fields provided that the decision informed by the expert advice was relevant to the subject matter in issue.

26. Public interest should trump any individual or personal interest of the petitioner whether in private law or in public constitutional law. Additionally, there was a public law duty of the court not to interfere with the constitutional functions of public bodies traceable to the constitutional doctrine of separation of powers. Petition dismissed. Each party was to bear its own costs.

Factors to be considered in rescinding or lifting of preservation orders against assets suspected to be proceeds of crime.

Asset Recovery Agency v Ali Abdi Ibrahim
Application No 12 of 2020
High Court at Nairobi
Anti-Corruption and Economic Crimes Division
J N Onyiego, J
June 15, 2020
Reported by Sharon Sang & Kakai Toili

Civil Practice and Procedure – civil forfeitures – recovery and preservation of property – preservation orders – lifting of preservation orders – where a bank account containing money suspected to be from proceeds of crime was frozen - factors to be considered in lifting of preservation orders – Proceeds of Crime and Anti-

Money Laundering Act, No 9 of 2009, sections 82, 83 and 84.

Civil Practice and Procedure – civil forfeitures – recovery and preservation of property – preservation orders – factors to be considered before issuing
preservatory orders - where a court issued preservatory orders freezing a bank account containing money suspected to be from proceeds of crime was frozen - what was the procedure to be followed after a court had issued an order to preserve assets suspected to be proceeds of crime - Proceeds of Crime and Anti-Money Laundering Act, No 9 of 2009, sections 82, 83 and 84.

Civil Practice and Procedure – civil forfeitures - forfeiture proceedings – nature of - what was the nature of forfeiture proceedings.

Brief facts

Through an originating summons, the respondent sought for orders that the court issue orders prohibiting the applicant from accessing the funds held in the accounts in question. The court granted the respondent the orders as prayed. The applicant then filed the instant application upon gazettement of the said orders seeking orders that pending inter partes hearing of the application, the court does not grant the respondent partial and reasonable access to the accounts and the funds. He also sought orders that the freezing and preservation orders against the applicants’ bank accounts be lifted and/or quashed.

Issues

i. What were the factors to be considered in lifting of preservation orders against assets suspected to be proceeds of crime?
ii. What was the procedure to be followed after a court had issued an order to preserve assets suspected to be proceeds of crime?
iii. What were the factors to be considered before issuing preservatory orders?
iv. What was the nature of forfeiture proceedings?

Relevant provisions of law

Proceeds of Crime and Anti-Money Laundering Act, No 9 of 2009

Section 82 – Preservation orders

(1) The Agency Director may, by way of an ex parte application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned -

(a) Has been used or is intended for use in the commission of an offence; or
(b) is proceeds of crime

(3) A court making a preservation order shall at the same time make an order authorizing the seizure of the property concerned by a police officer, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the court that made the relevant preservation order.

Section 89 (1) – Variation and rescission of orders

(1) A court which makes a preservation order –

(a) may, on application by a person affected by that order, vary or rescind the preservation order or an order authorizing the seizure of the property concerned or other ancillary order if it is satisfied –

(i) that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and

(b) shall rescind the preservation order when the proceedings against the defendant concerned are concluded.

Held

1. The impugned orders were issued exparte on April 3, 2020 pursuant to an originating motion dated April 2, 2020. The said orders were issued in accordance with section 82 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). Section 83 of POCAMLA went further to provide for gazettement of the preservation orders pursuant to section 84 of POCAMLA. Upon gazettement of preservation orders, the same were bound to expire after 90 days unless there was an application for a forfeiture order pending before the court in respect of the property subject of the preservation order.

2. Before a preservation order was made, the court making such order had to be satisfied that there were reasonable grounds to do so. Having issued the orders, it was presumed that the court having perused material placed before it was satisfied that there was prima facie evidence or reasonable ground to believe that the property in question was obtained as a result of proceeds
of crime or through money laundering. The court was therefore bestowed with wide discretionary powers to decide on whether to grant preservation orders or not.

3. As to whether eventually the preserved property was to be forfeited or not was a matter of evidence upon filing a forfeiture application or suit. The allegation that it was unconstitutional to issue ex parte orders could not therefore apply as the orders were issued pursuant to a statutory provision, which provided a remedy under section 89(1) of POCAMLA lay with the applicant. It was not enough to state that so and so was trading with so and so without proving that the business transacted was lawful and therefore the money generated therefrom was legitimate. Although the applicant had tried to connect the source of money as being proceeds out of construction works in completing Mandera County Government headquarters, which was subject to proof, the same amount had been mixed with other unexplained sources of income suspected to be proceeds out of money laundering.

4. The burden to prove that the applicant deserved the orders of rescission and variation of the preservation orders in accordance with section 89(1) of POCAMLA lay with the applicant. It was not enough to state that so and so was trading with so and so without proving that the business transacted was lawful and therefore the money generated therefrom was legitimate. Although the applicant had tried to connect the source of money as being proceeds out of construction works in completing Mandera County Government headquarters, which was subject to proof, the same amount had been mixed with other unexplained sources of income suspected to be proceeds out of money laundering.

5. The allegation that some money in terms of millions was from informal loan facilities without any evidence backing that allegation was not enough. That was a mere statement which required validation by way of cogent evidence. In the absence of any proof that such monies were obtained from legitimate sources of income, which was a matter of fact, the same had to be deemed money obtained through illegitimate means, which could be a crime by way of money laundering or fraud.

6. Since the applicant had not rendered a satisfactory account justifying receipt of the impugned deposits, the respondent had established a prima facie case that the preservation orders were based on reasonable grounds. The argument that similar orders were issued and vacated by the trial court was not a bar to the applicant from instituting forfeiture proceedings, which was an independent civil remedy as opposed to investigative proceedings before the trial court. The suit could not be declared res judicata on that account and therefore there was no need to appeal or seek review as the purpose for obtaining those orders was achieved by accessing and obtaining the intended bank related documents.

7. According to the replying affidavit and affidavit in support of the application for lifting the order, the applicant was a businessman. He was definitely going on with his normal business. The orders therein did not stop him from doing further business. Although the applicant claimed that the money in the account was being used for family survival and doing business, the same was the subject of litigation, which if proved could be forfeited. Therefore, it would defeat the very purpose of preservation orders if courts were to release such monies for further expenditure unless proven purely on humanitarian grounds that the frozen amounts were the only source of income relied upon by the family to survive hence the need to make provision for reasonable daily upkeep. The applicant had not endeavored to prove that fact.

8. The applicant did not state how much on average his family required for daily upkeep so as to persuade the court. He did not also tell the court whether the money in the account was the only source of income he had. The court was not convinced that the orders should be lifted on that ground.

9. If the orders were lifted, the applicant would withdraw, transfer or spend the money. Taking into account the amount involved, it was unlikely that such monies could be recovered easily without incurring unnecessary tax-payer's money to recover the transferred or spent amount. It would be prejudicial to the public interest if the orders were to be lifted and money withdrawn and spent.

10. To order withdrawals or transfer of the money would be tantamount to perpetuating an illegality which was being addressed by the applicant. The essence of instituting preservation of assets and forfeiture proceedings was not to benefit the State but to protect public money, and discourage reliance on illegitimate sources of income as a source of wealth. Therefore, the risk of lifting the order was higher than the hardship likely to be suffered by the applicant which in any event was short lived as the money was saved pending expiry of the 90 days since gazettement or institution of forfeiture proceeding which had to be proven on a balance of probability. At that stage the respondent’s property was safe hence no cause to worry.

11. The society had legitimate expectation that courts would reasonably balance individual
interest with public interest, which in any event was superior unless proved that the application for preservation was extremely malicious, founded on bad faith and amounted to an abuse of power or court process.

Application dismissed with no order as to costs.

**The Nairobi Metropolitan Service was established in contravention of the law and the Constitution.**

Okiya Omtatah Okoiti v Nairobi Metropolitan Service & 3 others; Mohamed Abdala Badi & 9 others (Interested Parties)

Petition 52 of 2020

Employment and Labour Relations Court at Nairobi

**HS Wasilwa, J**

June 18, 2020

Reported by Beryl Ikamari

**Jurisdiction** - jurisdiction of the Employment and Labour Relations Court - disputes about the deployment and secondment of staff - whether the court had jurisdiction to handle a dispute which questioned the lawfulness of the creation of an entity and also the lawfulness of the deployment and secondment of personnel to that entity - Constitution of Kenya 2010, article 162(2)(a); Employment and Labour Relations Court Act, No 20 of 2011, section 12.

**Constitutional Law** - institution of a constitutional petition - locus standi - whether a petitioner had locus standi to institute a petition which challenged the manner in which the performance of public functions was transferred from a county government to the National Government - Constitution of Kenya 2010, article 22(1).

**Constitutional Law** - devolution - functions of different levels of Government - transfer of certain functions from the Nairobi County Government to the National Government - whether it was lawful for such functions to be transferred without the involvement of the County Assembly of Nairobi - Constitution of Kenya 2010, article 189.

**Constitutional Law** - the Executive - powers of the President - establishment of an office in the public service in accordance with the recommendation of the Public Service Commission - where an office (Nairobi Metropolitan Service) was created via a presidential declaration without the existence of an instrument of establishment - whether the creation of the Nairobi Metropolitan Service infringed on the provisions of the Constitution - Constitution of Kenya 2010, article 132(4)(a).

**Constitutional Law** - public service - appointment of officers to public offices - compliance with constitutional requirements of transparency, merit and competitiveness in the appointment – secondment of staff from one level of Government to another without consultation between the respective levels of Government - whether the secondment of the staff was constitutional and lawful.

**Brief facts**

Pursuant to article 187 of the Constitution, certain functions of the Nairobi County Government were transferred to the National Government. The functions were county health services, county transport services, county public works, utilities and ancillary services and county government planning and development.

The Nairobi Metropolitan Service was an entity created through a presidential declaration in order to effect a transfer of functions of the County Government to the National Government. The petitioner contended that it was created in violation of article 132 (4) (a) of the Constitution of Kenya as read with sections 27 and 30 of the Public Service Commission Act. He also contended that the transfer of functions was done in a manner that violated articles 10, 47(1), 73, 94 (5), 129, 131 (2) (a), 132 (4) (a) and 259 (1) of the Constitution as read with sections 27 and 30 of the Public Service Commission Act and sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 22(1) and 23 of the Statutory Instruments Act.

The petitioner challenged the manner in which officers were appointed to serve in the Office of the Nairobi Metropolitan Service and he alleged that constitutional requirements related to such public appointments such as transparency, merit and competitiveness were not met. Further, he argued that the transfer of 6,052 employees was unlawful as it could not be done without the assent of the Nairobi County Government through the County Public Service Board and it did not comply with section 73(4) and 73(5) of the County Governments Act.
**Issues**

i. Whether the Employment and Labour Relations Court had jurisdiction to handle a dispute which questioned the lawfulness of the creation of an entity and also the lawfulness of the deployment and secondment of personnel to that entity.

ii. Whether a petitioner had *locus standi* to institute a petition which challenged the manner in which the performance of public functions was transferred from a county government to the National Government.

iii. Whether it was lawful for functions to be transferred from the Nairobi County Government to the National Government without the involvement of the County Assembly of Nairobi.

iv. Whether the creation of the Nairobi Metropolitan Service was lawful and constitutional.

v. Whether the appointment of officers to the Nairobi Metropolitan Service, allegedly without meeting constitutional requirements of transparency, merit and competitiveness, was constitutional.

**Held**

1. The court was established under article 162(2)(a) of the Constitution to deal with employment and labour relations matters. The jurisdiction of the court was also set out in section 12 of the Employment and Labour Relations Court Act. The petition raised issues about appointment of employees and secondment of employees from one government entity to another. Issues related to such appointment or secondment were within the court’s jurisdiction.

2. Under article 22(1) of the Constitution, every person had the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied. Therefore, the petitioner had *locus standi* to institute the petition to challenge the manner in which functions were transferred from one level of Government to another.

3. Under article 189 of the Constitution, the law contemplated cooperation between the National and County Governments. However, such cooperation had to respect the functional and institutional integrity of Government at each level and respect the constitutional status of Government at each level.

