The Kenya Law Android app contains:

- Selected Statutes of high public interest.
- The Kenya Gazette.
- Cause List (integrated with Kenya Law’s website).
- Case Search (which is integrated with Kenya Law’s Case law database).

This mobile app was borne out of collaboration between:

ACK Garden Annex, 5th Floor, 1st Ngong Avenue, Ngong Road, Upper Hill  P.O Box 10443 - 00100, Nairobi - Kenya
Tel: +254 (020) 2712767, 2011614, 2719231 Mobile: +254 718 799 464, 736 863 309

www.kenyalaw.org  mykenyalaw  @mykenyalaw  Mykenyalaw

National Council for Law Reporting (Kenya Law) - A service state corporation in the Judiciary
CONTENTS

THE BENCH BULLETIN

01 Editor’s Note


06 What they Said

08 Civil Litigation at the Industrial Court; The New Dimention for Lawyers;: A Paper Presented at the LSK CLE Programme by Hon. Lady Justice Hellen Wasilwa.

12 Kenya Law’s Study Tour to The National Archives (TNA) and the Stationary Office (TSO), the Incorporated Council for Law Reporting for England and Wales (ICLR) and the Lexis Nexis London, UK

COMMENTARIES

17 Fostering Security Through Environmental Conservation

19 Supreme Court of Unites States upholds prayer practice before legislative meetings

23 EU Court of Justice allows individuals to demand Google to remove search results containing their names
27 ICC Mode of liability can be recharacterized to prove accesoryship.
33 In the African Court of Human and Peoples’ Rights.
38 US Supreme Court renders the System of Aggregate Contributions on Campaign Donations unconstitutional.
42 Supreme Court of India recognizes transgender as third gender.
47 Legislative Update: Synopsis of Bills and Acts of Parliament
56 6 Skills you need to succeed
58 The 6th Annual Uwazi Tournament
70 Social Media Timeline

LIFESTYLE
72 What you Communicate, what other people hear

CASEBACK SERVICE
74

CASES
76
MEMBERS OF THE COUNCIL FOR KENYA LAW

Dr. Willy M. Mutunga, D. Jur., SC, EGH
Chief Justice, President of the Supreme Court of Kenya/Chairman

The Hon Lady Justice R. Nambuye
Judge of the Court of Appeal of Kenya

The Hon Lady Justice Lydia Achode
Judge of the High Court of Kenya

Prof. Githu Muigai
Attorney General

Prof. Annie Patricia G. Kameri-Mbote
SC. Dean, School of Law, University of Nairobi

Ms. Christine Agimba
Deputy Solicitor General, State Law Office

Mr. Evans Monari
Advocate, Law Society of Kenya

Mrs. Florence Mwangangi
Advocate, Law Society of Kenya

Mr. Silvester Migwi
Government Printer (Represented by Mr. Paul Sang, Snr. Printer)

Long’et Terer
(Ag CEO)

MEMBERS CO-OPTED TO SERVE IN AD-HOC ADVISORY CAPACITY

Mr. Justin Bundi
Clerk of the National Assembly of Kenya.

Anne Atieno Amadi
Chief Registrar of the Judiciary

Mr. Jeremiah M. Nyegenye
Clerk of the Senate (Represented by Mrs Consolata Munga)

Mrs. Flora Mutua
Snr. Management Consultant, Directorate of Personnel Management Services, Ministry of Devolution and Planning

Mr. Christopher Ombega
Senior Assistant Inspector General
Representing the Inspectorate of State Corporations

Disclaimer:
While the National Council for Law Reporting has made every effort to ensure both the accuracy and comprehensiveness of the information contained in this publication, the Council makes no warranties or guarantees in that respect and repudiates any liability for any loss or damage that may arise from an inaccuracy or the omission of any information.
Kenya Law has in the past few years instituted changes that are aimed at realigning and repositioning the institution to capitalize on its strengths and opportunities so as to better take advantage of its position as the official law reporter of the Republic of Kenya. In fact I can confidently say that the past one-year has been one of transformation at this institution. We have developed a new brand, a new logo and we have re-stated our vision and mission. In addition to this we recently moved to new and more spacious offices - this will definitely be a boost to the morale of the team here, and by extension it means that Kenya Law will be able to be more efficient and effective in discharging its core mandate.

Looking at all these events one thing remains true; that this institution is growing from strength to strength because of the resourceful staff members that we have and the great leadership, through our former Editors, which we have been privileged to have. I especially want to single out Mr Michael Murungi, the immediate past CEO, who was instrumental in guiding this institution in the past five years, and through whose leadership a lot of the initial vision for the institution was able to be brought to life. As he embarks on his new professional journey, we wish him nothing but the very best.

The jurisprudence from our courts is growing and giving life to our constitution. The general elections of 2013 were conducted under the Constitution of Kenya 2010 and subsequent to this, there have been a number of election petitions that have been determined by the Courts. These election petition matters are now beginning to find their way to the Supreme Court and these, considering the very limited grounds of the appeal to this court, will no doubt generate jurisprudence worthy of further analysis. The Election laws and regulations are also coming under strict scrutiny as this process is being undertaken and it is clear that the drafters of legislation and rules will need to be a bit more keen in future to ensure that legislation and rules that are passed and enacted actually meet the threshold of constitutionality in letter and spirit.

You will find within this publication a diverse range of case law, including international perspectives, which I hope will be enlightening and lead to the further development of our Kenyan jurisprudence.

Happy Reading!

Longe’t Terer
(Ag CEO)

Honorable Judges and Magistrates present,
Members of the Council for Law Reporting,
Colleagues from the Judiciary and other government agencies,
Mr. Mamadou Biteye – Managing Director, Rockefeller Africa,
Distinguished Ladies and Gentlemen;
It is a pleasure to welcome you here today.

The National Council for Law Reporting has over the years established Kenya as the only African country, and among the few countries in the world, that provides comprehensive, quality and up to date free online access to public legal information. Kenya law reports ceased to exist in 1980 and the NCLR revived Law reporting in 2002, ending two decades of practicing law in the dark. When we talk of Kenya’s or Africa’s ‘lost decades’, law reporting was certainly one of them. It is remarkable that the rapid decline in the rule of law, and the shrinking of freedom and liberties in this country, coincided rather neatly with the disappearance of law reporting. I want to thank NCLR for doing a splendid job since its inception. What we are doing today is one more demonstration of this great journey.

The organization has in the last year undertaken the upgrade of its website to improve its accessibility and functionality. The Council has also developed a user-friendly and modern digital platform for the Kenya Gazette. This is a great milestone for Kenya and is in keeping with the state’s constitutional duty to provide its citizens with access to quality, reliable and authoritative public legal information. Indeed, the scope, quality and accessibility of the website and the Kenya Gazette will make Kenya a world leader in that regard. NCLR’s versatile and innovative use of technology to provide legal information is testament to the functional utility of technology to advance the public interest. We at the judiciary have to learn from you where our massive investment in technology has merely provided avenue for graft and opportunities for abuse by individuals and institutions who have no respect for the law and morality. As we have stated in our Judiciary Transformation Framework, technology should be an enabler for justice not a platform for criminality and vile conduct. Judges want to feel safe and secure sharing their draft judgments as they e-conference on cases, and not be worried that strange individuals lacking in the basics of decency, or media houses lacking in the basics of professional ethics, are intercepting and broadcasting their communication.

The Constitution of Kenya, 2010 places an obligation on every citizen to respect, uphold and defend the Constitution. This obligation, and
indeed the obligation placed on the citizen to obey the other laws as well, necessarily gives rise to a duty on the State to publish the law. The citizen's obligation can therefore only be properly discharged where the citizen has easy access to an accurate, reliable and authoritative source of the text of the law.

Indeed, in the Bill of Rights, the Constitution establishes the citizen's right to access 'information held by the State' and places a duty on the State to 'publish and publicize important information affecting the nation'.

As the Judiciary, we strongly believe that the free flow of information is fundamental for both access to knowledge and the development of our society. Public legal information is part of the common heritage of humanity and maximizing access to this information promotes justice and the rule of law. Such information, which includes the primary sources of law, should therefore be accessible to all citizens. Indeed, a law reporting system that is weak and incompetent impoverishes the practice of law in our courts.

The National Council for Law Reporting has made access to quality legal information possible through its website and continues to avail legal information to Kenyans. The products we have unveiled here today will no doubt further enhance access to this information.

Further, thanks to the support from the Rockefeller Foundation, Kenyans can now access the Kenya Gazette online on a friendly user-interface that provides easy search and retrieval of current and past editions of the Gazette. This is no mean achievement and we must celebrate the Council for making this possible.

At the Judiciary we have recognized that we are part of the engine of societal transformation and so we have adopted a culture of service that is people centred. We are consciously aiming to create an environment that supports the delivery of justice, upholds the rights of the Kenyan people and promotes national values.

I urge the Judiciary and other arms of Government to mainstream Impact Sourcing in the delivery of their mandate. In this way, they will not only deliver services to the citizenry but also positively impact the lives of the vulnerable and the socio-economically disadvantaged.

The National Council for Law Reporting is making a bold promise. It understands its role as the agency through which Kenya’s robust, indigenous, patriotic and progressive jurisprudence will be monitored, reported and also packaged for the benefit of Kenya’s legal environment and also as a product for export to other jurisdictions.

We also acknowledge our social justice obligation to provide public legal information that is open and accessible, and so by this launch we are renewing our promise to the Kenyan people to be the gold standard by which law reporting and access to public legal information is measured. The people of Kenya, from whom our mandate is derived, the letter and spirit of the Constitution of Kenya, 2010 and the Judiciary Transformation Framework requires nothing less of us.

We have therefore renewed our minds and rededicated...
I would like to acknowledge and appreciate the leadership provided by the Members of the Council for Law Reporting; the innovativeness, diligence and dedication of the team at the Secretariat of the Council, and the technical and financial support of the Attorney General, The Rockefeller Foundation and our other development partners. I want to make special recognition to the immediate outgoing Chief Editor of NCLR, Mr. Michael Murungi, for his extraordinary contribution in making the Council what it is. It now gives me great pleasure to unveil the new brand identity for the National Council for Law Reporting – Kenya Law. Asanteni.

The Hon. Dr. Willy Mutunga, D. Jur., SC, EGH Chief Justice, President, Supreme Court of Kenya.

In conclusion, the essence of Kenya Law’s renewed sense of obligation is captured in its new slogan “Where Legal Information is Public Knowledge”. Am glad the Council has come to an enlightened understanding of its mandate and made a commitment to not merely be a provider of public legal information but also be the people’s fountain of knowledge and understanding of the law for the promotion of the rule of law and the advancement of a civilized society.
This Publication features the summaries and the full text of all the decisions made by the Supreme Court in the year 2011 & 2012.
What they Said

Supreme Court Judges
CJ W Mutunga, DCJ K Rawal, P K Tunoi, M K Ibrahim, J B Ojwang, S C Wanjala & N Njoki
in
Mary Wambui Munene v Peter Gichuki King’ara & 2 others Petition No. 7 of 2014

“What the Court pronounced itself on the issue of invalidity of section 76(1)(a) of the Elections Act, in line with the Constitution, the Court was not precluded from considering the application of the principles of retro activity or pro activity on a case-by-case basis. As such, in the instant matter, the issue of invalidity of Section 76(1)(a) of the Elections Act was bound to the issue of time. Time, as a principle, was comprehensively addressed through the attribute of accuracy, and emphasized by article 87(1) of the Constitution, as well as other provisions of the law. Time, in principle and applicability, was a vital element in the electoral process set by the Constitution. From a review of the principles as regards the settlement of electoral disputes, the court was convinced that for the benefit of certainty and consistency, the declaration of invalidity must apply from the date of commencement of the Elections Act...”

“While the Court pronounced itself on the issue of invalidity of section 76(1)(a) of the Elections Act, in line with the Constitution, the Court was not precluded from considering the application of the principles of retro activity or pro activity on a case-by-case basis. As such, in the instant matter, the issue of invalidity of Section 76(1)(a) of the Elections Act was bound to the issue of time. Time, as a principle, was comprehensively addressed through the attribute of accuracy, and emphasized by article 87(1) of the Constitution, as well as other provisions of the law. Time, in principle and applicability, was a vital element in the electoral process set by the Constitution. From a review of the principles as regards the settlement of electoral disputes, the court was convinced that for the benefit of certainty and consistency, the declaration of invalidity must apply from the date of commencement of the Elections Act...”

Court of Appeal judges
H.M. Okwengu, A. Makhandia, F. Sichale, in
Attorney General & 6 others v Mohamed Balala & 10 others (Law Society of Kenya) Civil Appeal No 191 of 2012

“Article 40 of the Constitution of Kenya, 2010 on the right to property allowed the owner of the land to use, transfer, enjoy and control their property. Therefore a condition of obtaining presidential consent before transferring the plot limited the owners’ right to property and was unnecessary clog or fetter to that freedom and indeed the freedom to contract...”

“Article 40 of the Constitution of Kenya, 2010 on the right to property allowed the owner of the land to use, transfer, enjoy and control their property. Therefore a condition of obtaining presidential consent before transferring the plot limited the owners’ right to property and was unnecessary clog or fetter to that freedom and indeed the freedom to contract...”

“Good governance demanded of the regulator (CCK) to comply with the conditionalities set by both the substantive law and the regulations on disqualification for one to hold a broadcasting digital distribution license. They failed to do so by disqualifying the 1 and 2nd appellants from the tendering process on grounds placed on the tender documents and yet to their knowledge none of those had been made as disqualifying conditions in the tender notice. It was also humiliating to degrade the appellants by knocking them out of the industry on such a technicality contrary to the value of human dignity under article 10 of the Constitution of Kenya, 2010, as it showed them to be persons without integrity...”

Judge of Appeal R N Namulye in
Royal Media Services Ltd & 2 others v Attorney General & 8 others, Civil Appeal No.4 of 2014

“Good governance demanded of the regulator (CCK) to comply with the conditionalities set by both the substantive law and the regulations on disqualification for one to hold a broadcasting digital distribution license. They failed to do so by disqualifying the 1 and 2nd appellants from the tendering process on grounds placed on the tender documents and yet to their knowledge none of those had been made as disqualifying conditions in the tender notice. It was also humiliating to degrade the appellants by knocking them out of the industry on such a technicality contrary to the value of human dignity under article 10 of the Constitution of Kenya, 2010, as it showed them to be persons without integrity...”
What they Said

“The Constitution left no doubt that the right to vote for Kenyans in the diaspora was to be achieved progressively. The article required Parliament to enact legislation that among other things provided for the progressive registration of the right to vote for citizens residing outside Kenya. Although the proximity of the time span between the time when IEBC was requested to take remedial action to facilitate the Appellant’s participation in the general election could have been too short for it to make any meaningful arrangements, directions on the way forward as regards future preparedness were feasible, considering that there were other declarations which were sought besides the one seeking facilitation to vote...”

High Court Judge Gv Odunga, in Kenya Country Bus Owner’s Association (Through Paul G. Muthumbi-Chairman, Samuel Njuguna- Secretary, Joseph Kimiri- Treasurer) & 8 Others v Cabinet Secretary for Transport & Infrastructure & 5 Others Civil Appeal No 350 of 2012

“The principle of accountability mandated that State and public officers were prepared to face the consequences of their actions whenever their actions were manifestly taken with impunity and mala fides. It was only when such officers were personally made to take the responsibility for their actions that the rule of law was to be upheld. The Courts had a duty and a responsibility to ensure that the public did not suffer at the expense of actions or inactions of officers deliberately designed to bring judicial process into disrepute and turn Courts of law into circuses...”

High Court Judge Mumbi Ngugi in The Kenya Magistrates & Judges Association v The Judges & Magistrates Vetting Board, Constitution petition no 64 of 2014

“Pertaining to the right to access environmental information, article 69(1)(d) of the Constitution of Kenya 2010 placed an obligation on the state to encourage public participation in the management, protection and conservation of the environment. Public participation would only be possible where the public had access to information and was facilitated in terms of their reception of different views...”

High Court Judge P Nyamweya, in Friends of Lake Turkana Trust v Attorney General & 2 others ELC Suit No 825 of 2012

“The mandate of the Vetting Board was limited to complaints against judicial officers who were in office on or before the effective date of August 27th, 2010, and arising on or before that said date. The magistrates who were in office on August 27th, 2010 had to be subjected to the vetting process in respect of matters as at that date. Any issue arising thereafter in their case, as in the case of judicial officers appointed after promulgation of the constitution and the attendant rigorous interview process, would fall within the mandate of the Judicial service Commission and carried out in accordance with the Judicial Service Act...”

High Court Judge P Nyamweya, in Friends of Lake Turkana Trust v Attorney General & 2 others ELC Suit No 825 of 2012
Introduction
The Industrial Court as currently constituted is a High Court by all means having been established under Art 162(2) of the Constitution of Kenya 2010. This Article establishes the Industrial Court as a Superior Court with the status of the High Court. This introductory remark will aid us in shifting our thinking from the position that this Court is a Tribunal as it was before the current constitutional dispensation and allow us shift into a different gear as we discuss the litigation currently at the court. It is imperative to note that the court is still applying and interpreting the same Employment Legislation it did apply before 2010 but now with an expanded mandate as a High Court.

The expanded mandate is derived from the court’s position as high Court which can now hear any matters related to labour and employment relations as mandated by the Constitution and section 12 of the Industrial Court Act 2011. This position of the court as a high court has been addressed by several courts and it is now settled that Under section 12 of the Industrial Court Act 2011, “The Industrial Court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other law which extends jurisdiction to the court relating to employment and labour relations including:

(a) Disputes relating to or arising out of employment between an employer and an employee;
(b) Disputes between an employer and a trade union;
(c) Disputes between an employers’ organisation and a trade unions organisation;
(d) Disputes between trade unions;
(e) Disputes between employer organisations;
(f) Disputes between an employers’ organisation and a trade union;
(g) Disputes between a trade union and a member thereof;
(h) Disputes between an employer’s organisation or a federation and a member thereof;
(i) Disputes concerning the registration and election of trade union officials; and
(j) Disputes relating to the registration and enforcement of collective agreements’.

Who has locus
Under section 12(2) of the Act “An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.”

Understanding that all the above have locus will be instrumental in understanding why trade unionists approach the court. Some counsels have had to question the locus of unionists in filing and attending court on behalf of their members. This is further reinforced by Art 48 on access to justice and Art 22(2) of the Constitution which allows an association to act in the interest of one or more of its members.
Remedies

The Industrial Court can grant any of the following remedies as envisaged under section 12 (3) of the Act:

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

Rules

The current rules applicable to the court are the Industrial Court (Procedure) Rules 2010) promulgated on the 4th May 2010. As may be noted, these rules are in urgent need of amendment having been promulgated before the Court was established under the current constitution in 2011. However, the rules are currently applied with the necessary modifications as the case may be and especially where there is no express provision in the rules as to the procedure to be applied in a given situation e.g. in taxation. Rule 31 for instance provides that the rules for execution applicable to the High Court will apply. The Rules as they stand however give a brief guide on how matters should be filed in court, what pleadings to file, what attachment or annexures and the processes to be followed from hearing of the matter to execution. The common mistake I have discovered is lack of adherence to rule 17 which in mandatory terms expects all documentary evidence parties may wish to rely on filed in court before hearing commences.

What are the common cases currently handled by the Industrial court.

Statistics at the court show that the majority of the cases relate to unfair dismissals. This stems mainly from the lack of understanding of what an employment relationship should be like. Most employees for instance do not give the employees appointment letters and where they are given, they fall below the standard expected under section— of the Employment Act 2007. Processes for disciplining errand employees are not adhered to and this is good reason for declaring any termination following a flawed disciplinary process declared unfair or unjustified as the case may be.

1. The employment relationship

Unlike general contract law, the employment contract has certain distinct features which have been causing problems to litigants and their counsel in certain instances. Under general contract law, the parties are strictly bound by the provisions of the contract and either party may repudiate the contract as agreed upon. However, in an employment contract, there is need to consider to a large extent the implications of repudiating the contract on the other party. The contract may provide for instance the fact that either party may terminate the contract by giving the other party one month notice or one month’s pay in lieu of notice. However, the one months notice may not suffice. This is because the employment contract is a social contract that extends beyond the individual employee and has the effect on the employee’s family even society at large and can even contribute to industrial peace and harmony or otherwise cause unrest in society. At the international level, the employment relationship is regulated by certain international Conventions and Recommendations and soft law provisions which need to be adhered to. ILO REC. 198 was for instance adopted on 15.6.2006 and it was partially to resolve certain sticky issues such as:

1 ILO Rec 198 Employment Relationship Recommendation, 2006
manner that hides his or her true legal status as an employee and that situations can arise where contractual arrangements have the effect of depriving workers the protection they are due.\(^2\)

The effect of being sure what the relationship is, will also determine the disciplinary measures to be employed, the safety of the employee, how the relationship can be terminated, and other terms of the employment relationship.

How to determine the existence of an employment contract

Facts relating to the performance of work and the remuneration of the worker largely determine the existence of an employment relationship. Under the Employment Act, 2007, the contract of employment can either be in writing or oral. However, a contract exceeding three months must be in writing and it is the duty of the employer to translate this contract in writing.\(^3\) When it comes to determining what the terms of the contract were in the absence of a written contract which the employer should have drawn, then of course it would be safe to assume that what the employee is stating is the correct position. There are instances where the employer asks the employee to prove a particular position in the contract which in my view is tantamount to shifting the burden of proof because in the first instance, the burden to have a written contract rests on the employer and once the contract is in writing the employer is safe as to the contract provisions.\(^4\)

Many of the cases filed at the court oscillate between unfair termination and failure to pay terminal dues. This would not be the case if the law is followed. The Employment Act is also very explicit on what should be included in an employment contract and this includes the following:\(^5\):

- Name, age, permanent address and sex of the employee, name of the employer, job description, date of commencement of employment, form and duration of the contract, place of work, hours of work, remuneration, scale and rate, method of calculating that remuneration and details of any other benefit, date on which the employer's period of continuous employment began and any other prescribed matter.

Thus the contents of an employment contract will determine what the relationship will be like literally.

Other considerations in determining the employment relationship will depend on the following matters:-

1.1. Subordination and dependence. If a worker is subordinate or dependent on the employer then that employment relationship exists. This however may not be necessarily true considering that in certain professional categories; there is considerable independence on the work the worker performs.\(^6\)

1.2. Control of work and instructions. This is one of the considerable indicators of subordination. The fact that work is done under the control and direction of an employer's direction and/or authority denotes the existence of an employment contract.\(^7\)

1.3. Integration of the worker in the enterprise\(^8\) If the employer forms part of the organizational structure of the enterprise, then they form part of that organization. Factors which indicate that a person operates their own business are e.g that they bear risks such as arising from bad workmanship, poor performance, price hikes and time overruns.

1.4. Work performed solely or mainly for another's benefit.\(^9\) If the work is solely done for the benefit of another, then that worker is an employee.

1.5. Work carried out personally by the worker.\(^10\) In determining whether the worker is an employee or an independent contractor, the fact that the worker does none or substantially little of the work himself or herself and can delegate or get a replacement shows that the individual is not a worker.

1.6. Carried out within specific hours or at an agreed place.\(^11\) This is still part of the control above.

1.7. Having particular duration and continuity.\(^12\) As opposed to casual labour, continuity denotes the existence of an employment relationship.

1.8. Requires the worker's availability.\(^13\) The

\(^2\) Ibid Art 4 of the Recommendation
\(^3\) Section 9 of the Employment Act 2007
\(^4\) See my decision on Miguna Miguna Vs A.G.
\(^5\) Section 10 of the Employment Act 2007

BB • Issue 25, April - June 2014 Feature Case
requirement that a worker be available may be evidence of employment status as much as the actual performance of work.

1.9. Provision of tools/materials by the person requesting the work. This is usually suggestive of the existence of an employment contract.

1.10. Periodic payment of the worker. This is also suggestive of the existence of an employment relationship.

1.11. This remuneration being the sole or principle source of income. This denotes the existence of an employment relationship.

1.11.1 Recognition of entitlements (e.g. weekly rest and annual leave).

1.11.2 Travel payments by the person requesting the work.

1.11.3 Absence of financial risk for the worker.

1. Outsourcing/ triangularization

This follows closely to the employment contract which is one of the trends in the labour market. Most of the time, this is meant to disguise the employment contract and avoid responsibly of supervision of the worker. Matters covered here includes agency work, home work, part time work, self employment etc.

2. Freedom of association and recognition

This is another issue that keeps the court engaged for a long period. What should be common knowledge is that the law on the issue is covered by Art 41 of the Constitution and the Labour Relations Act 2007. For the union to seek recognition, they must recruit the requisite number of members being 50% plus one of the unionisable employees. Once this is achieved, this right should not be denied unless it can be proved that the union is not the relevant one in the circumstances. The employers often hide behind the fact that the workers claimed to be their employees are not in fact employed by them. Many at times the employers will argue that the employees in question have been out sources from a different enterprise and so are not under them directly. What the court will resort to is again the test above on whether an employment contract exists or not. The court can also resort to enlisting the services of a labour officer who would physically go to the enterprise and do a fact finding exercise with the view of establishing the correct position and report back to court.

Conclusion

It will be a disservice not to address this nagging issue on the relationship of the Industrial Court with other High Court divisions. Under Art 162 (2) of constitution, what is established are courts with the status of the High Court. No judge is established under this Art. Judges of the High Court, like judges of the Industrial Court and by extension those in The Environment and Land Court are appointed under Article 166(1) b of the Constitution and are all judges of the Superior Courts. The distinction between the three courts is therefore meant to aid in the proper administration of justice. A judge from any of these courts can therefore effectively serve in any of the other courts. The catch is that when one is sitting as a judge from the High Court, One may not serve in the other divisions unless moved to that particular division. Those are my thoughts and I hope you agree with me.
Kenya Law’s Study Tour to The National Archives (TNA) & the Stationary Office (TSO), the Incorporated Council of Law Reporting for England and Wales (ICLR) and the Lexis Nexis London, UK

Report By Wambui Kamau and Njeri Githang’a

ICLR and the Lexis Nexis
The National Council for Law Reporting (Kenya Law) sent 5 delegates to participate in a 1 week study tour in London, UK aimed at acquainting the group with up to date standards and issues in law reporting specifically learn the development of a premium case law data base.

The study tour was hosted by the Incorporated Council of Law Reporting (ICLR) at their offices; Megarry House, Chancery Lane and by LexisNexis at their offices, Lexis House, Farringdon Street.

On the visit to ICLR, the team was met by Daniel Hoadley, the Business Development Manager ICLR who introduced the team to Kevin Laws, the CEO ICLR. David Hoadley gave the team an overview of the law reporting process.

In summary the ICLR law reporting process starts with collection of all judgments in soft or hard copies, selecting cases to be reported, preparation of case edits and head notes and uploading the case edits online as Weekly Law Report (WLR) daily. Case notes are prepared for the unreportable cases and also uploaded online on a daily basis.

The reportable cases are later formatted according to the ICLR style and sent back to the judge who delivered the decision for proof then published upon return. 8 cases are selected and published in the print (WLR) on a weekly basis. Of note is that all documents are prepared in XML format.

During the first day of the study tour, the NCLR team was able to shadow the Supreme Court Law Reporter, Jill Sunderland as she covered a case in the Supreme Court that dealt with the issue whether a race discrimination claim arising from employment is barred in circumstances where the employee’s contract of employment is tainted with illegality.

For the duration of the first part of the tour, the NCLR delegation was briefed on the law reporting process of the ICLR law reports from beginning to end, compared their reporting style and ICLR case law database to Kenya Law’s. The team was also taken through the ICLR website. Unlike Kenya Law, the ICLR has a premium case law database where users prescribe for about 800 pounds a year.

During the Second Part of the Tour, The team visited Lexis Nexis where the Team was received by Kevin Cassidy, Head of International Trade and Academic Sales and Stephen Hetherington. Stephen took the team through a brief history of LexisNexis and a presentation from the Law Reports and Halsbury Law teams.

Lessons Learnt Include;

1. It is imperative to use current electronic open standards for document processing in order to realize the benefits brought about by current technological innovations. ICLR uses XML for document processing which in turn provides rich search and indexing features on their web portal.

2. Before starting to serve premium contents to clients online, it is important to have a strategy on how to distinguish premium content from free content in such a way that the consumer sees the need to pay for what is considered ‘pay-for’ content. It is also important to come up with a good pricing structure.

3. Kenya Law should relook at its law reporting work flow process in order to provide legal information in a timely manner.

4. The need for Kenya Law to develop strategic
online partners where Kenya Law will push content through modes such as incorporating a widget to display content from Kenya Law website through RSS feeds which in turn directs traffic to Kenya Law website when a user clicks on an item on the feed. It is also important to leverage Social Media through providing a means through which users can share content via social media platforms in order to reach a wider online audience.

5. Law Reports should be published in cumulative paperback volumes at periodic intervals (may be monthly) with consecutive page numbers so that all the cases in the 46 or so volumes published by the end of the year go into one hard bound volume for that year with the page numbers maintained. This will help to keep judicial officers and practitioners updated with the most recent case law.

6. Kenya Law should update its index at least once every year. The index can be updated cumulatively as and when a new report is published and availed online and in paperback before the hard bound volume is published. As earlier mentioned, the index is the best seller print book for the ICLR.

7. Kenya Law may need to advocate for a court-appointed neutral citation system that will help to uniquely identify a particular case.

8. There might be need for Kenya Law to relook at its organization structure to optimize the staffing levels as well as to meet the demands of establishing a premium online service in addition to a paper subscription model.

9. Kenya Law needs to constantly update its staff with law reporting skills by having itself co-opted into the membership of professional associations (Australian Law Library Association...
Kenya Law is mandated to revise, consolidate and publish the Laws of Kenya via Legal Notice 29 of 2009. The revised laws are provided in both print and soft- on its online service [www.kenyalaw.org](http://www.kenyalaw.org). With this mandate, Kenya Law has been able to widen the scope of legislation going by the provisions in the recent development in the Constitution of Kenya, 2010 which provided for devolution. This has spearheaded Kenya Law to widen the scope of legislation by including County Legislation in its portal. There is now a wider process for managing County and National legislation. The latest developments in regard to access to information has also led to the continued pursuit for better tools and processes in law revision from countries with numerous laws and historical versions of legislation like the United Kingdom.

It is in this regard that participants from Kenya Law team visited The National Archives and The Stationary Office based in the United Kingdom between the 31st of March and 4th of April 2014 to gain more knowledge in the processing of large amounts of information and to make it accessible and useful.

Why the National Archives and The Stationery Office?

The National Archives (TNA) is the official archive and publisher for the United Kingdom. Their role is to collect and secure the future of the government record, both digital and physical, to preserve it for generations to come, and to make it as accessible and available as possible. They are the guardians of some of the most iconic national documents, dating back over 1,000 years. It is a center of expertise in every aspect of creating, storing, using and managing official information.

The National Archives has a secure publishing system that integrates UK bodies in charge of legislation. It incorporates Parliament, the National Archives, the Stationery Office, the three jurisdictions in the United Kingdom and the three devolved national administrations.

The Stationery Office (TSO) works with The National Archives (TNA) as the official publisher of UK legislation, bringing together the skills and specialisms needed in the digital world for managing and preserving government information for both past
and present making it accessible to its users. It is a contracted office that carries out digital publishing and printing for the National Archives. It was first opened in 1988. It started publishing UK gazettes in 1965 followed by UK legislation in 1999.

The Stationery Office are experts in using innovative technology to capture and process information faster and make it easy for people to access. They have therefore developed a web-based system that manages the dissemination of information to the public via their website www.legislation.gov.uk

Objectives of the Study Tour:

1. To learn from TNA and TSO experience in presenting legislation online and in print. There is a lot to consider when legislation is to be channeled to the user. Among the issues the department sought to improve with the knowledge from the training include;

   • the user experience
   • publishing standards and technologies and
   • the issue of rights and licensing.

   Best practice into legislation mark up
   • Featuring amendments; among others

2. Further, there was need to improve the laws of Kenya in-house systems and processes to ensure the easiest and fastest way to get the most updated and accurate information.
Online Presentation of the Laws
This allows accurate presentation of legislation to the website. It further assists in indexing and prioritization of similar pages. The user experience has ensured users access what they want with ease.

Users are able to navigate a particular section with accuracy as it works by making documents to have their own web address or rather their own uniform resource locator (URL).

Users searching for information are able to arrive to a particular web page and to a recent version of the law. A common feature with websites is the issue of broken links, it is reported that from 1996, UK Legislation has not experienced broken links. This accurate presentation of information is error free and has minimal or close to nil chances of errors when accessing information.

Key features of the UK Legislation Database.

Use of Site Maps
This online feature allows you to view what has changed to a particular legislation over the time for instance to a statute. This means that a user may be able to track the amendment to a whole Act, part, section, schedule and much more. Foot notes or end notes are used to illustrate the specific change to the particular section.

The website also reflects repeals and their effects. If a section of an act is repealed, one is able to see what was repealed and why it was repealed. UK Legislation online is presented in the way the user will understand, this is done by use of point in time timeline navigation control, that can be turned on to see how legislation has changed over a particular point in time.

The National Archives has also provided legislation in its original form i.e as it was enacted and the revised version as the latest available. This is very helpful because customers are able to view all the versions of the law.

This is similar to what Kenya Law has done. We have the online feature of Point in time where a user may be able to access a piece of legislation as it were at a particular point in time.

Natural Language Processing Software
It is a software used for identifying legislative effects. The editors work with two types of legislative effects, textual amendments, such as insertions, substitutions and repeals, and non-textual amendments that typically modify the application or scope of a provision without altering the text.

TNA’s Natural Language Processing capability has modules build in it that help identify legislation mark up. The approach develops a set of rules for identifying effects, extents, powers and commencements, and to refine those rules through usage by the editors.

TNA is also currently working on automating their marking up system so that editors do not need to manually insert and move their scripts from one editor to another.

Explanatory Notes
It describes the intent and purpose of the section of an Act. It is a separate or stand alone document which helps the user understand why a particular act was enacted as well as the rationale for amendments.