4. The County Government consisted of the Governor and the County Assembly. In as far as the Deed of Transfer of functions of Nairobi County Government was made without involvement of the County Assembly, the Constitution was breached and the transfer was done without involvement of the entire County Government as envisaged by the Constitution.

5. Article 132(4)(a) of the Constitution provided for the President’s power to establish an office in the public service in accordance with the recommendation of the Public Service Commission. The establishment of that office had to follow the law. There was no evidence that the 1st respondent was established by the President as there was no instrument of its establishment presented before the court. At the time of the filing of the petition, the legal status of the 1st respondent was not yet established as per the law as there was no instrument of its establishment before the court.

6. The 1st to 9th interested parties were not appointed; they were deployed or seconded. That meant that they were serving under the County Public Service Board or under the Public Service Commission and it was either the County Public Service Board or the Public Service Commission that should have deployed or seconded them. The applicable process was therefore overlooked and the deployment or secondment was done in contravention of the law and the Constitution.

7. On March 18, 2020, the instrument to facilitate secondment and/or deployment of 6,052 officers from the Nairobi City County to the Nairobi Metropolitan Services was signed between the Chairman of the Public Service Commission and the Chairman of the Nairobi County Public Service Board. It was therefore evident that there was consultation between the County Public Service and the Public Service Commission before staff from the County Public Service Board were seconded to the Public Service Commission.

8. The petition did not require the court to decide whether the seconded staff were consulted before being seconded. The court would therefore not address that issue.

9. In interpreting the Constitution, the court had jurisdiction to give effect to the letter and spirit of the law and to also ensure that the rights and freedoms of the citizenry were protected. A declaration of invalidity could be suspended for any period and on any conditions to allow a competent authority to correct the defect.

10. Considering that money had been expended and staff deployed and services were being rendered, the effect of the judgment if allowed to take immediate effect was to cause confusion and pandemonium which would lead to lack of
services to the residents of Nairobi. Therefore, it was appropriate to suspend the declaration of the invalidity of the 1st respondent's creation for a period of 90 days to allow for the 1st respondent to be established in accordance with the law and its instrument of establishment to be made. The issue of secondment and deployment of staff should also be addressed and the authority responsible in the exercise should action proper secondment/deployment letters.

Petition allowed.

Orders:-

i. A declaration that the creation of the Nairobi Metropolitan Service was done in violation of the law and the Constitution.

ii. The deployment and secondment of the 1st to 9th interested parties was done in contravention of the law and the Constitution.

iii. A declaration that secondment of the 6,052 staff to the Nairobi Metropolitan Service from the Nairobi City County was done with consultation between the Public Service Commission and the County Public Service Board and the reasons were noble but in contravention of the law – the County Government Act.

iv. The declaration of the invalidity 1st respondent's creation was suspended for a period of 90 days to allow for the 1st respondent to be established in accordance with the law and its instrument of establishment to be made. The issue of secondment and deployment of staff should also be addressed and the authority responsible in the exercise should action proper secondment/deployment letters. If there was a default in correcting the default in the 1st respondent's creation within 90 days, any party was free to apply for further orders.

The Constitution does not contemplate the withholding of salaries and allowances of commissioners of independent commissions in situations of illness.

Shadrack Mutia Muiu v National Police Service Commission & 2 others

Petition 115 of 2018

Employment and Labour Relations Court at Nairobi

ON Makau, J

July 2, 2020

Reported by Beryl Ikamari


Constitutional Law - independent commissions - removal of commissioner from office - applicable procedure - whether a commissioner's salaries and allowances could be withheld in situations where the commissioner suffered an illness that affected his ability to perform his duties - Constitution of Kenya 2010, articles 236(b), 250(8) & 251.

Constitutional Law - constitutional petition - pleading violations of the Constitution with a reasonable degree of precision - effect of failure to set out the violation complained of, the constitutional provisions that had been violated and the manner in which they had been violated – whether the court could decline to consider allegations of violations of the Constitution due to failure to plead the violations with a reasonable degree of precision.

Brief facts

The petitioner was appointed a Commissioner at the National Police Service for a term of six years beginning on October 2, 2012 and ending on October 2, 2018. While on a European benchmarking tour in February 2013, he fell ill and was hospitalized for a number of days. He then flew back to Kenya and was hospitalized for two weeks and put on medication. He did not report back to work until his tenure as a commissioner ended. His salary and allowances were withheld starting from March 2014. The decision to withhold his salary and allowances had its basis on the 1st respondent's letter addressed to the Principal Secretary, Treasury. The letter was dated February 10, 2014. The petitioner claimed that the withholding of his salary and allowances was a violation of rights to fair labour practices and discriminatory. He sought various reliefs from the court including an order of mandamus to compel the respondents to pay him his unpaid salary which amounted to Kshs. 35,145,000.

Issues

i. Whether the Code of Regulations for Civil
Commissioner's removal from office involved a petition to Parliament, Parliament petitioning the President to appoint a tribunal to investigate the commissioner and make recommendations on removal. A petition was presented to Parliament for the petitioner removal and it was forwarded to the President for the setting up of a tribunal but the tribunal was not set up. Instead the Head of Public Service wrote a letter to the petitioner imploring him to resign voluntarily but the said letter was never served on him. Therefore, the petitioner served his entire 6 years and the appointing authority waived the right to remove him from office on grounds of physical or mental incapacity to perform the functions of his office. Consequently, the stoppage of the petitioner's salary and allowances had no legal basis.

6. The petitioner did not plead with precision, the particulars of the alleged violations of his rights to fair labour practices and non-discrimination. Although paragraph 29 of the petition set out the provisions of the Constitution that were material and germane, the petitioner did not set out the manner in which those provisions were breached. The court would therefore not entertain the petition with relation to the alleged violations because of inadequate pleading.

7. Section 30 of the Employment Act could not justify the stoppage of the petitioner's salary and allowances. The petitioner's contract of service was firmly grounded on express provisions of the Constitution.

Petition allowed.

Orders:

i. An order of certiorari was issued to quash the 1st respondent's decision to withhold and/or stop the petitioner's salary and benefits.

ii. An order of mandamus was granted to compel the respondents pay the petitioner Kshs. 35,145,000 being the amount of his salary withheld from March 1, 2014 to October 2, 2018 when his term of office lapsed.

iii. The sum awarded was subject to statutory deductions.

iv. The petitioner was awarded costs plus interest at court rates from the date of filing the suit.
A structural interdict can be issued as an appropriate relief for a violation or a threat of violation of fundamental rights and freedoms at an interlocutory stage

Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 others; China Southern Co. Airline Ltd (Interested Party) [2020] eKLR
Petition 78, 79, 80 & 81 of 2020 (Consolidated)
High Court at Nairobi
JA Makau, J
August 3, 2020
Reported by Kakai Toili

Constitutional Law – remedies - remedies for violations of fundamental rights and freedoms - structural interdicts – claim where remedies of structural interdict was issued at an interlocutory stage - whether a structural interdict could be issued at an interlocutory stage - what were the factors to be considered in determining whether inherent powers of a court should be exercised for the ends of justice - Constitution of Kenya, 2010, articles 22 and 23.

Civil Practice and Procedure – injunctions – mandatory injunctions – issuance of mandatory injunctions at an interlocutory stage - what were the circumstances in which mandatory injunctions could be issued at an interlocutory stage.

Civil Practice and Procedure – orders – conservatory orders – what was the nature and role of conservatory orders.

Brief facts
Following the outbreak of the coronavirus (COVID-19), which did not have a known cure or vaccine, in China and which was later declared by the World Health Organisation (WHO) as a global health pandemic, Kenya continued to allow flights from China. The petitioners were aggrieved and thus filed the instant an application before the court challenging the Government’s decision to allow flights from China. The petitioners were aggrieved and thus filed the instant an application before the court challenging the Government’s decision to allow flights from China. The petitioners were aggrieved and thus filed the instant application seeking among others orders that; pending the determination of the application, a stay of the implementation of the court’s orders only to the extent that the same was in the form of a structural interdict compelling the 1st respondent to prepare and present to the court for scrutiny, a contingency plan on prevention, surveillance, control and response system to COVID-19 outbreak in Kenya. The respondents claimed that the impugned orders were in the nature of a mandatory injunction and were granted contrary to the principles of issuance of injunctions. The respondents further claimed that the a structural Interdict could only be issued as a final order or judgment and not at interlocutory stage.

Issues
i. Whether a structural interdict could be issued at an interlocutory stage.
ii. What was the nature and elements of structural interdicts?
iii. What were the circumstances in which mandatory injunctions could be issued at an interlocutory stage?
iv. What was the nature and role of conservatory orders?
v. What were the factors to be considered in determining whether inherent powers of a court should be exercised for the ends of justice?

Held
1. In considering the question whether inherent powers should be exercised for the ends of justice, the court was under duty to take into account relevant consideration;
   a. the existing circumstances;
   b. the injustice caused to the applicant;
   c. the remedy that could be available to the aggrieved party; and
   d. inconvenience and unnecessary expenses likely to be bundled on the parties.
   The court was required to take care that the act of the court did no injury to any of the litigants and in doing so the main concern was to do substantial justice in the administration of justice.
2. The High Court in its ruling specifically gave the reasons and explanation for its decision.
The Attorney-General had a duty to promote, protect and uphold the rule of law and defend public interest. The respondents in seeking the lifting of the structural interdict sought to invoke the court’s inherent powers but chose to not to say anything about the court’s constitutional duty to grant an appropriate relief in the circumstances of a matter as provided under article 23 of the Constitution of Kenya 2010 (Constitution) to preserve fundamental rights and freedoms. That went against the Attorney-General’s mandate under article 156(6) of the Constitution.

3. Under article 23(3) of the Constitution, the court was entitled to grant any appropriate relief in any proceedings brought under article 22 of the Constitution. Appropriate relief would be in essence the relief that was required to protect and enforce the Constitution depending on the circumstances of each case. The relief could be a declaration of rights, an interdict, a mandamus or such other relief as could be required to ensure that the rights as enshrined in the Constitution were protected.

4. Mandatory injunctions at interlocutory stage would only be granted in clear cases or where special circumstances existed. The petitioner’s case was strong and clear and brought under special circumstances regarding protecting Kenyans due to the threat of the COVID-19 pandemic and due to special circumstances in existence.

5. Article 22 of the Constitution entitled persons, like the Law Society of Kenya, to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed and was threatened. A threat to a right or fundamental freedom, invoked the court’s jurisdiction to issue conservatory orders.

6. Conservatory orders bore a more decided public-law connotation: for those were orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, were not, unlike interlocutory injunctions, linked to such private-party issues as the prospects of irreparable harm occurring during the pendency of a case; or high probability of success in the applicant’s case for orders of stay. Conservatory orders should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.

7. One of the remedies which was recognized in jurisdictions with similar constitutional provisions as Kenya’s article 23 of the Constitution was a structural interdict. In essence, structural interdicts (also known as supervised interdicts) required the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts had been isolated in that respect:
   a. the court issued a declaration identifying how the Government had infringed an individual or group’s constitutional rights or otherwise failed to comply with its constitutional obligations.
   b. The court mandated Government compliance with constitutional responsibilities.
   c. The Government was ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. That report, which should explicate the Government’s action plan for remedying the challenged violations, gave the responsible State agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan was typically expected to be tied to a period within which it was to be implemented or a series of deadlines by which identified milestones were to be reached.
   d. Once the required report was presented, the court evaluated whether the proposed plan in fact remedied the conditional infringement and whether it brought the Government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the Judiciary and the other branches of Government in the intricacies of implementation could be initiated. That stage of structural interdict could involve multiple Government presentations at several check-in hearings, depending on how the litigants responded to the proposed plan and whether the court found the plan to be constitutionally sound. Structural interdicts thus provided an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders.
   e. The chance to assess a specific plan, complete with deadlines, was especially valuable in cases involving the rights of poorest of the poor, who had to make the most of rare and costly opportunities to litigate. After court approval, a final order (integrating the Government plan and any court ordered amend-
ments) was issued. Following that step, the Government’s failure to adhere to its plan (or any associated requirements) essentially amounted to contempt of court.

8. The structural interdict as an appropriate relief could be available at interlocutory stage. The court had jurisdiction to grant a structural interdict including at the interlocutory stage, as was the case herein, if that was the appropriate relief.

9. From the conduct of the respondents and in view of the fact that an ex parte order had been given, no prejudice was suffered by the respondents nor were they denied rights to fair hearing. The application filed on April 8, 2020 was an afterthought as the respondents filed their replying affidavit on March 6, 2020 and on March 18, 2020 filed a report on the measures put in place by the Government to deal with COVID-19 threat in Kenya. The application to set aside and/or review or vacate the ex parte orders of February 28, 2020 was filed after expiry of 40 days which was dated April 8, 2020 raising the issue as regard the structural interdict. The delay was unexplained and without any basis.

10. Under article 2 of the World Health Organization Constitution (WHO Constitution), the World Health Organization (WHO) had the following functions relevant to the instant petition; to act as the directing and co-coordinating authority on international health work; to stimulate and advance work to eradicate epidemics, endemics and other diseases, to propose public conventions, agreements and regulations and to make recommendations with respect to international health matters. On regulations, article 21(a) and 22 the WHO Constitution empowered the World Health Assembly to adopt regulations, designed to prevent the international spread of disease. Once adopted by the World Health Assembly, the regulations entered into force for all WHO members states that did not affirmatively opt out of them within a specified time period. Having been adopted by the fifty eight World Health Assembly on May 23, 2005, the International Health Regulations, 2005 (the Regulations) entered into force on June 15, 2007.

11. The purpose and scope of the Regulations was to prevent, protect against, control and provide a public health response to the international spread of disease in ways that were commensurate with and restricted to public health risks, and which avoided unnecessary interference with international traffic and trade. On issue of public health contingency planning under international law, article 5 of the Regulations required each state party, to develop, strengthen and monitor as soon as possible, but not later than five years from the entry into force of the Regulations for that state party (not later than June 16, 2012). The capacities to detect, asses, notify and report events in accordance with annex 1 of the Regulations. The obligation in annex 1 was reiterated in article 13 of the Regulations on public health responses.

12. Article 22(1) of the Regulations required competent authorities like the respondents to have effective contingency arrangement to deal with an unexpected public health event. The WHO guidelines on contingency planning (Guidelines) indicated the rationale for contingency planning in protecting public health. The report of March 18, 2020 arose out of an ex-parte courts’ order on interim basis. The court’s order was served on March 2, 2020 and the respondents filed a report on March 18, 2020 within a period of 16 days from the date of service. The report was to be prepared and presented to the court for scrutiny and to satisfy itself with the compliance with the court’s order. The report was lacking in specifics but looking at it and being an interim report as of March 18, 2020 and not being a final report, the National Government had through the Ministry of Health put in place a contingency plan on prevention, surveillance, control and responsive systems to COVID-19 outbreak.

13. The report had a detailed plan on maintaining a heightened surveillance system at all points of entry, health facilities and communities across Kenya. The report indicated that the ministry had continued to provide prompt and regular updates to the members of public regarding COVID-19. The report of March 18, 2020 was not a final report from the National Government but an interim report that was ordered to be prepared and filed.

14. The respondents complied with the court’s order of February 28, 2020 and prepared an interim contingency plan and did not violate the right to health under the Constitution and international law. The court was alive to the fact that the report of March 18, 2020 was not the final report on the contingency plan. The report in question was an interim report in pursuance of interim orders of the court pending hearing and determination of the application inter partes and the petition.

Application dismissed; no orders as to costs.
Power of the Registrar of Companies to deregister a company that bore a similar name to an existing registered company where both companies were registered under the repealed Companies Act.

Republic v Registrar of Companies & 2 others; Ex Parte Schindler Limited
Miscellaneous Application No. 105 of 2019
High Court at Nairobi
JM Mativo, J
July 13, 2020
Reported by Ribia John and Ian Otenyo

The ex-parte applicant sought an order of mandamus to compel the 1st respondent to strike out the 3rd respondent from the Register of Companies. It also sought an order of prohibition to prohibit the 1st respondent or its agents, servants and or employees from continuing, sustaining or proceeding with registration of entities bearing its name or names that were strikingly similar which violated its Registered Trademarks and Licenses. Lastly, it prayed for costs of the case.

Issues
i. Whether statutes should be considered as affecting future matters only in the absence of an express provision to the contrary where a statute repealed its older version.

ii. What was the rationale for the presumption against the retrospective application of legislation?

iii. Whether the Companies Act, 2015, applied progressively to companies registered under the repealed Act.

iv. Whether under the Companies Act, 2015, the Registrar of Companies had the power to deregister a company that bore a similar name to an existing registered company where both companies were registered under the repealed Companies Act.

v. What was the rationale for protecting a registered name under the Companies Act, 2015, or under the repealed Act?

vi. What factors should a court consider before issuing:
   a. a writ of mandamus,
   b. a writ of prohibition.

vii. Whether a writ of prohibition was similar to a quashing order thus preventing a tribunal or authority from acting beyond its scope of powers.

viii. What was the distinctive factor between a writ of prohibition and a quashing order?

Relevant provisions of the law
Companies Act, Cap 486 (Repealed)
Section 20(2)
Change of Name
"2(a) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name is registered by a name..."
which, in the opinion of the registrar, is too like the name by which a company in existence is previously registered, the first-mentioned company may change its name with the sanction of the registrar and, if he so directs within six months of its being registered by that name, shall change it within a period of six weeks from the date of the direction or such longer period as the registrar may think fit to allow.

(b) If a company makes default in complying with a direction under this subsection, the company and every officer of the company who is in default shall be liable to a fine not exceeding one hundred shillings for every day during which the default continues."

Section 356
356. Application of Act to companies formed and registered under the repealed Acts

“This Act shall apply to existing companies—

(a) in the case of a limited company, other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares;

(b) in the case of a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; and

(c) in the case of a company other than a limited company, as if the company had been formed and registered under this Act as an unlimited company:

Provided that any reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under that one of the repealed Acts under which such company was registered."

Held
1. In a business, identity took utmost importance. Not only should the business entity have been readily identifiable among its customers, but the goods or services it offered had to also be identified or associated with it. A unique identity could have been targeted by those that sought to cash in on it for nefarious reasons. Under the law, a business had to have a business name or a company name (if so incorporated).

2. By the time the 3rd respondent was registered, the name was not available for registration because a different company existed under a similar name. The admission was sufficient to merit the prayers sought.

3. The Companies Act, 2015, applied to companies registered under the repealed Act. When compared to section 356 of the repealed Companies Act, the 1st respondent’s argument that the repealed Act did not empower it to deregister a company inadvertently registered as in the instant circumstances was legally frail. The legal position that laws did not operate retrospectively could not apply where the repealing statute expressly provided that it applied. Generally, a statute would be construed as operating prospectively only unless the legislature had clearly expressed a contrary intention.

4. The reasoning behind the presumption against the retrospective application of legislation was premised upon the unwillingness of the courts to inhibit vested rights. The general rule was that, in the absence of an express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted so as not to take away rights actually vested at the time of their promulgation. A further reason for its existence was that the creation of new obligation or an imposition of new duties by the Legislature was not lightly assumed. Thus a statute was presumed not to apply retrospectively, unless it was expressly or by necessary implication provided otherwise in the relevant legislation. Unless a contrary intention appeared from new legislation which repealed previous legislation, it was presumed that no repeal of an existing statute had been enacted in relation to transactions completed prior to such existing statute being repealed.

5. Where the statutory provision confirmed the existing law, it was not a case of true retrospectivity, since true retrospectivity meant that at a past date, the law was to be taken to have been that which it was not. Thus, if the legal position was A, and enactment X was designed merely to confirm A, then it could not be said that, subsequent to the promulgation of X, the legal position had become A. Accordingly, true retrospectivity could only become an issue once X replaced, amended or supplemented A. Presumptions, however strong, were merely an aid to interpretation and had to yield to the intention of the legislature as it emerged from any particular statute. Thus, the answer to the question whether a particular statute had retrospective operation could not be found by simply determining whether the statute dealt with substantive law or matters of procedure. One had to always ascertain the intention of the legislature.

6. The Constitution of Kenya, 2010, (Constitution) required a purposive approach to statutory interpretation. The purpose of a statute played an important role in establishing a context that clarified the scope and intended effect of a law. A contextual or purposive reading of a statute had to remain faithful to the actual wording of the statute. A contextual interpretation of a statute had to be sufficiently clear to accord with the rule of law.
7. In giving effect to the purposive approach, a court should, at least:
   a. look at the preamble of the Act or at the other express indications in the Act as to the object that had to be achieved,
   b. study the various sections wherein the purpose could be found,
   c. look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with); and
   d. draw logical inferences from the context of the enactment.

8. A purposive construction of the Companies Act, 2015, required courts and regulatory bodies tasked with enforcement of the Act to interpret and apply the Act in a manner that gave effect to its objects as set out in the preamble. The provisions of the Act proscribing regulation of registration of companies entrenched in the preamble had to be given effect when interpreting the statute. Those statutory and policy reasons discernible from the preamble included the need to ensure that double registration of names was not permitted. The legislative intention discernible from section 356 of the repealed Act was clear; the Act applied to companies registered under the repealed Act. Pursuant to section 20 of the Act, the Registrar had the power to deregister a company that had been inadvertently registered.

9. The rationale for protecting a registered name under the Companies Act, 2015 or under the repealed Act was not hard to find. Where the names of companies were the same or substantially similar and where there was a likelihood that members of the public would be confused in their dealings with the competing parties, those were important factors which the court would take into account when considering whether or not a name was undesirable. The rationale was also discernible in the common law principles concerning passing off which had an impact on whether a company may use its registered company name in trade. No man could pass off his goods as those of another. By implication, that offered some protection to a business that had established goodwill as a result of the use of a name/brand in respect of goods or services. Another business could not register that name as its company name if doing so would engender a misrepresentation that the source of its goods or services was the same as that of the business with established goodwill.

10. An order of mandamus would issue to compel a person(s) who had failed to perform the duty to the detriment of a party who had a legal right to expect the duty to be performed. Mandamus was a judicial command that required the performance of a specified duty, which had not been performed. It was employed to compel the performance, when refused, of a ministerial duty, that being its chief use. It was also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.

11. The eight factors that had to be present for the writ of mandamus to issue were:
   a. there should be a public legal duty to act,
   b. the duty should be owed to the applicants,
   c. there should be a clear right to the performance of that duty, meaning that:
      (i) the Applicants had satisfied all conditions precedent; and
      (ii) there should have been:
         a. a prior demand for performance,
         b. a reasonable time to comply with the demand, unless there was outright refusal; and
         c. an express refusal, or an implied refusal through unreasonable delay.
   d. No other adequate remedy was available to the applicants,
   e. the Order sought had to be of some practical value or effect;
   f. there was no equitable bar to the relief sought;
   g. On a balance of convenience, mandamus should lie.

12. The writ of prohibition arrested the proceedings of any tribunal, corporation, board or person, when such proceedings were without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order was similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference was that a prohibiting order acted prospectively by telling an authority not to do something in contemplation.

Application allowed; no order as to costs.
Orders:
   i. An order of mandamus issued compelling the 1st respondent to strike off the 3rd respondent from the Registrar of Companies.
   ii. An order of prohibition issued prohibiting the Registrar of Companies, its agents, servants and or employees from continuing, sustaining or proceeding with the registration of the 3rd respondent or any entity that bore the ex parte applicant’s name or names that were strikingly similar and/or which infringed the applicant’s trademarks and licenses.
Feedback For Caseback Service
By Emma Mwobobia, Ruth Ndiko & Patricia Nasumba, Law Reporting Department

Hon. Charles Obulutsa
Chief Magistrate
Nyahururu Law Courts

Thanks Kenya Law for your continued feedback. you keep me abreast of appeals from my decisions which goes a long way in enhancing my appreciation of the law. where i err i learn. where i am upheld my confidence soars.

Hon. Hosea Mwangi Ng’ang’a
Senior Resident Magistrate
Gatundu Law Courts

The case back system enriches our grasp of the common grounds in appeals and keeps up with emerging jurisprudence. Thank you Kenya Law.

Hon. Lilian Arika
Senior Principal Magistrate
Nakuru Law Courts

Dear Team NCLR,
Thank you for the invaluable services offered by the Caseback Team. Most gratefully acknowledged. Keep up the good work.