Expert Participation
This involves extending editorial capabilities to expert participants for purposes of clarity. It is a very important exercise as it helps to ascertain if what has been published was done correctly. It helps in removing bottlenecks in law revision. Quality Control is assured through this exercise.
Fostering Security Through Environmental Conservation

By Dr Isaac Kalua

Environmental crime is fuelling criminal activity by providing funds for groups like Somali’s Al shabaab and Sudan’s Janjaweed. A new report by UNEP and Interpol states that environmental crime, which entails the illegal exploitation of plants and animals, is worth as much as 18 trillion Kenya Shillings. This is ten times Kenya’s recent budget of 1.8 trillion Kenya Shillings which essentially means that annual proceeds from environmental crime can run Kenya for a decade!

It is this lucrative nature of environmental crime that keeps it going. Two types of environmental crime that are particularly rampant in East Africa are illegal ivory trade and illegal charcoal trade. The recent killing of 50 year-old Satao, Kenya’s great tusker underscored the brutal tragedy of poaching. Not even a legendary elephant was safe from the hands of poachers.

Poaching generates revenue as high as one billion Kenya shillings for militia operations across sub-Saharan Africa. It is likely that the Lord Resistance Army has been a key beneficiary of these poaching funds. What this means is that poaching is no longer harmful purely because of environmental reasons but also because of the insecurity that it enables.

Terrorist groups like Al Shabaab have caused insecurity in East Africa for several years. The UN report has now made it clear that illegal charcoal trade in Somali is providing funds for Al Shabaab, whose primary income seems to be from informal taxation at roadblock checkpoints and ports. The Report, which was released at the inaugural United Nations Environment Assembly, further notes that trading in charcoal and taxing the ports have generated for Al Shabaab an estimated annual total of up to five billion Kenya Shillings.

It is a catastrophic irony that trees, which are bosoms of life, should be turned into instruments of destructive criminality. In today’s world, ecosystem conservation goes beyond green sentimentalism into the very core of national security. If charcoal usage will be replaced by other renewable alternatives, demand for charcoal will be drastically lowered and revenue for groups like Al Shabaab will be dealt a severe blow.

Indeed, most of the ongoing conflict in Africa is partly fuelled by environmental crime. Apart from Somalia, other countries whose conflict draws sustenance from illegal charcoal trade are Central Africa Republic, Democratic Republic of Congo and Sudan. Militia and terrorist groups in these countries get as much as 25 billion Kenya Shillings annually from their involvement in and taxing of the illegal or unregulated charcoal trade.

Every shilling that is earned from environmental crime robs countries of legal revenue and robs ecosystems of irreplaceable natural resources. The trees felled for the charcoal cannot be replaced. Satao, the legendary fifty year-old elephant, together with all other felled elephants and wildlife cannot be replaced. Even more heartbreaking, the lives lost from the scourge of terrorism and violence as a whole cannot be replaced. African Governments must therefore begin to treat environmental conservation as a matter of national security.

Think green, Act green.
Yours in Green,
Dr Isaac Kalua
This Grey Book and CDROM contain a Collection of 15 selected Statutes on Kenyan Procedural Law.

1. Appellate Jurisdiction Act (Cap. 9) 2. Children Act (Cap.141) 3. Civil Procedure Act (Cap. 21)
15. Traffic Act (Cap. 403)

Contact Us
ACK Garden Annex, 5th Floor, 1st Ngong Avenue, Ngong Road, Upper Hill P.O Box 10443 - 00100, Nairobi - Kenya
Tel: +254 (020) 2712767, 2011614, 2719231 Mobile: +254 718 799 464, 736 863 309
Supreme Court of United States upholds prayer practice before legislative meetings

Reported by: Suzan Nabiño & Linda Awuor

Brief Facts
Town of Greece is a town in upstate New York. For some years, it began its monthly board meetings with a moment of silence. However, since 1999, the monthly town board meetings opened with a roll call, recitation of the Pledge of Allegiance, and a prayer given by clergy selected from the congregations listed in the local directory. While the prayer was open to all creeds, nearly all the local congregations were Christians, thus nearly all the participating prayer givers too were Christians.

The respondents were citizens who attended these meetings to speak on local issues. They filed suit, alleging that the town violated the First Amendment’s Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers. They sought to limit the town to “inclusive and ecumenical” prayers that referred to a generic God.

The District Court upheld the prayer practice on summary judgment, finding no impermissible preference for Christianity, concluding that the Christian identity of most of the prayer givers reflected the predominantly Christian character of the Town’s congregation an not an official policy or practice of discriminating against minority faiths; finding that the first amendment did not require Greece to invite clergy from congregations beyond its borders to achieve religious diversity and rejecting the theory that legislative prayer must be nonsectarian.

The Court of Appeals for the second circuit reversed this decision. It held that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity. The Court emphasized that the interaction of the facts of this present case that rendered the prayer practice unconstitutional.

Issues:
1. Whether the applicants, imposed an impermissible establishment of religion by opening monthly board meetings with a prayer.
2. Whether the prayer practice in Greece fits within the tradition long followed in congress and the state legislatures.
3. Whether the respondents were coerced to participate in the prayers.

Constitutional Law – Constitution of the United States -fundamental rights and freedoms - freedom of religion-whether the respondents were coerced to participate in the prayers

Constitution of the United States – First Amendment
“The First Amendment guarantees freedoms concerning religion, expression, assembly, and the right to petition. It forbids Congress from both promoting one religion over others and also restricting an individual’s religious practices. It guarantees freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely. It also guarantees the right of citizens to assemble peaceably and to petition their government.”

Held:
Majority opinion of the Court by Justice Kennedy
1. A majority of States had a consistent practice of legislative prayer. There was historical precedent for the practice of opening legislative meetings with prayer as well.

2. As practiced by congress since the framing of the Constitution, legislative prayer lent gravity to public business, reminded law makers to transcend petty differences in pursuit of a higher purpose, and expressed a common aspiration to a just and peaceful society.

3. Any test the court adopted had to acknowledge a practice that was accepted by the framers and had withstood the critical scrutiny of time and political change. A test that would sweep away what had long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause sought to prevent.

4. Insistence on nonsectarian or ecumenical prayer as a single, fixed standard was not consistent with the tradition of legislative prayer outlined in the court’s cases for example Marsh v Chambers,463 U.S. 783,792, where the court concluded that the Establishment Clause must be interpreted by reference to historical practices and understandings.

5. To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than was the case under the town’s current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.

6. Absent a pattern of prayers that over time denigrate, proselytize or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer would not likely establish a constitutional violation. So long as the Town maintained a policy of non-discrimination, the Constitution did not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.

7. The First Amendment was not a majority rule and government ought not to have sought to define permissible categories of religious speech. Once it invited prayers into the public sphere, government had to permit a prayer giver to address his or her own God or gods as conscience dictated, unfettered by what an administrator or judge considered to be nonsectarian.

8. The relevant constraint derived from the prayer’s place at the opening of legislative sessions, where it was meant to lend gravity to the occasion and reflect values long part of the Nation’s heritage. Prayer that was solemn and respectful in tone, that invited law makers to reflect upon shared ideals and common ends before they embarked on factitious business of governing, served that legitimate function. From the Nation’s earliest days, invocations had been addressed to assemblies comprising many different creeds, striving for the idea that people of many faiths might be united in a community of tolerance and devotion, even if they disagreed as to religious doctrine. The prayers delivered in Greece did not fall out of that tradition.

9. That nearly all of the congregations in town turned out to be Christian did not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintained a policy of nondiscrimination, the constitution did not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.

As per Justice Alito with whom Justice Kennedy, Justice Scalia and Justice Thomas joined
1. The prayer opportunity in this case had to be
evaluated against the backdrop of historical practice. As a practice that had long endured, legislative prayer had become part of the heritage, tradition, expressive idiom, similar to the Pledge of Allegiance, inaugural prayer or the recitation of ‘God save the United States and this the honorable court at the beginning of the Court’s sessions.

2. It was presumed that the reasonable observer was acquainted with that tradition and understood that its purposes were to lend gravity to public proceedings and to acknowledge the place religion held in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews.

3. The prayer in this case had a permissible ceremonial purpose. It was not an unconstitutional establishment of religion. The town of Greece did not violate the first amendment by opening its meetings with prayer that conformed with the tradition and did not coerce participation by non adherents.

4. The informal way in which the town lined out guest chaplains was typical of the way in which many things were done in small and medium sized units of local government. When a municipality like the town of Greece sought in good faith to emulate the congressional practice, that municipality ought not be held to have violated the constitution simply because its method of recruiting guest chaplains lacked the demographic exactitude that might be regarded as optimal.

5. Offense however, did not equate to coercion. Adults often encountered speech they found disagreeable and an Establishment Clause violation was not made out any time a person experienced a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public was welcome in turn to offer an invocation that reflected his or her own convictions.

Dissenting opinion by Justice Breyer joined by Justice Kagan and Justice Sotomayor

1. The Town made no significant effort to inform the area’s non-Christian houses of worship about the possibility of delivering an opening prayer.

2. The fact that nearly all the prayers given reflected a single denomination takes on significance. That significance would have been the same had all the prayers been Jewish, Hindu, Buddhist or any other denomination. The significance was that, in a context where religious minorities existed and where more could easily have been done to include their participation, the town chose to do nothing.

3. Greece’s Board did nothing to recognize religious diversity; in arranging for clergy members to open each meeting, the town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. That practice, did not square with the First Amendment’s promise that every citizen, irrespective of her religion, owned an equal share in her government.

4. The promise in the First Amendment was; full and equal membership in the polity for members of every religious group assuming only that they, like anyone who lived under the Government’s protection ought to demean themselves as good Citizens. This meant this much; when the citizens of this country approached their government, they did so only as Americans, not as members of one faith or another. And that meant that even in a partly legislative body, they ought not have confronted government-sponsored worship that divided them along religious lines. The Town of Greece betrayed that promise.

The judgment of the U.S Court of Appeals for the Second Circuit was reversed

Relevance to Kenyan Jurisprudence.

Article 8 of the Constitution 2010 provides that there shall be no state religion.
This means that government cannot be seen to dictate what is to be permissible as religious speech. Prayer givers have to be given the freedom to address their personal beliefs as conscience dictates.

Article 27 (4) of the Constitution, 2010 provides that; The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Article 32 provides for freedom of conscience, religion,
believe and opinion.

It provides that every person has the right to freedom of conscience, religion, thought, belief and opinion and that every person has the right either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship. The article further provides that a person shall not be compelled to act, or engage in any act, that is contrary to the person’s belief or religion.

This case could therefore offer guidance in matters where the state is dragged to court by an overzealous religious practitioner over the prayer practice during state functions.

Angel Falls is a waterfall in Venezuela. It is the world’s highest uninterrupted waterfall, with a height of 979 m and a plunge of 807 m. The waterfall drops over the edge of the Auyantepui mountain in the Canaima National Park, a UNESCO World Heritage site. The height figure 979 m of sloped cascades and rapids below the drop and a 30-metre (98 ft) high plunge downstream of the talus rapids.
EU Court of Justice Allows Individuals to Demand Google to remove Search Results Containing their Names

Reported by Linda Awuor.

Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), & Mario Costeja González,
Case C-131/12

Brief Facts
In 2010 Mario Costeja González, a Spanish national, lodged with the Agencia Española de Protección de Datos (Spanish Data Protection Agency, the AEPD) a complaint against La vanguardia Ediciones SL (the publisher of a daily newspaper with a large circulation in Spain, in particular in Catalonia) and against Google Spain and Google Inc. Mr Costeja González contended that, when an internet user entered his name in the search engine of the Google group (‘Google Search’), the list of results would display links to two pages of La Vanguardia’s newspaper, of January and March 1998. Those pages in particular contained an announcement for a real-estate auction organised following attachment proceedings for the recovery of social security debts owed by Mr Costeja González

With that complaint, Mr Costeja González requested, first, that La Vanguardia be required either to remove or alter the pages in question (so that the personal data relating to him no longer appeared) or to use certain tools made available by search engines in order to protect the data. Second, he requested that Google Spain or Google Inc. be required to remove or conceal the personal data relating to him so that the data no longer appeared in the search results and in the links to La Vanguardia. In this context, Mr Costeja González stated that the attachment proceedings concerning him had been fully resolved for a number of years and that reference to them was now entirely irrelevant.

The AEPD rejected the complaint against La Vanguardia, taking the view that the information in question had been lawfully published by it. On the other hand, the complaint was upheld as regards Google Spain and Google Inc. The AEPD requested those two companies to take the necessary measures to withdraw the data from their index and to render access to the data impossible in the future. Google Spain and Google Inc. brought two actions before the Audiencia Nacional (National High Court, Spain), claiming that the AEPD’s decision should be annulled. It is in this context that the Spanish court referred a series of questions to the Court of Justice.

International Law — protection of fundamental rights and freedoms — Personal data — Protection of individuals with regard to the processing of such data — Directive 95/46/EC, Articles 2, 4, 12 and 14 — Material and territorial scope — Internet search engines — Processing of data contained on websites — Searching for, indexing and storage of such data — Responsibility of the operator of the search engine — Establishment on the territory of a Member State — Extent of that operator’s obligations and of the data subject’s rights — Charter of Fundamental Rights of the European Union — Articles 7 and 8

Issues
1. Whether Article 2(b) of Directive 95/46 was to be interpreted as meaning that the activity of a search engine as a provider of content which consists in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as ‘processing of personal data’ within the meaning of that provision when that information contains personal data

2. Whether Article 4(1)(c) of Directive 95/46 could be interpreted as meaning that there is "use
of equipment … situated on the territory of the said Member State’, when a search engine uses crawlers or robots to locate and index information contained in web pages located on servers in that Member State.

3. Whether Google Search, as a provider of content, consisting in locating information published or included on the net by third parties, indexing it automatically, storing it temporarily and finally making it available to internet users according to a particular order of preference, when that information contained personal data of third parties; mean’t that an activity like the one described be interpreted as falling within the concept of “processing of … data” used in Article 2(b) of Directive 95/46?

4. Whether the [AEPD], while protecting the rights embodied in [Article] 12(b) and [subparagraph (a) of the first paragraph of Article 14] of Directive 95/46, directly imposed on Google Search a requirement that it withdrew from its indexes an item of information published by third parties, without addressing itself in advance or simultaneously to the owner of the web page on which that information was located

5. Whether the obligation of search engines to protect those rights would be excluded when the information that contains the personal data has been lawfully published by third parties and was kept on the web page from which it originated

6. Whether the rights to erasure and blocking of data, extended to enabling the data subject address himself to search engines in order to prevent indexing of the information relating to him personally, published on third parties’ web pages, invoking his wish that such information should not be known to internet users when he considers that it might be prejudicial to him or he wishes it to be consigned to oblivion, even though the information in question had been lawfully published by third parties

Article 3 of Directive 95/46, entitled ‘Scope’, states in paragraph 1:

“This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.’

Article 4 of Directive 95/46, entitled ‘National law applicable’, provides:

(i.) Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

a. the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;
b. the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;

c. the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.

Held:

1. By searching automatically, constantly and systematically for information published on the internet, the operator of a search engine 'collects' data within the meaning of the directive. the operator, within the framework of its indexing programmes, 'retrieves', 'records' and 'organises' the data in question, which it then 'stores' on its servers and, as the case may be, 'discloses' and 'makes available' to its users in the form of lists of results.

2. Those operations, which are referred to expressly and unconditionally in the directive, must be classified as 'processing', regardless of the fact that the operator of the search engine carries them out without distinction in respect of information other than the personal data. The operations referred to by the directive must be classified as processing even where they exclusively concern material that has already been published as it stands in the media. A general derogation from the application of the directive in such a case would have the consequence of largely depriving the directive of its effect.

3. The operator of the search engine is the ‘controller’ in respect of that processing, within the meaning of the directive; given that it is the operator which determines the purposes and means of the processing. In this regard, inasmuch as the activity of a search engine is additional to that of publishers of websites and is liable to affect significantly the fundamental rights to privacy and to the protection of personal data, the operator of the search engine must ensure, within the framework of its responsibilities, powers and capabilities, that its activity complies with the directive’s requirements. This was the only way that the guarantees laid down by the directive would be able to have full effect and that effective and complete protection of data subjects (in particular of their privacy) may actually be achieved.

4. The operator was, in certain circumstances, obliged to remove links to web pages that were published by third parties and contain information relating to a person from the list of results displayed following a search made on the basis of that person's name. Such an obligation may also exist in a case where that name or information was not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

5. Processing of personal data carried out by such an operator enables any internet user, when he made a search on the basis of an individual's name, to obtain, through the list of results, a structured overview of the information relating to that individual on the internet. This information potentially concerned a vast number of aspects of his private life and without the search engine; the information could not have been interconnected or could have been only with great difficulty. Internet users may thereby establish a more or less detailed profile of the person searched against. Furthermore, the effect of the interference with the person's rights was heightened on account of the important role played by the internet and search engines in modern society, which rendered the information contained in such lists of results ubiquitous. In the light of its potential seriousness, such interference could not be justified by merely the economic interest which the operator of the engine had in the data processing.

6. A fair balance should be sought in particular between that interest and the data subject's fundamental rights, in particular the right to privacy and the right to protection of personal data. Whilst it was true that the data subject's rights also override, as a general rule, that interest of internet users. This balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role...
played by the data subject in public life.

7. If it is found, following a request by the data subject, that the inclusion of those links in the list is, at this point in time, incompatible with the directive, the links and information in the list of results must be erased. The Court observed in this regard that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where, having regard to all the circumstances of the case, the data appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.

8. When appraising such a request made by the data subject in order to oppose the processing carried out by the operator of a search engine, it should in particular be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results that is displayed following a search made on the basis of his name. If that was the case, the links to web pages containing that information must be removed from that list of results, unless there are particular reasons, such as the role played by the data subject in public life, justifying a preponderant interest of the public in having access to the information when such a search is made.

Victoria Falls, or Mosi-oa-Tunya (Tokaleya Tonga: the Smoke that Thunders), is a waterfall in southern Africa on the Zambezi River at the border of Zambia and Zimbabwe. The nearby national park in Zambia, for example, is named Mosi-oa-Tunya, whereas the national park and town on the Zimbabwean shore both names and Victoria Falls. The World Heritage List officially recognizes both names.
International Criminal Court; Mode of liability can be recharacterized to prove accesoryship.

*Reported by Diana Kerubo, Intern R&D Department*

**Summary of Trial Chamber II’ of the International Criminal Court**

Judgment, pursuant to Article 74 of the Statute

**The Prosecutor v. Germain Katanga**


**Brief Facts.**

The accused (Germain Katanga) was charged with various crimes within the meaning of article 25(3)(a) of the Rome Statute. The charges included, one count of murder as a crime against humanity under article 7(1)(a), five counts of war crimes under article 8 (wilful killing, directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities, destruction of property, pillaging and the use of children under the age of fifteen years to participate actively in the hostilities.)

He was also charged with other counts for crimes in the knowledge that would occur in the ordinary course of events, committed through other persons under Article 7; the crimes against humanity of sexual slavery and rape and under Article 8, war crimes of sexual slavery and rape.

On 24th February, 2003 a village in the Democratic Republic of Congo known as Bogoro in the District of Ituri was attacked by Ngiti combatants of Walendu-Bindi collectivité. This group later assumed the name “FRPI” (Forç de résistance patrioite en Ituri [Patriotic Force of Resistance in Ituri]).

The accused was the commander in chief and president of the group. During the attack, some women were raped and others killed. A death toll of 60 was registered including 30 civilian victims of murder within the meaning of articles 7(1)(a) and 8(2)(c)(i) of the Statute and rape.

This attack was mainly influenced by ethnic differences previously evident between the two main ethnic groups, the Hema and the Lendu, the Hema population being the main target of attack due to its affiliation to the UPC which was Ngiti militia’s adversary.

The group that took part in the attack according to the prosecution was a structured military group with a hierarchical chain of command, which was centralized. In its view, the accused being the supreme leader, exercised authority over the collectivité in respect of both civilian and military matters. The prosecution contended that in February 2003, the accused effectively exercised his authority over the Ngiti militia which at the time constituted an apparatus of power, thus enabling him to exercise control over the crimes committed by the militia members.

It was also established that prior to the attack, in the early 2003, combatants of Walendu-Bindi were masteredin thousands and organized in a network of camps that could be moved throughout the collectivité. Children referred locally as ‘kadogos’ who in some cases were assessed to be under the age of 15 years also constituted part of the armed forces operating in Ituri. Military training and parades were held in some camps and that in the months towards the day of attack, there was delivery of weapons and ammunition in preparation of the imminent attack on Bogoro.

There were also well established communication networks in place to aid the attacks.

The prosecution did not allege that the accused physically committed the crimes himself but argued that they were committed by his troops according to a plan hatched by him; “wipe out” Bogoro.

The accused was originally charged under article 25(3)(a) of having committed the crimes through “indirect co-perpetration,” for using a hierarchical organization (the FRPI) to carry out the crimes. The prosecution however failed to prove beyond reasonable doubt that
the accused had committed the alleged crimes within
the meaning of article 25(3)(a) of the Statute thus the
accused had not incurred criminal responsibility on
the basis of article 25(3)(a). They further failed to prove
that the Ngiti militia was an organized apparatus of
power; and the accused, at that time, wielded control
over the militia such as to exercise control over the
crimes within the meaning of article 25(3)(a) of the
Statute.

The trial chamber suggested the change of the
charges against him to responsibility under article
25(3)(d)(ii). This criminalized intentional contribution
to a crime committed by a group acting with a
common purpose, knowing that the group intended
to commit the crime.

**Issue:**
Whether a mode of liability could be recharacterized
to accord with article 25(3)(a) in the proof of
accesoryship.

**International Criminal Law-charges** - reframing of
charges-legal characterization -elements that would
constitute recharacterization in proving accesoryship-
Rome Statute article 25 (3)(a); Regulations of the
Court, regulation 55.

Rome Statute of the International Criminal Court.

article 25(3)(a)
In accordance with this Statute, a person shall be
criminally responsible and liable for punishment for a
crime within the jurisdiction of the Court if that person:
(a) Commits such a crime, whether as an
individual, jointly with another or through
another person, regardless of whether that
other person is criminally responsible.

article 25(3)(d)
In accordance with this Statute, a person shall be
criminally responsible and liable for punishment for a
crime within the jurisdiction of the Court if that person:
In any other way contributes to the
commission or attempted commission of
such a crime by a group of persons acting
with a common purpose. Such contribution
shall be intentional and shall either:
(i) Be made with the aim of furthering the criminal
activity or criminal purpose of the group,
where such activity or purpose involves
the commission of a crime within the jurisdiction
of the Court; or

ii. Be made in the knowledge of the intention of
the group to commit the crime.

article 74(2)
The Trial Chamber’s decision shall be based
on its evaluation of the evidence and the entire
proceedings. The decision shall not exceed the facts
and circumstances described in the charges and any
amendments to the charges. The Court may base its
decision only on evidence submitted and discussed
before it at the trial.

**Regulations of the Court, 2004.**
Regulation 55
1. In its decision under article 74, the Chamber
may change the legal characterization of facts
to accord with the crimes under articles 6, 7 or
8, or to accord with the form of participation of
the accused under articles 25 and 28, without
exceeding the facts and circumstances described
in the charges and any amendments to the
charges.

2. If, at any time during the trial, it appears to the
Chamber that the legal characterization of facts
may be subject to change, the Chamber shall give
notice to the participants of such a possibility and
having heard the evidence, shall, at an appropriate
stage of the proceedings, give the participants the
opportunity to make oral or written submissions.
The Chamber may suspend the hearing to ensure
that the participants have adequate time and
facilities for effective preparation or, if necessary,
it may order a hearing to consider all matters
relevant to the proposed change.

3. For the purposes of sub-regulation 2, the Chamber
shall, in particular, ensure that the accused shall:
a. Have adequate time and facilities for the
effective preparation of his or her defence in
accordance with article 67, paragraph 1 (b); and

b. If necessary, be given the opportunity to
examine again, or have examined again, a
previous witness, to call a new witness or
to present other evidence admissible under
the Statute in accordance with article 67,
paragraph 1 (e).

**Held:**
1. The timing of the attack, the means and method
used; use of machetes, shooting indiscriminately
the sheer number of civilian victims including
children, women and elderly people indicated that the combatants intended to directly target the predominantly Hema civilian population of Bogoro thereby committing murder as a crime against humanity and a war crime under articles 7(1)(a), 8(2)(c)(i) and 8(2)(e)(i) of the Rome Statute.

2. Houses belonging to the predominantly Hema population of Bogoro were destroyed, set on fire or had their roofs removed by the combatants. Bogoro was extensively pillaged. The Ngiti combatants thus committed the war crimes of destroying the enemy’s property under article 8(2)(e)(xii) of the Statute and pillaging under article 8(2)(e)(v) of the Statute.

3. Children were present among the militia members at the camp although it was impossible to determine whether or not they were under the age of 15 years. They took part in military parades and guarded the camp and its prison, thereby providing the Ngiti militia with logistical support during hostilities. There was however no direct connection indicating that the accused used the children to participate in the hostilities. The accused was thus not found to have committed the crime of using child soldiers under article 8(2)(e)(vii).

4. The accused facilitated the receipt and storage of weapons and ammunition from Beni and had the power not only to allot them to the Walendu-Bindi commanders but also to decide the quantity of ammunition allocated. His instructions in this regard were followed. However, apart from his powers to receive, store and distribute weapons and ammunition, the accused did not wield, in all areas of military life and over all commanders and combatants in Walendu-Bindi collectivité, powers of command and control.

5. The accused’s titles as Commander or Chief of Aveba and “President” of the Ngiti militia, at times called “FRPI”, the effectiveness of his authority over the supply and distribution of weapons and ammunition to the militia, his duties as facilitator and negotiator did not, allow the Chamber to find the accused to have been vested with effective hierarchical power over all the commanders and combatants of the Ngiti militia in Walendu-Bindi collectivité.

6. In recharacterization, the Chamber did not exceed the facts and circumstances described in the charges. It was thus consistent with the requirements under Regulation 55 of the Regulations of the Court and articles 67(1) and 74(2) of the Statute. This however, could not apply to the crime of using child soldiers, as the charge of direct co-perpetration against the Accused could not be modified to accessoryship within the meaning of article 25(3)(d) without violating the aforesaid provisions.

7. The form of accessoryship defined under article 25(3)(d) needed to be proved beyond reasonable doubt based on the constituent elements that:

a. The crime falling within the jurisdiction of the court had been committed;
b. the persons who committed the crime formed part of a group acting with a common purpose;
c. the accused made a significant contribution to the commission of the crimes;
d. his contribution was intentional and
e. that it was made in the knowledge of the intention of the group to commit the crimes.

8. Ngiti combatants were part of a militia which constituted an organisation within the meaning of article 7(2) of the Statute and an organized armed group within the meaning of the law of armed conflict. This militia harboured its own design, which albeit was part of a wider design to reconquer territory, was to not only attack Bogoro and wipe out from that area the UPC soldiers, but also, to wipe out the Hema civilians who were there.

9. The conditions under which the attack was launched, the manner in which it proceeded and the treatment of the civilian population, in particular women, children and elderly persons, established the existence of a common criminal purpose against the population of Bogoro.

10. The crimes of murder, attack against civilians, destruction of property and pillaging which were committed at the time therefore formed part of the common purpose.

11. Regarding the crimes of rape and sexual slavery, the Chamber found that it could not conclude, on the basis of the evidence laid before it, that the criminal purpose pursued on 24 February...
2003 necessarily included their commission or, therefore that such crimes were also part of the common purpose. The Chamber however relied on its finding that the two crimes constituted crimes against humanity as they were part of the operation to wipe out the civilian population of Bogoro; it further determined that the rapes constituted the war crime of attack against civilians.

12. Although they were not alone at the scene of the crime, the physical perpetrators of the crimes were Ngiti combatants and members of the militia of Walendu-Bindi collectivité and they harboured the common purpose.

13. The accused performed the powers he held. As of November 2002, the accused helped the Ngiti militia mount the operation against Bogoro and which the Ngiti commanders and combatants organised locally. The activities engaged in by the accused from November 2002 to 24 February 2003 had a significant effect or impact on the commission of the crimes, within the meaning of article 25(3)(d) of the Statute.

14. The geographical and temporal scope of the group’s common purpose was confined to the 24 February 2003 operation against Bogoro. Indeed, there was perfect concordance between: the attack and the operation against Bogoro; the group’s common purpose, which specifically was to wipe out from that area the UPC military elements and the Hema civilians there; and the commission of the crimes by the Ngiti combatants. The activity which the accused engaged in respect of the preparation for the attack on Bogoro constituted a contribution to the commission of crimes by Ngiti combatants.

15. Not all assistance lent in preparation of the military operation perfere and as a rule constituted a contribution to crimes committed by the members of an armed group which took part in the operation. Nonetheless, the fact that the Accused’s conduct constituted a contribution to the military operation which was decided in Beni did not preclude that his conduct also constituted contribution to the commission of crimes by the Ngiti militia, within the meaning of article 25(3)(d) of the Statute.

16. The accuseds’ contribution proved to be particularly suited for the commission of the crimes which form part of the common purpose, since that contribution had considerable influence on their occurrence and the manner of their commission. His involvement allowed the militia to avail itself of logistical means which it did not possess and which, however, were of paramount importance to attacking Bogoro. His involvement, therefore, had a truly significant part in bringing the crimes to pass.

17. The accused's activities as a whole and the various forms which his contribution took, that, in the circumstances, had a significant influence on the commission of those crimes. He intended to make his contribution, which, he, moreover, had not contested. It was further established that he knew of the intention of the group to commit the crimes which formed the common purpose.

18. These findings as a whole established beyond reasonable doubt that the accuseds contribution to the crimes of murder, attack against the civilian population, destruction and pillaging committed in Bogoro on 24 February 2003 was significant and made in the knowledge of the intention of the group to commit the crimes.

Judge Van den Wygaert Dissenting

1. It was not possible to recharacterise the charges of the case from article 25(3)(a) to 25(3)(d)(ii) without fundamentally changing the facts and circumstances of the Confirmation Decision. The narrative of the charges were substantially amended contrary to article 74 of the Statute, an alteration that could not have been reasonably foreseen by the defence.

2. Recharacterisation rendered the trial unfair by infringing a series of the accused’s rights. The judges in particular believed that the accused did not receive adequate notice of the new charges under article 25(3)(d)(ii) and was not afforded a reasonable opportunity to conduct a meaningful investigation in response to those new charges. For these reasons, accused had been prevented from defending himself appropriately.

3. The accused's testimony could be used against him as evidence for the charges under article 25(3)(d)(ii). The accused was not forced to testify against himself, he was however misled about the scope of the permissible use of his testimony. Thus, the accused’s waiver of his right to remain silent could not be considered to have been made
freely.

4. The actual charges under Article 25(3)(d)(ii) did not permit the making of any findings beyond reasonable doubt that would lead to the conviction of the accused. The quality and reliability of the evidence was in question and essential evidence was missing from the case record, factors which would make it impossible to enter findings beyond reasonable doubt.

5. The elements of crimes against humanity were not fulfilled. No evidence was shown beyond reasonable doubt that the Ngiti fighters of Walendu-Bindi constituted a group acting with a common purpose to attack the Hema civilian population of Bogoro. The evidence also did not show that the accused intentionally contributed to the commission of any crimes committed in Bogoro. On the contrary, it could not be excluded that he made his contribution to a legitimate military plan, which would exclude his criminal responsibility under Article 25(3)(d)(ii).

6. The proceedings in the case were prolonged. This was in violation of the accused's right to be tried without undue delay as well as the Chamber's duty to conduct the proceedings expeditiously and to pronounce the judgment within a reasonable period of time after the Trial Chamber had retired to deliberate.

By Majority.

1. Pursuant to Regulation 55 of the Regulations of the Court, the legal characterization of the facts was modified such that the armed conflict connected to the charges was not of an international character between August 2002 and May 2003.

2. Pursuant to Regulation 55 of the Regulations of the Court, and with the exception of the crime of using children under the age of 15 years to participate actively in hostilities (Article 8(2)(e)(viii)), the legal characterization of the mode of liability initially applied to the accused under Article 25(3)(a) of the Statute (indirect co-perpetration) was modified to apply to him under Article 25(3)(d) (accessoryship through a contribution made in any other way to the commission of a crime by a group of persons acting with a common purpose).

Orders.
The Court by majority found the accused guilty within the meaning of Article 25(3)(d) of the Statute, as an accessory to the crimes committed on 24 February 2003 of:

a. Murder as a crime against humanity under Article 7(1)(a) of the Statute;

b. murder as a war crime under Article 8(2)(c)(i) of the Statute;

c. attack against a civilian population as such or against individual civilians not taking direct part in hostilities, as a war crime under Article 8(2)(e)(i) of the Statute;

d. destroying the enemy's property as a war crime under Article 8(2)(e)(xii) of the Statute;

e. pillaging as a war crime under Article 8(2)(e)(v) of the Statute;

The court unanimously found the accused not guilty, within the meaning of Article 25(3)(d) of the Statute, as an accessory to the crimes of:

a. Rape and sexual slavery as crimes against humanity under Article 7(1)(g) of the Statute;

b. rape and sexual slavery as war crimes under Article 8(2)(e)(vi) of the Statute; and acquitted him of those charges.

Not guilty, within the meaning of Article 25(3)(a) of the Statute, of the crime of:

a. Using children under the age of 15 years to participate actively in hostilities as a war crime under Article 8(2)(e)(vii) of the Statute; and acquitted him of that charge.

The court by majority decided that the accused remains in detention until the time when the sentence is passed.
The court ordered that reparations procedures be implemented.

Relevance to Kenya.

This case bears great jurisprudential value considering that Kenya is a signatory to the Rome Statute and it allows for the application of a treaty or convention ratified by it under Article 2(6) of the Constitution.

The issue of recharacterization to prove accessoryship has also been brought out in the case. This area of jurisprudence can be referred to and used in subsequent matters arising.

Kenya is also one of the African countries other than
DRC, Mali, Central African Republic that have referred their cases to the court in addition to the Sudan and Libya cases referred by the Security Council. The jurisprudence set in this case can inform the trend and dimension of the ongoing cases especially the Kenyan cases keeping in mind that some of the charges and situations dealt with in the case relate to the current case.

Public Interest. This case also elicits public debate as to the efficiency of the ICC in the prosecution of crimes under the Rome Statute. This case records the second conviction after the Thomas Lubanga Case (recruitment, enlistment and use of child soldiers) since its inception in 2002.
In the African Court of Human and Peoples’ Rights.

Reported by Diana Kerubo Intern R&D Department

Urban Mkandawire v. The Republic of Malawi
Application 003/2011
21st June, 2013.

Brief Facts.
The Applicant had entered into an employment contract with the University of Malawi as a lecturer of French. He signed the contract with the University on 1st December, 1998 which came into effect then, and started teaching on 5th July, 1999.

The employment was for an indefinite period and one of the terms of the contract was that either party would terminate on a three months’ notice or with three months payment in lieu of notice.

The Applicant was however dismissed as a result of complaints levelled against him by students regarding his competence as a lecturer. This was followed by a dismissal letter dated 2nd December, 1999 by the Registrar.

He as a result lodged a case through the Malawian Courts including the Industrial Court and went all the way right up to the Supreme Court of Appeal which is the highest judicial authority in Malawi. The Applicant was still not satisfied with the outcome and lodged the application with the Commission.

In his application, he contended that the termination of his employment violated his rights under the Protocol to the African Charter on Human and Peoples Rights specifically under Articles 4, 5, 7, 15 and 19 and sought remedies for the reinstatement of his position as a lecturer, for the payment of damages and payment of his entitlement under the scheme run by the National Insurance Company on his 9 months’ salary as if he was contributing to the scheme were he not dismissed prematurely.

The Respondent (The Republic of Malawi) on the other hand raised the question as to the admissibility of the application as the matter was already before the African Commission on Human and Peoples Rights and therefore sub judice.

It also questioned the jurisdiction of the court to handle the matter since the applicant’s alleged violation took place in 1999 yet the Protocol came into operation in respect of the Respondent on 25th January, 2004. They also argued that the Applicant’s rights under Article 7 of the Charter had not been violated as he had exercised his right to go to the national courts and was given a fair hearing.

As regards the violation of Article 15 of the Charter, the respondents argued that he was employed by the university under contract and one of the terms was that it could be terminated by either party on three months’ notice or by three months payment in lieu of the notice.

Issues:

i. Whether the application was sub judice thus inadmissible since it was already before the African Commission on Human and Peoples’ Rights.

ii. Whether the court could apply provisions of the Protocol to the Africa Charter on Human and People’s Rights on the Establishment of an African Court on Human and Peoples Rights (the protocol) retrospectively with regards to human rights violations.

iii. Jurisdiction of the court with regards to human rights violations.

iv. Whether all the available local judicial remedies were exhausted.

International Law-treaties- interpretation of treaties- Protocol to the Africa Charter on Human and
People’s Rights on the Establishment of an African Court on Human and People’s Rights—whether the ACHPR could apply provisions under the Protocol retrospectively with regard to human rights violations—article 3 of the protocol.

**International Law** - jurisdiction—African Court of Human and Peoples Rights—extent of jurisdiction of ACHPR on human rights violations—article 3, article 5(3), article 34(6) of the protocol.

**International Law** - redress mechanisms—whether the applicant had exhausted all available local judicial redress mechanisms—article 6 of the Protocol—article 56(5) of the Charter.

African Charter of Human and Peoples Rights (the charter).

Article 7(1)
“Every individual shall have the right to have his cause heard. This comprises:

a) The right to an appeal to competent national organs against acts violating fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;…

Article 15
Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

Article 56(5)
Communications relating to human and peoples’ rights referred to in Article 55 received by the Commission shall be considered if they: are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.


Article 3(1)
The jurisdiction of the court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this protocol and any other relevant Human Rights instrument ratified by the States concerned.

Article 3(2)
In the event of a dispute as to whether the court has jurisdiction, the court shall decide.

Article 6(2)

Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.

**Held:**
1. The applicant did formally withdraw his communication from the Commission before lodging his application. He submitted two copies of his letters to the Commission withdrawing his communication. Once the applicant had withdrawn his communication from the commission, he had the right to approach another forum.

2. Whereas the applicant’s alleged violation of his rights took place in 1999, the protocol came into operation in respect of the Respondent only after the Respondent ratified it on 9th October, 2008. The Charter on the other hand came into operation on 21st October, 1986 and the Respondent ratified it in 1989. At the time of alleged violation of the Applicant’s rights in 1999, the Charter was already binding on the Respondent. The latter was under duty to protect the Applicant’s rights alleged to have been violated. The court further noted that the Applicant’s violation of his rights under Articles 7 which provided for the right to have his cause heard and appeal to competent national organs against acts violating fundamental rights and Article 15 which provided for the right to work under equitable and satisfactory conditions are continuing.

3. The jurisdiction of the court with regard to the subject matter was set out in Article 3 of the Protocol. The provision extended to all cases and disputes on human rights issues concerning the interpretation and application of the Charter, the protocol and other relevant human rights instruments ratified by the state concerned. The requirements of the subject matter of jurisdiction were met as the rights alleged to be violated are human rights are enshrined in the Charter.

4. As regards jurisdiction of the court to bring one to its adjudicative process, the applicant was a national of Malawi, a state that had ratified the protocol and also filled the required declaration terms of Article 34(6) as read together with Article 5(3) of the protocol. It had accepted the competence of the court to deal with cases against it from individuals and Non-Governmental organizations.

5. No objection was raised based on the failure to
exhaust local remedies. It however remains the duty of the court to enforce the provisions of the Protocol and of the Charter. The court is enjoined to ensure that an application meets amongst others the requirements for admissibility as stipulated in the Protocol and the Charter. The law does not have to be pleaded. Failure by the respondent to raise the issue of non-compliance with the requirements stipulated in the Protocol and the Charter did not render admissible an application which is otherwise inadmissible.

6. The requirement of exhaustion of local remedies was fundamental in the interaction between state parties to both the Protocol and the Charter, with their national courts on the one hand and the African court on the other hand. State parties ratify the Protocol on the understanding that local remedies would first be exhausted before recourse to the African court.

7. By exhaustion of local remedies, the court primarily referred to judicial remedies [Matter of Tanganyika Law Society and the Legal and Human Rights Centre v. The United Republic of Tanzania Application no. 009/2011 and Reverend Christopher R Mtikila v. the United Republic of Tanzania Application no. 011/2011] the court held that the term local remedies is understood in human rights jurisprudence to refer primarily to judicial remedies as these are the most effective means of redressing human rights violations.

8. The avenue to claim damages for alleged wrongful dismissal and the avenue to challenge the judgment of the Industrial Relations Court which had ruled that his dismissal was fair and lawful were still open to the Applicant. However, he did not use these avenues. It was open for him to argue before the High Court against the judgment of the Industrial Relation Court and, if he did not succeed, to argue on further appeal to the Supreme Court of Appeal. As a result of the failure to do so, the courts did not have the opportunity to deal with the merits of the claim for wrongful dismissal.

9. There was no undue delay in the disposal of the Applicant’s case before the highest judicial institution in Malawi, that is, the Malawi Supreme Court of Appeal. The case number indicates the year that the case was registered and the date of the judgment was not long thereafter: in the Supreme Court the case number was No. 38 of 2003; the judgment was handed on 12th July 2004 and in case No. 24 0 of 2007, the judgment was delivered on 11th October, 2007.

The application was not admissible; it was struck out. Each party to bear its own costs.

Relevance to Kenya.

Under Article 159(2)(c) of The Constitution of Kenya, in exercising judicial authority, the courts and tribunals shall be guided by the following principles:

- Alternative forms of dispute resolution including conciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

Traditional dispute resolution mechanisms under Article 159(3) shall however not be used in a manner that contravenes the Bill of Rights, is repugnant to justice and morality and in a manner that is inconsistent with the Constitution or any other written law.

Kenya is also a signatory to the African Charter on Human and Peoples Rights and allows the application of the Charter vide Article 2(5) and (6) of the Constitution as part of the laws of Kenya.
A policy can be generally defined as an elaborate plan of action for an individual or group. This means that is a well thought out plan and has certain objective that the maker of the policy aims at attaining. For instances, there could be an employment policy, an education policy a health policy, a disability work policy etc.

Policy formulation is a process that entails the issue of collecting data and information that will dictate the contents of the document. In itself it’s not a legally binding document like a statue of parliament, but it can be used as a supporting document in instances where issues of law arise regarding the same subject matter.

The advantage and importance of using policies is that one avoids the use of ad hoc methods and actions at will. The use of policies is further heightened if the policies to be develop concern a large number of the population/citizenry or concern a large or high impact institution like an institution of higher learning, a health institution or other sectors of the government.

It means that then the authorities concern will be bound and their actions dictated by the policies of the particular institution and thus the policy acts as a guideline for the implementation of the same. Since all aspects of a particular organization cannot be coded into statutes then policy come in to fill in the lacunas and act as step gap measures that have a logical and clear reasoning and can later be adopted into laws passed by the legislature.

Institutions and ministries of government and academic institutions of higher learning should be encouraged to adopt the formulation and use of such policies that they have developed for themselves with the aid of legal expertise. Secondly the use of such policies is tailored to guide the implementing authorities in the manner as to which they are to follow the constitution and statues in performing their duties in regards to the same.

Legal position of policies:

Although policies have all the above enumerated virtues and more, they cannot be relied upon in a court of law as having the force of the law. I.e. Unlike the contravention of the constitution or the statutes one cannot bring an action in law against non total enforcement of a certain policy. Instead they can be used as supporting evidence of an action brought upon against omission or commission of act that is contrary to a set provision of law and which can be further elaborated in its performance or lack of it by a certain policy.

The beauty of a policy is that it’s easier to amend and change or “upgrade” as comparable to statutes, or conventions as the situation dictates. It is also flexible in that it can be used to achieve both short and long term objectives.
Constitutional Law Case Digest
Volume - 1

This Publication features the Summaries of selected cases on the interpretation of the Constitution of Kenya, 2010 (September 2011 - May 2013)

Available at Our Offices
ACK Garden Annex, 5th Floor, 1st Ngong Avenue, Ngong Road, Upper Hill  P.O Box 10443 - 00100, Nairobi - Kenya
Tel:  +254 (020) 2712767, 2011614 ,2719231 Mobile: +254 718 799 464, 736 863 309

www.kenyalaw.org  mykenyalaw  @mykenyalaw  Mykenyalaw

National Council for Law Reporting (Kenya Law) - A service state corporation in the Judiciary
US Supreme Court Renders the System of Aggregate Contributions on Campaign Donations Unconstitutional.

Reported by Linda Awuor and Diana Kerubo.

United States Supreme Court Shaun McCutcheon, Et Al. v. Federal Election Commission On Appeal from the United States District Court for the District of Columbia April 2, 2014

Brief Facts.

The appellant in this case contributed a total of $33,088 during the 2011-2012 election cycle to 16 different federal candidates. This was in compliance with the base limits applicable as per The Federal Elections Campaign Act, 1971 as amended by the Bipartisan Campaign Reform Act, 2002. The Act set out two types of limits on campaign contributions. First, was the base limit which restricted the amount of money a donor contributed to a particular candidate or committee and the second, set the aggregate limits of contributions which basically affected what an individual contributed directly to committees. The individual remained free to volunteer, join political associations and engage in independent expenditures.

The appellant alleged that the aggregate limits posed prevented him from contributing to 12 additional candidates and to a number of non-candidate political committees. He also claimed that he wished to make similar contributions in the future all within the base limits.

He sought to challenge the system of aggregate limits of contributions claiming that they were unconstitutional under the First Amendment.

The District Court upheld the base limits providing that they appropriately served the Government’s anticorruption interest and concluded that the aggregate limits survived First Amendment scrutiny because they prevented evasion of the base limits.

The Government sought to justify the existence of the aggregate limits, providing that it was to prevent quid pro quo corruption. It argued that the opportunity for corruption existed if a legislator was given a large check (cheque). Thus, the limits were used as a means to deter corruption by exposing large contributions and expenditures publicly. It further provided for the rationale for posing the limits arguing that the aggregate limits prevented an individual from giving too many initial recipients who could then re-contribute the donation. It also defended the disclosure requirement as per the Act justifying it as a means to promote governmental interest in providing the electorate with information on the source of election related spending.

Issues:

i. Whether the system of aggregate limits of contributions were unconstitutional under the First Amendment to the Constitution.

ii. Whether the aggregate limits violated the free speech clause of the First Amendment to the Constitution.

iii. Whether the limits set fostered government interest in the prevention of corruption.
iv. Whether the contributions resulted to circumvention of the donations.

**Constitutional Law** - interpretation of the Constitution—Constitution of United States—First Amendment—political expression—effect of the aggregate limits on free speech—whether the aggregate limits violated the free speech clause of the First Amendment.

**Constitutional Law** - political expression and association—election campaign funding—effect of the Federal Election Campaign Act on political campaign contributions—whether the posed aggregate limits for contribution towards campaigns were unconstitutional—First Amendment to the United States Constitution—Federal Election Campaign Act. Constitution of United States

**Amendment I**
The First Amendment guarantees freedoms concerning religion, expression, assembly, and the right to petition. It provides for the freedom of political speech through political participation in campaign contributions to candidates, political parties and political action committees. It also guarantees the right of citizens to assemble peaceably and to petition their government.

Federal Elections Campaign Act, 1971
441a.Limitations, contributions, and expenditures
(a) Dollar limits on contributions.
(1) Except as provided in subsection (i) and section 315A (2 U.S.C. § 441a-1), no person shall make contributions—
A. to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000;
B. to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $25,000;
C. to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000; or
D. to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000.

(2) No multicandidate political committee shall make contributions—
A. to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;
B. to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or
C. to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—
A. $37,500, in the case of contributions to candidates and the authorized committees of candidates;
B. $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

**Held:**
Majority opinion by Justice Roberts
1. Contributing money to a candidate was an exercise of an individual’s right to participate in the electoral process through both political expression and political association. A restriction on how many candidates and committees an individual may support was hardly a modest restraint on those rights. The Government could no more restrict the number of candidates that a donor supported.
2. The aggregate limits prohibited an individual from fully contributing to the primary and general election campaigns of ten or more
candidates, even if all contributions fell within the base limits. The limits denied an individual all ability to exercise his expressive and associational rights by contributing to someone who would advocate for his policy preferences.

3. In assessing the First amendment interests, proper focus was placed on an individual's right to engage in political speech and not collective conception of public good. The whole point of the First Amendment was to protect individual speech that majority would prefer to restrict, or that legislators or judges would not view as useful in the democratic process.

4. The aggregate limits did little to address the concern raised by the Government that it prevented circumvention of the base limits as they seriously restricted participation in the democratic process.

5. The Government did not give any reason to believe that candidates would dramatically shift their priorities if the aggregate limits were lifted. Absent such a showing, the court could not conclude that the aggregate limits were appropriately tailored to guard against any contributions that would implicate the Government's anti-circumvention interest.

6. Disclosure of contributions reduced the potential for abuse of the campaign finance system. Disclosure requirements, which were justified by a governmental interest in providing the electorate with information about the sources of election-related spending, would deter corruption by exposing large contributions and expenditures to the light of publicity. These requirements would burden speech, but often was represented a less restrictive alternative to flat bans on certain types or quantities of speech. Particularly with modern technology, disclosure offered more robust protections against corruption.

7. Recasting as corruption a donor’s widely distributed support for a political party would dramatically expand government regulation of the political process. And though the Government suggested that solicitation of large contributions posed the danger of corruption, the aggregate limits were not limited to any direct solicitation by an office holder or candidate.

8. The Government argued that the aggregate limits furthered the permissible objective of preventing quid pro quo corruption. The difficulty was that once the aggregate limits kicked in, they banned all contributions of any amount, even though Congress's selection of a base limit indicated its belief that contributions beneath that amount did not create a cognizable risk of corruption. The Government had to thus defend the aggregate limits by demonstrating that they prevented circumvention of the base limits, a function they did not serve in any meaningful way.

9. The Government had a strong interest in combatting corruption and its appearance. This interest had to however be limited to a specific kind of corruption, quid pro quo corruption. This was to ensure that Government’s effort did not restrict the First Amendment right of citizens to choose who will govern them. Thus, the aggregate limits on contributions did not further the only governmental interest as accepted as legitimate in Buckley v. Valeo, 424 U. S., at 14. They instead intruded without justification on a citizen’s ability to exercise the most fundamental First Amendment activities.

Per Thomas J.

10. Limiting the amount of money a person would give to a candidate imposed a direct restraint on his political communication; if it did not, the aggregate limits at issue would not create a special burden on broader participation in the democratic process.

11. Contributions and expenditures were simply two sides of the First Amendment coin and efforts to distinguish the two produced mere word games rather than cognizable principles of constitutional law. For this reason, the rule in Buckley v. Valeo, 424 U. S., at 241,244 would be overruled, subjecting the limits in the Bipartisan Campaign Reform Act, 2002 to strict scrutiny which would fail. Under traditional strict scrutiny, broad prophylactic caps on both spending and giving in the political process were unconstitutional.
Dissenting opinion of Justice Breyer with whom Justice Ginsburg, Justice Sotomayor and Justice Kagan joined

1. The First Amendment advanced not only the individual’s right to engage in political speech, but also the public’s interest in preserving a democratic order in which collective speech mattered.

2. The upshot is that the interests the Court described as preventing corruption or the appearance of corruption were more than ordinary factors to be weighed against the constitutional right to political speech. Rather, they were interests rooted in the First Amendment itself. They were rooted in the constitutional effort to create a democracy responsive to the people, a government where laws reflected the very thoughts, views, ideas, and sentiments, and the expression of which the First Amendment protected.

The District Court judgment was reversed.

Relevance to Kenya.
The Constitution of Kenya under Article 36(1) provides for the freedom of association such that every person has the right and it includes right to form, join or participate in the activities of an association of any kind.

Article 38(1)(b) provides for political rights such that every citizen is free to make political choices which includes the right to participate in the activities of a political party.

This includes contributions towards campaigns to an individual, political party or referendum committee. The Election Campaign Finance Act, 2013 governs campaign financing in Kenya.

Like the United States Federal Election Campaign Act, it regulates campaign financing by prescribing limits on contribution that one may choose to donate to a candidate, political party or referendum committee. Section 12 provides that the commission shall through notice in the Gazette prescribe limits on: total contributions; contributions from a single source; paid-up media coverage; loan forming part of a contribution, which a candidate, political party or referendum committee may receive during the expenditure period at least twelve months before a general election.

The Act further provides that no contribution from a single source ought to exceed twenty percent of the total contributions received by that candidate, political party or referendum committee.

On disclosure, the commission is mandated to prescribe limits beyond which contributions received by a candidate, a political party or a referendum committee from a single source may be disclosed. Section 16 provides that where contributions are received from a harambee, the authorized person shall keep a record of the specific details of the harambee including the venue, date, organizer of the harambee and total contributions.

A candidate, political party and a referendum committee shall disclose the amount and source of contributions received for campaign for a nomination, an election or a referendum, as the case may be. The Act also makes failure to disclose funds and donations as prescribed an offence.

This case can be instrumental in the implementation of the provisions under the Election Campaign Finance Act since the contribution limits are not specifically set yet.

The case can alternatively be used to assess the Constitutionality of the Act in so far as the prescription of limits is concerned.
Brief facts.

The petitioner in this case, an institution constituted under the Legal Services Authority Act, 1997 sought reliefs in respect of Kinnar, a transgender community highlighting the traumatic experiences they faced. The petition was supported by the life experiences of a member of the Hijra community (Laxmi Narayan Tripathy) and a eunuch (Siddarth Narrain) who were impleaded to put across the cause of the members of the transgender community.

The petitioner argued that every person of the transgender community had a legal right to decide their sex orientation and to espouse and determine their identity. And that since the transgenders were neither treated as male or female, nor given the status of a third gender, they were deprived of many of the rights and privileges which other persons enjoy as citizens of the country. They were also deprived of social and cultural participation and hence restricted access to education, health care and public places which deprives them of the Constitutional guarantee of equality before law and equal protection of laws. It was also pointed out that the community faced discrimination to contest election, right to vote, employment, to get licences and, in effect, treated as outcasts. This according to the petitioner amounted to discrimination on grounds of gender, violating Articles 14 to 16 and 21 of the Constitution of India.

Transgender.

Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex. Transgender also takes in persons who do not identify with their sex assigned at birth, and they do not identify as either male or female. Transgenders also include persons who intend to undergo Sex Re-Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons.

Further, there are persons who like to cross-dress in clothing of opposite gender, i.e transvestites. The term is used to describe wide range of identities and experiences, including but not limited to pre-operative, postoperative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex; male and female.

In India there is a perceived wide range of transgender related identities, cultures or experiences which are: Hijras- do not identify with their sex assigned at birth, and they do not identify as either male or female. Hijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation.

Since Hijras do not have reproduction capacities as
either men or women, they are neither men nor women and claim to be an institutional “third gender”. Among Hijras, there are emasculated (castrated, nirvana) men, non-emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites).

Eunuchs- They refer to emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth.

Aravanis and ’Thirunangi-biological male who self-identifies himself as a woman trapped in a male’s body.

Kothi – They are a heterogeneous group. They are described as biological males who show varying degrees of ‘femininity’ which may be situational. Some have bisexual behavior and get married to women. Jogtas/Jogappas: The term’Jogi-Hijras’ is used to denote those male-to-female transgender persons who are devotees/servants of Goddess Renuka Devi and who are also in the Hijra communities. This term is used to differentiate them from ‘Jogtas’ who are heterosexuals and who may or may not dress in woman’s attire when they worship the Goddess. Also, that term differentiates them from ‘Jogtis’ who are biological females dedicated to the Goddess.

Shiv-Shakthis: These are males who are possessed by or particularly close to a goddess and who have feminine gender expression. Usually, Shiv-Shakthis are inducted into the Shiv- Shakti community by senior gurus, who teach them the norms, customs, and rituals to be observed by them. In a ceremony, Shiv-Shakthis are married to a sword that represents male power or Shiva (deity). Shiv-Shakthis thus become the bride of the sword. Occasionally, Shiv-Shakthis cross-dress and use accessories and ornaments that are generally/socially meant for women.

Issues:

i. Whether transgenders have a right to be identified as third gender.

ii. Whether persons born male with predominantly female orientation (or vice versa), or having undergone operational procedure to change sex have a right to be recognized as per their choice.

International Human Rights Law - fundamental rights-freedom from discrimination-transgender as ‘third gender’-whether recognition of the binary (male and female) genders with the exclusion of the transgender as a ‘third gender’ amounts to discrimination as to sex- constitution of India article 15 and article16 (2).

International Human Rights Law -fundamental rights-equality before the law-whether non-recognition of transgenders as ‘third gender’ under legislation denies the right to equal protection before the law- Constitution of India article 14.

The Constitution of India.

Article 14
The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15
1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
2. No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -
   A. access to shops, public restaurants, hotels and places of public entertainment; or
   B. the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Article16 (2)
No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

Article 21
No person shall be deprived of his life or personal liberty except according to procedure established by law.

Held:

1. Determination of gender to which a person belongs to, was left to the decision of the person concerned. In other words, gender identity was found to be integral to the dignity of an individual and at the core of personal autonomy and self-determination. The protection offered by Article 21 of the
Constitution was that of the right to self-determination of the gender to which a person belonged. Thus the Hijras/Eunuchs, were considered as the third gender, over and above binary genders under the Constitution and the laws.

2. Articles 14, 15, 16, 19 and 21 of the Constitution of India, did not exclude Hijras/Transgenders from its ambit, but Indian law on the whole recognized the paradigm of binary genders of male and female, based on one’s biological sex. The binary notion of gender had for instance been reflected in the Indian Penal Code, and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations. Non-recognition of the identity of Hijras/Transgender in the various legislations denied them equal protection of law and they as a result faced wide-spread discrimination.

3. The Constitution of India under Article 14 used the expression “person” and Article 15 used the expression “citizen” and “sex” same to Article 16. Article 19 also used the expression “citizen”. Article 21 used the expression “person”. All these expressions were held to be “gender neutral” which evidently referred to human-beings. This covered Hijras/Transgenders who are not limited to male or female gender.

4. Gender identity according to the court formed the core of one’s personal self, based on self-identification, not on surgical or medical procedure. Gender identity was thus held as an integral part of sex and that no citizen could be discriminated on the ground of gender identity, including those who identified as third gender. It further held that discrimination on the basis of sexual orientation or gender identity included any discrimination, exclusion, restriction or preference, which had the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under the Constitution, and hence the court was inclined to give various directions to safeguard the constitutional rights of the members of the transgender community.

5. If a person changed his/her sex in tune with his/her gender characteristics and perception, a procedure that became possible due to advancement in medical science, and if that was permitted in medical ethics with no legal embargo, the court posed no impediment, legal or otherwise, in giving due recognition to the gender identity based on the reassigned sex after undergoing SRS. It was for this reason that even in the absence of a statutory regime in the country, a person was held to have a constitutional right to get the recognition as male or female after SRS, which was not only his/her gender characteristic but became his/her physical form as well. Transgenders thus had a right to be identified and categorized as “third gender”.

6. The term transgender was used in the wider sense. Even gay, lesbian, bisexual were included by the descriptor ‘transgender’. Etymologically, the term ‘transgender’ was derived from two words, namely ‘trans’ and ‘gender’. The former being a Latin word meaning ’across’ or ‘beyond’. The grammatical meaning of ‘transgender’, therefore, is across or beyond gender. This came to be known as the umbrella term which included Gay men, Lesbians, bisexuals, and cross dressers within its scope. However, while dealing with the issue, the court was not concerned with the wider meaning of the expression transgender.

7. Transgender in India assumed a distinct and separate class/category which was not prevalent in other parts of the World except in some neighbouring countries. The transgender community comprised of Hijras, eununch, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. [A Right to Exist: Eunuchs and the State in Nineteenth-Century India Laurence W. Preston Modern Asian Studies, Vol.21, No.2 (1987), pp.371-387]. Thus on the question of conferring distinct identity, the court restricted the meaning that was to be given to the transgender community such as the Hijra etc.

8. The historical background of transgenders was that they were treated with respect, a scenario that did not apply anymore. The attrition in their status was triggered with the passing of the Criminal Tribes Act, 1871 which deemed the entire community of Hijra persons as innately ‘criminal’ and ‘adapted to the systematic commission of non-bailable offences’. Further injury was caused by,
Section 377 of the Indian Penal Code which was misused and abused as there was a tendency, in British period, to arrest and prosecute transgenders under Section 377 merely on suspicion.

9. There may have been marginal improvement in the social and economic condition of transgenders in India. This was however still far from satisfactory as the transgenders still faced different kinds of economic blockade and social degradation. They still faced multiple forms of oppression. The court thus held transgenders to be citizens with the equal right to achieve their full potential as human beings and further entitled to proper education, social assimilation, access to public and other places but employment opportunities.

10. Recognizing transgender as third gender meant that, they would be able to enjoy their human rights, to which they are largely deprived of for want of the recognition.

11. Gender identification was held to be an essential component required for enjoying civil rights by the community. It was only with the recognition that many rights attached to the sexual recognition as ‘third gender’ would be available to the community more meaningfully such as the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver’s license, the right to education, employment, health so on.

12. There was no reason as to why a transgender would be denied of basic human rights which included right to life and liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence, right against exploitation and right against discrimination. The Constitution fulfilled its duty of providing rights to transgender and it was now time for the court to recognize and interpret it in a manner that ensured dignified life for transgender people.

13. In order to translate the rights of transgenders into reality, it was imperative to first assign them their proper ‘sex’. Sex was assigned at the time of birth of the child as either male or female. In the process, the law and society completely ignored the basic human right of transgenders to give them the appropriate sex categorization. They as a result have been treated as either male or female. This has in dignified the transgenders and amounted to a violation of their human rights.

14. Though there was no statutory regime recognizing ‘third gender’ for the transgenders, there was however enough justification to recognize this right in natural law sphere. This was traced to the various provisions contained in Part III of the Constitution relating to ‘Fundamental Rights’.

15. The term rule of law did not merely mean public order. It also connoted social justice based on public order The law existed to ensure proper social life. Social life was a means to allow an individual the right to life in dignity and development. The Court had duty to protect this concept of the rule of law. By recognizing transgender as third gender; the Court not only upheld the rule of law but also advanced justice to the class, so far deprived of their legitimate natural and constitutional rights. This was the only solution that ensured justice not only to transgenders but to the society as well.

The court declared that:

i. Hijras, Eunuchs, apart from binary gender, be treated as “third gender” for the purpose of safeguarding their rights under Part III of the Constitution and the laws made by the Parliament and the State Legislature.

ii. Transgenders have the right to decide their self-identified gender and the Centre and State Governments were directed to grant legal recognition of their gender identity such as male, female or as third gender.

iii. The Centre and the State Governments take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

iv. Centre and State Governments operate separate HIV Sero-surveillance Centres since Hijras/ Transgenders face several sexual health issues.

v. Centre and State Governments were directed to seriously address the problems faced by Hijras/Transgenders such as fear, shame,
gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

vi. Centre and State Governments take proper measures to provide medical care to transgenders in the hospitals and also provide them separate public toilets and other facilities.

vii. Centre and State Governments also take steps in framing various social welfareschemes for their betterment.

viii. Centre and State Governments take steps to create public awareness so that transgenders feel that they are also part and parcel of the social life and be not treated as untouchables.

ix. Centre and the State Governments take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

Kenyan Context.
Kenya through the Constitution and legislation has impliedly only recognized two genders: male and female.

Transgenders as per the wide definition that includes gays lesbian and bisexuals are not recognized.

For instance Article 45 provides that every adult has the right to marry a person of the opposite sex based on the free consent of the parties. There are issues that arise from this provision.

What is the opposite gender for purposes of marriage? Whether the opposite gender includes transgenders i.e persons who have undergone Sex Re-Assignment Surgery.

Legislation has in fact criminalized acts that would be considered unnatural and prescribes a sentence of fourteen years imprisonment and considers a felony act of gross indecency between two males prescribing a sentence of five years imprisonment. The Penal Code under Section 162 provides for unnatural offences and Section 165 provides for acts of gross indecency. The Constitution of Kenya however like India, provides for certain rights and freedoms and guarantees protection to all persons without discrimination as to sex.

Constitution of Kenya.
Under Article 20(3)(b), the court is to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

Article 27 provides for equality and freedom from discrimination. Every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. It further states that the State or a person shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Article 43 provides for economic and social rights such that, every person has the right to the highest attainable standard of health, which includes the right to health-care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education. And that a person shall not be denied emergency medical treatment.

There is no legislation setting out rules for dealing with transgender and ensure their protection from discrimination.

There are no institutions, facilities for transgenders i.e toilets, cells, schools, trained personnel some of their rights are violated such as the right to movement and participation in democratic process as they are not provided for in statutory forms in application of passports, identity cards etc.

Andrew Mbugua Ithibu v. Attorney General & Another. an ongoing case to watch out for.
(A) NATIONAL ASSEMBLY BILLS

1. Climate Change Bill, 2014:

Kenya Gazette Supplement No. 3 (Bills No. 1)

The object of the Bill is to provide for the framework for the reduction and regulation of the effects of climate change and to ensure the best possible measures are put forth for the preservation of the climate and environment in general. The Bill provides for the establishment, composition, powers and functions of the National Climate Change Council which is charged with advising and coordinating the government and various other stakeholders towards the achievement of climate resilient and low-carbon development.

2. Kenya National AIDS Authority Bill, 2014:

Kenya Gazette Supplement No. 10 (Bills No. 1)

The object of this legislation is to provide a legal framework for the establishment, powers and functions of the Kenya National AIDS Authority. The Authority is established as a successor to the National AIDS Control Council. In its current state the National AIDS Control Council is a State Corporation established vide the National AIDS Control Council Order published in legal Notice No 170 of 1999, which reports to the Office of the president. The lack of autonomy may be limiting in the exercise of its general functions. Hence this Bill which seeks to reverse this state of affairs by establishing the Authority as a body Corporate with perpetual succession and a common seal, to give it full autonomy to enter into contracts on its own and transfer property in its own name.

3. Pharmacy and Poisons (Amendment) Bill, 2014:

Kenya Gazette Supplement No. 11 (Bills No. 2)

The principal aim of this Bill is to amend the Pharmacy and Poisons Act (Cap 244), to transform the Poisons Board into a more effective semi-autonomous authority to be known as the Pharmacy and Poisons Authority. The Bill also proposes to create new offenses relating to the regulation of the pharmaceutical sector in the county. It also seeks to enhance the current penalties meted out for offences under the Act to bring them in reality to modern economic realities taking into consideration inflationary trends.

4. Private Security Regulation Bill, 2014:

Kenya Gazette Supplement No. 18 (Bills No. 3)

The object of the Bill is to provide for the regulation of the private security industry and to provide for a framework for cooperation between the private security services industry and the state agencies that deal with security. The Bill establishes the Private Security Regulatory Authority along with its functions and powers. The Authority shall be governed by a Board which shall ensure the effective administration, supervision, regulation and control of the private security services industry in Kenya.

5. Business Registration Service Bill, 2014:

Kenya Gazette Supplement No. 21 (Bills No. 4)

The Bill establishes the Business Registration Service, its composition and functions as regards the registration of various businesses. The Business Registration Service will, among others, be responsible for the implementation of policies, laws and other matters relating to registration of companies, partnerships and firms, individuals and corporations carrying on business. The Bill also provides for the various Acts to be administered by the Service.

6. Scrap Metal Bill, 2014:

Kenya Gazette Supplement No. 22 (Bills No. 5)
The purpose of this Bill is to provide for the appropriate regulation of dealing in scrap metal and provides the necessary framework for the administration and enforcement of regulations relating to scrap metal. The Bill establishes the Scrap Metal Council along with its functions and composition. The Council shall advise the Cabinet Secretary responsible for matters relating to industrialization on various matters related to scrap metal, review and process the applications for the grant or renewal of licences, and work with interested players in the industry to bring order and integrity to the scrap metal trade.