Hon. Mildred Obura
Senior Principal Magistrate
Milimani Commercial Courts

I am sincerely grateful for the prompt and frequent feedback. Not only is it motivating but it is also a learning opportunity. Thank you.

Hon. Samuel Kiprotich Mutai
Principal Magistrate
Kapenguria Law Courts

Thank you for these great Feedback. Kudos!
**Legislative Updates**

*By Stacy Mboya, Laws of Kenya Department*

This is a synopsis of legislation in the form of Acts of Parliament and Bills published in the period July to August, 2020.

### A. ACTS OF PARLIAMENT

<table>
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<tr>
<th>ACT</th>
<th>APPROPRIATION ACT, 2020</th>
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</thead>
<tbody>
<tr>
<td>Act No.</td>
<td>7 of 2020</td>
</tr>
<tr>
<td>Commencement</td>
<td>1st July, 2020</td>
</tr>
<tr>
<td>Objective</td>
<td>An Act of Parliament to authorize the issue of a sum of money out of the Consolidated Fund and its application towards the service of the year ending on the 30th June, 2021 and to appropriate that sum and a sum voted on account by the National Assembly for certain public services and purposes.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ACT</th>
<th>FINANCE ACT, 2020</th>
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</thead>
<tbody>
<tr>
<td>Act No.</td>
<td>8 of 2020</td>
</tr>
<tr>
<td>Commencement</td>
<td>See Section 1 of this Act</td>
</tr>
</tbody>
</table>
| Objective | An Act of Parliament to amend the laws relating to various taxes and duties and for matters incidental thereto. The Acts amended include:  
  • Income Tax Act (Cap. 470);  
  • Value Added Tax (No. 35 of 2013);  
  • Excise Duty Act (No. 23 of 2015);  
  • Tax Procedures Act (No. 29 of 2015);  
  • Miscellaneous Fees and Levies Act (No. 29 of 2016). |

<table>
<thead>
<tr>
<th>ACT</th>
<th>SUPPLEMENTARY APPROPRIATION (NO. 2) ACT, 2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act No.</td>
<td>9 of 2020</td>
</tr>
<tr>
<td>Commencement</td>
<td>30th June 2020</td>
</tr>
<tr>
<td>Objective</td>
<td>An Act of Parliament to authorize the issue of certain sums of money out of the Consolidated Fund and their application towards the service of the year ending on the 30th June, 2020, and to appropriate those sums for certain public services and purposes.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ACT</th>
<th>COUNTY GOVERNMENTS (AMENDMENT) (NO. 2) ACT, 2020</th>
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</thead>
<tbody>
<tr>
<td>Act No.</td>
<td>10 of 2020</td>
</tr>
<tr>
<td>Commencement</td>
<td>27th July, 2020</td>
</tr>
<tr>
<td>Objective</td>
<td>An Act of Parliament to amend the County Governments Act to provide for the procedure for the disposal of a report of a Commission of Inquiry established under Article 192(2) of the Constitution and to provide for the termination of a suspension of a county government under Article 192(4) of the Constitution; and for connected purposes.</td>
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</tbody>
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<table>
<thead>
<tr>
<th>ACT</th>
<th>OFFICE OF THE COUNTY ATTORNEY ACT, 2020</th>
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<tbody>
<tr>
<td>Act No.</td>
<td>14 of 2020</td>
</tr>
<tr>
<td>Commencement</td>
<td>27th July, 2020</td>
</tr>
<tr>
<td>Objective</td>
<td>An Act of Parliament to: establish the Office of the County Attorney; provide for the functions and powers of the County Attorney; provide for the discharge of duties and the exercise of powers of the County Attorney; and for connected purposes.</td>
</tr>
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</table>
### ACT

<table>
<thead>
<tr>
<th>Act No.</th>
<th>15 of 2020</th>
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<tbody>
<tr>
<td>Commencement</td>
<td>27th July, 2020</td>
</tr>
</tbody>
</table>

**Objective**

An Act of Parliament to: give effect to Article 37 of the Constitution on the right to petition a county assembly; to provide the procedure for the exercise of that right; and for connected purposes.

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## B. NATIONAL ASSEMBLY BILLS

### NATIONAL ASSEMBLY BILL

<table>
<thead>
<tr>
<th>Dated</th>
<th>19th June, 2020</th>
</tr>
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</table>

**Objective**

The principal object of this Bill is therefore to amend the Public Procurement and Asset Disposal Act, 2015 to bring the local contractors at par with their foreign counterparts.

- Clause 1 of the Bill provides for the short title.
- Clause 2 of the Bill provides for the amendment of section 54 of the Act to provide that in cases where a procuring entity is allowed to split a contract, then each part of the split contract should be awarded to a different company. This is to spread the risk among many companies and also allow to as many companies as possible to benefit from the tender.
- Clause 3 of the Bill provides for the amendment of section 86 of the Act to provide that in addition to the criteria to be awarded a contract, the contract price should be within a fifteen per cent range of the Engineers Estimate where applicable. This is to avoid a company quoting an unrealistically low price just to get the tender and thereafter undertaking a below the par job or having to vary the contract price upwards. It would also avoid a company quoting an unrealistically high price for a contract whose actual cost is low.
- Clause 4 of the Bill provides that the national and county governments shall settle their payments to the successful tenderers by way of a bank guarantee. This is to avoid delay in payments of the contractors.
- Clause 5 of the Bill increases the amount for exclusive preference for Kenyans from five hundred million shillings to one billion shillings. It also gives preference to a Kenyan company which bids for one and a half times the amount bid by a foreign company. Lastly, it increases the amount that international tenders must source supplies from citizen contractors from forty per cent to sixty per cent.

**Sponsor**

Patrick Wainaina, Member of Parliament

### NATIONAL ASSEMBLY BILL

<table>
<thead>
<tr>
<th>Dated</th>
<th>19th June, 2020</th>
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</table>

**Objective**

The principal object of this Bill is to amend the Central Bank of Kenya Act in order to ensure that the Central Bank of Kenya regulates the conduct of providers of digital financial products and services.

**Sponsor**

Oroo Oyioka, Member of Parliament, National Assembly

### NATIONAL ASSEMBLY BILL

<table>
<thead>
<tr>
<th>Dated</th>
<th>9th July, 2020</th>
</tr>
</thead>
</table>

**Objective**

The object of the Bill is to amend the Public Finance Management Act, 2012, in order to provide for guarantees by the Cabinet Secretary for loans advanced to micro, small and medium enterprises.

**Sponsor**

Amos Kimunya, Leader of the Majority Party, National Assembly
Legal Supplements

By Stacy Mboya, Laws of Kenya Department
This article provides a summary of Legislative Supplements published in the Kenya Gazette on matters of general public importance in the period 18th June, 2020 and 14th July, 2020

<table>
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<tr>
<th>DATE OF PUBLICATION</th>
<th>LEGISLATIVE SUPPLEMENT NUMBER</th>
<th>CITATION</th>
<th>PREFACE</th>
</tr>
</thead>
<tbody>
<tr>
<td>18th June, 2020</td>
<td>94</td>
<td>Agreement between the government of the Republic of Kenya and the government of the Republic of Mauritius for the avoidance of double Taxation with respect to taxes on income (L.N. 108/2020)</td>
<td>The Cabinet Secretary for the National Treasury and Planning, in exercise of the powers conferred by section 41 of the Income Tax Act, declares that: • the arrangements made between the Government of the Republic of Kenya and the Government of the Republic of Mauritius, in the articles of the convention set out in the Schedule hereto and signed on the 10th April, 2019, with a view of affording relief from double taxation in relation to income tax and any rates of similar character imposed by the laws of Kenya, shall, notwithstanding anything to the contrary in the Act or any other written law, have effect to income tax under the Act.</td>
</tr>
<tr>
<td>30th June, 2020</td>
<td>106</td>
<td>Avoidance of Double Taxation with Respect to Taxes on Income (L.N. 114/2020)</td>
<td>The Cabinet Secretary for the National Treasury and Planning, in exercise of the powers conferred by section 41 of the Income Tax Act, declares that: • the arrangements made between the Government of the Republic of Kenya and the Government of the Republic of Mauritius, in the articles of the convention set out in the Schedule hereto and signed on the 10th April, 2019, with a view of affording relief from double taxation in relation to income tax and any rates of similar character imposed by the laws of Kenya, shall, notwithstanding anything to the contrary in the Act or any other written law, have effect to income tax under the Act.</td>
</tr>
<tr>
<td>8th July, 2020</td>
<td>112</td>
<td>Legal Aid Code of Conduct for Accredited Legal Aid Providers, 2019 (L.N. 121/2020)</td>
<td>The National Legal Aid Service makes this Code of Conduct in exercise of the powers conferred by section 31 of the Supreme Court Act, 2011. The scope and objective of this Code is to: • set standards of conduct for accredited legal aid providers; • facilitate access to justice; and • promote integrity, respect, confidentiality, accountability, public responsibility and competence of accredited legal providers.</td>
</tr>
<tr>
<td>8th July, 2020</td>
<td>112</td>
<td>Marriage (Matrimonial Proceedings) Rules, 2020 (L.N. 122/2020)</td>
<td>The Judiciary makes these Rules in exercise of the powers conferred by section 95 of the Marriage Act, 2014. The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of matrimonial disputes under the Act and any other written law.</td>
</tr>
</tbody>
</table>
| 14<sup>th</sup> July, 2020 | 128 | Land Registration (Electronic Transactions) Regulations, 2020 (L.N. 130/2020) | The Cabinet Secretary for Lands and Physical Planning, in exercise of the powers conferred by section 110 of the Land Registration Act, 2012 after taking into account the advice of the National Land Commission, makes these Regulations which provide for, among others:

• Electronic Registry to be maintained by the Chief Land Registrar;
• Pre-registration process; and
• Registration process. |
| 14<sup>th</sup> July, 2020 | 128 | Survey (Electronic Cadastre Transactions) Regulations, 2020 (L.N. 132/2020) | The Cabinet Secretary for Lands and Physical Planning, in exercise of the powers conferred by section 45(1)(a) of the Survey Act, makes these Regulations to provide for inter alia:

• Maintenance of an Electronic cadaster by the Director of Surveys
• Registration of a user of the system
• Access to the electronic cadastre by a surveyor.
• Numbering and authentication of survey data. |

Apart from offering great insights about Constitutional Law in Kenya after the transition to the new Constitution of Kenya 2010, the KLR 2013 series also provides insights on criminal law, labour law, tax law and tort law. The KLR 2013 series is a must have in your Library!

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A court can depart from the rule of arbitral referral where a dispute would not be resolved if a stay of legal proceedings was granted. 

Uber Technologies Inc. v Heller

2020 SCC 16

Supreme Court of Canada

Wagner CJ; Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer, SCJJ

June 26, 2020

Reported by Faith Wanjiku

**Statutes** – interpretation of statutes – interpretation of the International Commercial Arbitration Act (ICAA) vis-à-vis the Ontario Arbitration Act (AA) – where the definition of commercial did not provide for employment disputes - whether employment disputes, in a transaction of an international nature, were governed by the International Commercial Arbitration Act (ICAA) of the Ontario Arbitration Act (AA) - International Commercial Arbitration Act, section 5(3).

**Arbitration** – stay of legal proceedings – rule of arbitral referral – challenge to arbitral referral – factors considered by the court - what amounted to a bona fide challenge to arbitral jurisdiction that only a court could resolve.

**Contract Law** – contracts of adhesion – principle of unconscionability – factors considered by the court – knowledge of a party’s vulnerability - what were the factors a court considered in order to determine that a contract between parties was unconscionable - whether knowledge of a party’s vulnerability in the contracting process was a necessary requirement to prove unconscionability of contract.

**Arbitration** – arbitration clause – validity of – unconscionability - mandatory clause in standard form contract between driver and multinational corporation requiring that disputes be submitted to arbitration in the Netherlands and imposing substantial up-front costs for arbitration proceedings - whether arbitration clauses in standard form contracts that required a party to pay high administrative fees to institute arbitration proceedings was unconscionable and thus invalid - whether arbitration clauses in standard form contracts that gave the impression that the designated law and place of arbitration was a foreign country were unconscionable and thus invalid.

**Arbitration** – arbitration clause – enforceability – public policy – where arbitration clause imposed substantial up-front costs for arbitration proceedings - whether an agreement clause in a contract that imposed high prohibitive fees to institute arbitration proceedings was unenforceable and thus violated public policy.

**Arbitration** – arbitration clause – doctrine of separability – where parties agreed to refer matters to arbitration – where a contract was found to be unconscionable - whether an arbitration clause in a contract was a separate and independent agreement.

**Arbitration** - stay of legal proceedings – remedies – where arbitration clause was invalid – conditional stay and severance - what were the remedies available to a court where an arbitration clause in a contract was marred with perceived unfairness?

**Brief facts**

The respondent (Heller) provided food delivery services in Toronto using the appellant’s (Uber’s) software applications. To become a driver for Uber, the respondent had to accept the terms of the appellant’s standard form services agreement. Under the terms of the agreement, he was required to resolve any dispute with the appellant through mediation and arbitration in the Netherlands. The mediation and arbitration process required up-front administrative and filing fees of US$14,500, plus legal fees and other costs of participation. In 2017, the respondent started a class proceeding against the appellant in Ontario for violations of employment standards legislation. Uber brought a motion to stay the class proceeding in favour of arbitration in the Netherlands, relying on the arbitration clause in its services agreement with the respondent.
The respondent argued that the arbitration clause was unconscionable and therefore invalid. The trial court stayed the proceeding, holding that the arbitration agreement’s validity had to be referred to arbitration in the Netherlands, in accordance with the principle that arbitrators were competent to determine their own jurisdiction. The Court of Appeal allowed the respondent’s appeal and set aside the trial court’s order. It concluded that respondent’s objections to the arbitration clause did not need to be referred to an arbitrator and could be dealt with by a court in Ontario. It also found the arbitration clause to be unconscionable, based on the inequality of bargaining power between the parties and the improvident cost of arbitration. The appellants filed the instant appeal against the decision of the Court of Appeal.

Relevant provisions of the law

Ontario Arbitration Act

Court intervention limited

6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

   1. To assist the conducting of arbitrations.
   2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
   3. To prevent unequal or unfair treatment of parties to arbitration agreements.
   4. To enforce awards.

Stay

7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

   1. A party entered into the arbitration agreement while under a legal incapacity.
   2. The arbitration agreement is invalid.
   3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
   4. The motion was brought with undue delay.
   5. The matter is a proper one for default or summary judgment.

Issues

i. Whether employment disputes, in a transaction of an international nature, were governed by the Ontario International Commercial Arbitration Act (ICAA) or the Ontario Arbitration Act (AA).

ii. What amounted to a bona fide challenge to arbitral jurisdiction that only a court could resolve?

iii. What were the factors a court considered in order to determine that a contract between parties was unconscionable?

iv. Whether knowledge of a party’s vulnerability in the contracting process was a necessary requirement to prove unconscionability of contract.

v. Whether arbitration clauses in standard form contracts that:

   a. required a party to pay high administrative fees to institute arbitration proceedings; and
   b. gave the impression that the designated law and place of arbitration was a foreign country were unconscionable and thus invalid.

vi. Whether an agreement clause in a contract that imposed high prohibitive fees to institute arbitration proceedings was unenforceable and thus violated public policy.

vii. When could a court depart from the rule of systematic referral to arbitration?

viii. Whether an arbitration clause in a contract was a separate and independent agreement.

ix. What were the remedies available to a court where an arbitration clause in a contract was marred with perceived unfairness?

Held by majority

1. The parties’ dispute was fundamentally about labour and employment. The International Commercial Arbitration Act (ICAA) was not meant to apply to such cases. The ICAA and Arbitration Act (AA) were exclusive. If the ICAA governed the agreement, the AA did not, and vice versa. Section 5(3) of the ICAA stated that the Model Law applied to international commercial arbitration agreements and awards made in international commercial arbitrations. The meaning of commercial in the section of the ICAA had to be the same as the meaning of commercial under the Model Law, as the latter stated that it applied to international commercial arbitration.

2. An employment dispute was not covered by the word commercial. The question of whether someone was an employee was the most fundamental of employment disputes. It followed that if an employment dispute was excluded from the application of the Model Law, then a dispute over whether the respondent was an employee was similarly excluded. That was not the type of dispute that the Model Law was intended to govern, and thus it was not the type
of dispute that the ICAA was intended to govern. It seemed unlikely that the drafters of the Model Law would have included such a thorough list of included commercial relationships and not considered whether to include employment. Employment disputes, in sum, were not covered by the ICAA. Therefore, the AA governed.

3. The AA directed courts, on motion of a party, to stay judicial proceedings when there was an applicable arbitration agreement. However, a court had discretion to retain jurisdiction and decline to stay proceedings in five circumstances enumerated in section 7(2) of the Arbitration Act. Under the Dell Computer Corp. v Union des consommateurs, [2007] 2 S.C.R. 801(Dell) framework, the degree to which courts were permitted to analyse the evidentiary record depended on the nature of the jurisdictional challenge. Where pure questions of law were in dispute, the court was free to resolve the issue of jurisdiction. Where questions of fact alone were in dispute, the court had to normally refer the case to arbitration. Where questions of mixed fact and law were in dispute, the court had to refer the case to arbitration unless the relevant factual questions required only superficial consideration of the documentary evidence in the record.

4. Although it was possible to resolve the validity of the appellant’s arbitration agreement through a superficial review of the record, the instant case also raised an issue of accessibility that was not raised on the facts in Dell and justified departing from the general rule of arbitral referral. As Dell itself acknowledged, the rule of systematic referral of challenges to jurisdiction requiring a review of factual evidence applied normally. The instant case was one of those abnormal times.

5. The underlying assumption made in Dell was that if the court did not decide an issue, then the arbitrator would. As Dell stated, the matter had to be resolved first by the arbitrator. Dell did not contemplate a scenario where the matter would never be resolved if the stay were granted. That raised obvious practical problems of access to justice that the Ontario legislature could not have intended when giving courts the power to refuse a stay.

6. One way (among others) in which the validity of an arbitration agreement could not be determined was when an arbitration was fundamentally too costly or otherwise inaccessible. That could occur because the fees to begin arbitration were significantly relative to the plaintiff’s claim or because the plaintiff could not reasonably reach the physical location of the arbitration. Another example might be a foreign choice of law clause that circumvented mandatory local policy, such as a clause that would prevent an arbitrator from giving effect to the protections in Ontario employment law. In such situations, staying the action in favour of arbitration would be tantamount to denying relief for the claim. The arbitration agreement would, in effect, be insulated from meaningful challenge. Those situations were not contemplated in Dell. The core of Dell depended on the assumption that if a court did not decide an issue, the arbitrator would.

7. There were ways to mitigate the concern that made the overall calculus favour departing from the general rule of referring the matter to the arbitrator in those situations. Courts had many ways of preventing the misuse of court processes for improper ends. Proceedings that appeared vexatious could be handled by requiring security for costs and by suitable awards of costs. Further, if the party who successfully enforced an arbitration agreement were to bring an action, depending on the circumstances they might be able to recover damages for breach of contract, that contract being the agreement to arbitrate. Moreover, Dell itself made clear that courts could refer a challenge to arbitral jurisdiction to the arbitrator if it was a delaying tactic or would unduly impair the conduct of the arbitration proceeding. That provided an additional safeguard against validity challenges that were not bona fide.

8. A court could determine there was a bona fide challenge to arbitral jurisdiction that only it could resolve by first, determining whether, assuming the facts pleaded to be true, there was a genuine challenge to arbitral jurisdiction. Second, the court had to determine from the supporting evidence whether there was a real prospect that, if the stay was granted, the challenge could never be resolved by the arbitrator. In those circumstances, a court could resolve whether the arbitrator had jurisdiction over the dispute and, in so doing, could thoroughly analyze the issues and record.

9. Turning to the instant appeal, the respondent had made a genuine challenge to the validity of the arbitration agreement. The clause was said to be void because it imposed prohibitive fees for initiating arbitration and those fees were embedded by reference in the fine print of a contract of adhesion. Second, there was a real prospect that if a stay was granted and
the question of the validity of the appellant’s arbitration agreement was left to arbitration, then the respondent’s genuine challenge could never be resolved. The fees imposed a brick wall between the respondent and the resolution of any of the claims he had levelled against the appellant. An arbitrator could not decide the merits of the respondent’s contention without those — possibly unconscionable — fees first being paid. Ultimately, that meant that the question of whether the respondent was an employee could never be decided. The way to cut that Gordian Knot was for the court to decide the question of unconscionability.

10. Departing from the general rule of arbitral referral in those circumstances had beneficial consequences. It would prevent contractual drafters from evading the result of the case through a choice of law clause. A choice of law clause could convert a jurisdictional question that would be one of law (and which therefore could be decided by the court) into a question as to the content of foreign law, which would require hearing evidence in order to make findings as to the content of foreign law, something that one would not ordinarily have been contemplated in a superficial review of the record.

11. Even though the instant case could have been resolved based on undisputed facts, such an approach could not be sustainable in future cases. An approach to arbitral referral that depended on undisputed facts would invite parties to dispute facts. Were that standard to apply, unreasonably disputing facts would allow a party to evade any review of the merits, by use of an arbitration clause. There would be no negative consequence, in that context, to a party unreasonably disputing facts if it meant the stay in favour of arbitration would be granted. That differed significantly from the standard civil litigation context, where unreasonable disputes as to facts could be deterred by costs awards.

12. Unconscionability was meant to protect those who were vulnerable in the contracting process from loss or improvidence to that party in the bargain that was made. Although other doctrines could provide relief from specific types of oppressive contractual terms, unconscionability allowed courts to fill in gaps between the existing islands of intervention so that the clause that was not quite a penalty clause or not quite an exemption clause or just outside the provisions of a statutory power to relieve would fall under the general power, and anomalous distinctions would disappear.

13. The Canadian doctrine of unconscionability had two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and an improvident transaction. In many cases where inequality of bargaining power had been demonstrated, the relevant disadvantages impaired a party’s ability to freely enter or negotiate a contract, compromised a party’s ability to understand or appreciate the meaning and significance of the contractual terms, or both.

14. A bargain was improvident if it unduly advantaged the stronger party or unduly disadvantaged the more vulnerable. Improvidence was measured at the time the contract was formed; unconscionability did not assist parties trying to escape from a contract when their circumstances were such that the agreement then worked a hardship upon them. For a person who was in desperate circumstances, for example, almost any agreement would be an improvement over the status quo. In those circumstances, the emphasis in assessing improvidence should be on whether the stronger party had been unduly enriched. That could occur where the price of goods or services departed significantly from the usual market price.

15. Unconscionability, in sum, involved both inequality and improvidence. The nature of the flaw in the contracting process was part of the context in which improvidence was assessed. And proof of a manifestly unfair bargain could support an inference that one party was unable adequately to protect their interests. It was a matter of common sense that parties did not often enter a substantively improvident bargain when they have equal bargaining power.

16. The court rejected the four-part test approach as that higher threshold required that the transaction was grossly unfair, that there was no independent advice, that the imbalance in bargaining power was overwhelming, and that there was an intention to take advantage of a vulnerable party. Unconscionability, moreover, could be established without proof that the stronger party knowingly took advantage of the weaker. Such a requirement was closely associated with theories of unconscionability that focused on wrongdoing by the defendant. But unconscionability could be triggered without wrongdoing.

17. One party knowingly or deliberately taking advantage of another’s vulnerability could
provide strong evidence of inequality of bargaining power, but it was not essential for a finding of unconscionability. Such a requirement improperly emphasized the state of mind of the stronger party, rather than the protection of the more vulnerable. The court’s decisions left no doubt that unconscionability focused on the latter purpose. Parties could not expect courts to enforce improvident bargains formed in situations of inequality of bargaining power; a weaker party, after all, was as disadvantaged by inadvertent exploitation as by deliberate exploitation. A rigid requirement based on the stronger party’s state of mind would also erode the modern relevance of the unconscionability doctrine, effectively shielding from its reach improvident contracts of adhesion where the parties did not interact or negotiate.

18. The requirements of inequality and improvidence, properly applied, struck the proper balance between fairness and commercial certainty. Freedom of contract remained the general rule. It was precisely because the law’s ordinary assumptions about the bargaining process did not apply that relief against an improvident bargain was justified.