7. Prohibition of Anti-Personnel Mines Bill, 2014:

Kenya Gazette Supplement No. 23 (Bills No. 6)

The Bill seeks to provide for the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and their destruction in accordance with the Anti-Personnel Mine Ban Convention (Ottawa Convention). It provides for the offences related to anti-personnel mines, the securing and safe destruction of anti-personnel mines, and the proper keeping and administration of records kept relating to anti-personnel mines.

8. Water Bill, 2014:

Kenya Gazette Supplement No. 27 (Bills No. 7)

The main object of this Bill is to make provision for the regulation, management, conservation, use and development of water and sewerage services. There is need to conform to the Kenyan Constitution and the various international instruments that Kenya ratified (for instance the International Covenant on Economic and Social Rights).

9. Mining Bill, 2014:

Kenya Gazette Supplement No. 28 (Bills No. 8)

The main objective of this Bill is to repeal any previous legislation relating to mining and to create a new legal framework for the management of all mineral resources in Kenya; also it proposes to consolidate several laws relating to the mining sector, in order to ease the administration of the sector. The Bill provides for the ownership of minerals, the general principles that govern mineral rights and their acquisition, the various dealings as regards minerals and their administration, along with health, safety and environmental issues concerned with activities related to mining.

10. Insolvency Bill, 2014:

Kenya Gazette Supplement No. 29 (Bills No. 9)

The main purpose of this Bill is to repeal and replace the Bankruptcy Act (Cap 53 of the Laws of Kenya) and to simplify insolvency proceedings. The Bill seeks to encourage the dissolution of non-viable and inefficient businesses and the survival of efficient ones and to maximize the value of liquidated assets. Among other things, the Bill also provides for independent administrators to take control of businesses at the point of insolvency; provides for the equitable distribution of liquidation assets among creditors and; provides effective mechanisms for identifying and prosecuting managers or directors whose illegal actions contribute to the insolvency of a firm.

11. Order of Precedence Bill, 2014:

Kenya Gazette Supplement No. 32 (National Assembly Bills No. 11)

The object of this Bill is to provide for the Order of Precedence for officials at diplomatic, official and social state functions within Kenya and abroad so as to maintain public order and decorum at national functions and social engagements of the Government of Kenya. The Bill further provides for the national flag and sirens on motorcades and during processions as well as titles to be used in addressing certain persons and office holders.

12. Companies Bill, 2014:

Kenya Gazette Supplement No. 34 (National Assembly Bills No. 13)

The proposed law seeks to facilitate commerce, industry and other socio-economic activities by enabling one or more natural persons to incorporate as legal entities with perpetual succession, with or without limited liability and to provide for the regulation of those entities in the public interest and in particular the interests of their members and their creditors. The aim is to develop a modern company’s law to support a competitive economy in a comprehensive form. The Bill also seeks to consolidate the law regarding incorporation, registration, operation of foreign companies that carry on business in Kenya.
13. Alcoholic Drinks Control (Amendment) Bill, 2014:

Kenya Gazette Supplement No. 37 (National Assembly Bills No. 16)

The principal object of this Bill is to amend the Alcoholic Drinks Control Act, 2010 so as to provide an additional function to the National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA), namely the provision of support and assistance in the establishment of treatment and rehabilitation programmes. The Bill also seeks to empower the Cabinet Secretary in charge of Finance to implement tax policies and where appropriate grant remission of duty under the relevant law on alcoholic drinks that are locally manufactured so as to promote compliance of those drinks with the objectives of the Alcoholic Drinks Control Act, 2010.

14. Diabetes Management Bill, 2014:

Kenya Gazette Supplement No. 58 (National Assembly Bills No. 19)

The principal object of this Bill is to establish a legal framework to provide for prevention, treatment and control of diabetes. The Bill further seeks to reduce the prevalence of type2 diabetes by addressing the lifestyle that people live, regulating the quality and type of products that people consume and promoting awareness about the causes, methods of prevention and cure for diabetes. The Bill further seeks to encourage data collection on diabetes by making it mandatory for hospitals to report new cases on detection, a fact that will help the government in healthcare planning.

15. Securities and Investment Analyst Bill, 2014:

Kenya Gazette Supplement No. 60 (National Assembly Bills No. 21)

The principal purpose of this Bill is to provide for the establishment, powers and functions of the Institute of Certified Securities and Investment Analysts and for the registration of certified securities and investment analysts to facilitate realization of accountable, efficient and trustworthy securities and investment analysts in Kenya. The Bill seeks to establish the Institute as a body Corporate and sets out requirements for one to qualify as a Securities and Investment Analyst.

16. Mental Health Bill, 2014:

Kenya Gazette Supplement No.61 (National Assembly Bills No.22)

The purpose of the Bill is to provide for the prevention of mental illnesses, care, treatment and rehabilitation of persons with mental illness and to provide for the procedures for admission, treatment and general management of persons with mental illness. The Bill also establishes the Mental Health Board which is responsible for the coordination of mental health care activities in Kenya with an aim to establish efficient procedures for admission, treatment and overall management of persons with mental illness.

17. Transfer of Prisoners Bill, 2014

Kenya Gazette Supplement No. 68 (National Assembly Bills No. 23)

The main purpose of this Bill is to create a framework to facilitate the implementation of arrangements made for the transfer of prisoners serving sentences in Kenya or in countries outside Kenya, pursuant to agreements made between Kenya and such countries. The proposed legislation provides for the procedure to be observed as regards transfer of prisoners from Kenya and/or to Kenya. It also provides for the enforcement of sentences of the transferred prisoners. It goes on to provide that such prisoners may not serve harsher sentences in Kenya and may also not appeal against such sentences in Kenya.

(B) SENATE BILLS

1. Alcoholic Drinks Control (Amendment) Bill, 2014

Kenya Gazette Supplement No. 17 (Bills No. 5)

The Bill aims to amend the Alcoholic Drinks Control Act No.4 of 2010, so as to make it conform to the provisions of the Constitution, 2010 and to make it conform to the practical challenges in implementation arising out of its enactment and implementation. The Bill intends to mandate all liquor sellers and producers to display warning health messages on their products and premises where the alcoholic drinks are sold.


Kenya Gazette Supplement No. 19 (Bills No. 6)
The Bill seeks to effect various amendments to various Acts which include: the Cancer Prevention and Control Act, No. 15 of 2012; National Transport Safety Authority Act, No. 33 of 2012; National Authority for the Campaign Against Alcohol and Drug Abuse Act, No. 14 of 2012; Sports Act, No. 25 of 2013; Pyrethrum Act, No. 22 of 2013; Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, No. 56 of 2012; and the National Honours Act, No. 11 of 2013.

3. County Industrial Development Bill, 2014:
Kenya Gazette Supplement No. 20 (Bills No. 7)

The Bill seeks to promote and facilitate economic growth through industrial development in all counties through the creation of viable industries in the counties leading to the emergence of employment opportunities within the counties. The Bill establishes the County Industrial Development Board mandated to rationalize industrial development across all the counties. The Board will ensure that counties engage in viable projects that will enhance the economic growth of each county and create employment opportunities.

4. County Governments (Amendment) (No. 3) Bill, 2014:
Kenya Gazette Supplement No. 40 (Senate Bills No. 8)

The Bill seeks to amend the County Governments Act (No. 17 of 2012) in order to provide for the election of a deputy speaker of a county assembly, clarity on the functions of a deputy governor, the requisite majority required to uphold the impeachment of a governor by senate and the process for the removal of a deputy governor from office.

5. Intergovernmental Relations (Amendment) Bill, 2014:
Kenya Gazette Supplement No. 43 (Senate Bills No. 9)

The principal object of this Bill is to amend the Intergovernmental Relations Act (No. 2 of 2012) in order to provide for the establishment of a Council of Deputy Governors and a Council of County Assemblies. The Bill also seeks to establish cohesion and cooperation between the proposed new councils and the Council of Governors in order to ensure enhanced efficiency in county governments.

Kenya Gazette Supplement No. 44 (Senate Bills No. 10)

This Bill seeks to amend section 21 of the Government Proceedings Act (Cap 40) so as to extend its application to county governments. Section 21 of the Act makes specific provision on the manner in which court orders against the Government are to be satisfied, and in so doing, protects the interests of the Government. By this amendment to section 21 of the Act, the interests of the county governments will be similarly protected.

7. Public Finance Management (Amendment) Bill, 2014:
Kenya Gazette Supplement No. 46 (Senate Bills No. 11)

The principal object of this Bill is to amend the Public Finance Management Act (No. 18 of 2012) to provide for the receipt of proceeds of any loan raised or external government security issued under the Act and to ensure smooth implementation of the Act.

8. County Assemblies Powers and Privileges Bill, 2014
Kenya Gazette Supplement No. 54 (Senate Bills No. 14)

The purpose of the Bill is to provide for the powers, privileges and immunities of county assemblies, their committees and members and to make provision regulating admittance to and conduct within the precincts of county assemblies. The Bill gives effect to Article 196(3) of the Constitution which provides that Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.

Kenya Gazette Supplement No. 55 (Senate Bills No. 15)

The object of this Bill is to provide for the powers, privileges and immunities of Parliament and its committees and to make provision regulating admittance to and conduct within the precincts of Parliament. The Bill gives effect to Article 117 of the Constitution that provides for the powers, privileges and immunities of Parliament; to this extent, the Bill
seeks to repeal and replace the National Assembly (Powers and Privileges) Act, Cap. 6 of the Laws of Kenya.


Kenya Gazette Supplement No. 56 (Senate Bills No. 16)

The principal object of this Bill is to amend section 6 of the National Honours Act, No. 11 of 2013, in order to include the Senate Majority Leader and the Senate Minority Leader in the membership of the Parliamentary Honours Advisory Committee so as to ensure equitable representation of both Houses of Parliament in the Committee.

11. Reproductive Health Care Bill, 2014

Kenya Gazette Supplement No. 57 (Senate Bills No. 17)

The Bill seeks to make provision for the actualization of reproductive rights through the promotion of the rights and welfare of every person particularly couples, adult individuals, women and adolescents. The Bill envisages dealing with the issue of inadequate facilities at county government hospitals, especially in terms of emergency services including but not limited to ambulance services and equipment for intensive care services and gynaecological services as well. The Bill also seeks to bring forth the issue reproductive health for the adolescent and mentally unstable persons, who have been neglected for a long time.

(C) ACTS OF PARLIAMENT

Kenya Heroes Act, 2014:

Kenya Gazette Supplement No. 63 (Acts No. 5)

The object of this Act is to provide for the recognition of heroes, to establish criteria for the identification, selection and honouring of national heroes and to provide for the categories of heroes. The Act establishes the National Heroes Council that shall be charged with the formulation and implementation of policy relating to heroes, oversee the keeping and maintenance of registers in which shall be entered the names of every national hero and the names of any dependant of any such hero, have custody and oversee the management properties and institutions relating to heroes, and do such other things as may be incidental to the attainment of the objects for which it is established.

---

We are what we repeatedly do. Excellence, then, is not an act, but a habit. - Aristotle
This article presents a brief summation of Legislative Supplements published in the Kenya Gazette on matters of general public importance. The outline covers period between 10th January, 2014 and 11th April, 2014.

<table>
<thead>
<tr>
<th>Date of Publication</th>
<th>Legislative Supplement Number</th>
<th>Citation</th>
<th>Preface</th>
</tr>
</thead>
<tbody>
<tr>
<td>17th January, 2014</td>
<td>3</td>
<td>Credit Reference Bureau Regulations, 2013. (L.N. 5/2014)</td>
<td>These regulations provide for the establishment and licensing of credit reference bureaus. They also provide for the qualification of credit reference bureaus and also for the prohibition of operation without a license. Regulation 15 provides for the activities that Bureaus may engage in and they include; to obtain information and receive customer information, store, manage, evaluate, update and disseminate the customer information to subscribers in accordance with these regulations, credit scoring, among others.</td>
</tr>
<tr>
<td>28th January, 2014</td>
<td>4</td>
<td>The Energy (Petroleum Information and Statistics) Regulations, 2013. (L.N. 6/2014)</td>
<td>These regulations detail the information as relating to energy and petroleum that is to the furnished by any person engaged in petroleum business or a petroleum business licensee. These Regulations do not apply to the Kenya Defence Forces.</td>
</tr>
<tr>
<td>Date</td>
<td>No.</td>
<td>Regulations</td>
<td>Notes</td>
</tr>
<tr>
<td>-----------------------</td>
<td>-----</td>
<td>-----------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>28th January, 2014</td>
<td>4</td>
<td>The Energy (Retail Facility Construction and Licensing) Regulations, 2013. (L.N. 7/2014)</td>
<td>These regulations provide for the permits and licenses required in the construction of retail petroleum facilities. These Regulations do not apply to the Kenya Defence Forces.</td>
</tr>
<tr>
<td>29th January, 2014</td>
<td>5</td>
<td>The Energy (Licensing of Petroleum Road Transportation Business) Regulations, 2013. (L.N. 8/2014)</td>
<td>These regulations set out guidelines on conduct of petroleum road transportation business with emphasis on licensing. They provide for the procedure of applying for a license and where potential licensees can get information. These Regulations do not apply to the Kenya Defence Forces; petroleum contained in a vehicle for use by that vehicle or petroleum transported in containers whose combined volume does not exceed one thousand litres.</td>
</tr>
<tr>
<td>7th February, 2014</td>
<td>7</td>
<td>The Kenya Information and Communications (Registration of Subscribers of Telecommunication Services) Regulations, 2013. (L. N. 10/2014)</td>
<td>The regulations provide a process for the registration of existing and new subscribers of telecommunication services provided by telecommunication licensees in Kenya.</td>
</tr>
<tr>
<td>7th February, 2014</td>
<td>7</td>
<td>The Basic Education (Education Standards and Quality Assurance Council) Regulations, 2013. (L. N. 11/2014)</td>
<td>The object of these Regulations is to establish and provide for the operations of the Education Standards and Quality Assurance Council.</td>
</tr>
<tr>
<td>7th February, 2014</td>
<td>7</td>
<td>The Public Procurement and Disposal (Amendment) Regulations, 2014. (L.N.15/2014)</td>
<td>Regulation 68 (1) of the Public Procurement and Disposal Regulations, 2006, is amended in paragraph (c), by adding the Public Procurement and Disposal (Amendment) Regulations, 2014. (L. N. 15/2014) the expression &quot;or (b)&quot; at the end of the sentence.</td>
</tr>
<tr>
<td>Date</td>
<td>Issue</td>
<td>Description</td>
<td>Details</td>
</tr>
<tr>
<td>--------------</td>
<td>-------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>28th February, 2014</td>
<td>10</td>
<td>The Public Procurement and Disposal (Amendment) Regulations, 2014. (L.N.22/2014)</td>
<td>The regulations seek to amend regulations 12, 16 and 55 of the Public Procurement and Disposal Regulations, 2006. The Cabinet Secretary for the National Treasury issued these regulations in accordance with powers conferred under section 140 of the Public Procurement and Disposal Act, 2005.</td>
</tr>
<tr>
<td>11th March, 2014</td>
<td>11</td>
<td>The National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014. (L.N. 23/2014)</td>
<td>The regulations govern the operation of public service vehicles and mandate each operator to have their vehicles inspected by qualified mechanics. The regulations also require long distance operators to have in place or outsource a fleet management system capable of recording speed and location of the vehicle at any one time and to ensure or subscribe to an accident and emergency mutual aid system. The night operators are mandated to employ two drivers per vehicle and to ensure that each driver gets to rest for at least eight hours before the next night shift.</td>
</tr>
<tr>
<td>14th March, 2014</td>
<td>12</td>
<td>The Employment (General) Rules, 2014. (L. N. 28/2014)</td>
<td>These regulations seek to establish certain rules on key employment issues such as the rights of an employee, paternity leave, and employment of children, sanitation and medical treatment.</td>
</tr>
<tr>
<td>14th March, 2014</td>
<td>13</td>
<td>The Parliamentary Service Act, The Parliamentary Service (Parliamentary Fund) Regulations, 2014. (L.N. 29/2014)</td>
<td>The legislation provides for financial management of the Parliamentary Fund established under Section 24 1 of the Public Finance Management Act, 2012. Section 4 particularly spells out what the use of the moneys of the Fund shall be; in accordance with the provisions of the yearly Finance Act, in conformity with the decisions of the Commission and shall be exclusively and prudently for the expenditures of Parliament in accordance with the appropriations made in its budget.</td>
</tr>
<tr>
<td>Date</td>
<td>Page</td>
<td>Act Description</td>
<td></td>
</tr>
<tr>
<td>-------------------</td>
<td>------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>11th April, 2014.</td>
<td>16</td>
<td>The Advocates (Remuneration (Amendment) Order, 2014. (L.N. 35/2014)</td>
<td></td>
</tr>
</tbody>
</table>

The Transition Authority approves the transfer of various Agricultural functions pursuant to section 15 of the Sixth Schedule to the Constitution as read with sections 23 and 24 of the Transition to Devolved Governments Act, 2012 and further to the Kenya Gazette Supplement No. 116 of 2013.

The legislation amends the Advocates Remuneration Order, 2009. The fees chargeable of clients by Advocates have been revised and increased. For example, under the first schedule, the fee charged on property valued at 5,000,000 has been increased from 1.5% or 25,000 whichever amount is higher, to 2% or 35,000 whichever is higher. It however reduces the fee chargeable by one third for those transactions for which the acting Advocate does not per take in preparation of the necessary documents like the letter of agreement, heads of agreement or agreement for sale.

“There can be no greater gift than that of giving one’s time and energy to help others without expecting anything in return.” Nelson Mandela
While we all aspire to climb to the top of our respective professions, from time to time, we come up against a roadblock or a barrier that slows our climb to the top. Whether you are being consistently overlooked in favor of someone else who is a bit more productive or perhaps there is just some intangible quality that allows other people to get ahead of you, it can be immensely frustrating to be denied a job you know you could excel in.

With this in mind, let us consider the six skills you need to succeed. It is worth noting that all of these skills are transferable and have as much relevance in your personal life as they do in your professional life.

1. Speaking skills
Whether you are hustling for a promotion when you bump into a CEO in an elevator or making an important speech at an international conference, the ability to speak with a wide variety of people is an absolute essential. Good eye contact, a varied vocabulary and the ability to tailor your language to suit your audience are all essential characteristics of an artful speaker. Being a good speaker will give you presence and make you memorable to those who are listening. Practice talking with anyone and everyone you meet, look for a debating society or a Toastmasters group. The rewards are worth it. Being more adept in social situations and being better equipped to network successfully will help you forge working relationships that could be very advantageous to you in the future. It will also be useful to you for performing duties as a best man.

2. Confidence in decision making
Nothing says mediocrity like indecision. A good leader is decisive and will always back himself up when making the correct decision. If you want to be considered leadership material, you have to possess these characteristics. If you are paralyzed by the fear of getting it wrong, you will end up doing nothing, which is worse than trying something and failing. A lot of high-fliers are prepared to take risks knowing that a mistake can be corrected. Learn to evaluate different decisions for their pros and cons, and make decisions that will take you closer to completing a given task. The key is to make sure that your decisions are thought out and reasoned. Be confident in your judgment and believe in yourself to get things right. Don’t just play it safe every time — you will blend into the wallpaper and no one will notice you. Putting yourself on the line will earn you respect, and if your decisions turn out to be right, you can expect to be rewarded for your efforts.

3. Accountability
Another major part of being successful is accepting responsibility, both for successes and failures. If you want other people to respect you, acknowledge your errors rather than trying to blame someone else for your shortcomings. Everyone makes mistakes, but the real test is how you react to that. Putting yourself in the firing line is the mark of a man who wants to achieve great things and is prepared to be scrutinized. It is a sign of confidence and self-belief, and is a key ingredient among men who want to be successful. Being able to admit you have made a mistake is also a sign of humility and can garner respect from your employees. A useful way to hold yourself accountable is to scrutinize your to-do lists, see what you accomplished and what you did not. Look at ways you can improve your performance and take appropriate steps to correct mistakes yourself.

Three more skills you need to succeed after the jump.

4. A positive attitude
Being positive about work and life is also essential to success. While your colleagues may laugh at your endless cynicism and misanthropic tendencies, your boss will see you as someone who hates his job and who will never support the aims of the company. We should distinguish between the occasional bad day (although you should always try to minimize this and remain upbeat no matter how trying the circumstances) and being consistently pessimistic.
The eternal pessimist will always try to drag other people down and will probably be less productive. If you can cultivate a positive outlook, you will encourage others to be more positive. You’ll also be more productive and possibly more credible as someone with executive potential. A positive attitude is entirely self-determined and can be helped by accentuating the positives in any situation. Don’t see problems; see solutions.

5. Self-presentation
Learning how to present yourself to others is another major aspect of being successful. Good grooming and, in particular, smart attire will project an image of success to other people — before you have even said a word. Wearing a well-cut suit, quality shoes and an elegant timepiece speak of a man who takes pride in his appearance. High sartorial standards indicate someone who has high standards generally, and this will cause people to view you favorably. A huge amount of your impact on colleagues, bosses or clients will be based on how well put together you appear. And while substance is crucial, having a great style to support it is no bad thing. Read fashion magazines and think about visiting a hairstylist rather than a barber. If you can afford it, have suits and shoes made to measure; they will fit much better than off-the-rack goods. Don’t forget that the way you look also enhances the way you feel about yourself, making you more confident.

6. Time management skills
It doesn’t matter how well you dress, how positive you are or how well-spoken you are if you cannot keep everything under control. Disorganization means that you will be forever playing catch-up with your work, rushing to meet deadlines and producing work below par. Learn to keep a detailed diary, listing deadlines and setting a schedule for your work, to ensure it is all done with time to spare. Your work will be of better quality and you will be entrusted with increased responsibility. It will also afford you additional leisure time. It is a key element to success and well worth practicing. This means overcoming procrastination (which we can all be guilty of at times), setting goals that are challenging (but realistic) and trying to use your time efficiently. Don’t check your e-mails 17 times every hour; spend that time writing up that project that is due tomorrow. Ideally, you will reach a stage when you can get ahead of the curve and start taking on additional projects and responsibilities — a surefire way of setting yourself up for that promotion. Success is simple when you follow these professional skills...
Each year The International Commission of Jurists (ICJ Kenya) organizes a Tournament that targets teams from Civil Society Organizations, Government Bodies and Private Sector Companies.

True to its name "Uwazi" the event continues to support the principles of Access to Information, Transparency and Accountability in Kenya's Governance System.

Through the theme was “Effective devolution through the theme access to information” the tournament ensured that: Awareness was raised on the importance of access to information; Avenues for transparency and accountability were provided; a call for attention to the importance of the access to information laws was made and a platform of fun and engaging activity for advocacy, team building and network was provided.

This year a total of nineteen (19) teams participated in the tournament. We are confident to state that the event was a success and this was majorly contributed by our team spirit and hard work. Kenya Law reached the shield quarter finals.

1. The Kenya Law football team
2. Kenya Law technical bench making a substitution
3. Andrew Halonyere tackling an opponent during one of the matches.
“Effective devolution through the theme access to information”

i. The entertaining group

ii. The Kenya Law cheering squad watching the on-going match

iii. Ken Oduor dribbles the ball past an opponent

iv. Hon. Ekwe Ethuro, Otiende Amollo and George Kegoro having a light moment as they watch the proceedings of the on-going match

v. L-R Cornellius Lupao (Kenya Law), Ekwe Ethuo (Senate Speaker), Pascal Othieno (Kenya Law) and George Kegoro (Director ICJ)
The National Council for Law Reporting (Kenya Law) unveiled its new brand name and logo, Kenya Gazette Database and a new website, (www.kenyalaw.org) on April 30, 2014. The event was graced by the Hon. Chief Justice Dr. Willy Mutunga, D. Jur., SC. E.G.H., President of the Supreme Court of Kenya, who is also the Chairman of the National Council For Law Reporting. Also in attendance was the Deputy Chief Justice and Vice President of the Supreme Court of Kenya, Ms Kalpana Rawal, The Chief Registrar of the Judiciary Ms. Anne Amadi among other senior officials from both the national and county governments, representatives of diplomatic missions and development partners, a cross-section of citizens, judges and magistrates, civil society officials, lawyers and others.

The unveiling of the new brand name, KENYA LAW, was a culmination of a deeper transformation that the institution has gone through inspired by the new requirements of public service delivery under the new Constitution; the increased awareness and demand for legal information by the citizen and the transformation that has been going on in the Judiciary.

The essence of this transformation is expressed in a new brand identity - KENYA LAW. This however does not mean that the Council has changed its legal name. It has merely adopted a brand name. While the Institution and its products will be more popularly known by its brand name, its legal and statutory name remains the National Council for Law Reporting.

Dr. Willy Mutunga in his speech, noted that Kenya Law has re-engineered its systems and processes and has exceed the expectations of Kenyans and stakeholders.

"The essence of our renewed sense of obligation is captured in our new slogan "Where Legal Information is Public Knowledge". We have come to an enlightened understanding of our mandate and make a commitment
to not merely be a provider of public legal information but the people’s fountain of knowledge and understanding of the law for the promotion of the rule of law and the advancement of a civilized society.” He said.

**THE KENYA GAZETTE ONLINE DATABASE**

The event also saw the launch of the Kenya Gazette online database. It was the first time that Kenya was launching an online official version of the Kenya Gazette, a weekly government publication that contains public and private notices on matters that are required to be notified to the public as a matter of law or policy, such as new legislation, government appointments, revocation of titles to land, registration and dissolution of companies and societies, succession and inheritance notices, etc.

The design of the Kenya Gazette database and the conversion, data entry and populating of its content has been done using the services of an Impact Sourcing Service Provider, which is a business process outsourcing (BPO) services provider that employs the labor of socio-economically challenged youths (an outsourcing model known as Impact Sourcing), with initial funding provided by the Rockefeller Foundation.

This is in line with the government’s initiative to promote access to government contracts by youth, disadvantaged groups and marginalized communities. The Rockefeller Foundation’s Poverty Reduction through Information and Digital Employment (PRIDE) is a development initiative which seeks to harness the potential of the global Business Process Outsourcing (BPO) industry to improve the lives of the poor and vulnerable people by employing them as principal workers in BPO centers.

A new website was also launched. The development of a new website – [www.kenyalaw.org](http://www.kenyalaw.org) was informed by the hopes and aspirations of the people of Kenya, the letter and spirit of the Constitution of Kenya, 2010; the strategic direction of the Kenya Vision 2030, the

In order to ensure that our users enjoy The Kenya Law Experience, the website has been revamped and optimized in order to guarantee the most enjoyable and at the same time informative browsing experience. The website is universally accessible and makes legal information accessible to all, especially to persons with disabilities. In keeping with the Constitution of Kenya 2010, under Article 7, Article 35, Articles 54, and The Persons with Disability Act, section 21, Kenya Law is committed to ensuring that its online platform and information are as accessible to all persons with disabilities and to the public.

*Our web-pages meet the checkpoints of the Web Content Accessibility Guidelines (WCAG) 2.0 as issued by the World Wide Web consortium (W3C).*

Another salient feature of *kenyalaw.org* is the improved Case Law Database.

This service enables users to access the most comprehensive and authoritative collection of Kenyan case law from 1980's to date via a powerful built-in search module that allows advanced searches. Users can also download, print and share their comments on judicial opinions via social media.

This new website also contains Free-to-view Publications such as the Laws of Kenya database, Kenya Law Case Updates and the Kenya Law Weekly.

Kenya Law has previously been led by Mr. Michael Murungi, Mrs. Gladys B. Shollei, and Mr. Justice (Rtd.) Richard Kuloba, a former judge of the High Court. It is currently under the leadership of Mr. Longet Terer who is the acting Chief Executive Officer.
New Brand Identity Pictorial

Long’et Terer, Snr. Assistant Editor/ Ag CEO Kenya Law delivering his speech

The Hon. Justice, Dr. Willy Mutunga and The Hon. Lady Justice Kalpana Rawal sharing a light moment

Mamadou Biteye, Managing Director the Rockefeller Foundation Africa Regional office delivering his speech

The Kenya Police Band graced the event with their wonderful entertainment
Muthoni Kimani, Senior Deputy Solicitor General Office of the Attorney General delivers her speech during the launch.

Guests keenly listening to the presentations.

Some of Kenya Law Staff Members during the launch.

By Lydia Midecha

The Strategy, Quality Assurance and Performance Evaluation (SQAPE) Department, as the name suggests, is responsible for performance measurement at Kenya Law (the National Council for Law Reporting- NCLR). The department achieves this core objective at Kenya Law through undertaking four main activities:

- Performance Measurement.
- Implementation of the strategic plan.
- Monitoring and Evaluation
- Quality assurance

1. Performance Measurement.

"Measurement is the first step that leads to control and eventually to improvement. If you can’t measure something, you can’t understand it. If you can’t understand it, you can’t control it. If you can’t control it, you can’t improve it." Dr. H James Harrington.

One of the fundamental principles of discovery, growth, performance and excellence is measurement. Imagine, for a moment, what our world would be without standard units or systems of measurement:

- How would we quantify time and what we do with it if there was no system to divide it into seconds, minutes, hours, days, months, seasons and years?
- How would we calculate the weight, size, length or value of objects?
- How would we trade without a standard way to value monetary currencies?
- How would scientists and researchers make new discoveries without a standard way to gauge elements in the natural world?

- How would students determine their academic progress if they were not tested?
- How would businesses determine their profitability if there was no way to analyse their sales?

It logically follows that any team, organization, or person who wishes to perform better, gain mastery over something or accomplish goals must have meaningful points of measurement. Progress and success must first be defined and tracked before one can know whether they are successful or not. In particular, an organisation must clearly establish a metric for success, quantify progress and continually improve to produce the desired outcome. In 1955, Henry Landsberger coined the term “Hawthorne effect” which described a phenomenon where people tend to improve an aspect of behavior being measured simply in response to the fact that measurement is taking place. Human beings tend to work harder and put in more effort when they know they are being monitored and are ultimately going to be evaluated. Put simply, if an activity carried out by humans is measured, it is going to be improved upon.

Measurement of performance is therefore critical to the success and continual improvement of both individuals and organisations. Several positive outcomes are experienced when the principle of performance measurement is applied to help improve performance at the personal or corporate level. It is possible to evaluate progress and clarify where the individual or organization currently stand. Key aspects in need of refinement can then be identified and the results of these refinements observed. Trouble shooting of problems becomes easier and more accurate. Finally measurement
provides motivation to strive harder to achieve. Essentially you can’t improve what you don’t measure, making measurement a critical part of the process of striving for excellence. Before a person or organisation can develop or improve four key limbs must be considered;

a. **What is your starting point?** This is also called the benchmark or baseline and is the point from which all progress is measured.

b. **What is your goal?** This is a clear idea of where you are headed and what you wish to accomplish.

c. **What key factors will influence your success?** These factors must be identified and harnessed correctly. They include strengths, skills, talents, abilities, market opportunities and advantages over competitors.

d. **How are you going to measure your progress?** A clearly defined mode of measurement has to be created to gauge how the factors that influence success are performing.

2. **Implementation of the Strategic Plan.**

Strategic planning is an element of strategic management that seeks to systematically identify a small number of key issues that are of fundamental importance to an organization. The process of strategic planning results in production of a strategic plan that documents the mandate, objectives and ethical principles of an organization. The plan also outlines the specific strategies designed to achieve the targets set for each of these.

The **SQAPE** department is responsible for overseeing the development and implementation of the strategic plan. Initially Kenya Law’s organizational growth was shaped by the Judiciary Strategic Plan. Once Kenya Law became a semi-autonomous state agency it developed its own independent strategic plan that was implemented between 2009 and 2012. The Draft Strategic Plan 2014-2019, currently in its final stage of development, distilled the core mandate of Kenya Law and formulated four key result areas. These areas are directly related to the organization’s core mandate of law reporting and revision, and each has its own specific strategic objective. Based on the strategic plan, the departments that make up NCLR Secretariat are able to develop work plans to guide their daily, monthly and quarterly activities as they strive to achieve the organization’s broad mandate. The departments are ultimately evaluated by comparing how much of their work plan they are able to achieve within the proposed time frame. By breaking down the strategic plan into activities with specific, achievable, realistic goals that are time-bound, Kenya Law is able to maintain excellence and continually improve.

<table>
<thead>
<tr>
<th>Key Result Area</th>
<th>Strategic Objective</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Provision of Public Legal Information.</td>
<td>To provide public legal information to Kenya Law stakeholders.</td>
</tr>
<tr>
<td>b. Policy and Legal Framework.</td>
<td>To establish a robust facilitative policy and legal framework for the NCLR.</td>
</tr>
<tr>
<td>c. Institutional Development.</td>
<td>To strengthen the institutional capacity of the NCLR and efficiently deliver its mandate.</td>
</tr>
<tr>
<td>d. Branding, Visibility and Corporate Image.</td>
<td>To strengthen the Kenya Law Brand and raise the profile of Kenya Law’s products in the market.</td>
</tr>
</tbody>
</table>
3. Monitoring and evaluation.

In the context of strategic management monitoring refers to the systematic and routine collection of information from activities. This process is carried out periodically and serves four main purposes:

- It permits organisations to learn from past experiences and make future improvements;
- It encourages both internal and external accountability;
- It makes it easier to make informed decisions about future activities;
- It empowers those who are meant to benefit from the activity.

Evaluation refers to the systematic and objective assessment of a completed activity. The information that is assessed forms the basis of strategic decisions made to improve the activity. Information gathered during the monitoring process provides the basis for the evaluative analysis. Monitoring is therefore integral to evaluation. During an evaluation, raw data from previous monitoring processes is used to understand current activities and to stimulate change in the future.

The SQAPE department evaluates how well departments perform by comparing the set activities for each department against the implemented activities within a given period of time. Each department is required to submit quarterly reports that are then compiled to produce an annual report to track the progress of the organisation through a calendar year. The annual report is submitted to Parliament.