19. A standard form contract did not, by itself, establish an inequality of bargaining power. Standard form contracts were in many instances both necessary and useful. Sophisticated commercial parties, for example, could be familiar with contracts of adhesion commonly used within an industry. Sufficient explanations or advice could offset uncertainty about the terms of a standard form agreement. Some standard form contracts could clearly and effectively communicate the meaning of clauses with unusual or onerous effects.

20. Unconscionability had a meaningful role to play in examining the conditions behind consent to contracts of adhesion, as it did with any contract. The many ways in which standard form contracts could impair a party’s ability to protect their interests in the contracting process and make them more vulnerable, were well-documented. The potential for such contracts to create an inequality of bargaining power was clear. So too was their potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that violated the adhering party’s reasonable expectations by depriving them of remedies. That was precisely the kind of situation in which the unconscionability doctrine was meant to apply.

21. Applying the unconscionability doctrine to standard form contracts also encouraged those drafting such contracts to make them more accessible to the other party or to ensure that they were not so lop-sided as to be improvident, or both. In the instant appeal, there was clearly inequality of bargaining power between the appellant and the respondent. The arbitration agreement was part of a standard form contract. The respondent was powerless to negotiate any of its terms. His only contractual option was to accept or reject it. There was a significant gulf in sophistication between the respondent, a food deliveryman in Toronto, and the appellant, a large multinational corporation. The arbitration agreement, moreover, contained no information about the costs of mediation and arbitration in the Netherlands.

22. A person in the respondent’s position could not be expected to appreciate the financial and legal implications of agreeing to arbitrate under ICC Rules or under Dutch law. Even assuming that the respondent was the rare fellow who would have read through the contract in its entirety before signing it, he would have had no reason to suspect that behind an innocuous reference to mandatory mediation under the International Chamber of Commerce Mediation Rules that could be followed by arbitration under the Rules of Arbitration of the International Chamber of Commerce, there lay a US$14,500 hurdle to relief. Exacerbating the situation was that those Rules were not attached to the contract, and so the respondent would have had to search them out himself.

23. The arbitration clause, in effect, modified every other substantive right in the contract such that all rights that the respondent enjoyed were subject to the apparent precondition that he traveled to Amsterdam, initiate arbitration by paying the required fees and receive an arbitral award that established a violation of the right. It was only once those pre-conditions were met that the respondent could get a court order to enforce his substantive rights under the contract. Effectively, the arbitration clause made the substantive rights given by the contract unenforceable by a driver against Uber. No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it.

24. The unconscionability of the arbitration clause could be considered separately from that of the contract as a whole. Further support came from
the severability clause of the Uber Rasier and Uber Portier agreements, and section 17(2) of the AA.

25. Respect for arbitration was based on it being a cost-effective and efficient method of resolving disputes. When arbitration was realistically unattainable, it amounted to no dispute resolution mechanism at all. Based on both the disadvantages faced by the respondent in his ability to protect his bargaining interests and on the unfair terms that resulted, the arbitration clause was unconscionable and therefore invalid.

Per Brown SCJJ (concurring)

26. Contractual stipulations that foreclosed access to legally determined dispute resolution — that was, to dispute resolution according to law were unenforceable not because they were unconscionable, but because they undermined the rule of law by denying access to justice and were therefore contrary to public policy. The arbitration agreement between the appellant and the respondent did just that: it effectively barred the respondent from advancing any claim against Uber, no matter how significant or meritorious. In effect, it was not an agreement to arbitrate, but rather not to arbitrate. As a matter of public policy, courts would not enforce contractual terms that, expressly or by their effect, denied access to independent dispute resolution according to law. That obviated any need to resort to, and distort, the doctrine of unconscionability.

27. Access to civil justice was a precondition not only to a functioning democracy but also to a vibrant economy, in part because access to justice allowed contracting parties to enforce their agreements. A contract that denied one party the right to enforce its terms undermined both the rule of law and commercial certainty. That such an agreement was contrary to public policy was not a manifestation of judicial idiosyncrasies, but rather an instance of the self-evident proposition that there was no value in a contract that could not be enforced. Thus, the harm to the public that would result from holding contracting parties to a bargain they could not enforce was substantially incontestable.

28. It would be the rare arbitration agreement that imposed undue hardship and acted as an effective bar to adjudication. Arbitration could require upfront costs, sometimes significant costs and far greater than those required to commence a court action. But those costs could be warranted considering the parties’ relationship and the timely resolution that arbitration could provide. Public policy should not be used as a device to set aside arbitration agreements that were proportionate in the context of the parties’ relationship but that one party simply regretted in hindsight.

29. The arbitration agreement between the appellants and the respondent was disproportionate in the context of the parties’ relationship. The respondent, and only him, would experience undue hardship in attempting to advance a claim against Uber, regardless of the claim’s legal merit. That form of limitation on legally determined dispute resolution undermined the rule of law and was therefore contrary to public policy.

30. Blue-pencil severance was achieved by mechanically removing illegal provisions from a contract. In the instant case, there was no single component of the arbitration clause that was, on its own, illegal and that could be struck with a blue line. The agreement could very well embody not just the intention to arbitrate, but also the intention to prohibit either party from advancing claims valued at less than US$14,500. Barring such claims, however, in the context of the agreement between those parties, was precisely what made the arbitration clause illegal. It was therefore impossible to strike any illegal portion of the agreement without fundamentally altering the consideration associated with the bargain and doing violence to the intention of the parties. The only available remedy in response to the illegality identified was to find that the entire arbitration agreement was unenforceable. Any other remedy would require considerable distortion of the intention of the parties.

31. The arbitration agreement between the parties effectively barred the respondent from accessing a legally determined dispute resolution thereby imposing undue hardship on the respondent and undermining the rule of law. The arbitration agreement was unenforceable.

Per Côté SCJJ (dissenting)

1. The respondent’s arguments based on the doctrine of unconscionability and on the ESA raised questions of mixed law and fact which could not be decided on the basis of a superficial review of that evidence and should therefore be decided by the arbitrator. The testimonial evidence before the court was insufficient to support a finding that the Arbitration Clause was unconscionable. In addition, the Arbitration Clause was neither inconsistent with
the Employment Standards Act, nor contrary to public policy.

2. The doctrine of separability was one of the conceptual and practical cornerstones of arbitration law which played an important role in ensuring the efficacy and efficiency of the arbitration process. According to the doctrine, an arbitration clause should be analyzed as a separate agreement that was ancillary or collateral to the underlying contract. The Arbitration Clause and the UNCITRAL Model Law codified one aspect of the doctrine, that was, the preservation of an arbitral tribunal’s jurisdiction to rule on the validity of the underlying contract on the basis that the arbitration agreement was to be treated as a separate and independent contract for such purposes. However, the separability doctrine had wider significance. More broadly, the doctrine held that an arbitration agreement was invalidated only by a defect relating specifically to the arbitration agreement itself and not by one relating merely to the underlying contract in which that agreement was found.

3. The commitment to submit disputes to arbitration should be considered to be an independent agreement which was separate from the Service Agreement. Therefore, while the Choice of Law Clause and the Arbitration Clause appeared together in the Service Agreement, the Choice of Law Clause applied to the Service Agreement as a whole and had to be analyzed separately from the Arbitration Clause.

4. In any case involving an arbitration clause, a challenge to the arbitrator’s jurisdiction had to be resolved first by the arbitrator. A court could depart from the rule of systematic referral to arbitration only if the challenge was based solely on a question of law or on a question of mixed law and fact that required only a superficial consideration of the documentary evidence. The court had to also be satisfied that the jurisdictional challenge was not a delaying tactic and would not unduly impair the conduct of the arbitration proceeding.

5. Efforts to avoid the operation of the rule of systematic referral to arbitration reflected the same historical hostility to arbitration which the legislature and the court had sought to dispel. The simple fact was that the parties in the instant case had agreed to settle any disputes through arbitration; the court should not hesitate to give effect to that arrangement. The ease with which the Arbitration Clause was dispensed with on the basis of the thinnest of factual records that the doctrines of unconscionability and public policy were being converted into a form of ad hoc judicial moralism or palm tree justice would sow uncertainty and invite endless litigation over the enforceability of arbitration agreements. That was in fact what the Arbitration Act and the UNCITRAL Model Law were designed to avoid.

6. The rule of systematic referral was based on the arbitral tribunal’s competence to rule on its own jurisdiction. Article 16(1) of the UNCITRAL Model Law and section 17(1) of the Arbitration Act both stated that the arbitral tribunal had competence to rule on objections with respect to the existence or validity of the arbitration agreement. The court should not create the exception to the rule of systematic referral that would apply where an arbitration agreement was deemed to be too costly or otherwise inaccessible. If such an exception were to be created, it should not be applied on the basis of the record before the court. The rule of systematic referral was the product of an exercise of interpretation of the UNCITRAL Model Law. That meant that any exception to the rule had to also be a product of statutory interpretation.

7. It was important to understand that arbitration was not litigation by another name. Rather, it was a substitute for the parties’ own ability to negotiate or to reach agreement through mediation and was not based on a transference or denial of court power. Courts retained an oversight role throughout the arbitration process and afterwards. Arbitration legislation and supporting doctrines such as the rule of systematic referral should not therefore be conceptualized as a limit on the supervisory jurisdiction of the courts. Instead, they should be seen as a positive reinforcement of the principle of party autonomy in that they required parties to an arbitration agreement to abide by their agreement.

8. The threshold for a finding of inequality of bargaining power had been set so low as to be practically meaningless in the case of standard form contracts. That standard rather vague and illusory might be open to abuse by a party to a standard form contract who chose to enjoy the benefits of the agreement as long as it suited them, but who then chose to rely on the opaque standard when called upon to honour an obligation which was not in their interest. That would be an unwelcome development, as it would undermine private ordering and commercial certainty, which were important
considerations in the law of contracts.

9. The point that it would not be clear to a person reading the Arbitration Clause that the selection of the ICC Rules meant that initiating the arbitration process would entail the payment of US$14,500 (approximately CAN$19,000) in fees had some force. However, individuals should be expected to be aware that any form of dispute settlement, including litigation in the courts, came with a price. A person could not read an arbitration clause and reasonably assume that the process would be free of charge. It had not been shown that the ICC fees were out of step with the cost of pursuing litigation — or of pursuing arbitration under a different set of rules — for a claim involving an amount equivalent to the unknown amount of the respondent’s claim. It was therefore difficult to accept the speculation that the respondent would have had no reason to suspect that fees of that magnitude were required.

10. It was difficult to see how the drafter of a contract could anticipate the total of the fees to be paid in a non-institutional arbitration that would be conducted on an ad hoc basis under either the Arbitration Act or the International Act, which meant that it was hard to see how an arbitration clause in a standard form contract could possibly be drafted in a way that would satisfy the requirements of the unconscionability doctrine.

11. Whether to restrict arbitration clauses in standard form contracts or not was a matter for the legislature. The doctrine of unconscionability approach taken was therefore inconsistent with the proper law-making role of the courts. It was the legislature, and not the courts, which was primarily responsible for law reform. Major changes in the law were best left to the legislature, because reform should be considered with a wider view of how the new rule would operate in the broad generality of cases. A court of law could not be in a position to appreciate the economic, social and other policy issues at stake.

12. Concerns were heightened by the economic context of the instant appeal, which related to the contractual arrangements of businesses operating in what some have styled the sharing economy. Enterprises with business models similar to that of Uber and individuals in the respondent’s position were part of a vital and growing sector of Canada’s economy which could be stifled if the majority’s reduced threshold for inequality of bargaining power was adopted. That sector depended on standard form contracts that were agreed to electronically by businesses and the people who used their online platforms. Individuals in the respondents’ position could have reduced opportunities to generate income in that sector of the economy if businesses like the appellant could not be assured of certainty in their contractual arrangements, as certainty was essential for global business operations. The court was simply not in a position to know what the fallout from unconscionability doctrine approach might be.

13. It was true that the UNCITRAL Model Law, the Arbitration Act and the ICC Arbitration Rules left the decision regarding the location of the proceedings to the arbitral tribunal, but there was no reason to presume that an arbitral tribunal would act arbitrarily and callously by compelling a party to travel overseas unnecessarily and at great hardship. There was good reason to assume otherwise. Therefore, there was no basis for assuming that the respondent would require the respondent to travel to Amsterdam in order to participate in arbitration proceedings. Hearings, if any needed to be conducted, could reasonably be expected to be held in Ontario or to be conducted remotely. Further, the court should take judicial notice of the fact that modern communications technology made it unnecessary for an Ontario resident to travel overseas in order to pay the ICC Fees or to make initial representations to the arbitral tribunal.

14. The Arbitration Clause could not be impugned on the basis that the Place of Arbitration Clause would require the respondent to travel to a foreign jurisdiction in order to initiate a claim or to participate in the hearings, thereby incurring expenses, and any arguments to that effect could not stand. Therefore, there was no basis for concluding that the Place of Arbitration Clause favoured the appellant significantly at the respondent’s expense.

15. In the instant case, the Choice of Law Clause was not dependent on arbitration being the parties’ chosen means to settle disputes. Despite the fact that the text of the Choice of Law Clause appeared in the same paragraph of the Service Agreement as the text of the Arbitration Clause, the two clauses had very different legal effects and should have been considered to be separate. Even if the separability doctrine did not apply, there was nothing unusual or offensive about a choice of law clause in an international contract. Uber was a company
with global operations and was headquartered in the Netherlands. Its selection of Dutch law to govern the contract was merely an attempt at risk management designed to ensure a degree of certainty in its operations. For a company with global operations, that served a valid commercial purpose which courts should not interfere with lightly.

16. Public policy concerns did not justify overriding the very strong public interest in the enforcement of contracts. The Arbitration Act and the International Act as strong statements of public policy favoured enforcing arbitration agreements. Deciding whether to submit disputes to arbitration or to pursue litigation in the courts involved trade-offs. In arbitration, the parties traded the procedural certainty of the courts and the opportunity to appeal an unfavorable decision for the procedural flexibility, expediency, and efficiency of arbitration. There was no guarantee that arbitration would always yield the correct decision, but the courts were equally unable to offer that guarantee. Deciding whether that trade-off was in the parties’ best interests lay with them, not with the courts.

17. While it was often complementary to other legislative objectives, the pursuit of access to justice should not be permitted to overwhelm the other important objectives pursued by the Arbitration Act. The Act also pursued another important objective: it gave effect to party autonomy by permitting parties to craft their own dispute resolution mechanism through consensual agreement. Concluding that an arbitration agreement was invalid on public policy grounds without impeaching the parties’ consent to the agreement undermined another objective of the Arbitration Act of holding parties to their commitment to submit disputes to arbitration where they had agreed to do so.

18. The pro-arbitration stance that had been taken by legislatures across Canada and which was embodied in the court’s jurisprudence supported a generous approach to remedial options which would facilitate the arbitration process. Two such options were:
(a) Ordering a conditional stay of proceedings
and
(b) Applying the doctrine of severance.

19. If the exceptions in section 7(2) of the Arbitration Act or article 8(1) of the UNCITRAL Model Law did not apply, the legislation directed a stay of the proceedings. A stay was mandatory in such circumstances, but the Arbitration Act and the International Act were silent as to what conditions, if any, could be imposed on the stay. However, section 106 of the Courts of Justice Act provided that a court may stay a proceeding on such terms as it considered just. Although it would usually be unnecessary for a court to order a conditional stay, it could be appropriate to do so to ensure procedural fairness in the arbitration process. A court should be careful not to impose conditions which impinge on the decision-making jurisdiction of the arbitral tribunal. Nonetheless, in the period before the appointment of the arbitral tribunal, a condition which facilitated the arbitration process could protect the tribunal’s jurisdiction by ensuring that the parties were able to proceed with the arbitration.

20. Courts hearing motions for stays and for referral to arbitration had ordered conditional stays in the past, such conditions supported one of the purposes of arbitration agreements and of modern arbitration legislation, that of proceeding with dispute resolution in a timely manner rather than delaying progress in the courts. Considering the respondent’s particular circumstances, the court would impose a condition that the appellant advance the filing fees to enable the respondent to initiate such proceedings. The decision as to who should ultimately bear those costs would be left to the arbitral tribunal.

21. Conditional stays of proceeding with dispute resolution in a timely manner would be consistent both with the principle of party autonomy and with the legislature’s intent, because it would facilitate the arbitration process. As it would merely be an interim measure, it would not change the substantive rights and obligations of the parties pursuant to the Arbitration Clause. It would therefore be consistent with section 17(1) of the Arbitration Act and article 16(1) of the UNCITRAL Model Law, because it would leave the decision on the question of the validity of the Arbitration Clause to the arbitral tribunal.

22. Compelling policy considerations supported a generous application of the doctrine of severance in cases in which the parties had clearly indicated an intent to settle any disputes through arbitration but in which some aspects of their arbitration agreement had been found to be unenforceable. Where doing so was practical, courts ought to strive to give effect to the parties’ intentions by severing unenforceable terms and referring the parties to arbitration. The doctrine of severance took two forms:

(b) Applying the doctrine of severance.
23. Notional severance involved reading down a contractual provision so as to make it legal and enforceable. Blue-pencil severance consisted of removing the illegal part of a contractual provision. Whereas notional severance called for the application of a bright line test of illegality, blue-pencil severance could be effected where the court could strike out the portion of the contract it wanted to remove by drawing a line through it without affecting the meaning of the part that remained. In deciding whether to apply the doctrine of severance, a court ought to also consider whether it would be both commercially practical and consistent with the parties’ intentions for it to enforce the remainder of the arbitration agreement. Therefore, where the parties’ intention to submit disputes to arbitration was clearly established, applying the doctrine of severance would usually be consistent with their intentions.

24. The practice in other countries was to sever unenforceable provisions while giving effect to the arbitration clause wherever possible. In the instant case, the parties’ commitment to submit disputes to arbitration was clear. The selection of the ICC Rules was neither contrary to public policy nor unconscionable, but, if it were so, the appropriate remedy would be for the court to apply blue-pencil severance and strike the selection of the ICC Rules, leaving it to the appellant and the respondent to agree on an arbitration procedure, or to the arbitral tribunal to decide how to proceed. The same would be the case for the Place of Arbitration Clause. That approach was more consistent with the parties’ intentions and with the legislature’s intent than simply holding that the entire arbitration agreement was invalid.

25. If the parties were unable to agree on how to proceed, the Arbitration Act and the UNCITRAL Model Law contained detailed provisions to assist in the enforcement of an arbitration agreement where the parties were unable to agree on the details.

Appeal dismissed with costs to the respondent throughout.

Relevance to the Kenyan situation

Kenyan courts have been seen to promote arbitration by staying proceedings in order to promote alternative dispute resolution as provided for under article 159(2)(c) of the Constitution of Kenya, 2010.

The Kenyan Arbitration Act of 1995 under section 6(1) provides that a court may stay proceedings and refer the parties to arbitration unless if finds-

a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

This is similar to the Ontario Arbitration Act that provides for exceptions to when a court may refuse to stay the proceeding under section 7(2). In the case of Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2000] eKLR, the majority of the court held that an applicant for a stay of proceedings under section 6(1) of the Arbitration Act was obliged to bring his application promptly. The court would then consider three things, these were:

a. whether the applicant had taken any steps in the proceeding other than the steps allowed by the section;
b. whether there were any legal impediments on the validity, operation or performance of the arbitration agreement; and
c. whether the suit indeed concerned a matter agreed to be referred to arbitration.

Validity of an arbitration agreement is one of the exemptions to issuing stay of proceedings in Kenya. Therefore, Kenyan courts cannot enforce unconscionable and invalid arbitration agreements which are marred with inequality of bargaining power and resulting improvident bargain. In the case of James Heather – Hayes v African medical and Research Foundation (AMREF) [2014] eKLR, the court held that contracts were normally commenced by sober and willing parties. The contract of employment was standard form contract and a product of the employer which did not give the employee a chance to participate in its making. Parties were expected to execute contractual documents on their free will or else issues of duress and undue influence came to their rescue.

It is worth noting that article 159 of the Constitution of Kenya, 2010 courts were continuously commanded to promote arbitration and other forms of alternative dispute resolution mechanisms and should by wary to hamper with the process of arbitration. Section 10 of the Arbitration Act provides that courts should only intervene as far as the law permitted. However, the words employed was intervene which connoted a form of justifiable intervention in law. This was reiterated in the case of Chania gardens Limited v
Confidential communication of criminal nature can be tendered as evidence in court without violating a party’s right to privacy

Sutherland v Her Majesty’s Advocate (Scotland) 2020 UKSC 32
Supreme Court of United Kingdom
Reed CJ; Hodge, Lloyd-Jones, Sales, Leggatt, SCJJ
July 20, 2020
Reported by Faith Wanjiku & Ian Otenyo

Statutes—application of statutes—application of statutes concerning sharing of confidential communication - application of the European Convention on Human Rights when confidential communication was shared with third parties – where the nature of confidential communication was reprehensible in nature – whether evidence gathered through the violation of an individual’s right to privacy could be used to prosecute a party in court - European Convention on Human Rights of 1950, article 8

Evidence Law – covert obtainment of evidence – where evidence was gathered covertly by a decoy – whether proper authorization was necessary before a decoy could gather evidence covertly and present it in court for admissibility – Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA) section 7 (3)

International Law – international human rights law – European Convention on Human Rights of 1950 – right to privacy under the European Convention on Human Rights– whether a member state had a positive obligation to protect the appellant’s right to privacy where confidential communication contained inculpatory evidence against the appellant – European Convention on Human Rights of 1950, article 8

Brief facts

The appellant was nabbed by a deceptive operation orchestrated by a paedophile hunting (PH) group. The PH had used a fake profile of a thirteen-year-old boy as a decoy to attract communications with adults that were sexually interested in children. The decoy was a member of Grindr dating application, where personal phone numbers were exchanged with the appellant and subsequent conversations were done on the WhatsApp messaging platform. The appellant sent the decoy a picture of his erect penis and later arranged for a physical meeting. The PH group turned up at the appointed venue and detained the appellant until the police showed up. The appellant was arrested and the PH gave the police communications that they had with the appellant for reliance during prosecution. The appellant claimed that his right to privacy was breached by the PH and that the prosecution shouldn’t be allowed to tender such evidence in court.

Relevant provisions of the law

European Convention on Human Rights of 1950 (ECHR)

Article 8 - Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in
a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA)

Section 7. Authorisation of covert human intelligence sources

An authorisation is necessary on grounds falling within this subsection if it is necessary—

(a) for the purpose of preventing or detecting crime or of preventing disorder;

(b) in the interests of public safety;

Issues

i. Whether the applicant’s right to privacy was violated by the Paedophile Hunting (PH) group when they disclosed the contents of their communication to the police and whether the state had a positive obligation to protect the appellant’s right to privacy in relation to their confidential communication with the decoy as provided under article 8 of European Convention on Human Rights (ECHR).

ii. Whether the prosecution could rely on covertly gathered evidence in prosecuting the appellant.

iii. Whether the paedophile hunters were required to get authorization before they gathered confidential communication that involved the appellant.

Held

1. In considering whether in a particular set of circumstances, a person had a reasonable expectation of privacy (or legitimate expectation of protection), it was necessary to focus both on the circumstances and on the underlying value or collection of values which article 8 of the European Convention on Human Rights of 1950 was designed to protect. Given the lack of any longstanding pre-existing relationship between the appellant and the person with whom he thought he was communicating, he had no reasonable expectation that the communications would remain confidential or private. The decoy did not owe the appellant any obligation of confidentiality. The appellant had voluntarily engaged in his communications on Grindr and WhatsApp with a person he believed to be a child, for sexual purposes. By the time the police were informed, the criminal activity had already been carried out.

2. The nature of the communications from the appellant to the decoy, whom he believed to be a child, was not such as was capable of making them worthy of respect for the purposes of the application of the European Convention on Human Rights ECHR. The appellant had no reasonable expectation of privacy in relation to the communications, with the result that he enjoyed no relevant protection under article 8(1) of the ECHR as regards their disclosure to and use by the respondent and the other public authorities.

3. Although freedom of expression and confidentiality of communications were primary considerations and users of telecommunications and internet services should have a guarantee that their own privacy and freedom of expression would be respected, such guarantee could not be absolute and had to yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others.