Quality Assurance (QA) is a systematic process designed to prevent defects in products and or mistakes when delivering solutions or services to customers. It also refers to administrative and procedural activities implemented in a quality system so that requirements and goals for a product, service or activity will be fulfilled. It involves the measurement or comparison with a standard, monitoring of processes and an analysis of information that is focused on error prevention.

The SQAPE department is responsible for developing and implementing guidelines on standardized procedures and style for production of products to ensure that their quality is consistent. The department is working towards ensuring that Kenya Law is accredited with a Quality Management System. Reporting mechanisms must also be streamlined in order to ensure that quarterly, annual and various reports produced by the organization are uniform. Finally the department must ensure that the organization complies with the principles of good corporate governance.

Quality Statement

Kenya Law’s Quality Statement expresses our commitment to the highest professional standards and organizational excellence. The SQAPE department will continually engage in effective performance management to ensure that the organization continues to achieve its aspirations.
The Internet has changed the way that business is done in virtually every industry around the world. Some of these changes are positive, while other evolutions have put both the employee and the organization into difficult situations. While the Internet can be used as a powerful tool of communication and commerce, it can also be used as a means of distraction and time-wasting on a daily basis. Employees use the Internet to reach out to customers around the world, and they also use it to chat with their friends, visit various shopping sites, and simply surf aimlessly. Therefore, some organizations have felt compelled to keep an eye on their workers so that they have some assurance that everyone is theoretically being productive.

Employee monitoring has emerged as a necessity and yet as a very controversial issue due to the complexity and widespread use of technology. While more and more employers are using monitoring devices to check or keep track of their employees’ actions, some employees feel that too much monitoring is an invasion of their privacy. While exceptional circumstances can be tolerated by the employers, they also feel that excess use of the Internet for non-job related activities while on the job can be destructive for their organization.

New technologies allow employers to check whether employees are wasting time at recreational Web sites or sending unprofessional e-mails. But when do an employer’s legitimate business interests become an unacceptable invasion of worker privacy?

You are not at home
From an organizational standpoint, there is the issue of environment. When an employee comes to work, they are on organizational turf. In other words, the office-space, phones, computers, and other equipment belong to the employer. All of these elements can feel like they belong to the individual employee, but technically speaking the person is on “company time.” Therefore, the company can take certain steps to make sure that their people are working throughout the day.

The Bigger Picture
Generally, people have to keep in mind that the Internet is simply another medium of communication. Employees are not supposed to spend excess time on the Internet in the same way they are not supposed to make a high number of personal phone calls or take extended breaks throughout the day. In most organizations, people are allowed to use the Internet for a bit of personal business during the day. And as long as people are getting their work done,
companies are not terribly concerned if people take a break every once in a while. The ethics of monitoring employees is actually an element of a bigger issue. A policy of monitoring may make people uncomfortable, but people have to keep in mind an employer can certainly expect their employees to work throughout the day. How the company accomplishes this has a great deal of variance. Organizations can use monitoring to get this done. Whether they “should” or not is sometimes a completely different issue.

Privacy as a Moral Matter
From an ethical point of view, an employee surely does not give up all of his or her privacy when entering the workplace. To determine how far employee and employer moral rights should extend, it’s useful to start with a brief exploration of how privacy becomes a moral matter.

As thinking actors, human beings are more than cogs in an organization—things to be pushed around so as to maximize profits. They are entitled to respect, which requires some attention to privacy. If a boss were to monitor every conversation or move, most of us would think of such an environment as more like a prison than a humane workplace. But, like all rights, privacy is not absolute. Sometimes, as in the case of law enforcement, invasions of privacy may be warranted.

The Case for Workplace Monitoring
If an employer uses a software package that sweeps through office computers and eliminates games workers have installed, few people will feel such an action is an invasion of privacy. Our comfort with this kind of intrusion suggests that most of us don’t fault an employer who insists that the equipment he or she provides be used for work, at least during working hours.

Why, then, should we protest when an employer tries to ensure that his/her equipment is not being used to surf non-job-related Web sites? Hours spent online browsing different Biriani recipes are no less a breach of the work contract than playing online games.

Joseph R. Garber, a columnist for Forbes magazine once said that: “The underlying principle is value for money. If you don’t deliver value for money, in some sense, you’re lying.” To prevent such abuses, Garber argues, employers need to be allowed to monitor employees.

The Case against Workplace Monitoring
Consider this: It’s lunch hour. An employee writes a note to her boyfriend. She puts it in an envelope, affixes her own stamp, and drops it in the basket where outgoing mail is collected. Does the fact that the pencil and paper she used belong to her employer give her boss the right to open and read this letter? Although most people would answer no, that’s just the argument employers are making to defend monitoring e-mail.

Another ethical consideration in the debate is fairness. Usually, it’s not the management or directors who are subject to monitoring, but line workers.

Trust is often mentioned by opponents of monitoring as a major ethical issue. Rita Manning, a writer in the Journal of Business Ethics noted that: “When we look at the workplaces in which surveillance is common, we see communities in trouble. What is missing in these communities is trust.”

If employers create trust, employee behavior “will conform to certain norms, not as a result of being watched, but as a result of the care and respect which are part of the communal fabric.”

Can we at least agree to disagree?
It is possible to moot many of these ethical issues by arguing that monitoring all comes down to a question of contract. There isn’t an agreement that is morally right for everybody. The important thing is what the parties agree to. If the employer gives a promise of privacy, then that should be respected. If, on the other hand, the employer reserves the right to read e-mail or monitor Web browsing, the worker can either accept those terms or look elsewhere for employment.

Most parties to the debate agree that companies should have clear policies on electronic surveillance and that these should be effectively communicated to employees.

Experts believe that involving employees in the creation of a monitoring policy is also a way to find common ground. By bringing employees and managers together to develop principles and guidelines for electronic mail, it is possible to create a policy that is acceptable to both sides.
Social Media Timeline

By Nelson Tunoi, Robert Basweti & Ochiel Dudley

>>> 1
Kenya Law shared a link.
3 December 2013

It's official, government declares December 13th a public holiday #Kenyaat50 http://kenyalaw.org/kenyalawblog/gazette15099/ #

GAZETTE NOTICE No. 15099
PUBLIC HOLIDAYS ACT
(Cap. 110)
DECLARATION OF A PUBLIC HOLIDAY
IT IS notified for general information that Friday 13th December 2013, will be a Public Holiday pursuant to section 3 of the Public Holidays Act.
Dated the 2nd December, 2013.

JOSEPH OLE LENKU,
Cabinet Secretary, Ministry of Interior and Coordination of National Government

Gazette Notice No. 15099 – Declaration of a Public Holiday | Kenya Law
kenyalaw.org
Except for some material which is expressly stated to be under a specified Creative Commons license, the contents of this website are in the public domain and free from any copyright restrictions

Like Comment Share

>>> 2
Kenya Law shared a link.
30 June

Whether one can obtain interim relief under the Mutunga Rules without filing a Notice of Motion http://ow.ly/4WIB

Petition 9 of 2014 - Kenya Law
kenyalaw.org
1. By a petition filed before this court on 25th June, 2014 the petitioner seeks among others, that pending the hearing and determination of the...

Like Comment Share

0 people like this.

Write a comment...

Guansari Tuiwa Interesting read, didn’t know but still wouldn’t risk not putting an application. I also can’t file a petition by way of a letter
Like • Reply - 1 July at 07:34

>>> 3
Kenya Law shared a link.
3 July

Refusal to answer an employer, without good reason and in front of guests, is an aggravated case of gross misconduct http://ow.ly/M024

Cause 327 of 2013 - Kenya Law
kenyalaw.org
1. This Claim is brought by Linet Akata Shikoli against her former Employer Lilian Otundo. She was employed as a House Help, in the year 2006, at a...

Like Comment Share

2 people like this.

Write a comment...

Maelia Museya The law is now practical
Like • Reply - 3 July at 23:31
Social Media Timeline

1. Kibet (@kibet_roco - May 14) MyKenyaLaw is there a link already for the Court of Appeal ruling on what it’s election petition?
   Details

2. Kenya Law (@mykenyalaw - May 14) @kibet_roco yes, kindly check our TL for the link to the decision. @WanduroKidero
   Details

3. Kibet (@kibet_roco)
   @MyKenyaLaw I got it! thanks
   RT 1
   0:43 PM - 14 May 2014

4. Kenya Law (@mykenyalaw)
   Check our websites under Amendment Acts/2014 @Saving_James @Strathmorelaw @StrathU @MyKenyaLaw How about VAT 2014 Amendments?
   Details

5. Jokos (@kithinji__) - Jun 14
   Oya @kithinji__ @MyKenyaLaw your site is offline has been down and it us inconveniencing some of us yawa!
   Details

Issued by KENYA LAW
A QUARTERLY PUBLICATION
Where Legal Information is Public Knowledge

Issue 25, April - June 2014
Most of the time, the words we communicate have less impact than the energy behind the words. Therefore most times what you say is often not what the other person hears. The energy behind the words is often determined by our intention. Our movements, the way we tilt our heads, our tone of voice and eye contact often speak volumes about our intention as well as inner feelings.

When our intent is to control a situation, or person, rather than learn, we always find ourselves locked into conflict and power struggles, no matter how effective we think our skills of communication are. When partners in relationships are communicating, we often find confusion, and most times there is a very good reason for this confusion.

One couple complained that they were often locked up in conflicts over minor issues. In a recent conflict, Luka asked Pam why she was reading a particular book. Pam responded with irritation. Upon deeper investigation by the therapist about the type of book, it turned out that, the book was about women and independent lifestyle. Luka admitted that he was threatened by Pam learning how to be independent and thus pulling away from him. Pam had responded to Luka’s intention to control her. If Luka had asked with an intention to learn about the book and Pam’s interest in it, rather than control her, perhaps Pam would not have responded with irritation.

According to Dr Margret Paul, a relationship expert and author of several books, on relationships, the intent to control creates power struggles in relationships. While most people certainly want to be in control, they do not want to be controlled. She says that power struggles result when one person behaves and speaks in a controlling way and the other person is resisting. People often respond to the blaming and shaming edge behind a controlling person’s words.

Perhaps next time you want to communicate not only with your partner but even on normal day to day basis, with other people ask yourself, “why do I want to communicate?” If you discover your intention is to control, eg, get the other person to change, consider learning about the situation, or person rather than being controlling. You will get a far much better result. This is because, the hard closed controlling energy is often taken by the respondent as a demand and they may fear that any response may be met with negative consequences.

The common belief that yelling louder, threatening more will bring good results instead leads to defensiveness, unhappiness, blame shifting and eventually bad relationships.

Always speak in a light, soft tone, with no judgment, with curiosity and real caring. You will discover that interactions with others will greatly improve.
Being a lawyer is not just putting people behind bars and keeping them locked up all their life?!

Not all lawyers go to court!
While the popular media is bombarded with images of lawyers in courtrooms, not all lawyers actually appear before judges. Some lawyers - called transactional lawyers - work behind the scenes, writing contracts and doing other legal work that doesn’t ever involve going to court.

Your lawyer cannot disclose what you tell him/her - even if you confess to a crime!
Advocate-client privilege is designed to ensure that you are candid with your lawyer. Under most circumstances, your lawyer cannot tell anyone - a judge, the police or your family members - what you tell him/her in confidence.

Argwings Kodhek was the first Kenyan African advocate to set up law practice in Kenya. He made a name for himself defending many Mau Mau suspects following the declaration of a state of emergency throughout Kenya by the colonial authorities in 1952. He was also the first African to set up a political party in Nairobi, the Nairobi District African Congress.

Mathew Guy Muli was the only person to serve as Attorney General of Kenya after serving as a Judge of the High Court. And when, after nearly a decade of dedicated service as Attorney General, he went back to the judiciary as a judge of the Court of Appeal, the first person in Kenya to serve as a judge after being the Chief law officer.

Kitili Mwendwa was Kenya's youngest and first African Chief Justice. He served the shortest term (July 1968 and served until July 1971 )as Chief Justice, leaving his office under a cloud following a military plot to overthrow the government of Kenya's founding President Jomo Kenyatta. After more than a decade in private business he would come back to public service as a Member of Parliament for Kitui Central and for a while compete with veteran freedom fighter Paul Ngei for political supremacy in Ukambani.

Rachael Omamo is the first woman to become the chairperson of the Law Society of Kenya (LSK). She is a lawyer with vast experience. She is the immediate former ambassador to France and currently Kenya's Defense secretary. She was a member of the task force for the establishment of Truth, Justice and Reconciliation Commission, a member of task force on the Review of Landlord and Tenant legislation as well as Assisting Counsel to the Ndung'u Land Commission.

Kalpana Hasmukhrai Rawal set up a private practice in the year 1975 becoming the first woman lawyer to do so in Kenya. She run a general practice until 1999 when she was appointed a commissioner of assize, and judge of the High Court thereafter. She is a Kenyan lawyer and a Judge of the Supreme Court of Kenya. She was sworn in on June 3, 2013 as the Deputy Chief Justice of Kenya in a ceremony presided over by the President of Kenya and the Chief Justice.

Joyce Aluoch is the first kenyan lawyer to be a Judge-elect of the International Criminal Court in The Hague. She was elected to the International Criminal Court in 2009 from the African group of states and her nine-year term will expire in 2018. She is a member of Trial Chamber III which is hearing the trial of Jean-Pierre Bemba, and is the presiding judge of Trial Chamber IV, which is hearing the case of Banda and Jamus.

She is a former judge of the High Court of Kenya. She has also served as the inaugural head of the family division of the Kenyan High Court and a member of the Court of Appeal. Until her appointment as a Judge of Appeal in December of 2007 she was the most Senior Judge of the High Court, handling civil, criminal, commercial and family law cases.

She established and served as Inaugural Head of the Family Division of the High Court and simplified litigation in Family Law matters in line with the principles of ‘just, quick and cheap’.
Feedback For Caseback Service

By Emma Mwobobia, Ruth Ndiko & Patricia Nasumba
ReporterLaw Reporting Department

---

**Hon. Dolphina Alego**

Thank you so much Team Kenya Law for this feedback. I truly appreciate the same. Kind regards and keep up the good work you are doing. God bless.

---

**Hon. Lillian A. Arika**

Thank you & keep up the good work! Most gratefully acknowledged. I look forward to receipt of others. Kind regards,

---

**Hon. Hannah Okwengu**

Many thanks for your most efficient and helpful service.

---

**J. K. Ng’arng’ar. Senior Principal Magistrate**

I take this opportunity to thank the entire team of Kenya Law Report for the good work. The timely case back service go a long way to built on our jurisprudence. Keep it up. Kind regards,
Inspiration

24 Things to Always Remember... and One Thing to Never Forget

Your presence is a present to the world.
You’re unique and one of a kind.
Your life can be what you want it to be.
Take the days just one at a time.

Count your blessings, not your troubles.
You’ll make it through whatever comes along.
Within you are so many answers.
Understand, have courage, be strong.

Don’t put limits on yourself.
So many dreams are waiting to be realized.
Decisions are too important to leave to chance.
Reach for your peak, your goal, and your prize.

Nothing wastes more energy than worrying.
The longer one carries a problem, the heavier it gets.

Don’t take things too seriously.
Live a life of serenity, not a life of regrets.

Remember that a little love goes a long way.
Remember that a lot... goes forever.
Remember that friendship is a wise investment.
Life’s treasures are people... together.

Realize that it’s never too late.
Do ordinary things in an extraordinary way.
Have health and hope and happiness.
Take the time to wish upon a star.

And don’t ever forget...
For even a day...
How very special you are.

By: Nelson Tunoi, Robert Basweti
**The Supreme Court Cases**

**Supreme Court Re-affirms the Constitutionality of Rule 41(1) of the Supreme Court Rules, 2012**

*In the Matter of Kenya National Commission on Human Rights & 2 others*

Reference No 1 of 2012  
Supreme Court of Kenya at Nairobi  
P K Tunoi, M K Ibrahim, J B Ojwang, S C Wanjala & S N Ndungu, SCJJ  
February 27, 2014  
*Reported by Teddy Musiga*

**Issues:**

Whether a petition could be filed at the High Court challenging rules made by the Supreme Court.

Whether Rule 41(1) of the Supreme Court Rules, 2012 was restrictive and required re-drafting/ amendment to enable other parties other than the national government, county governments and state organs to seek the advisory opinion of the Supreme Court under article 163(6) of the Constitution.

Whether individuals, NGO’s and professional bodies were excluded from the restrictive words of Rule 41(1) of the Supreme Court Rules, 2012.

**Constitutional Law** – Jurisdiction - Supreme Court jurisdiction on Advisory opinion – scope of Supreme Court jurisdiction on advisory opinions – whether Rule 41(1) of the Supreme Court Rules were restrictive and required amendment – Supreme Court Rules, 2012, Rule 41(1), Constitution of Kenya, 2010, article 163(6)

**Held:**

1. The main principles/parameters that guided the Supreme Court when exercising it’s jurisdiction to offer advisory opinions were; a matter concerning the County government. The question as to whether a matter concerned the county government was determined on a case to case basis.

2. The only parties that could make a request for an Advisory opinion were the national government, a state organ or county government. Any other person could only be enjoined in the proceedings with leave of court either as an intervener (interested party) or as amicus curiae. (In the Matter of the Interim Independent Electoral Commission: Constitutional Application No. 2 of 2011)

3. The Reference as filed was not one seeking an advisory opinion within the meaning of article 163(6) of the Constitution of Kenya, 2010, because, there was no matter concerning county government in the issues framed by the applicant. The “reference for an advisory opinion” was actually a constitutional reference in disguise. The main objective was to elicit a declaration from the Supreme Court regarding the Constitutionality or otherwise of Rule 41(1). It ought to have been filed at the High Court.

4. There was no hierarchical impropriety if a party were to challenge a Supreme Court rule in the High court. In such a case, what would be at stake was not the reputation of the Supreme Court but the unconstitutionality of the rule in question. The High court was seized with original jurisdiction to determine whether a piece of legislation or subsidiary legislation was unconstitutional.

5. Rule 41(1) of the Supreme Court Rules, 2012 was a replica of article 163(6) of the Constitution. Therefore, it could not be said to be either restrictive or discriminative in any manner.

6. Persons in general did not have a right to an advisory opinion of the Supreme Court. Rights declared under article 22 (such as access to justice) were enforceable by way of ordinary "court proceedings". Such proceedings did not necessarily include the Supreme Court's advisory opinions. By their very nature and design, Advisory opinions were meant to serve as a device in aid of the main tasks of the institutional conduct of
The declaration of invalidity of Section 76(1)(a) of the Elections Act must apply from the date of commencement of the Elections Act

Mary Wambui Munene v Peter Gichuki King’ara & 2 others
Petition No. 7 of 2014
The Supreme Court of Kenya at Nairobi
CJ W Mutunga, DCJ K Rawal, P K Tunoi, M K Ibrahim, J B Ojwang, S C Wanjala & N Njoki SCJJ
May 5, 2014
Reported by Njeri Githang’a and Charles Mutua

Brief Facts
The Appellant (Mary Wambui Munene) and the 1st Respondent, (Peter Gichuki King’ara) together with seven others, contested for the seat of Member of the National Assembly for Othaya Constituency, in the General Elections held on 4th March, 2013. After the counting and tallying of the results, the Appellant was declared the duly elected member of the National Assembly for Othaya Constituency. The 1st Respondent emerged as the 1st runner-up. Agrieved by this declaration of the Appellant as the winner, the 1st Respondent filed a petition challenging that outcome which was dismissed with costs, and confirmed the Appellant as the duly elected member of the National Assembly for Othaya Constituency. Agrieved by the foregoing orders of the Election Court, the 1st Respondent appealed to the Court of Appeal which ordered for a fresh election and declared the election as having been full of election irregularities.

The Appellant subsequently filed an appeal before the Supreme Court seeking to set aside the whole Judgment of the Court of Appeal nullifying her election as the Othaya Member of Parliament.

Meanwhile, the Supreme Court had in (Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]eKLR) determined the issue as to when the time-limit envisaged under Article 87(2) of the Constitution is set in motion, and had declared Section 76(1)(a) of the Elections Act ultra vires the Constitution. The appellant sought to have the proceedings before the Court of Appeal and High Court declared a nullity on the basis of Joho’s decision.

Issues
Whether the Election Petition proceedings were a nullity ab initio, having been premised on a petition filed out of time at the High Court.

Whether the declaration by the Supreme Court in the Joho case that section 76(1)(a) of the Elections Act, 2011 was invalid had retrospective effect, therefore invalidating the proceedings filed before the date of the decision.

Constitutional Law - statutes-constitutionality of a Statute-where an Act of parliament is found to be in conflict with the Constitution-effect of the conflict-whether the declaration by the Supreme Court in the Joho case that section 76(1)(a) of the Elections Act, 2011 was invalid and had retrospective effect, therefore invalidating the proceedings filed before the date of the decision-Constitution of Kenya 2010, article 4

Electoral Law - election petitions-expeditious hearing and disposal of election petitions-the Supreme Court having declared Section 76(1)(a) of the Elections Act inconsistent with Article 87(2) of the Constitution – where article 87(2) made the provision requiring that election petitions for elections other than Presidential elections, be filed within 28 days after the declaration
of the election results by the Commission—whether proceedings were a nullity \textit{ab initio}, having been premised on a Petition filed out of time at the High Court—Constitution of Kenya 2010, articles 87 (1); National Assembly and Presidential Elections Act, section 22; Elections Act (No 24 of 2011) Section 85A

Held

1. Whether the proceedings in the Court of Appeal were a nullity \textit{ab initio} was an issue that went to the jurisdiction of that Court to entertain that matter. The question of jurisdiction was a pure question of law, it had to be determined from the start, and where the Court found it had no jurisdiction, it should put down its tools.

2. The electoral history of Kenya was replete with cases of delay in finalizing matters, thereby denying the voters the opportunity to have their chosen representatives in the organs of democratic governance. It was clear that the sovereign power belongs to the people, and was exercised either directly or through their democratically elected representatives in the State Organs, which included Parliament and the Legislative Assemblies in County Governments. The voters’ rights in that regard were quite clear, from the terms of the Constitution (article 1).

3. Article 87(1) of the Constitution directed Parliament to establish mechanisms for the timely settlement of electoral disputes; hence the Elections Act. Further, article 87(2) made the provision requiring that election petitions for elections other than presidential elections, be filed within 28 days after the declaration of the election results by the Commission.

4. Parliament had enacted a contradictory provision, in the form of section 76(1)(a) of the Elections Act. In considering the effect of that provision, the Court declared section 76(1)(a) of the Elections Act inconsistent with article 87(2) of the Constitution. [Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]eKLR]

5. The Supreme Court has to give guidance on fundamental principles of the Constitution; and pursuant to that role, the Court in the Joho case adverted to the bearing of time in the scheme of constitutional processes.

6. While the principle of timely disposal of election petitions affirmed by the Court of Appeal must be steadfastly protected by any Court hearing election disputes, or applications arising from those disputes, the interests of justice and rule of law must be constantly held paramount.

7. The Supreme Court had been keen to ensure predictability, certainty, uniformity and stability in the application of the law. That inclination was asserted in the case of \textit{Jasbir Singh Rai and 3 others v The Estate of Tarlochan Singh Rai and 4 Others, Petition No. 4 of 2012 (the Rai case)}

8. Decisions of the Supreme Court were only arrived at after conscientious and due consideration. That approach was the basis upon which the court evaluated the case before the court. As noted, Section 76(1)(a) of the Elections Act was declared a nullity—a declaration that was clear as well as unqualified. Indeed, the Court of Appeal appreciated the sanctity of that declaration and dismissed the appeals before it in accordance with comparative judicial practice around the world.

9. Under the Constitution and even otherwise, the Supreme Court is naturally looked upon by the country as the custodian of the law and the Constitution, and if the Court were to review its own previous decisions merely because another view is possible, the litigant-public may be encouraged to think that it is always worthwhile taking a chance with the highest Court in the land. \textit{Bengal Immunity Co. Ltd v Bihar, (1955) 2 S.C.R 603, (‘55’) A. SC 661}

10. The Supreme Court had been silent in \textit{Johos case} on the effect of declaration of invalidity of a statute and therefore unequivocal about the invalidity of any action emanating from section 76(1)(a) of the Elections Act. In appropriate cases, it might exercise its jurisdiction to give its constitutional interpretations retrospective or prospective effect. That was derived from the broad mandate accorded by article 1, 10, 163, 159 and 259 of the Constitution, and Section 3 of the Supreme Court Act, 2011.

11. If a statute is void from its very birth then anything done under it, whether closed, completed, or developing, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law.
12. While the Court pronounced itself on the issue of invalidity of section 76(1)(a) of the Elections Act, in line with the Constitution, the Court was not precluded from considering the application of the principles of retro activity or pro activity on a case-by-case basis. As such, in the instant matter, the issue of invalidity of Section 76(1)(a) of the Elections Act was bound to the issue of time. Time, as a principle, was comprehensively addressed through the attribute of accuracy, and emphasized by article 87(1) of the Constitution, as well as other provisions of the law. Time, in principle and applicability, was a vital element in the electoral process set by the Constitution.

13. From a review of the principles as regards the settlement of electoral disputes, the court was convinced that for the benefit of certainty and consistency, the declaration of invalidity must apply from the date of commencement of the Elections Act.

14. Several constitutional processes had been concluded, and others ensued as a result of the directions of the Courts while handling electoral disputes following the 2013 General Elections. In either of those scenarios, and as a matter of finality of Court processes, parties could not reopen concluded causes of action. The apprehension that a declaration of nullity and its retrospective effect could trigger a frenzy to re-open concluded or determined election cases, could hence not arise or be contemplated.

Appeal allowed

The Supreme Court reinstates Peter Munya as the Governor of Meru County

Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 Others
Supreme Court of Kenya at Nairobi
Petition No 2B of 2014
W M Mutunga, K H Rawal, P K Tuno, M K Ibrahim, J B Ojwang, S C Wanjala & S N Ndung’u, SCJJ.
May 30, 2014
Reported by Phoebe Ida Ayaya and Maryconcepter Nzakuva

Brief Facts
This was an appeal against the judgment of the Court of Appeal sitting in Nyeri, delivered on 12th March, 2014 in Nyeri Civil Appeal No. 38 of 2013, overruling the decision of the High Court sitting at Meru (Makau J.) in Election Petition No.1 of 2013. The Court of Appeal decision invalidated the election of the Appellant as the duly-elected Governor of Meru County. Aggrieved by the said judgment, the Appellant, on 20th March, 2014 filed an appeal and a Notice of Motion under certificate of urgency at the Supreme Court.

The Appellant contended that the appellate court misdirected itself on issues of fact, thereby breaching the Appellant’s right to a fair hearing as stipulated under articles 50 (1) and 25 (c)of the Constitution of Kenya,2010. The Appellant also stated that the appellate court had misdirected itself by delving into issues of fact, contrary to the provisions of section 85A of the Elections Act, 2011 which limited appeals to the Court of Appeal to matters of law only.

The Appellant also submitted that the Court of Appeal misinterpreted section 82 (1) of the Elections Act,2011 as read together with rule 33(4)of the Election Petition Rules,2013 by reading the word ‘constituency’ into the word ‘polling station’.

Issues:
Whether the appellate court acted in excess of its jurisdiction by delving into matters of fact, contrary to the provisions of section 85A of the Elections Act,2011 as read with article 87(1) of the Constitution on appellate jurisdiction of the Court of Appeal in election disputes and timely settlement of election disputes.

Whether the appellate court erred in law, in their interpretation of section 82(1) of the Elections Act, 2011 vis-a-vis rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 regarding the recount and scrutiny of votes.

Whether the appellate court erred in shifting the “burden of proof” in electoral disputes contrary to the applicable law and the binding precedent, as decreed by the doctrine of stare decisis under article 163(7) of the Constitution of Kenya, 2010.
Whether the appellate court erred in placing reliance on the percentage "margin of victory" as opposed to the numerical accretion of votes, in annulling the election of the appellant, contrary to article 180 (4) of the Constitution of Kenya, 2010.

Whether the appellate court erred in its appreciation of the "legal effect" of errors and irregularities upon an election, in the context of article 86 of the Constitution.

Jurisdiction - jurisdiction of the Court of Appeal to hear matters of fact-whether the appellate court acted in excess of its jurisdiction by delving into matters of fact-Constiution of Kenya, 2010, article 87(1) & Elections Act, 2011, section 85 A.


Evidence Law - burden of proof-standard of proof in electoral matters-where burden and standard of proof lies-circumstances when the burden of proof shifts-whether the appellate court erred in shifting the "burden of proof" in electoral disputes contrary to the applicable law and the binding precedent, as decreed by the doctrine of stare decisis-Constitution of Kenya, 2010 article 163(7).

Constitutional Law - election of county governor-declaration of the elected candidate-margin of victory- whether the appellate court erred in placing reliance on the percentage "margin of victory" as opposed to the numerical accretion of votes, in annulling the election of the appellant-Constitution of Kenya, 2010, article 180 (4).

Held:

1. Section 85 A of the Elections Act, 2011 was a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. It was directed at litigants who were dissatisfied with the judgment of the High Court in an election petition and was meant to limit appeals to the Court of Appeal to matters of law only.

2. The phrase ‘matters of law’ characterized three elements: the technical element: which involved the interpretation of a constitutional or statutory provision; the practical element: which involved the application of the Constitution and the law to a set of facts or evidence on record; and the evidentiary element: which involved the evaluation of the conclusions of a trial Court on the basis of the evidence on record.

3. With specific reference to section 85A of the Elections Act, the phrase “matters of law only”, meant a question or an issue which involved; the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor; the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial court in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor; the conclusions arrived at by the trial court in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claimed that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it was not enough for the appellant to contend that the trial court would probably have arrived at a different conclusion on the basis of the evidence.

4. Flowing from the above, it followed that a petition which required the appellate court to re-examine the probative value of evidence tendered at the trial Court, or invited the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. The appellate court ought to have directed their attention, to determine whether the conclusions by the trial court were supported by the evidence before it, or not. But, by elevating the analysis of the appellant/petitioner to a pedestal of "proven
evidence”, and drawing their own conclusions of fact therefrom, the appellate court could not be said to have been considering “matters of law” within the meaning of section 85A.

5. There was no fundamental inconsistency between rule 33 (1) of the Petition Rules and Section 82 (1) of the Elections Act. An order for a recount or scrutiny of the vote could be made at any stage after filing of an election petition or during the hearing of an election petition and before the determination of the said petition.

6. There was no inconsistency between rule 33(2) of the Petition Rules, 2013 and section 82 (1) of the Elections Act,2011 as it regarded the exercise of discretion as to whether to order for scrutiny and recount or not. Contrary to dicta in some of the High Court decisions, the discretion vested in an election court by section 82(1) of the Act, was not unfettered. Such discretion ought to be exercised reasonably, so as not to defeat the objectives of article 87 (1) of the Constitution of Kenya, 2010 and the Elections Act, 2011.

7. The following would be the guiding principles on the right to scrutiny and recount of votes in an election petition:

The right to scrutiny and recount of votes in an election petition was anchored in section 82(1) of the Elections Act, 2011 and rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition was entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition. The trial court was vested with discretion under section 82(1) of the Elections Act, 2011 to make an order on its own motion for a recount or scrutiny of votes as it could specify, if it considered that such scrutiny or recount was necessary to enable it to arrive at a just and fair determination of the petition. In exercising the said discretion, the court was to have sufficient reasons in the context of the pleadings or the evidence or both. It was appropriate that the court recorded the reasons for the order for scrutiny or recount.

8. The right to scrutiny and recount did not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition was to establish the basis for such a request, to the satisfaction of the trial court. Such a basis could be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.

9. Where a party made a request for scrutiny or recount of votes, such scrutiny or recount if granted, was to be conducted in specific polling stations in respect of which the results were disputed, or where the validity of the vote was called into question in the terms of rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules, 2013.

10. The appellate court erred in finding that scrutiny and recount in a constituency meant scrutiny and recount in all polling stations in the constituency. On the contrary, an application for scrutiny and recount ought to be couched in specific terms, and clothed with particularity, as to which polling stations within a constituency were to attract such scrutiny. If a party laid a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity was not to be entertained.

11. The appellate court erred in stating that the mandate of the court was to order scrutiny of votes and not scrutiny of polling stations. Rule 33(4) of the Petition Rules, 2013 did not require the court to order scrutiny of polling stations. The rule simply provided that scrutiny was to be confined to the polling stations in which the results were disputed.

12. Rule 33 (4) was a logical extension of the court’s discretion under section 82 of the Elections Act, 2011. Indeed, the rule ought to be seen as providing the necessary guidelines for the exercise of discretion by the court under section 82 of the Act. By providing that scrutiny was to be confined to the polling stations in which the results were disputed, the rule was by no means limiting to the court’s discretion. If election results were seriously disputed in all the polling stations in a constituency, then rule 33(4) would not erect any barrier to an order for scrutiny in those polling stations. Hence, rule 33(4), looked up to article 86 (b) and (c) of the Constitution of Kenya, 2010, which placed a premium on the polling station as the basic arena of voting, and counting of votes.
13. There was nowhere in the Elections Act, 2011 and the Constitution of Kenya, 2010 where the words “polling station” and “constituency” were used interchangeably. There was no ambiguity arising from the language used in rule 33 of the Petition Rules, 2013, in reference to “polling station”, and as such there was no reason to apply any other meaning different from the definition embodied in section 2 of the Elections Act.

14. The limiting of scrutiny to polling stations enabled the election court to focus on the determination of the contested facts, and not to be turned into a large-scale tallying centre. A further reason was based upon the principle that the process of scrutiny could not be abused. This could happen when it was turned into a fishing expedition, where a petitioner came without a basis for challenging an election, but instead elected to seek scrutiny as a device to generate election-dispute material.

15. The trial court correctly appreciated and applied the law, in confining scrutiny and recount to the seven polling stations mentioned in its judgment. Consequently, the appellate court fell into error in its interpretation of the law, and in holding that the trial court ought to have ordered for scrutiny in all the polling stations in the four constituencies mentioned, even where the results had not been disputed.

16. The evidential burden regarding the contents of the register and declared results lay on the IEBC, save that this burden was activated in an election petition only when the initial legal burden had been discharged. In the instant case, the petitioner was content to rely on a document that had no evidential value, when he could have made an application for the production of the authentic register, to aid his cause in discharging the initial burden.

17. The appellate court fell into error in finding that the trial court erred in placing the burden to prove the number of registered voters on the Petitioner/Appellant. The issue was not the total number of registered voters, but whether the number of votes cast in certain polling stations exceeded the number of registered voters as had been alleged by the petitioner; an allegation which, he had the initial burden to prove.

18. In the circumstances, the appellate court erred by not appreciating: first the nature of the burden of proof; secondly on whom the burden rested; and third, when it was activated in an election petition. The appellate court further erred by shifting the burden of proof from the Petitioner to the 2nd and 3rd Respondents, contrary to the applicable law, and to the decision of the Supreme Court. The holding by the appellate court, in that regard, offended Article 163 (7) of the Constitution on the doctrine of precedent.

19. Article 180 (4) of the Constitution of Kenya, 2010 established the statistical basis upon which a candidate could be declared the winner in a gubernatorial election. It was clear that the Constitution required that for one to be declared a winner in a gubernatorial election, he or she needed to garner a majority of the votes. This was the logical meaning attributed to the words “greatest number of votes”. It mattered not how wide or small the margin of victory was. Indeed, this was the requirement in all the elections other than a Presidential election, where specific percentages were prescribed by the Constitution.

20. A narrow margin between the declared winner and the runner-up beckoned as a red flag where the results were contested on allegations of counting and tallying errors at specified polling stations. Where a re-count, re-tally or scrutiny did not change the final result as to the gaining of votes by candidates, the percentage or margin of victory however narrow was immaterial as a factor in the proper election-outcome. To nullify an election in such a context would fly in the face of article 180 (4) of the Constitution.

21. The appellate court had been content to conclude that the “statistically small margin” would have “significantly impacted”, without taking into account the numerical alignment of votes. It would have been necessary for the appellate court to demonstrate how a figure of 3, 436 win-votes would have reversed the outcome of victory in favour of the Petitioner. Without such a demonstration, the scenario was one in which an election was annulled on the ground of “what might have been” and not necessarily, “what was”. This, in truth, amounted to invalidating an election on speculative grounds, rather than proven facts.

22. Consequently, the appellate court erred in questioning the credibility of the election on the
basis of the percentage or margin of victory, without demonstrating how the final statistical vote-outcome had been compromised.

23. An election ought to be conducted substantially in accordance with the principles of the Constitution of Kenya, 2010, as set out in article 81 (e). Voting was to be conducted in accordance with the principles set out in article 86. The Elections Act and the Regulations thereunder, constituted the substantive and procedural law for the conduct of elections.

24. If it was to be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election was not to be invalidated only on ground of irregularities. Where, however, it was shown that the irregularities were of such magnitude that they affected the election result then such an election stood to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection were not enough, by and of themselves, to vitiate an election.

25. The appellate court duly appreciated the legal effect of irregularities upon an election, though they erred in the manner in which they applied the test to the dispute before them. While the appellate court took note of errors of entry and transposition of results in Forms 35 and 36, as shown on the record, they did not ask themselves whether those errors/discrepancies affected the result and/or the integrity of the election and if so, in what particulars.

26. The appellate court misdirected itself, regarding the test to be applied in determining the effect of irregularities on an election. Such a test could not be a speculative one. It could not be based on extrapolation of limited-scale irregularity to the broad expanse of Meru County.

27. On its way to annulling the Meru gubernatorial election, the appellate court showed scant deference to the recorded findings of the trial court, substituting the conclusions of the trial court with its own, though without evidentiary justification. Furthermore, the appellate court misinterpreted and misapplied the electoral law, and overlooked the doctrine of precedent, contrary to article 163(7) of the Constitution.

As per Mutunga, CJ

28. Under article 163(7) of the Constitution of Kenya, 2010, all courts, other than the Supreme Court, were bound by the decisions of the Supreme Court. Thus, the adopted theory of interpretation of the Constitution would bind all Courts, other than the Supreme Court.

29. The emphasis on free and fair elections, through an electoral system that was simple, accurate, verifiable, secure, accountable and transparent, in articles 81(e) and 86 of the Constitution, had a rich Kenyan historical, economic, social, political, and cultural context.

30. Article 86(b) of the Constitution of Kenya, 2010 provided that the votes cast were to be counted, tabulated, and results announced promptly by the presiding officer at each polling station.

31. It was no longer the will of the Ruler that ruled under the Kenyan Constitution. The Constitution envisioned the will of Kenyan people through the sanctity of the vote. Indeed, all sovereign power belonged to the people of Kenya, by dint of article 1 of the Constitution.

32. The guiding principles under article 163(4) of the constitution of Kenya, 2010 were that: a court’s jurisdiction was regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent; the chain of courts in the constitutional set-up had the professional competence to adjudicate upon disputes; and only cardinal issues of law or jurisprudential moment deserved the further input of the Supreme Court; the lower court’s determination of an issue appealed against ought to take a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court; an appeal within the ambit of article 163(4)(a) was one founded on cogent issues of constitutional controversy.

With regard to election petitions, the Elections Act and the Regulations were normative derivatives of the Constitution and, in interpreting them, a court of law could not disengage from the Constitution.

33. Democracy was predicated upon notions of free choice, and fair competition. The freedom to choose was cardinal to democratic processes, to such an extent it constituted the heart and soul of
34. Kenya’s political history had been characterized by large-scale electoral injustice. This was what the Constitution of Kenya, 2010 sought to correct, through elaborate provisions, and the adoption of exemplary standards in our electoral system.

35. Constitutional provisions were by themselves not enough. The duty-bearers, ought to all invest in emancipating and protecting the vote. Once the Constitution gave citizens the right to vote, the freedom to choose, and conditions were created for the realization of that right, it was not the business of the court to aid the indolent.

36. The election was first and foremost the citizen’s election. Every Kenyan ought to protect his or her right to vote and the right to participate in the political affairs of the nation. It was upon exercising all the rights which the Constitution bestowed upon the citizen, that she or he could claim the sovereign power that she or he donated to her or his representative.

37. Therefore, it was time to develop election-petition litigation: depart from the practice in which a petitioner pleaded 30 grounds for challenging an election, but only proffered cogent evidence for 3 grounds. Every party in an election needed to pull their own weight, to ensure that the ideals in article 86 were achieved. As a result, there would be simple, accurate, verifiable, secure, accountable, transparent elections. The election belonged to everybody, and it was, therefore, in everybody’s collective interest, and in everybody’s collective and solemn duty, to safeguard it.

38. Given the strict electoral timelines in the Constitution, it was clear that the above collective constitutional responsibility to ensure free and fair elections would result in cogent grounds upon which election results would be challenged. There would be candidates conceding defeat in elections because they had been free and fair and electoral litigation that could be ended through consent of the parties because they agreed that the grounds upon which the election results were based, were solid and not frivolous.

39. The constitutionally-mandated agency for electoral management, the IEBC, ought to demonstrate competence, impartiality, fairness, and a remarkably high sense of accountability to the public, and the parties who were its primary customers. It had to embrace high disclosure standards, and avoid conduct such as hoarding of information and data that the public had the right to, both as a matter of course, and also as a matter of article 35 of the Constitution. Materials that were in the possession of the IEBC were not private property but public resources.

40. The IEBC, therefore, ought to demonstrate an instant readiness to respond to public concerns, whenever these were raised and to maintain a public-accountability posture at all time. Public confidence in the electoral agency would only be realized if two tests were constantly met: the test of openness in the management of the entire electoral process, and the test of competence.

The Judgment of the Court of Appeal annulling the election of the Appellant quashed. The part of the said Judgment of the Court of Appeal recommending to the Director of Public Prosecutions the conduct of investigations to determine whether an election offence was committed by PW4, Stephen Mugambi and PW6, Christine Kananu George affirmed.

The Petition of Appeal dated 20th March, 2014 allowed. The declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the seat of Governor of Meru County restored.
Court of Appeal Cases

Circumstances in which there would be a common intention to commit murder

Dickson Mwangi Munene & another v Republic

Criminal Appeal No 314 of 2011

Court of Appeal at Nairobi

R N Nambuye, D K Maraga & J Mohammed, JJ.

February 28, 2014

Reported by Beryl A Ikamari

Brief facts

On Friday afternoon, on January 23, 2009, the two appellants who were friends met at the 2nd appellant’s home and drank alcohol at the home. Thereafter they proceeded to various clubs and bars within Nairobi area for more drinking. They had drunk for 14 hours when the events leading up to the killing of the deceased person began at Crooked Q Club.

It was alleged that the deceased insulted a person called Tish and also insulted a friend to the appellants, known as Sagini, asking him whether he was gay. It was said that the remark made against Sagini caused a scuffle between the deceased person and his friends on one part and Sagini and his friends, who included the appellants, on the other part. It was claimed that in the course of the scuffle, the deceased person also insulted the 2nd appellant, while asking who the 2nd appellant was.

The bouncers at Crooked Q Club attempted to separate the two groups involved in the scuffle. When the 2nd appellant was restrained he called out to the 1st appellant in anger. Meanwhile, the deceased was driven off the club by his brother. In response, the 1st appellant pursued the deceased person. The 1st appellant, an armed police officer, caught up with the deceased near Sarit Centre. In an attempted arrest, he threw handcuffs at the deceased. The deceased did not agree to take up the handcuffs. There was a struggle in which gunshot were heard and the deceased was fatally injured.

At the High Court hearing, in a judgment delivered on October 5, 2011, by Justice Warsame, the appellants were both convicted and sentenced to death. The appellants lodged an appeal against the judgment at the Court of Appeal.

Issues

Whether the weapon, a gun, used to kill the deceased was identified.

Whether the person who killed the deceased was identified.

Whether the 1st appellant had the intention, malice aforethought, necessary to convict him of the offence of murder.

Whether there was a common intention, between the two appellants, to kill or to cause grievous harm to the deceased.

Criminal Law - murder - intention to commit murder (malice aforethought)-whether firing gunshot at a person on the stomach in an alleged attempt effect arrest was sufficient to constitute an intention to murder-Penal Code (Cap 63); section 206.

Criminal Law - joint offenders-common intention-the circumstances in which the court would find that an accused person had a common intention to commit an offence jointly with other persons-Penal Code (Cap 63); section 21.

Held

1. There were various serial numbers given to identify the gun which was used to shoot the deceased and such inconsistencies created confusion. However, the evidence of the 1st appellant was that it was the deceased who grabbed his gun, which was insecurely fastened on his waist and fired it. Therefore, the evidence availed was sufficient to identify the weapon used as the gun which the 1st appellant had in his possession.

2. There was also confusion concerning the rounds
of ammunition used. The Arms Movement Book showed that the 1st appellant was issued with 13 rounds of ammunition but he surrendered 11 rounds of ammunition and 2 empty cartridges were recovered from the scene of crime. Further, the pathologist’s evidence was that 3 shots were fired at the deceased.

3. The figures on the rounds of ammunition and the shots fired did not tally, but such differences in figures would not negate the finding that it was the 1st appellant’s gun that was used to fire the fatal shots at the deceased.

4. When the 1st appellant attempted to handcuff the deceased, there was a struggle between them. However, for two reasons, the deceased could not have shot himself, namely; The 1st appellant, at the investigation stage had not alleged that any other person gained possession of his gun, at the material time. Therefore, the gun was not dusted for fingerprints by the investigating officers.

5. The pathologist’s evidence was that the accused had been shot at close range from a higher level in front. There was no evidence that the deceased and the appellant had a struggle on the ground (floor). The struggle ensued while they were both standing. If the deceased had grabbed the gun and accidentally shot himself, the trajectory of the gunshots would have been horizontal and not vertical and not downwards as the pathologist had found.

6. It was the 1st appellant that shot the deceased. The mens rea, malice aforethought, for murder, as recognized in section 206 of the Penal Code (Cap 63) included an intention to cause death or to do grievous harm to any person, whether that person was actually killed or not. If the 1st appellant intended to subdue the deceased, he would have aimed to shoot him on the legs or arms. By shooting the deceased on the stomach the 1st appellant either intended to kill the deceased or recklessly shot him, while being indifferent to the consequences of the shooting.

7. The circumstances were such that the 1st appellant had the malice aforethought necessary to convict him of the offence of murder. As provided in section 21 of the Penal Code (Cap 63), for a common intention to be deemed to have existed, it was necessary to show that the accused person: - had the criminal intention to commit the offence charged, jointly with others; where the criminal act committed was outside the common purpose pursued, such an act was a natural or foreseeable consequence of pursuing the common purpose; and, the accused was aware of the common intention pursued and the nature of the act to be carried on, when he or she agreed to participate in the joint criminal act.

8. There was some confrontation between the deceased person and the 2nd appellant outside the club. The confrontation arose from an insult made by the deceased, questioning whether one of the appellants’ friends was gay. It was not clear whether the confrontation included physical violence in the form of hitting or kicking, either by the deceased person or the 2nd appellant. It was the 2nd appellant who called on the 1st appellant when he had been restrained in order to end the scuffle.

9. The link between the 2nd appellant and the 1st appellant’s act of shooting the deceased was extremely tenuous. The evidence availed did not reveal a common intention to shoot and kill the deceased. The 2nd appellant could not be liable for the 1st appellant’s actions.

The 1st appellant’s appeal was dismissed & the 2nd appellant’s appeal was allowed.
Precondition of presidential consent before transfer of 1st and 2nd row beach plots is unconstitutional and illegal

Attorney General & 6 others v Mohamed Balala & 10 others (Law Society of Kenya)

Civil Appeal No 191 of 2012

Court of Appeal at Mombasa

H.M. Okwengu, A. Makhandia, F. Sichale, JJA

March 27, 2014

Reported by Lynette A. Jakakimba & Valerie Adhiambo

Held

1. Article 258 of the Constitution of Kenya, allowed every person the right to institute court proceedings claiming a right or fundamental freedom had been infringed or was threatened with contravention and that included public interest suits. The Mombasa Law Society (a branch of the Law Society of Kenya) therefore had the locus standi to institute the matter on their own behalf and on behalf of their clients.

2. Article 40 the Constitution of Kenya, 2010 on the right to property allowed the owner of the land to use, transfer, enjoy and control their property. Therefore a condition of obtaining presidential consent before transferring the plot limited the owners’ right to property and was unnecessary clog or fetter to that freedom and indeed the freedom to contract.

3. Whatever was done in the name of the country had to have a legal basis and supported by the constitution. The requirement for presidential consent was therefore opaque and could not be traced to any legal ground for evaluation nor rationale.

4. The arguments that the requirements for presidential consent was done in the interest of national security could not stand. Although national security would ordinarily triumph over the rights of individuals it was however in such instances that the court had to be convinced that it was absolutely necessary before sanctioning it. Furthermore such a decision had to be based on the law so as to prevent abuse. There was no law governing that presidential fiat (of requiring consents) thus it was left open and could be misused and abused.

Appeal was dismissed with costs to the respondents.

A promise by the President to alienate or allocate land is not enforceable in law.
A promise by the President to alienate or allocate land is not enforceable in law
Lucy Migigo & 550 others v. Minister for Lands & 4 others [2011] eKLR
Civil Appeal No. 227 of 2011
Court of Appeal at Nyeri
M. Koome, P. M. Mwilu & J. Otieno- Odek, J.J.A.
January 22, 2014
Reported by Nelson Tunoi & Riziki Emukule

Brief Facts:
The applicants (Lucy Migigo & 550 others) brought a judicial review appeal for an order of mandamus to issue against the respondents and in the alternative compensation for land. The facts of the case were that while in the employment of the Forest department of Ontulili forest within Mt. Kenya forest in Meru in the 1970s, they had petitioned the then president (Jomo Kenyatta) to allot them land from this forest since they were squatters.

Following their visit to the President, the then Ministers for Natural Resources and for Lands and Settlements respectively were instructed to earmark suitable land to be excised from Ontulili forest for these squatters. The appellants were thereafter allocated a total of 973 hectares through Legal Notices No. 68 of 1975 and No. 107 of 1977.

This land was later taken over by a company associated with the 5th appellant hence the present suit.

Issues:
Whether the appellants had any interest in the suit property capable of being enforced?

Whether a non-vested and promissory interest in land was enforceable in law?

Whether a promise by the President to alienate or allocate land was enforceable in law?

Whether the appellants were squatters in the circumstances and what rights, if any, did they have as squatters?

Whether the doctrine of rights in alieno solo was applicable in this case?

Whether an order of mandamus could be issued against private citizens?

When is time deemed to begin running for purposes of limitation in respect to an order of mandamus?

Whether a prayer for compensation for equivalent land was available in judicial review proceedings?

Contract law - privity of contract doctrine-whether appellants had any registerable interest or beneficial trusteeship in the suit property-whether a non-vested and promissory interest in land was enforceable in law-whether the doctrine of rights in alieno solo was applicable in the circumstances of the case-Law of Contract Act, section 3(3)

Judicial review - mandamus-appeal-whether an order of mandamus could be issued against private persons-when is time deemed to begin running for purposes of limitation in respect of an order of mandamus-

Whether a prayer for equivalent land compensation was available in judicial review proceedings-whether the appeal had merit

Constitutional law - fundamental rights and freedoms-bill of rights-right to human dignity-whether the appellants were by definition squatters in the circumstances of the case-whether the provisions under the bill of rights were meant to impose a constitutional duty on the government to allocate land to any squatter or person-whether the appellants had any interest in the suit property capable of being enforced-Constitution of Kenya, 2010 article 28

Jurisdiction - jurisdiction of court on land matters-mandate of the National Land Commission-whether a promise by the President to alienate or allocate land was enforceable in law-Constitution of Kenya, 2010, article 67

Words and phrases
“Rights in alieno solo”- rights that a party has over another person’s land.
Held

1. The order of mandamus compels a public body to exercise a duty bestowed upon it by law or to judiciously exercise a discretionary power. Given that the 4th and 5th respondents were not public bodies but private citizens, then the order of mandamus could not issue against them. Moreover, such an order of mandamus could not be issued against a person if it would not be within his power to comply with it and would of necessity fail.

2. With regard to the 1st, 2nd and 3rd respondents, who were a public body, the order of mandamus could issue against them since such order would compel them to perform a specific act where statute imposed a clear and qualified duty to that act. However, where an individual was challenging a decision that he had no entitlement to, the appropriate remedy would be an order of certiorari to quash the decision and not an order compelling the authority to provide the benefit sought.

3. The appellant had not demonstrated or pointed out any specific statutory obligation vested in the 1st, 2nd and 3rd respondents which had been violated. Given that mandamus compels performance of a statutory public duty, it was up to the appellants to adduce evidence showing the constitutional or statutory duty on the part of the respondents that was owed to them and that was breached. Failure to do this was fatal and an order of mandamus could not issue since there was an absence of a specific statutory obligation to be enforced.

4. The suit property the appellants were claiming was excised from Mt. Kenya for their benefit comprising of two pieces of land (Land Reference Nos. 13269 and 12234) respectively were registered in the name of the 5th respondent who later transferred it to the 4th respondent. The appellants never took physical possession of the land and this failure to take possession and occupy the land meant that they were not squatters as they claimed to be.

5. The doctrine of rights in alieno solo recognized various categories of rights that a third party could have over another person's land such as easements, licenses, profits, restrictive covenants, overriding interests and mortgages. The appellants did not have such registerable interest or beneficial trusteeship in the suit property and as such the doctrine of rights in alieno solo was inapplicable to their case and they had no enforceable third party rights over the suit property. With regard to the issue of the promise for land made by the former President (Jomo Kenyatta) to the alleged squatters, the order of mandamus could not issue to enforce a promise to do anything in the future and neither could mandamus issue to enforce a promise not underpinned by a statutory provision and moreover a promise could not create nor convey an interest in land.

6. The Law of Contract Act clearly spelt out the requirements for a valid instrument to convey an interest in land with a key requirement being a memorandum or note in writing and signed by the party to be charged. There was no privity of contract between the appellants and respondents in this case in relation to the suit property and a squatter could have no privity of estate that runs with the estate.

7. Given the absence of such privity of contract between the appellants and the respondents, lack of a letter of allotment from the government to the appellants in relation to the suit property and also an absence of part performance by the appellants to occupy the land, the averred promise by the former President to give them land was unenforceable by an order of mandamus. It was trite law that a promise to enter into a contract was not enforceable.

8. On whether the appellants had a vested interest in the suit property, the rule of thumb was for the interest to vest, it had to do so within 21 years. In the instant case, when the legal gazette notices were issued and land excised from the forest, the parcels of land created vested in the 4th respondents and not upon the appellants.

9. The promise by the former President to allot land was a future promise which did not vest any interest in the suit property on the appellants. Moreover, it was trite law that a future interest in land was void if it did not vest within the stipulated time frame.

10. With regard to the issue of limitation period, two aspects were considered namely, the limitation period for instituting judicial review proceedings under Order 53 of the Civil Procedure Rules and the limitation period for recovery of land under the
Limitation of Actions Act (cap 22 of the Laws of Kenya). There was a six month limitation period for an order of certiorari but none for institution of the order of mandamus. Limitation for such orders was to be determined by the reasonableness and length of time between the cause of action and time for filing suit.

11. The order of mandamus was not an appropriate remedy to issue under the new constitutional dispensation and the appellants had no registered, possessor or future enforceable right over the suit property. The appellants also did not show any statutory obligation owed to them that had been breached. On the issue of limitation period for the issuance of an order of mandamus, the appellate court found that the trial court erred in arriving at the figure of 50 years without indicating as to how they had arrived at that figure.

12. Although article 28 of the Constitution of Kenya, 2010 was to the effect that every person had the inherent dignity and the right to have that dignity respected and protected, the article was not meant to impose a constitutional duty on the government to allocate land to any squatter or person. Likewise, the provisions on social justice, equality, equity and prevention of inhuman, cruel and degrading treatment were not meant to be used to demand land allocation from the government.

13. It was the mandate of the National Land Commission to investigate issues of historical land injustices and to recommend appropriate redress as per article 67 (1) (e) of the Constitution of Kenya, 2010. It was not the duty of the courts to allocate land and more so the judicial remedy of mandamus was not created to settle ownership disputes or to confer title to land.

14. The order of mandamus did not lie as a matter of course against a public officer and was a matter of court discretion. However, if such issuance of the order would lead to judicial interference with the executive arm of government, then the court would decline to issue it. If the order of mandamus was granted it would be contrary to the spirit of Chapter Five of the Constitution relating to management of land as a resource in the country as well as interfere with the executive arm of government in resource allocation.

Appeal dismissed with costs.

Court of Appeal suspends switch off date from analogue - digital migration broadcasting
Royal Media Services Ltd & 2 others v Attorney General & 8 others
Civil Appeal No.4 of 2014
Court of Appeal at Nairobi
R N Nambuye, D K Maraga & D K Musinga, JJ.A
March 28, 2014
Reported by Teddy Musiga

Brief facts:
The instant appeal arose out of a decision from the High Court delivered by Justice Majanja on the 23rd of December, 2013 where the appellants’ petition was dismissed with costs. The appellants (then petitioners) had mainly accused the 2nd and 3rd respondents (Ministry of Information Communication & Technology & Communications Commissions of Kenya respectively) of violating their constitutional rights under articles 33 and 34 of the Constitution in the proposed migration from analogue to digital terrestrial broadcasting platform by refusing to grant the 1st and 2nd appellants (Royal Media Services Ltd & Nation Media Group Ltd respectively) a Broadcasting Signal Distribution license (BSD)

Issues
Whether legitimate expectation for the grant of Broadcasting Signal Distribution (BSD) license can arise on account of substantial investments in the broadcasting sector Whether or not there exist circumstances in which an award of Broadcasting Signal Distribution (BSD) license could be issued without a tendering process. What are the circumstances in which the doctrine of issue estoppel arises in litigation?

Whether Communications Commission of Kenya (CCK) as at the time (then) constituted was the regulatory body (to regulate broadcasting and other electronic media) envisaged under article 34(5) of the Constitution of Kenya, 2010.
Whether the implementation of the digital migration from analogue to digital broadcasting violated any fundamental rights and freedoms and if so, whether the process could be stopped, varied or delayed in order to vindicate those fundamental rights and freedoms.

Constitutional Law – fundamental rights and freedoms – enforcement of rights – freedom of the media – whether the implementation of the analogue-digital migration broadcasting violated any fundamental rights & freedoms – constitution of Kenya, 2010, article 34


Per R N Nambuye, JA

Held

1. Article 40 of the Constitution of Kenya protected the right to property. Once property was developed or acquired from a third party, it became personal property and in terms of the regulation 14(2) (b) and 29 of LN 187/2009, any accessing and airing of such material without consent of the owner became trespass. The moment it became personal property then it fell into the protective bracket provided under article 40(1) of the constitution of Kenya, 2010. Therefore the intellectual property rights of the appellants had been infringed/ violated and there was a real threat of continued violation if no restraint order was given by the court.

2. Since article 40 of the Constitution of Kenya, 2010 allowed for protection of intellectual property, the appellants had a right to protect what they owned. On the other hand, application for licensing could only be done through a tendering process. As such there was nothing wrong for the appellants to be licensed as they were considering that they already had infrastructure in place and were holding onto convertible frequencies.

3. Through the framing of the tender notice, the 3rd respondent (Communications Commissions of Kenya) held out to the intending licensees; That the conditions put out in the tender notice were the only conditions that were required to be fulfilled by an intending licensee;

That they (CCK) would comply with both the substantive law and the regulations;

4. Consequently, the appellants acknowledging the above as the only procedures for application for broadcasting signal distribution license therefore had a legitimate expectation which was not met by the respondents in the condition in which they were so as to translate from analogue to digital broadcasting.

5. The doctrine of issue estoppel barred a party from re-litigating matters already ruled on by the court. It only arose regarding determination of facts. In the instant case, issue estoppel did not arise because of three reasons;

The tendering process was not fair as the 3rd respondent (CCK) acted outside the substantive law and regulations thereunder for regulating broadcasting;

The 1st and 2nd appellants did not acquiesce to that process and challenged it immediately;

The conditions precedent for the issuance of a license by the Permanent Secretary were also without basis as it was contrary to the same provisions of law and regulations.

6. The proper forum to adjudicate over issues touching on the Bill of rights was the High Court. There was sufficient material to link the appellants’ claim to constitutional issues capable of being adjudicated upon by the High court such as infringement of article 34(3) in connection with denial of the subject license to the appellants, issues as to whether the 3rd respondent (CCK) was the body contemplated in article 34(5), whether own content or that acquired from third parties fell into the category of intellectual property thus capable of being protected as such. Since there was no set number of issues required to be met before one could access a constitutional court, even one issue sufficed.

7. Article 24(3) of the Constitution of Kenya, 2010 required the entity intending to create a limitation to the enjoyment of any right to justify that limitation both in the intended law and in the regulation. In the instant case, it was therefore important for the
CCK as the regulator and provider to justify such limitation.

8. Good governance demanded of the regulator (CCK) to comply with the conditionalities set by both the substantive law and the regulations on disqualification for one to hold a broadcasting digital distribution license. They failed to do so by disqualifying the 1st and 2nd appellants from the tendering process on grounds placed on the tender documents and yet to their knowledge none of those had been made as disqualifying conditions in the tender notice. It was also humiliating to degrade the appellants by knocking them out of the industry on such a technicality contrary to the value of human dignity under article 10 of the Constitution of Kenya, 2010 as it showed them to be persons without integrity.

9. Communications Commission of Kenya (CCK) was not the body envisaged under article 34(5) of the Constitution of Kenya, 2010. The operative words were “independent of government”. Therefore, CCK as at the time of execution of its mandate in relation to litigation that gave rise to the instant appeal was not independent of government. It therefore had no legitimacy to do what it did.

Appellants appeal partially dismissed in relation to the High Court’s order striking out paragraphs 50 and 51 of the petition and paragraph 16, 17, and 18 of the supporting affidavits of Samuel Kamau Macharia and paragraph 19 of the supplementary affidavit of Linus Gitahi (some of the media owners).

The rest of the appeal was allowed as follows:

1. In view of the violation of the Constitution in failing to reconstitute CCK in tandem with the requirements of Article 34(3)(b) the appellants were entitled to seek relief by way of a constitutional petition.

2. The 3rd respondent’s direction to the 4th, 5th, 6th and 7th respondents to air the appellants’ Free to air (FTA) programmes without their consent was a violation of the appellants’ Intellectual Property Rights and was declared null and void.

3. That in its composition at the material time, CCK was not the independent body envisaged by Article 34(3)(b) to regulate airwaves in Kenya after the promulgation of the Constitution of Kenya, 2010 consequently the public procurement process of determining applications for the BSD licenses that it conducted in connection with this matter was therefore null and void.

4. An independent body or authority constituted strictly in accordance with Article 34(3)(b) was directed to conduct the tendering process afresh.

5. In view of the appellants’ massive investment in the broadcasting industry, it was directed that an independent regulator constituted as stated above do issue a BSD license to the appellants without going through the tendering process upon meeting the terms and conditions set out in the appropriate law and applicable to other licensees.

6. The issue of a BSD license to the 6th respondent was declared null and void. The 3rd respondent was to refund to the 6th respondent whatever fees it paid for that license.

7. Pending compliance with the above orders as regards BSD licensing, the 2nd and 3rd respondents were restrained from switching off the appellants’ analogue frequencies, broadcast spectrums and broadcasting services.

8. In order to comply with these orders, the new switch-off date was to be not later than 30th September, 2014.

The 1st, 2nd, and 3rd respondents were to pay the appellants’ and the 8th respondents’ costs

Per D K Maraga, JA

Held

1. Order 19 rules 6 and 7 of the Civil Procedure Code entitled a judge to strike out scandalous pleadings without a formal application being made or even suo moto. Therefore the trial court was right in striking out some paragraphs of the petition and supporting affidavit.

2. The highest level an international convention could get to in the municipal law hierarchy was that of an ordinary Act of parliament. The trial court neither elevated the RRC-06 agreement above nor even equated it to the Constitution.

3. To allow any broadcaster to air free to air (FTA) programmes of others without their consent
amounted to infringement on the intellectual property rights of the owners of those programmes. Therefore, the 3rd respondent’s (CCK) direction to the 4th, 5th, 6th and 7th respondents was null and void.

4. Immediately after promulgating the constitution, and at least before making any major decisions like the implementation of RRC-06 agreement with far reaching implications, the government was obliged to strictly comply with the letter of the Constitution by altering composition of CCK to align it with article 34(3)(b) of the Constitution even before the requisite legislation was passed.

5. Section 6 of the Kenya Information and Communication Act 1998 listed the composition of CCK as appointees of the Executive. A body under such control was not the kind of regulatory authority envisioned under article 34(3)(b) of the Constitution of Kenya, 2010. Therefore the broadcasting signal distribution licenses granted by CCK after the promulgation of the Constitution were null and void. A regulator appointed strictly in accordance with article 34(3)(b) had to conduct the tendering process afresh and issue fresh broadcasting signal distribution licenses.

6. For a legitimate expectation to arise, the decisions of the administrative authority had to affect the person by depriving him of some benefit or advantage which either; he had in the past been permitted by the decision maker to enjoy and which he could legitimately expect to be permitted to continue to do and until there had been communication to him about some rational grounds for withdrawing it on which he had been given an opportunity to comment; or he had received assurance from the decision maker that the benefit or advantage would not be withdrawn without giving him first the opportunity of advancing reasons for contending why it couldn't be withdrawn. (Joel Nyabuto Omwenga & 2 others v Independent Electoral & Boundaries Commission & Another [2013]Eklr)

7. Failure to grant the appellants a BSD license affected their right to media establishment and to freely and economically broadcast their programmes and thus rendered their infrastructure worthless. Consequently, the appellants had (and continued to have) a legitimate expectation and were entitled to a BSD license without going through the tender process.

8. The principle of issue estoppel developed as a proscription against re-opening and re-litigating a point of fact or law that had in a previous suit been distinctly put in issue and finally decided. Issue estoppel could arise where a plea of res judicata could not be established because the causes of action were not the same. (Trade Bank Ltd v LZ Engineering Construction Ltd [2000] 1 EA 266)

9. The appellants should have challenged the legality of CCK’s action in a judicial review application pursuant to section 100 of the Public Procurement and Disposal Act, but that was no bar as the entire process conducted by CCK was fundamentally flawed. Allowing that process and the final decision of the Public Procurement Review Board to stand would have sanctioned a violation of the Constitution. The appellants did not need to file two cases – a constitutional petition to challenge the constitutionality of the tender process and another to enforce their intellectual property rights. Therefore, the petition giving rise to the instant appeal was competently before the court and was not barred by the doctrine of issue estoppel.

Appeal allowed and judgment of the trial court delivered on 23rd December, 2013 by Majanja J. set aside with costs.

Appellant’s claim that the trial court erred in striking out some paragraphs of the petition and some averments in the affidavits in support of their petition dismissed.

By directing the 4th, 5th, 6th and 7th respondents to air the appellants Free to Air programmes, the 3rd respondent violated the appellants’ intellectual property rights.

The new switch off date to be not later than 30th September, 2014. Respondents restrained from switching off or in any way interfering with the appellant’s analogue broadcasting.
Per D K Musinga, JA.

Held:

1. The appellants’ contention that article 34 of the Constitution of Kenya, 2010 entitled them to a Broadcasting signal Distribution (BSD) license as a matter of right was not properly grounded both on facts and law.

2. Factually, the appellants’ right to broadcast was not limited by lack of a BSD license. There was a distinction between provision of broadcast content and signal distribution of the content. The appellants’ freedom of establishment as content producers was not pegged on the issuance of a BSD license. BSD license was subject to licensing procedures as stipulated under article 34(3) of the Constitution of Kenya, 2010 and the Migration Taskforce Report which recommended that interested investors including the then current broadcasters could be licensed to offer signal distribution services.

3. Article 34(3) (b) of the Constitution of Kenya, 2010 required licensing procedures that were independent of control by the government, political or commercial interests. Undisputedly, the minister and all the other members of the board were appointees of the President.