4. Under the scheme of the ECHR and for the purposes of its article 8, the interests of children in the field had priority over any interest a paedophile could have for being allowed to engage in the conduct which had been criminalised by those provisions. As such, there was no interference with the appellant’s right to privacy.

5. The actions of the appellant were aimed at the destruction or limitation of the rights and freedoms of a child under article 8 of the ECHR which were the subject of positive obligations owed to children by the state. Those positive obligations outweighed any legitimate interest the appellant could have under article 8(1) of the ECHR to protection for his actions. The facts were criminal in nature and the appellant’s actions were not an aspect of his private life that he was entitled to keep private.

6. Once the police passed the evidence to the respondent, the appellant had no legitimate interest under the scheme of the ECHR to prevent the respondent from making use of that evidence in criminal proceedings against him. The police and the respondent, as relevant public authorities, had a responsibility, under the scheme of values in the ECHR, to take effective action to protect children, to the extent that the information provided by the decoy indicated that the appellant represented a risk to them.

7. The state had no supervening positive obligation arising from article 8 of the ECHR to protect the appellant’s interests which would impede the respondent in any way in making use of the
evidence about his communications with the
decoy to investigate or prosecute in respect of
the crimes he was alleged to have committed.
On the contrary, in so far as positive obligations
under article 8 of the ECHR were engaged, the
relevant positive obligation on the respondent,
as a public authority, was to ensure that the
criminal law could be applied effectively so
as to deter sexual offences against children.
Contrary to the appellant’s argument, article 8
of the ECHR had the effect that the respondent
should be entitled to, and indeed could be
obliged to make use of the evidence of the
communications with the decoy in bringing a
prosecution against him.

Appeal dismissed

Relevance to the Kenyan situation

The test employed in determining the admissibility
of evidence by Kenyan courts where evidence had
been acquired through means that violated an
individual’s constitutional right is double pronged.
The first prong directs the court to examine the
relevance of the evidence in question to the case at
hand. If the evidence in question is relevant to the
case then it is admissible. This test was employed in
the case of Nicholas Randa Owan Ombija v. Judges
and Magistrates Vetting Board [2015] eKLR where it
was held that:

The test to be applied both in civil and
in criminal cases in considering whether
evidence is admissible is whether it is
relevant to the matters in issue. If it is, it is
admissible and the court is not concerned
with how it was obtained.

The second prong directs the court to examine
if the evidence in question is detrimental to the
administration of justice and against the principle
underlying Article 50(4). It was stated in David

Ogolla Okoth v. Chief Magistrate Court, Kibera & 2
others; [2016] eKLR that:

I do not however agree that all evidence
not properly obtained lead to some form
of prejudice and therefore the automatic
termination of a criminal trial. Such an
approach negates and dilutes, invariably,
the words of the Constitution emphasized
above. There has to be established that a
right in the Bill of rights was unjustifiably
violated whilst obtaining the evidence
in question. Secondly, there must then
be shown that the admission of such
evidence would render the trial unfair or be
detrimental to the administration of justice.

Article 50 (4) of the Kenyan Constitution 2010
states that:

Evidence obtained in a manner that violates
any right or fundamental freedom in the Bill
of Rights shall be excluded if the admission
of that evidence would render the trial
unfair, or would otherwise be detrimental
to the administration of justice.

Though suits instituted by parties that claim their
privacy rights had been violated by private citizens
conducting covert investigations are not quite
common in Kenya, the United Kingdom case
can inform Kenyan courts to further interrogate
the nature of the contents of adduced evidence to
reveal if it would be useful in furthering the ends of
justice before declaring it inadmissible. The revealed
nature of the contents of the interrogated evidence
will then determine its admissibility. The upshot, is
that courts should not be stopped at looking into
evidence merely because it was acquired in a manner
that violated the human rights of a party.
### Law Reform Issues July-September, 2020

Compiled by Faith Wanjiku

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<td>A.</td>
<td>Director of Public Prosecutions v Peter Aguko Abok &amp; 35 others [2020] eKLR Revision Application No. 42 of 2019 Anti-Corruption and Economic Crimes Division JN Onyiego, J February 19, 2020</td>
<td>1. Despite lack of express legislative legal framework governing the process of disclosure of material evidence in criminal proceedings, the requirement was underscored constitutionally under article 50(2) of the Constitution. Article 50(2) on the right to a fair trial (hearing), which under article 25(e) was absolute as an inalienable right, could not be compromised at the altar of any convenience.</td>
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<td>Brief facts</td>
<td>2. From the plain reading of article 50(2)(b) and (j) of the Constitution, prosecution had a legal and binding obligation to supply to the defence all material evidence in its possession which it intended to rely on to enable the defence prepare its defence adequately. The rationale behind that provision was to avoid practice by ambush. It was meant to put both the prosecution and the defence on equal footing so that none was caught by surprise. It was in fulfillment of article 35 of the Constitution which underpinned the right to access information.</td>
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<td>The accused persons had been arraigned before the trial court facing corruption related charges. Having returned a plea of not guilty, the accused persons were released on various bail terms and conditions. During the hearing of the bail application, the prosecution intimated that they had about 250 documents to disclose, some of which had more than 1,000 pages and that they had 65 witnesses whom they intended to call. The trial court in its ruling made remarks suo motto stating that anti-corruption matters were complex hence required a different approach in handling them from the inception, the absence of the law governing their uniqueness notwithstanding. The trial court further directed the prosecution to among others make disclosure in every prosecution file and that henceforth, the investigative agencies and the prosecution to ensure that disclosure in each prosecution file had to be done count by count. Aggrieved by the ruling and in particular the direction for disclosure count by count, the prosecution filed the instant application.</td>
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<td>3. Although the trial court was creative and innovative in trying to advance jurisprudence, there had to be a legal framework stipulating on how the process was to be undertaken and the consequences for non-adherence with such directions. Unlike civil cases where a case could be dismissed at a preliminary stage for failure to disclose reasonable cause of action, in criminal cases, the case had to go through a full trial before a court could acquit.</td>
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<td>B. The Republic, PSC and the AG and the National Assembly need to consider an enactment to improve and fill the lacuna in section 4 (1) of the Controller of Budget Act, 2016 so as to expressly provide for and include a vacancy if or where the Controller of Budget leaves office by reason of lapsing of the prescribed term of tenure of 8 years per Article 228 (3) of the Constitution; and, where foreseeable, a procedure for timely transparent and competitive interviews, identification, nomination, approval for appointment, appointment and swearing into office of the next holder of the office of Controller of Budget.</td>
<td>Okiya Omtatah Okoti v The National Executive of the Republic of Kenya &amp; 8 others Petition 235 of 2019 Employment and Labour Relations Court at Nairobi B Ongaya, J July 3, 2020 Brief facts The petition was about recruitment in the office of Controller of Budget. The petitioner sought a determination whether it was constitutional under the Constitution of Kenya 2010 (Constitution) to have an Acting Controller of Budget given the mandatory provisions of the Constitution in relation to qualifications for the holder of and process of nomination, approval and appointment to that office. The petitioner was aggrieved that section 4(2) of the Controller of Budget Act, 2016(Act) that provided for vacancy and procedure for appointment of the Controller of Budget pursuant to which the 6th respondent was appointed to the office of Controller of Budget was inapplicable. The petitioner averred that the committee convened by the Public Service Commission (Commission) for purposes of considering job applications and shortlisting three persons for appointment as the Controller of Budget was unconstitutional. The petitioner claimed that the National Assembly inadequately approved the nomination of the 6th respondent for appointment as Controller of Budget yet she did not meet the mandatory minimum qualifications set in the Constitution for appointment to the office.</td>
<td>1. While Parliament intended to provide in the Act a procedure for filling a vacancy in the office of the Controller of Budget in any event, there appeared a clear gap in the legislative drafting that failed to capture a vacancy flowing from the lapsing of the prescribed term of the office holder. However, nothing should have stopped the 1st, 2nd, 3rd, and 5th respondents from considering and taking action towards improving section 4(1) of the Act (for clarity and avoidance of ambiguity) to provide for and include a vacancy if or where the Controller of Budget left office by reason of lapsing of the prescribed term of tenure; and as appropriate. Where such lapsing of tenure being foreseeable, a procedure for timely identification, nomination, approval for appointment and appointment of the next holder of the office as at the time of the lapsing of the term of the incumbent.</td>
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<td>2. In the natural flow of things, it was conceivable that the office of the Controller of Budget could fall vacant in unforeseeable circumstances such as death, resignation or removal as per the constitutional provisions. The functions, powers and duties vested in the office were in the nature of day-to-day roles that were necessary for continued running of state and public service operations. Essentially the Controller of Budget held the key to the purse holding all Government money and it was unnecessary to emphasize that a vacancy in the office meant the key was unavailable. The temporary acting appointment with the prescribed safeguards were not unconstitutional or even irrational but necessary towards dealing with the likely event that the office was vacant.</td>
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<td>3. An acting Controller of Budget was only temporarily discharging the functions of the office and such service though clothed with all requirements and standards expected of the substantive office holder as per the safeguards set out in section 7 of the Act, the acting person was not a substantive Controller of Budget or an office separate from the constitutionally established office of Controller of Budget. Section 7 of the Act embraced true fidelity to the original constitutional provisions about the office of the Controller of Budget. The section did not render itself as an avenue for the President to circumvent the original constitutional provisions on the office of the Controller of Budget.</td>
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The Rules Committee needed to reconsider section 20(1) of the Sexual Offences Act on its stand on whether a man could commit incest on a male relative.

JKM v Republic
Criminal Appeal No 54 of 2018
High Court at Nyahururu
RPV Wendo, J
July 30, 2020

Brief facts
The appellant had been convicted for the offence of incest contrary to section 20(1) of the Sexual Offences Act (the Act) by the trial court. The particulars of the charge were that the appellant intentionally caused his genital organs to penetrate the genital organs of his son (the complainant) a child aged 9 years. In the alternative, the appellant was charged with the offence of indecent act with a child, contrary to section 11(A) of the Act in that he intentionally caused his genital organs to come into contact with the genital organs of the complainant. Upon conviction, the appellant was sentenced to serve 20 years imprisonment. The appellant was aggrieved by the judgment of the trial court and thus filed the instant appeal. The appellant prayed that the conviction be quashed and the sentence set aside.

1. The offence of incest by a male person was created by section 20(1) of the Sexual Offences Act. To establish a case under section 20, the prosecution had to prove the elements of the offence which were that there had to be:
   a) an indecent act or an act that caused penetration; and
   b) the victim had to be a female person who was related to the perpetrator in the degrees set out in section 22 of the Act.

2. There was overwhelming evidence on record that the complainant was aged about 8 years old. The complainant was a child of tender age and had undergone a voire dire examination. PW6 who examined the complainant, assessed his age at 8 years, at the time he was in nursery school.

3. There was no evidence on record as to suggest why the complainant, a child of tender age, could have framed the appellant with such a serious offence and given such candid details of the incident. The complainant was a truthful witness, he gave his evidence on oath and was subjected to cross-examination and his testimony was not shaken. The appellant was therefore the perpetrator of the offence that caused anal penetration of the complainant.

4. The complainant was a male person and did not fall within the category listed in section 20(1) of the Act. Under section 20(1), a male person committed the incest with a female relative. There was no provision in the Act where a male person was deemed to commit incest with male relative. An offence of incest had therefore not been disclosed as no such offence existed under section 20(1).

5. The evidence on record disclosed an offence of defilement under section 8(1) as read with section 8(2) of the Act. The trial court erred in convicting and sentencing the appellant under section 20(1) of the Act. The appellant was thus guilty of the offence of defilement contrary to section 8(1) as read with section (2) of the Act.

6. The Rules Committee needed to reconsider section 20(1) of the Sexual Offences Act, whether a man could commit incest on a male relative.
The Directorate of Criminal Investigations (DCI) cannot institute criminal proceedings against an individual without the consent of the Director of Public Prosecutions (DPP).

The rejection of a nominee to a county executive committee for lack of experience and relation to another nominee does not violate the Constitution.

The Constitution does not contemplate the withholding of salaries and allowances of commissioners of independent commissions in situations of illness.