4. Communications Commission of Kenya (CCK) as then constituted did not meet the constitutional threshold to regulate airwaves and undertake licensing of signal distribution. CCK was therefore not independent the body envisaged under article 34 of the Constitution of Kenya, 2010.

5. Issue estoppel arose when a particular issue forming a necessary ingredient in a cause of action had been litigated upon and decided, and the same issue was raised in a subsequent proceeding between the same parties involving a different cause of action in which the same issue was relevant and one of the parties sought to re-open the issue. That being the case, if the appellants were questioning no more than the merits of the tender committee of CCK then they would have been estopped. However, since they raised the issue of constitutionality of the licensing process given the composition of the CCK Board then the appellants were not barred from filing their petition by doctrine of issue estoppel and neither was it a collateral attack on the decision of the Public Procurement Review Administrative Board.

6. The appellants were unable to prove the infringement of their intellectual property rights. Further to it, a violation of intellectual property rights was not a matter to be addressed by a petition to enforce fundamental rights and freedoms when there was a specific legal regime established by law to address such complaints.

7. A proper implementation of the Regional Conference Agreement (RRC-06) could not occasion any violation of the appellants’ constitutional rights.

8. Legitimate expectation could not prevail against statute and the constitution. If a person or statutory body promised certain relief or benefit to a claimant and undertook to do something in favour of a claimant but in a way that offended the constitution, the claimant could not purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise.

9. Notwithstanding the appellants’ investments or promises made to them by CCK or any other government official, the constitutional principles for the grant of licenses had to prevail and no one could claim that they were entitled to a BSD license as of right as that would be contrary to the letter and spirit of articles 34(3) and (5) of the Constitution of Kenya, 2010 as well as values and principles of governance under article 10 which included non-discrimination, good governance, integrity, transparency and accountability.

10. The ICT policy guidelines spoke of “encouraging the growth of a broadcasting industry that was
efficient, competitive and responsive to audience needs and susceptibilities, provision of a licensing process and for the acquisition and allocation of frequencies through an equitable process.” That could not be achieved if a government functionary was allowed to issue an executive fiat to CCK as to who could get a BSD license or where the appellants insisted that they had to be given the license because of their massive investments in the broadcasting industry or because a certain government official promised that they would get a license. That would be unconstitutional and could not be the basis for a grant of a BSD license on the doctrine of legitimate expectation.

11. Save for the holdings on the independence of the CCK as an independent body contemplated by article 34(3) (b) and (4) of the constitution of Kenya, 2010, and the issue of issue estoppel, the judgments by the trial court was sound.

Since the process of the grant of the second BSD license was unconstitutional, it was cancelled. The 6th respondent (Pan African Network Group Kenya Ltd) was entitled to a refund of the consideration paid to the 3rd respondent (Communications Commission of Kenya) for the grant of the respondent.

The licensing Authority was to proceed to advertise afresh for the award of licenses of National terrestrial broadcasting signal distribution network in strict conformity to the dictates of the constitution and the applicable laws and guidelines.

The government and all stakeholders were to fix a new switch off date not later than 30th September, 2014. Pending that date, the respondents were restrained from switching off the appellants’ analogue frequencies, broadcast spectrums and broadcasting services.

Costs of the appeal as well as the 8th respondent were to be borne by the 1st, 2nd and 3rd respondents.

IEBC to undertake steps to ensure progressive realization of the right to vote for Kenyans living in the diaspora

New Vision Kenya (NVK Mageuzi) & 3 others v Independent Electoral & Boundaries Commission & 5 others

Court of Appeal at Nairobi
Civil Appeal No 350 of 2012
R Nambuye, D K Musinga & K M’inoti, JJA
June 6, 2014

Reported by Phoebe Ida Ayaya and Maryconcepter Nzakuva

Brief facts
The Appellants sought from the High Court a declaration that Kenyan citizens in the diaspora possessed a fundamental and inalienable right to be registered as voters and to vote and/or seek elective office pursuant to article 38(3)(a) and (b) of the Constitution; and a declaration that the failure by the Respondents to provide the diaspora with the opportunity to register and vote was a violation to their fundamental right to vote and a contravention of article 82(1) of the Constitution which provided for the progressive registration of citizens residing outside Kenya and the progressive realization of their right to vote.

They also sought to have the 1st Respondent (IEBC) ordered by the court to declare and set up more polling centers over and above embassies and consulates and deploy IEBC officials as returning officers or to collaborate with host electoral bodies to provide similar service. The High Court dismissed that petition. The Appellants, aggrieved by the dismissal appealed.

Issues:
Whether the trial court misapprehended the nature and extent of the right to vote for Kenyan citizens residing outside the country.

Whether the trial court misapprehended the responsibility of the IEBC in facilitating the right to vote of Kenyan Citizens residing abroad.

Whether the trial court erred in failing to grant the Appellants the reliefs they had sought in their petition.

Constitutional Law - fundamental rights and freedoms - political rights - right to be registered as a voter - right to vote in an election - responsibility of the IEBC to carry out registration of citizens residing outside Kenya and to ensure progressive realization of their right to vote - whether the trial court misapprehended
the nature and extent of the right to vote for Kenyan citizens residing outside the country - whether the trial court misapprehended the responsibility of the IEBC in facilitating the right to vote of Kenyan Citizens residing abroad - Constitution of Kenya, 2010 articles 38(3) (a)&(b), & 82(1).

Held:
1. The right to vote was a fundamental right recognized under the Bill of Rights as enshrined in the Constitution and the enjoyment of the said right was subject only to limitations contemplated in the Constitution. Limitation was only permissible if it was in accordance with the law, was reasonable and justifiable.

2. The said right to vote was however not absolute. Reasonable restrictions on the right were permissible. However, in order to determine what was meant by “reasonable restrictions”, one had to interrogate the meaning of articles 81, 82 and 83 of the Constitution on general principles for the electoral system, legislation on elections and registration as a voter.

Article 21 of the Constitution obligated the state to take measures to achieve the progressive realization of rights guaranteed under the Bill of Rights with article 20(5)(a) placing an obligation on the state to show that it did not have resources to ensure enjoyment of the right by a claimant.

3. In compliance with the obligation under article 21 of the Constitution, the Government established the IEBC under article 88. To facilitate the exercise of the mandate bestowed on the IEBC and in obedience with articles 81, 82 and 83 of the Constitution, Parliament enacted the Independent Electoral and Boundaries Commission Act No. 9 of the 2011.

4. Section 4 of the Act gave the Commission the mandate to inter alia conduct and/or supervise elections. Under section 5(1) of the Act, registration of voters was anticipated to be continuous. Section 109 of the Act made provision for the promulgation of regulations and pursuant to this provision, regulations governing the registration of voters living outside Kenya were made. The Regulations also provided a framework for the progressive realization of the right of Kenyan citizens living outside Kenya.

5. Notably, the IEBC was given the responsibility of implementing the provisions relating to the realization of the rights of Kenyan citizens living outside Kenya because it had the technical expertise and competence to do so since that right, for persons residing abroad, presented complex problems.

6. By virtue of the fact that the decision of the trial court was rendered on the 15th day of November, 2012 by which time the IEBC Regulations on the preferential voting by Kenyan citizens living abroad had already come into force, it would not have been practicable for the IEBC to roll out a registration and voting system to accommodate all Kenyans, including all those in the diaspora.

7. Some reasonable restrictions were on account of lack of both financial and human resources to set up Embassies, High Commissions and Consulates in each and every country where a Kenyan could be living. In addition, the expansive right to vote had just been introduced in 2010 and by November, 2012 the elections were less than six months away.

8. Article 82(1)(e) of the Constitution left no doubt that the right to vote by Kenyans in the diaspora was to be achieved progressively. The article required Parliament to enact legislation that among other things provided for the progressive registration of the right to vote for citizens residing outside Kenya. Although the proximity of the time span between the time when IEBC was requested to take remedial action to facilitate the Appellant's participation in the general election could have been too short for it to make any meaningful arrangements, directions on the way forward as regarded future preparedness were feasible, considering that there were other declarations which were sought besides the one seeking facilitation to vote.

9. The Appellants had a genuine concern in moving to court in a bid to enforce their right to vote. It was on account of constraints attributable to the state that they were not able to participate in the said elections.

10. Having missed out on the 4th March, 2013 elections, the Appellants were entitled to seek the court’s intervention to ensure that in future, more Kenyans in the diaspora had the opportunity to vote. Hence, their decision to pursue this appeal to its logical conclusion was sound and proper in order for them to seek directions to issue to the IEBC in particular, and the state in general, to take remedial measures to avoid a repeat of the 4th March, 2013 scenario in so far as Kenyans in the diaspora are concerned.

Appeal partially allowed.
Brief Facts:
The Claimant’s services were terminated on the ground that she was unable to upgrade her professional skills as demanded by the Respondents.

Upon termination, the Claimant referred the issue to the Ministry of Labour, who, upon hearing the parties decided that the Claimant’s termination was unfair, and recommended that she be paid an equivalent of one year’s wages as provided under section 49(1)(c) of the Employment Act of 2007. The Respondents were aggrieved with that recommendation and brought the matter before the Industrial court.

It was the Respondents’ case that in order to deal with the new job challenges they required the Claimant to upgrade her qualification in accounts from ACNC to CPA I, and that they undertook to refund 50% of the course fee once the Claimant passed her examination.

The Claimant on her part submitted that she was unable to enroll for the training and take the examination because she had just taken a loan; whose repayment deductions did not leave her with enough income to enroll for the training as well as fend for her family.

Issues:
Whether an employer could limit or attempt to limit the right of an employee to dispose of his/her wages in a manner which the employee deems fit.

Did the dismissal of an employee for failing to upgrade their qualification to a desired level, in the circumstances of the case, amount to unfair termination?

Labour Law – Employment Law: termination of employment – termination for failure to upgrade professional skills to a desired level - whether an employer can limit the right of an employee to utilize wages in a manner which the employee deems fit – whether the Claimant was unfairly dismissed - Employment Act of 2007 Section 45 (2), 17 (11),

Section 45 (2) of the Employment Act of 2007 provides as follows:
The termination of employment by an employer is unfair if the employer fails to prove—

that the reason for the termination is valid

that the reason for the termination is a fair reason—related to the employees conduct, capacity or compatibility; or

based on the operational requirements of the employer; and

that the employment was terminated in accordance with fair procedure.

Section 17 (11) of the Employment Act, 2007 provides that:

No employer shall limit or attempt to limit the right of an employee to dispose of his wages in a manner which the employee deems fit, nor by a contract of service or otherwise seek to compel an employee to dispose of his wages or a portion thereof in a particular place or for a particular purpose in which the employer has a direct or indirect beneficial interest.

Held:
1. The Claimant did not refuse to undergo the required training. She had a desire to do so but was incapacitated by compelling financial...
commitments. The Respondents were only prepared to refund 50% of the cost of training on condition that the claimant passed the examinations. In other words, a failure would have meant no refund.

2. If the Respondents wanted to retain the Claimant in employment but at the same time wanted her professional skills enhanced, they were very much capable of sponsoring her fully even if it meant recovering the costs gradually from her salary. Improving the Claimant’s professional skills would not only have benefited the Respondents but the Claimant as well. Therefore, on account of that, the Claimant’s termination was unfair.

3. The Employment Act of 2007, by Section 17 (11), prohibits any employer from limiting or attempting to limit the right of an employee to dispose of his or her wages in a manner he or she sees fit. As a parent, the Claimant’s priority was to educate her child and to repay her loan. The Respondents’ requirement for the Claimant to enroll herself in an accountancy course not only limited her right to use her wages as she pleased, but also amounted to an unfair labour practice; rendering her dismissal unfair, and one that was outside of the justification set out in section 45 (1) of the Employment Act of 2007.

Claimant awarded 6 months’ salary as compensation, at the amount earned monthly at the time of termination

Unfair labor practices and administrative action in relation to disabled employees by an Employer amounts to inhuman and degrading treatment

Duncan Otieno Waga v Attorney General [2014] eKLR

Cause no. 89 of 2013
Industrial Court at Mombasa
Onesmus Makau, J
April 25, 2014

Report by: Njeri Githang’a Kamau & Charles Mutua

Brief Facts
The Claimant was enlisted as a Police Constable into the Kenya Police Force on 22nd March 1986 after successful training at the Kenya Police College. He however developed an eye problem but continued to do special duties allocated by his seniors. These duties included manning the Report Office and the Radio Room. In 2004, the Police Commissioner transferred the Claimant to the Central Police Station despite protest by the Claimant. For the period 2004 – 2008 the Claimant was not assigned any duties although he was fully able to do certain special duties as he used to do at the Central Bank of Kenya Police Post. In 2008, the Claimant appeared before the Medical Board at Nairobi whereby the Board recommended that he be rehabilitated to perform special duties such as Radio Operator, Telegraphist and Receptionist. Contrary to the Board’s recommendation, the Commissioner of Police commenced proceedings for the removal of the Claimant vide a Notice to Show Cause why he should not be removed on medical grounds under Section 30(2) of the Force Standing Order. The Claimant responded to the show cause letter but was nevertheless removed and his appeal to the Commissioner of Police dismissed.

Issues
Whether the retirement of the Claimant on medical ground was tantamount to discrimination and contravention of his rights and freedoms under the statute and international law

Whether a claimant could file a claim for discrimination on medical grounds under the repealed Constitution considering the repealed Constitution did not regard disability as an element of discrimination

Constitutional Law - fundamental rights and freedoms-discrimination-protection from discrimination-equality before the law-termination of employment due to blindness-whether the retirement of the Claimant on medical ground was tantamount to discrimination and contravention of his rights and freedoms under the statute and international law-whether a claimant could file a claim for discrimination on medical grounds under the repealed Constitution considering the repealed Constitution did not regard disability as an element of discrimination-Constiution of Kenya 2010, article 29 (Section 74 of the repealed
Employment Law - termination of employment due to blindness - discrimination under Section 15 and 22 of the Persons with Disabilities Act - whether termination of employment on medical grounds could be brought under these provisions - Constitution of Kenya 2010, article 29 (Section 74 of the repealed constitution) Universal Declaration of Human Rights (UDHR) article 1; Persons with Disabilities Act, section 15 & 22

Held

1. The fact that the Police Service was not employment as known to strict law, put the respondent to a higher obligation to protect and go an extra mile in ensuring that the welfare of those who suffer disability during their service and even after service was held supreme. Consequently, the Force Standing Orders were brought to question on the foregoing basis. At that time and era, there could never be some legislation which continued to run contrary to the Constitution and the international law which had then become part of municipal law once ratified.

2. The retirement of the Claimant on medical grounds was discriminative and a contravention of his fundamental rights and freedoms as enshrined under the Persons with Disabilities Act and the international Human Right instruments. As much as the repealed Constitution did not regard disability as an element of discrimination, Persons with Disabilities Act provided the desired protection to fill up the lacunae that existed in the repealed constitution.

3. The Court could not make declaration that the right to be treated with dignity as provided for under Article 1 of the Universal Declaration of Human Rights (UDHR) had been violated by the Respondent since the cause of action in that dispute was older than the 2010 constitution and as such article 29 and 2(6) of the said Constitution could not apply retrospectively and therefore cannot order recalculation of the pension based on the minimum retirement age of 60 years.

4. The Respondent terminated the Claimant’s employment prematurely and in violation of section 22 of the Persons with Disabilities Act and discriminated against the Claimant and continued to violate section 15 of the Persons with Disabilities Act.

Judgment entered for the claimant in the sum of Kshs.3 million awarded as compensation for premature termination of services and discrimination on ground of disability. Damages were mitigated by the fact that the Claimant was awarded pension which he continued to receive at the expense of the tax payers.
Brief facts:
The Plaintiff (U) sought for the sharing and division of some property held in the names of her former husband the defendant (I). U got married to I when she was 18 years old and did not bring any money into the marriage. She joined her husband in an Auto spares business and she helped with the management of the shops. It was stated that before having difficulties in their marriage U was a good and hardworking wife. It was his testimony that some properties were acquired in the course of his marriage to U, while some was acquired prior to the marriage but was subdivided in the course of the union.

Issues
Whether the equality contemplated by Article 45(3) of the Constitution of Kenya 2010 was an automatic 50:50 sharing of matrimonial property upon dissolution of the marriage.

Whether the Court could apply Article 45(3) in resolving the dispute where the disputed properties were all acquired before the promulgation of the Constitution of Kenya, 2010.

Constitutional law – fundamental rights and freedoms – right to equality – equality in marriage-equality in distribution of matrimonial property-whether the equality contemplated by Article 45(3) of the Constitution of Kenya 2010 was an automatic 50:50 sharing of matrimonial property upon dissolution of the marriage-whether the Court could apply Article 45(3) in resolving a dispute where the disputed properties were all acquired before the promulgation of the Constitution of Kenya, 2010-Constitution of Kenya, 2010, 45(3)- Matrimonial property Act, 2013, Sections 2,6 and 7

Constitution of Kenya, 2010 Article 45(3) provides as follows:-
“45.(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

The Matrimonial Property Act, 2013 which received assent on 24th December 2013 and commenced on 16th January 2014, states at section 7 as follows:-
“7. Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

Contribution is defined by Section 2 to mean monetary and non-monetary contribution. And non-monetary contribution includes:-
a. Domestic work and management of the matrimonial home;
b. Child care;
c. Companionship;
d. Management of family business or property; and
\[e. Farm work; \]

“Family business” means any business which-
\[a) is run for the benefit of the family by both spouses or either spouse; and \]
\[b) generates income or other resources wholly or part of which are for the benefit of the family;\]

Held;
1. The provisions of the Matrimonial Property Act, 2013 ameliorate the harshness that was associated with the decision in Echaria v Echaria. The Statute recognized the non-monetary contribution of a spouse. It however did not go as far as what the Court of Appeal had suggested in Agnes Nanjala William –vs- Jacob Petrus Nicolas Vander Goes,Civil Appeal No.127 of 2011 where it argued that article 45(3) was perhaps “a Constitutional Statement of the principle that marital property is shared 50-50 in the event that
2. Sections 2, 6 and 7 of the Matrimonial Property Act, 2013 fleshed out the right provided by article 45(3) of the Constitution of Kenya, 2010. By recognizing that both monetary and non-monetary contribution must be taken into account, it was congruent with the Constitutional provisions of article 45(3) of the Constitution that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

3. At the dissolution of a marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect. To hold that article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That would be oppressive to the spouse who makes the bigger contribution and that cannot be the sense of equality contemplated by Article 45(3).

4. Although the suit was filed post the Constitution of Kenya 2010, it related to a dispute over property acquired before the coming into force of the new Constitution. If the Court were to apply the provisions of the Constitution of Kenya 2010 then it would be doing so retroactively. However, since the right to equality is as inherent and indefeasible to all human beings, it mattered not that the cause of action accrued before the current constitutional dispensation. Agnes Nanjala William –vs- Jacob Petrus Nicolas Vander Goes, Civil Appeal No. 127 of 2011

5. Article 45(3) requires that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. In division of matrimonial property that right was safeguarded by vesting in each spouse ownership according to their respective contributions be it monetary or non-monetary. For that reason the court would strive to give effect to any monetary or non-monetary contribution that U proved in the acquisition or improvement of the properties in dispute.

6. The statements by I was that U made some non-monetary contribution towards the developments on the subdivided plots. The contribution made towards the improvement of the property would entitle her to a beneficial interest therein equal to the contribution she made.

7. The Plaintiff did not give evidence of any financial contribution towards purchase of property bought about 14 days into the marriage. Although acquired during the coverture, it was acquired in the very nascent days of the union and in the absence of proof of monetary contribution by U, it would be inequitable to hold otherwise than that the property was acquired wholly by I.

8. There was evidence that Dr. W who was an uncle to I gave him one of the plots as a gift. U was unable to prove an allegation that she contributed the whole of the purchase price of Ksh.350,000/=.

9. After weighing all evidence, U made a non-monetary contribution to the development of some of the suit plots. Of significance was that one of them housed the matrimonial home in which she resided. U’s contribution towards the improvement of some of the plots deserved acknowledgement.

10. To enable the Court make an informed decision, separate valuations be conducted of each of the plots. The costs of valuation to be shared equally by the parties. The Court, after receiving the valuation Reports was to give its final orders.
Case History
(Appeal arising from the original conviction and
sentence by M.A. NANZUSHI, RM in KIMILILI PMCCRC
NO 21 OF 2011 on 31.10.2012)

Brief Facts
The Appellant made a representation of fact in writing
to the complainant through an agreement for sale of
1 acre of land. He received a sum of Kshs. 252,000
leaving a balance of Kshs. 18,000 which was to be
paid by the complainant upon transfer of the land. The
suit land was surveyed and a boundary demarcated
but the complainant was not able to enter the suit
land because he was prevented from doing so by
the relatives of the Appellant. The Appellant did
not also deliver vacant possession of the land to
the complainant because he had not obtained the
consent of the relevant Land Control Board (LCB).
The Appellant was consequently charged with the
offence of obtaining money through false pretence
contrary to section 313 of the Penal Code. He was
tried for the offence, convicted and sentenced to pay
a fine of Kshs. 50,000 or in default to serve 12 months
imprisonment hence the appeal.

Issues
What were the elements of the offence of obtaining
money through false pretence?
Did the facts of the case support a charge of obtaining
money through false pretence?
Whether the charge of obtaining money through false
pretence was proved beyond any reasonable doubt.
Whether the judgment of the trial court conformed to
section 169 of the CPC.

Penal Code
section 313  Obtaining through false pretences Any
person who by any false pretence, and with intent
to defraud, obtains from any other person anything
capable of being stolen, or induces any other person
to deliver to any person anything capable of being
stolen, is guilty of a misdemeanour and is liable to
imprisonment for three years.

Section 312 Definition of false pretence
Any representation, made by words, writing or
conduct, of a matter of fact, either past or present,
which representation is false in fact, and which the
person making it knows to be false or does not believe
to be true, is a false pretence.

Land Control Act, Cap 302 of the Laws of Kenya
section 6
An application for consent in respect of a controlled
transaction shall be made in the prescribed form to
the appropriate land control board within six months
of the making of the agreement for the controlled
transaction by any party thereto:
Provided that the High Court may, notwithstanding
that the period of six months may have expired,
extend that period where it considers that there is
sufficient reason so to do, upon such conditions, if
any, as it may think fit.

Section 7 provides for the remedy as follows:
If any money or other valuable consideration has
been paid in the course of a controlled transaction
that becomes void under this Act, that money or
consideration shall be recoverable as a debt by the
person who paid it from the person to whom it was
paid, but without prejudice to section 22.

Where a controlled transaction, or an agreement
to be a party to a controlled transaction, is avoided by
section 6 of this Act, and any person—
(a) pays or receives any money; or
(b) enters into or remains in possession of
any land,
in such circumstances as to give rise to a reasonable
presumption that the person pays or receives the
money or enters into or remains in possession in
furtherance of the avoided transaction or agreement
or of the intentions of the parties to the avoided
transaction or agreement, that person shall be guilty
of an offence and liable to a fine not exceeding three
thousand shillings or to imprisonment for a term not
exceeding three months, or to both such fine and
imprisonment.

Held,
1. The essential elements of the offence of obtaining
through false pretences were: that the person;
a) Obtained something capable of being stolen;
b) Obtained it through a false pretence; and
b) With the intention to defraud.
The Appellant received a sum of Kshs. 252,000
from the complainant, which was something
capable of being stolen under the law. However,
it’s not the taking of money that constitutes the
offence, but rather that it was taken with the
intention to defraud. The fraud was found in the
false pretence

Definition of false pretence was that; there must
be:
a) A representation of fact by word, writing or
conduct;
b) The representation is either past or present;
c) The representation must be false; and
d) The person made the representation knowing
it to be false or did not believe it to be true.

2. The offence of obtaining does not relate to future
events. The representation should be of either a
past or present fact, not future fact.
A statement of intention about future conduct,
whether or not it be a statement of existing fact,
is not such a statement as will amount to a false
pretence in criminal law. Devlin, J. R v DENT 1955
2 Q.B. pp 594/5.

3. The Appellant was the registered proprietor of the
suit land and had proprietary interest in the suit
land. The only problem was that family members
did not support or approve of the sale. There was
nothing false or untrue about the agreement for
sale of the land or the land itself. Therefore, it could
not be said in the circumstances of the case, that
the Appellant made a false representation of fact
about the land.

4. The sale was a controlled transaction covered
by section 6 of the Land Control Act, Cap 302
and as a matter of law, it needed consent from
the relevant Land Control Board (LCB) in order to
complete and validate the sale of the suit land.
Under section 8 of the said Act, the Appellant
ought to have applied for consent from LCB within
six months of the making of the agreement for
sale or within such period of time as shall have
been extended by the High court.

5. The grant or refusal to grant consent to a
controlled transaction was a preserve of the LCB,
and was dependent upon certain conditions being
met by the transaction and the applicant. Grant of
consent was not automatic or under the control
of the applicant. Therefore, the fact that consent
from LCB was not applied for or obtained did not
in itself convert the representation to sell land into
a false pretence for purposes of section 313 of
the Penal Code.

6. Under section 6 of Cap 302 of the Laws of
Kenya, where consent was not obtained within
the prescribed period, the controlled transaction
became void. As a consequence thereof, the
law provided the remedy for the purchaser
under section 7 of the said Act and penalties for
furtherance of voided transactions.

7. The legal framework which governed the
transaction in controversy; made the transaction
a purely civil action, thus removing it from the
realm of criminal law except where section 22 of
Cap 302 had been called into play; and provided
for a complete mechanism for and the relief in the
event the transaction became void.

8. Section 7 should be read together with the
conditions of sale in the agreement, especially the
clause dealing with default, which offered relief
to the complainant’s gravamen. Guided by the
relevant law attending the case, the transaction
did not constitute a false pretence or intention to
defraud for purposes of the offence of obtaining
through false pretences under section 313 of the
Penal Code and further, the charge before the trial
court was not a charge under section 22 of Cap
302.
9. Criminal process was never a substitute for criminal remedy or to be used as a means to settle a civil claim or to avail a party in a commercial transaction undue or collateral advantage over the other. That kind of practice was fraudulent, demented and abuse of the court process; should always be avoided by parties, resisted and forcefully suppressed by courts of law whenever it manifested itself before court.

The judgment by the trial court fell short of compliance with Section 169 of the Criminal Procedure Code. It did not, *inter alia*, contain the point(s) for determination; the evaluation of the defence; the decision arrived at; and reasons for that decision.

*Appeal allowed, conviction quashed and the sentence set aside.*

**Executions of search warrants do not require prior notice to the affected person**

James Humphrey Oswago v Ethics and Anti-Corruption Commission  
Petition No 409 of 2013  
High Court at Nairobi  
Mumbi Ngugi, J  
January 17, 2014  
Reported by Phoebe Ida Ayaya

**Brief facts:**

The petitioner who was the Chief Executive Officer (CEO) of the Independent Electoral and Boundaries Commission (IEBC) was on several occasions summoned by the Ethics and Anti-Corruption Commission to its offices where he gave information in his capacity as CEO of IEBC on issues touching on the tendering and procurement process of the Election Voter Identification Device (EVID) kits used in the 4th March 2013 general elections. The said summonses were not issued to him in his personal capacity but as the CEO of IEBC.

The commission was investigating alleged malpractices in the procurement of the EVID kits used in the said election. The commission then applied and was granted orders to search the petitioner’s premises. Pursuant to the grant of these orders, the respondent proceeded to search the petitioner’s homes in Loresho and Fedha Estate in Nairobi and his rural home in Kisumu, and took away there from various documents and electronic equipment.

**Issues:**

Whether the Ethics and Anti-Corruption Commission could invoke the provisions of section 118 of the Criminal Procedure Code to obtain search warrants against the petitioner.

Whether in making an application for a search warrant, the Ethics and Anti-Corruption Commission had to give advance notice to the person against whom the order was sought.

Whether the petitioner was entitled to be heard before an order-authorizing search and seizure could be made.

**Criminal Practice and Procedure** – warrant – issuance of search warrants – procedure for issuance of search warrants – where the application for a search warrant was for an investigation under the provisions of the Anti-Corruption and Economic Crimes Act (ACECA) – where the applicant was to abide by the procedure provided for under the Anti-Corruption and Economic Crimes Act – where the application was done in regard to the provisions of the Criminal Procedure Code – whether the Ethics and Anti-corruption Commission could invoke the provisions of the Criminal Procedure Code to obtain search warrants – ACECA sections 23 & 29; Criminal Procedure Code section 118.

**Criminal Practice and Procedure** – warrant – issuance of search warrants – procedure for issuance of search warrants – where the application for a search warrant was done *ex-parte* – where the party against whom the warrant was issued averred that he ought to have been given notice of the application – where the party against whom the warrant was made averred that he ought to have been heard before the warrant was issued – whether an application for issuance of a search warrant ought to have been made *inter partes* – whether the party against whom a search warrant was made was entitled to be heard before the order was made – ACECA sections 23 & 29; Criminal Procedure Code section 118.

**Anti-Corruption and Economic Crimes Act (ACECA)**  
Section 23(1) "The Director or a person authorized by the director may conduct an investigation on behalf of the Commission."
Except as otherwise provided by this part, the powers conferred on the Commission by this part may be exercised, for the purposes of an investigation, by the director or an investigator.

For the purposes of an investigation, the director and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the director or investigator has under this part.

The provisions of the Criminal Procedure Code (Cap 75), the Evidence Act (Cap 80), the Police Act (Cap 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Director and an investigator as if reference in those provisions to a police officer included reference to the Director or an investigator.

Section 29(1)“The Commission may, with a warrant, enter upon and search any premises for any record, property or other thing reasonably suspected to be in or on the premises and that has not been produced by a person pursuant to a requirement under the foregoing provisions of this Part.”

(2) “The power conferred by this section is in addition to, and does not limit or restrict, a power conferred by section 23(3) or by any other provision of this part.”

Criminal Procedure Code
Section 118“Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.”

Held:
1. A reading of section 29 of the ACECA showed that it did not provide a process for obtaining the search warrant contemplated. It only permitted the Commission to enter premises ‘with a warrant’ without providing how such warrant was to be obtained. However, when read with section 23(4) of the ACECA, it was clear that the warrant required was to be obtained as provided under section 118 of the Criminal Procedure Code.
2. The commission properly exercised its powers under the provisions of the ACECA in obtaining warrants to search the petitioner’s premises by invoking the procedure provided under section 118 of the Criminal Procedure Code.
3. The purpose of obtaining search warrants was two-fold. With regard to the protection of the rights of citizens, it was to ensure that any entry into a citizen’s premises or property was done in accordance with, and with the sanction and authority of the law. With regard to the public interest, the administration of justice and the apprehension of offenders, the section was intended to ensure that investigating authorities could gain access to incriminating information or evidence without the suspected offender getting an opportunity to conceal or destroy such evidence.
4. It would defeat the purposes and intention behind searching premises as contemplated under section 118 of the Criminal Procedure Code if an application for a search warrant were to be made inter parte, with notice, and for the person in respect of whose property or premises the search warrants were directed to be heard before such warrants were issued.

Petition dismissed.

Judges & Magistrates Vetting Board lacks jurisdiction to entertain complaints arising after promulgation of the Constitution, 2010

The Kenya Magistrates & Judges Association v The Judges & Magistrates Vetting Board

In the High court of Kenya at Nairobi
Constitution petition no 64 of 2014
Mumbi Ngugi, J.
March 24, 2014

Reported by Teddy Musiga and Getrude Serem

Brief facts:
The petitioners contended that the Vetting board could not lawfully investigate the conduct, acts, omissions and information on the part of judicial officers purportedly arising after the promulgation of the Constitution (August 27th, 2010.) Specifically
they challenged the constitutionality of vetting certain senior resident magistrates who were employed in July 2010 and only started working in September 2010. That those judicial officers who had been subjected to the vetting exercise in respect of allegations purportedly arising after promulgation of the constitution (August 27th, 2010) were subjected to unlawful and unfair treatment contrary to articles 3, 47 and 50(1) of the Constitution of Kenya, 2010 and such acts were therefore null and void to that extent.

Issues:
Whether by challenging section 18 of the Vetting of Judges and Magistrates’ Act the petition was res judicata;
Whether the Vetting Board had jurisdiction to entertain complaints against judicial officers in respect of conduct arising after 27th August 2010 (date of promulgation of the constitution);
Whether the Vetting Board in exercise of its functions under section 23 of the sixth schedule, Constitution of Kenya could lawfully interrogate acts and omissions on the part of judicial officers purportedly arising after August 27th, 2010. (date of promulgation of the constitution);
Whether judicial officers subjected to vetting in respect of allegations arising after promulgation date (August 27th 2010) were subjected to lawful and fair treatment as required by the Constitution;
Whether the Court had jurisdiction to ‘read-in’ into section 18(1) of the Act words that would confine the vetting to acts and omissions occurring on or before the effective date.

Constitutional law – Vetting of Judges and Magistrates - Whether the judges and magistrates Vetting Board could vet judicial officers in respect to acts or omissions occurring after promulgation of the constitution (27th August 2010) - Section 23 of the Sixth Schedule of the constitution 2010; Section 18(1) of the Vetting of Judges and Magistrates Act.

Constitutional law - Vetting of Judges and Magistrates - whether the vetting of magistrates after promulgation of the Constitution (27th August 2010) amounted to unlawful and unfair treatment - articles 3, 27, 47, and 50 (1) of the Constitution of Kenya, 2010


Section 18(1) of the Vetting of Judges & Magistrates Act stated that:
“*The Board shall, in determining the suitability of a judge or magistrate, consider—*
(e) pending complaints or other relevant information received from any person or body, including the—
(i) Law Society of Kenya;
(ii) Ethics and Anti-corruption Commission;
(iii) Advocates Disciplinary Tribunal;
(v)…
(x) Judicial Service Commission
Section 23(1) of the Sixth schedule, Constitution of Kenya, 2010 provided that:
“Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.”

Held:
1. The Vetting Board had the jurisdiction to vet judicial officers in respect of complaints that arose subsequent to the effective date, August 27, 2010 provided that the complaint was made 14 days before the Vetting and in accordance with section 2 of the Vetting of Judges and Magistrates Act.
2. As opposed to Denis Mogambi Mong'are v Attorney General Civil case No. 123 of 2012 that challenged the constitutionality of the Vetting process; the instant case challenged the jurisdiction of the Vetting Board from entertaining complaints against judicial officers that purportedly arose on or before the effective date. Therefore the matter was not res judicata.
3. The constitutional intention behind the establishment of the Board was to check the suitability of those judicial officers who were in office on the effective date and to establish their suitability for service in the new constitutional dispensation, upon consideration of such complaints as may have been pending against
them before the bodies set out in section 18(1) (e) including the JSC. Any complaint that arose subsequent to the effective date could only be dealt with, under the Constitution and by law, by the JSC.

4. The Board was given a specific, time-bound mandate with regard to complaints against judicial officers who were in office on the effective date, the 27th of August 2010. That mandate related to the suitability of the officers as at that date, and related to complaints as at that date. To hold otherwise was to give the Board a mandate unintended by the Constitution, and would lead to an encroachment on the mandate of the Judicial Service Commission under Article 168 and 172 of the Constitution.

5. The mandate of the Vetting Board was limited to complaints against judicial officers who were in office on or before the effective date of August 27th, 2010, and arising on or before that said date. The magistrates who were in office on August 27th, 2010 had to be subjected to the vetting process in respect of matters as at that date. Any issue arising thereafter in their case, as in the case of judicial officers appointed after promulgation of the constitution and the attendant rigorous interview process, would fall within the mandate of the Judicial Service Commission and carried out in accordance with the Judicial Service Act.

6. To the extent that the provisions of section 18(1) of the Vetting of Judges and Magistrates Act was interpreted as allowing the Board to consider complaints arising after the effective date, it was inconsistent with the Constitution. Therefore, the interpretation given to section 18(1) by the respondents had the effect of violating the Constitution and violated the rights of the petitioner's members as they had been subjected to vetting in respect of complaints arising after the effective date.

7. The concept of "reading in" as a tool of statutory interpretation had been adopted in various jurisdictions which had a system of law similar to Kenya's. Reading in was defined as what the statute wrongly excluded rather than what it wrongly included. Where the inconsistency was defined as what the statute excluded, the logical result of declaring inoperative that inconsistency could be to include the excluded group within the statutory scheme. The reach of the statute was effectively extended by way of reading in rather than reading down. (Schachter v Canada, [1992] 2 SCR 679)

The principles applicable to "reading in" as a remedy for unconstitutionality are:

The severance of words from a statutory provision and reading words into the provision. In deciding whether words could be severed from a provision or whether words could be read into one, a court paid careful attention first, to the need to ensure that the provision which resulted from severance or reading words into a statute was consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible.

8. In deciding to read words into a statute, a court had to bear in mind that it would not be appropriate to read words in, unless in so doing a court could define with sufficient precision how the statute ought to be extended in order to comply with the constitution. Moreover, when reading (as when severing) a court had to endeavor to be as faithful as possible to the legislative scheme within the constraints of the constitution. (National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs and others [CCT10/99] 1999 ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 DECEMBER 1999)

9. The remedy in the circumstances was to read into the legislation, words that made clear what the scope and extent of the Board's jurisdiction was intended to be under the Constitution and the legislation enacted pursuant to the constitutional provision.

10. The Vetting of Judges and Magistrates Board, in the exercise of its functions stipulated in Section 23 of the Sixth Schedule to the Constitution of Kenya 2010, could not lawfully investigate the conduct, acts omissions and information on the part of a judicial officer purportedly arising after the 27th of August 2010.

11. The judicial officers who were subjected to the exercise of vetting by the Vetting of Judges and Magistrates Board in respect of allegation purportedly arising after the 27th of August 2010 were subjected to unlawful and unfair treatment contrary to the provisions of Articles 27 of the Constitution of Kenya 2010 and such vetting was therefore null and void to the extent of its reference to such conduct, acts, omissions and information.
Court Upholds Constitutionality of the 20% Withholding Tax Subjected to Winnings from Betting and Gaming


Petition No 56 of 2014
High Court at Nairobi
D.S. Majanja, J.
March 7, 2014

Reported by Nelson Tunoi & Riziki Emukule

Brief Facts:
The 1st petitioner (Association of Gaming Operators-Kenya) is a registered society and the umbrella body for companies involved in the gaming industry in Kenya. They filed a petition challenging the manner in which winnings from gaming and betting were to be taxed especially with the introduction of some clauses in the Finance Act (Act No.38 of 2013).

The petitioners were opposed to the introduction of a withholding tax of 20% on all winnings from betting and gaming, and they were apprehensive that imposition of the 20% withholding tax would have adverse effects on their business since it would serve to lure away their customers. The petitioners further contended that the Finance Act was unconstitutional since it was passed without public participation contrary to articles 10, 118 and 210 of the Constitution of Kenya, 2010.

Issues:
Whether the Finance Act, 2013 was unconstitutional for lack of public participation.

Whether the Finance Act, 2013 was unconstitutional for want of compliance with article 205 of the Constitution of Kenya, 2010.

Whether the implementation of the Finance Act, 2013 in so far as it concerned the petitioners gaming business was impractical and if so, what was the effect thereof.

Constitutional Law - petition-petitioners challenging the constitutionality of the provisions of the Finance Act subjecting winnings from betting and gaming to 20% withholding tax-whether the Finance Act, 2013 was unconstitutional for lack of public participation and want of compliance with article 205 of the Constitution-whether the High Court had jurisdiction to interfere with the implementation of the Finance Act, 2013 in regard to the gaming business-whether the petition had merit-Constitution of Kenya, 2010 articles 10, 118, 201, 205, 209, 210; Finance Act, 2013, sections 9, 11, 14, 15 & 23.

Held:
1. Public participation as a national value was an expression of the sovereignty of the people articulated in article 1 of the Constitution of Kenya, 2010. The golden thread running through the Constitution was one of sovereignty of the people of Kenya and article 10 that made public participation a national value was a form of expression of that sovereignty. Article 94 of the Constitution of Kenya 2010 vested legislative authority of the people of Kenya in Parliament.

2. Although the 1st petitioner complained that they were not accorded an opportunity to make oral submissions after forwarding a memorandum to the Parliamentary Committee when the Finance Bill, 2013 was published, an oral hearing was not necessary in every situation and the legislature had wide latitude to determine how to receive submissions.

3. The opportunity availed to the petitioners to forward their memorandum was ample demonstration that there was public participation. The fact that the outcome did not result in what the petitioners wanted did not necessarily negate public participation.

4. Although public participation in the law making process was required, essentially all that was required of the legislature was to provide opportunity for some form of public participation, for instance allowing the public to make either written or oral submission at some point in the legislative process. Thus the petitioners failed to establish that the Finance Act, 2013 was passed in violation of the principles of public participation espoused under articles 10, 118 and 210 of the Constitution of Kenya, 2010.

5. Article 205 of the Constitution of Kenya provided that it was the Commission on Revenue Allocation which ought to consider financial bills affecting Counties once it was published and make its recommendation. However, in the instant case,
there was no indication that the Commission on Revenue Allocation considered the Finance Bill, 2013 and made recommendations. In the absence of such recommendation by the Commission on Revenue Allocation, article 205(2) of the Constitution of Kenya, 2010 was not applicable.

6. The absence of recommendation by the Commission on Revenue Allocation could not result in the legislation being declared unconstitutional by reason that the Commission on Revenue Allocation failed to discharge its duty to make recommendations on the Finance Bill, 2013. Therefore, the Finance Act, 2013 could not be impugned on the basis of want of compliance with article 205.

7. Article 209 of the Constitution of Kenya, 2010 empowered the national government to impose taxes and charges. Such taxes included income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax was defined, administered and collected was a matter for Parliament to define and it was not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under article 209 of the Constitution, the legislature retained wide authority to define the scope of the tax. [See Bidco Oil Refineries v Attorney General and Others Petition No. 177 of 2012, paras. 53 – 56.]

8. The impracticability or problems of implementation of the law were outside the court’s jurisdiction to resolve unless there was an allegation that there was a violation of the petitioners’ fundamental rights and freedoms or of the Constitution. In the instant case, there was no allegation in the petition that the implementation of the Finance Act, 2013 violated the Constitution.

9. If there were indeed any difficulties of implementation, the 2nd interested party (Betting, Control and Licensing Board) had indicated that the same could be resolved through a tripartite process which it had initiated. The court could not therefore enter into an inquiry which would involve an interpretation of “winnings” as provided in the Finance Act, 2013. Acceding to such a request would amount to proffering what was in effect an advisory opinion as there was no real dispute between any of the petitioners and the 3rd respondent (Kenya Revenue Authority). If such a dispute arose in the collection of taxes there existed sufficient mechanisms under the Income Tax Act to resolve and interpret the law in light of the facts at hand.

Petition dismissed with no order as to costs.

Kenya Revenue Authority is constitutionally bound to process a Taxpayers VAT refunds timeously

Tata Chemicals Magadi Ltd v Commissioner of Domestic Taxes (Large Taxpayers) [2014] eKLR
Petition No. 476 of 2013
High Court at Nairobi
D S Majanja, J
April 14, 2014
Reported by Nelson Tunoi & Riziki Emukule

Brief Facts:
The Petitioner was a limited liability company engaged in the business of manufacturing Soda ash and salt in Kenya while the Respondent was an office established under the Kenya Revenue Authority (“KRA”) mandated to administer Value Added Tax (“VAT”) and Income Tax in accordance with the applicable statutes under the general control and direction of KRA. The Petitioner exported approximately 90% of its soda ash and as a result was in a perpetual credit position as a result of supplying zero rated goods thus entitling them to VAT refunds. Following an earlier petition by the Petitioners still on the subject of VAT refunds, the Respondent had paid up a portion of the total amount then later sent an email to the Petitioners purporting to set off the balance to the tune of Kshs. 235 million hence the present petition seeking to quash this decision.

Issue:
Whether the failure to pay Value Added Tax (hereafter VAT) tax refunds to an entity amounts to a violation of its rights as per article 47 of the Constitution of Kenya, 2010
Constitutional Law - fundamental rights and freedoms-right to fair administrative action- Constitution of Kenya, 2010 article 47

Tax Law - Value Added Tax –tax refunds-right of a taxpayer to timeous processing of VAT refunds-where a party is entitled to tax refunds by KRA Article 47 of the Constitution provided, in part, that;

1. The purpose of article 47 of the Constitution of Kenya, 2010 was to uplift the standards of administrative action by providing constitutional standards and as such the national values and principles of governance articulated in article 10 of the Constitution of Kenya, 2010 among them good governance, integrity, transparency and accountability must be infused in administrative action.

2. Government had a public duty to effect change to any unprogressive arrangements, such as those that could characterize the operational linkage of the respondent to slothful structures, so as to render the respondent, as well as such structures, capable of responding to the overriding demands of the Constitution; and in that regard, ordinary statutory arrangements could not qualify the constitutional provisions. On that account, the respondent had no justification for failing to make VAT refunds timeously.

3. The correspondence from the Respondent to the Petitioners that Kshs. 235 million was used to set off claims was in violation of the Petitioners rights since initially the agreement between the two parties was for the money to be held in bond on behalf of the Petitioners. There was no other agreement for the money to be set off against other tax liabilities.

4. Further, the correspondence did not elaborate as to why the Respondents unilaterally decided to effect a set off and moreover the contentious sum was still subject to a pending appeal. Thus the purported set off of Kshs. 235 million was without legal basis and hence quashed and the Respondent directed to deal with the appeal lodged in respect of the outstanding amount of Kshs. 234,968,183.

5. The duty of the Respondent to process and pay VAT refunds was set out in the Value Added Tax Act (Repealed). The court could not step into the business of the Respondent and the Exchequer in extension to tell them how to do their job. Rather, the court was more desirous of protecting the rights of a taxpayer who carried on his business in a legitimate manner and was entitled to a refund as of right.

Petition allowed, order of mandamus granted directing Respondent to deal with the appeal relating to the sum in contention, Respondent to process and pay out to the petitioner their VAT refund within 90 days of the judgement and costs to borne by the Respondents.

Transitional provisions & the retirement age for judges appointed under the repealed Constitution.

Philip K Tunoi & another v Judicial Service Commission & another

Petition 244 of 2014

High Court of Kenya at Nairobi

Milimani Law Courts

G V Odunga, J

May 28, 2014

Reported by Beryl A Ikamari & Karen Mwende

Brief facts

In a letter dated April 28, 2014, the Chief Registrar wrote to the Petitioners informing them that the Judicial Service Commission had resolved that all judges would retire at the age of seventy years. The letter elaborated on the date at which each of the Petitioners was expected to retire and appreciated the Petitioners’ services. Concerning retirement age,
the Judicial Service Commission, had issued two conflicting letters; a letter dated May 24, 2011 stated that the retirement age for the Petitioners would be seventy four years and a letter dated March 27, 2014, which stated that the retirement age for all judges would be seventy years.

The Petitioners were challenging the constitutionality of the resolution of the Judicial Service Commission on retirement age. They explained that as part of the transitional measures, particularly as provided for in section 31 of the Sixth Schedule to the Constitution of Kenya, 2010, they were entitled to retire in accordance with the terms of the previous Constitution which provided that their retirement age would be seventy four years.

As an interim measure the Petitioners sought conservatory orders to prevent the enforcement of the retirement age of seventy years, while their petition was still pending for hearing and determination.

**Issue**

Whether conservatory orders would be granted to prevent the enforcement of the retirement age of seventy years for all judges serving in the Judiciary.

**Constitutional Law** - judiciary-judges-tenure of office-retirement age for judges-whether conservatory orders would be issued to prevent the enforcement of the retirement age of seventy years for judges who were appointed under the terms of the repealed Constitution of Kenya-Constitution of Kenya, 2010, Sixth Schedule, section 31.

**Constitutional Law** - fundamental rights and freedoms-enforcement of fundamental rights and freedoms-remedies for breaches of fundamental rights and freedoms-conservatory orders-circumstances in which the court would grant conservatory orders to prevent an alleged breach of fundamental rights and freedoms-Constitution of Kenya, 2010, article 22 & 23(3)(c).

**Held**

1. Article 23(3)(c) of the Constitution of Kenya 2010, entitled the court to grant any appropriate relief, including a conservatory order, in a suit which concerned the enforcement of fundamental rights and freedoms. A party seeking a conservatory order would be required to show that he had a prima facie case with a likelihood of success and that unless the court grants the order he would suffer prejudice as a result of a violation or threatened violation of the Constitution. (Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General, Petition 16 of 2011, High Court of Kenya at Nairobi.)

2. A conservatory order would direct both parties to a suit not to undertake any action for purposes of enforcing their respective rights until a final determination was made. Effectively, it ensured that the status quo would be maintained.

3. The issues raised in the petition were weighty matters requiring further investigations. Those issues included the question on whether within the terms of section 31 of the Sixth Schedule to the Constitution of Kenya 2010, the petitioners had attained the retirement age and whether the Judicial Service Commission had powers to make resolutions concerning the retirement age of judges.

Conservatory orders issued. (Conservatory orders were issued prohibiting the Respondents from removing or retiring the Petitioners from service as Judges of Superior Courts, pending the hearing and determination of the application inter partes.)
Brief facts:
By a letter to all County Directors of Education, District Education Officers and all principals of secondary schools in Kenya the 2nd respondent issued guidelines for form one selection in 2014 aimed at ensuring placement of candidates in schools of their choice and through merit, equity in school placement through quotas and affirmative action where applicable, proportionate sharing of national schools places between public and private schools candidates in every district based on the number of candidates taking KCPE from either category of primary schools and harmonization of the selection polices throughout the county at all levels; national county and district.

The extra-county schools (high performing schools with a mean score of 6.5 in KCSE) and county schools were supposed to admit students as follows: Extra County: 40% National, 40% from within county and 20% from the district hosting the school and County: 20% from the district hosting the school and 80% from the rest of the county.

The petitioner stated that the circular was not followed in schools within Nyeri county thereby violating the constitutional provision under article 27 of the Constitution of Kenya, 2010 by discriminating against the students from Nyeri County and its various districts by having negligible students admitted from its host district schools and a staggering of students from other counties admitted in its schools over and above the 40% prescribed in the guidelines.

Issues:
1. Whether the court had jurisdiction to determine a dispute between the national and county governments
2. Whether the dispute before the court was a dispute between national and county governments
3. What constituted a dispute between the national and county governments within the provisions of the Intergovernmental Relations Act and the Constitution

Government Relations – intergovernmental dispute – dispute between the national and county governments – where a dispute arose as to the guidelines issued for selection process of form one students – where the dispute touched on the relations between the two levels of government – whether the dispute was one which could be termed as an intergovernmental dispute – Intergovernmental Relations Act sections 30 & 31; Constitution of Kenya, article 189; South African Intergovernmental Relations Frameworks Act 2005.

Jurisdiction – jurisdiction of the High Court – where the jurisdiction of the High Court was questioned in regard to the provisions of the Intergovernmental Relations Act – where the dispute was framed as a constitutional question – whether the High Court had jurisdiction to hear the dispute as framed – Constitution of Kenya, 2010 article 165.

Constitution of Kenya, 2010
Article 189(1) “Government at either level shall:”
“Perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of government as the other level and respect the constitutional status and institution of government at the other level and in case of county government within the county level.”
“Assist, support and consult and as appropriate implement the Legislation of the other level of Government and”
“Liase with government at the other level for purposes of exchanging information, coordinating policies and administration and enhancing capacity”
(2) “Government at each level and different governments at the county level shall cooperate in the performance of functions and exercise of powers and for that purpose may set up joint committees and joint authorities.”
(3) “In any dispute between governments the governments shall make every reasonable effort to settle the dispute, including by means of procedure provided under National Legislation.
(4) “National legislation shall provide procedures for settling Intergovernmental disputes by alternative
dispute resolution mechanism including negotiation, mediation and arbitration.

Intergovernmental Relations Acts Cap 5(a)

Section 30(1) “In this part unless the context otherwise requires ‘dispute’ means an Intergovernmental dispute.”

Section 31 “The National and County Governments shall take reasonable means to:

resolve disputes amicably and apply and exhaust the mechanisms for alternative dispute resolutions provided under the Act or any other Legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution

South African Intergovernmental Relations Frameworks Act 2005 defined Intergovernmental Disputes as:

“a dispute between different governments or between organs of state from different governments concerning a matter: arising from Statutory powers or function assigned to any of the parties an agreement between the parties regarding the implementation of a statutory power or function and which is justifiable in a court of law and include any dispute between parties regarding a related matter”

Held:

1. What the provisions of the Constitution and statute in respect of the dispute resolution between the national and county governments did was not to oust the jurisdiction of the court but to postpone the same until the alternative dispute mechanism had been attempted.

2. The express provisions of article 165 of the Constitution of Kenya, 2010 gave the court unlimited original jurisdiction in criminal or civil matters and jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights had been denied, violated, infringed or limited.

3. Section 30(1) of the Intergovernmental Relations Act provided that disputes, which could be resolved under the act, were disputes between the national government and a county government or amongst county governments. The existence of the alternative remedy and procedure could not necessarily oust the jurisdiction of the court (Republic v Transition Authority & another ex-parte Kenya Medical Practitioner, Pharmacist & Dentist Board (KMPDH) & 2 others).

4. The court had jurisdiction but the exercise of that jurisdiction was postponed or the court could decline to exercise jurisdiction pending settlement of the same.

5. In determining the question as to whether the dispute was one between a county and national government to which dispute settlement mechanism under the Intergovernmental Relations Act applied and for which the court ought to postpone or decline the exercise of its jurisdiction to enable the parties exhaust the procedures set therein, a definition of a dispute had to be undertaken as it was missing from the Intergovernmental Relations Act and to get the definition thereof the court had to look at the South African Intergovernmental Relations Frameworks Act 2005.

6. The disputes referred to by both the Constitution and statute were those in respect of traditional government functions at the two levels of governments established by the constitution as stated at articles 6(2) & 189 which provided for cooperation between national and county governments. A dispute between governments was a dispute in relation to the functions and exercise of powers between the different levels of government.

7. The nature of the dispute had to be looked at in totality and the dispute before court related to selection of form one in county schools within Nyeri County. It was brought to enforce fundamental rights and freedoms under articles 22 and 23 and 27 of the Constitution and so was a dispute in respect of the functions of the petitioner as stated in schedule 4 of the Constitution. There was no reason to hold that it was an intergovernmental dispute simply because the County Government of Nyeri was the petitioner and an entity of the National Government which was the respondent.

8. There was no reason to reduce an allegation of violation of fundamental rights to a dispute between a county and national Government as to do so would amount to judicially created limitations on the express provision of the Constitution. The Constitution was clear that any person could bring an action in respect of an allegation of breach of fundamental rights and freedom but the court was not persuaded that the petitioner was not a person within the meaning of article 22.

Preliminary objection dismissed.
Brief Facts
The matter was brought before court for determination of quantum damages arising from a suit against the Defendant herein as a result of the injuries sustained by the Plaintiff from a road traffic accident which had occurred involving the Defendant’s motor vehicle and another one in which the Plaintiff was a passenger. The two parties had filed a consent in which judgment was to be entered in favour of the plaintiff as against the defendant in the ratio of 10:90%.

Issues
Whether the court could determine losses on earnings based on the standard retirement age limit of 60 years.
Whether the court could award damages for future expenses arising out of the condition developed as a result of the injuries sustained.

Tort law- damages- general damages- whether there was a limit which the court could award damages in an accident claim in which the Plaintiff had sustained injuries which resulted in a complete lifestyle change.

Injuries Suffered
- Spinal injury
- Fracture on the 6th cervical bone
- Fracture on the right leg
- Bruises on the head and palms
- Partial paralysis on the right hand
- Incontinence

Held:
Amount of damages payable for;

Pain and suffering
The plaintiff suffered lots of pain as a result of the injuries and the residual effects have had a significant psychological and physical trauma on him. Taking into consideration the value of the shilling and the inflation rate which has changed for the worse, the sum of Kshs. 5,000,000 was awarded as adequate compensation.

Loss of earnings and earning capacity
At the time the plaintiff sustained injuries, he was 39 years old and earning Kshs. 72,079. The court took into account the contents of the plaintiff’s payslip and whether the sum of Kshs.72,079 was the gross pay or net pay. The Court also considered the fact that the plaintiff would be expected to pay taxes and other statutory deduction as well as the period that the plaintiff would have worked.

The letter of employment produced in court, written by the Administration Officer Personnel clearly indicated that the plaintiff was unable to discharge his duties as a result of the permanent disability arising from the injuries and he was thus leaving the company. The letter also confirmed that Kshs.72,098/= was his gross salary. His payslips over the years show an average net earnings of Kshs.38,000/= after various deductions. That was the figure which guided the Court in its assessment.

The court took judicial notice that the retirement age for persons employed by the Government of Kenya was set at 60 years. Usually those in the private sector have a longer working life but since nothing different had suggested in the instant matter, It was reasonable to use the 60 year limit. It was therefore not unreasonable to infer that all things being equal, the plaintiff would have worked for another 21 years and thus:

\[ 38,000/= \times 21 \times 12 = 9,576,000/= \]

The plaintiff was awarded Kshs.9,576,000/= for loss of earning capacity.

Medical Expenses (Special damages pleaded and proved)
Nurse Aide expenses which amounted to Kshs. 2,164,976/= 

Future Medical Expenses and attendant costs
The plaintiff, his wife, both doctors of the plaintiff and defendant and his own former employer confirmed that the plaintiff was paraplegic and could not perform simple daily tasks on his own. He needed the continuous presence of an assistant. He was currently developing arthritis and the doctors had recommended...
continuous physiotherapy which would be a lifetime engagement. To aide his movements – even just a trip to the bathroom, he would require a wheel chair. The wheel chair would practically be his motor vehicle and its lifespan (if a motorized one), would be as any other motor vehicle in Kenya i.e. 5 years.

He would require diapers, urine bags and bed pads and use a catheter for the rest of his life – the frequency of use was considered as well as the nurse and/or whoever else assisted the plaintiff and would require gloves. The receipts produced to demonstrate his expenses were of great use in projecting what amount to award, and bearing in mind the Kenyan economic trends and the rate of inflation.

There was certainly the element of future medical check-up and purchase of medicines. These further needs and expenses were not far-fetched. The court lumped the daily conveniences that the plaintiff required i.e. Diapers and Catheters
Adult diapers, bed under pads, 2 way catheters, condom catheters, urine bag and gloves – which attracted a cost of kshs.3100/= for five days. It was not unreasonable to expect these expenses to continually arise which worked at: 3100 x 5 = 18,600 x 12 x 21 (given the general life expectancy and his circumstances) = 5,133,600/= Nurse Aide
The nurse was being paid Kshs.400/= per day, which amounted to Kshs.11, 200/= This figure was not contested by the defendant and therefore the court used the figure as a guide:
11,200 x 12 x 23 = 3,091,200/= (Three million and ninety one thousand, and two hundred shillings only).

Future purchase of motorized wheel chair
An estimate/quotation was given by Physical Therapy Services as Kshs.361,340/=, and there was no reason to doubt that figure nor had the defence suggested a different amount. Recognizing that just like a motor vehicle, the wheelchair may require maintenance and repair every so often. The quotation given was not unreasonable and therefore the court awarded Kshs. 361,340/= (Three hundred and sixty one thousand, three hundred and forty only).

Quantum assessed to a total of Kshs. 22,795,000/= Costs of the suit to be borne by the defendant. Interest to be calculated at court rates.

Distribution royalties not subject to customs duty
Republic v Kenya Revenue Authority
ExparteBata Shoe Company (Kenya) Limited
JR Case No. 36 of 2011
High Court of Kenya
Judicial Review Division
W K Korir, J
February 21, 2014
Reported by Lynette A Jakakimba & Valarie Adhiambo

Brief facts:
The applicant (Bata Shoe Company (Kenya) Limited) sought judicial review orders against Kenya Revenue Authority’s (KRA) decision to demand payment of taxes on royalties it paid to an entity known as Bata Brands for use of the Bata trademark. The applicant’s case was that it paid royalty fees to Bata Brands being a percentage of the sales made of its locally manufactured shoes and imports from Bata related suppliers and third party suppliers. The Applicant further argued that the royalty fee was not made as a condition of sale of the imported goods and it did not pay the royalty fee directly or indirectly to the suppliers of the imported goods thus it could not be said that it made the royalty payments in connection to the products purchased from suppliers.

The applicant further sought orders against the decision of KRA to charge duty on service charge it paid to China Footwear Services (CFS) and Bata Shoe Singapore (BSS). It was the applicant’s case that it paid royalty fees to Bata Brands being a percentage of the sales made of its locally manufactured shoes and imports from Bata related suppliers and third party suppliers. The Applicant further argued that the royalty fee was not made as a condition of sale of the imported goods and it did not pay the royalty fee directly or indirectly to the suppliers of the imported goods thus it could not be said that it made the royalty payments in connection to the products purchased from suppliers.

Issues
Whether Kenya Revenue Authority (KRA) had
jurisdiction to demand payment of taxes on distribution royalties.

Whether distribution royalties were subject to customs duty as they were not royalties related to goods being valued that a buyer had to pay, either directly or indirectly, as a condition of the sale of the goods being valued within the meaning of rule 9(i)(c) of the Fourth Schedule to the East African Community Customs Management Act.

Whether a party aggrieved by the decision of KRA had to first seek redress from the Customs and Excise Appeals Tribunal before petitioning the High Court.

Whether the High Court had jurisdiction to make a determination on disputes relating to charging of duty on buying commissions.

**Intellectual Property Law** - royalties-distribution royalties - where Kenya Revenue Authority sought to charge duty on distributions royalty paid by Bata Shoe Company Kenya to Bata Brands for use of the Bata trademark - whether distribution royalties were a condition of sale and therefore subject to customs duty - East African Community Customs Management Act rule 9, Fourth Schedule

**Tax Law** - collection of taxes-goods and services subject to taxes - collection of taxes on distribution royalties - whether Kenya Revenue Authority (KRA) had jurisdiction to demand payment of taxes on distribution royalties - East African Community Customs Management Act rule 9, Fourth Schedule East African Community Customs Management Act (EACCMA)

**Rule 9, Fourth Schedule**

(1) In determining the customs value under the provisions of Paragraph 2, there shall be added to the price actually paid or payable for the imported goods as follows:

(a) to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:
   (i) the commissions and brokerage, except buying commissions;
   (ii) the cost of containers which are treated as being one for customs purposes with the goods in question;
   (iii) the cost of packing whether for labour or materials;
   (b) the value, apportioned as appropriate, of the goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable as follows:
   (i) materials, components, parts and similar items incorporated in the imported goods;
   (ii) tools, dies, moulds and similar items used in the production of the imported goods;
   (iii) materials consumed in the production of the imported goods;
   (iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Partner State and necessary for the production of the imported goods;
   (c) royalties and license fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;
   (d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller.

**Held**

1. The Customs and Excise Appeals Tribunal had expertise in tax matters and it had to be given room to discharge its mandate. However where a matter fell within the purview of judicial review, a party was entitled to approach the court notwithstanding the availability of an alternative remedy.

2. The royalty fee paid to Bata Brands was not a condition of sale. The Trade Mark Licence Agreement (TLA) between the applicant and Bata Brands had no nexus between the purchases the applicant made from China through Bata Shoe Singapore (BSS). Where the nexus between the sale and the royalty payment was remote, it could not be said that the royalty payment was made as a condition of sale.

3. As to whether the term "condition of sale" was to be given a legal construction or an ordinary common sense meaning. The East African Community Customs Management Act (EACCMA) was an Act of Parliament and the words found therein could either take a legal connotation or the ordinary meanings ascribed to them. The words however were to be given the meaning attributed to them in contracts relating to sale of goods. If the lawmaker had intended otherwise, nothing would
have been easier than to state that royalties and licence fees were to be added to the value of the goods for customs purposes.

4. The royalty fees paid to Bata Brands by the applicant were paid for the use of the trademarks in Kenya and they had nothing to do with the prices of imported products. It would have been a herculean exercise to try and separate royalties for locally manufactured goods and imported goods so as to find out what was the price payable for the imported good. The respondent was therefore asking the applicant to pay taxes which it was not obligated by law to pay.

5. It was not the role of a judicial review court to determine whether the payments made by the applicant to China Footwear Services (CFS) were buying commissions that would be a usurpation of the KRA's powers. Even if the Court decided to be the taxman, it did not have in its possession the documents presented to the respondent by the Applicant in support of its claim that whatever it paid CFS were buying commissions.

Orders
An order of certiorari issued to remove to the Court the portion of the respondent's letter dated 24th November, 2010 in respect of royalties and specifically claiming payment, from the Applicant, of extra taxes amounting to Kshs.53,192,381.00 payable as:
- ID F                                  Kshs. 3,063,436.00
- Import Duty                          Kshs. 27,849,444.00
- Value Added Tax                     Kshs. 22,279,531.00.

An order of prohibition issued prohibiting the respondent and its officers or agents from commencing or instituting any enforcement actions against the applicant in relation to the said sum of Kshs.53,192,381.00.

Applicant’s application unmerited in respect of the sum of Kshs.35,425,823.00 arising from service charges. Each party to meet its costs.

Court quashes the regulations contained in the National Transport and Safety Authority (operation of public service vehicles) Legal Notice no. 219 of 2013
Kenya Country Bus Owner’s Association (Through Paul G. Muthumbi- Chairman, Samuel Njuguna-Secretary, Joseph Kimiri- Treasurer) & 8 Others v Cabinet Secretary for Transport & Infrastructure & 5 Others [2014] eKLR
Judicial Review Case No. 2 of 2014
High Court of Kenya at Nairobi
G V Odunga, J
April 14, 2014
Reported by Emma Kinya, Andrew Halonyere & Opiyo Lorraine

Brief Facts
The Cabinet Secretary for Transport and Infrastructure herein referred to as the 1st Respondent on 11th March, 2014 revoked Legal Notice No. 219 of 2013 and reproduced the same as Legal Notice No. 23 of 2014. The reason for this action was the realisation that the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, Legal Notice No. 219 of 2013, was null and void having not been tabled before Parliament as mandated under section 11 of the Statutory Instruments Act. The Applicants instituted Judicial Review Proceedings through a Notice of Motion supported by the affidavit of the chairman of Mbukinya Bus Service (Kenya) Ltd, the second Applicant in this matter seeking orders that the court stays the implementation of the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, Legal Notice Number 24 of 2014.

Issues
Whether the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, Legal Notice Number 219 of 2013 issued by the Cabinet Secretary for Transport and Infrastructure was valid having never been tabled before both Houses of Parliament in accordance with section 11 of the Statutory Instruments Act.

Whether the Cabinet Secretary failed to comply with the Statutory Instruments Act when he revoked one Legal Notice and incepted another one it its place.

Whether the Cabinet Secretary acted contrary to the principles of good governance and integrity in claiming that Legal Notice No. 219 of 2013 was to further passenger safety in banning night travel.

Constitutional Law - supremacy of the people of
Kenya - executive authority - where executive authority emanated from the people of the Republic of Kenya - whether the Cabinet Secretary for Transport and Infrastructure failed to lawfully exercise his executive powers when he failed to table the Legal Notice No. 219 of 2013 before Parliament as required by the Statutory Instruments Act and instead imposed night travel ban on bus operators thereby claiming that it was in furtherance of passenger safety - Constitution of Kenya, 2010 Article 129.

Constitutional Law - national values and principles of governance - whether state organs and state officers were bound by principles of national values such as good governance, integrity, transparency and accountability in carrying out their duties in office and court - where the Cabinet secretary in this case failed to disclose to the court the fact that the Legal Notice No 219 of 2013, the subject of the matter had already been revoked three days prior to the delivery of the judgment of the court - Constitution of Kenya, 2010 Article 10.

Constitution of Kenya 2010

Article 10;
“The national values and principles of governance in this Article bind all State organs, State officers, public officers and all person whenever any of them applies of interprets this Constitution; enacts, applies or interprets nay law; or makes or implements public policy decisions.”

Article 10 (2)
“The national values and principles of governance include -
c) good governance, integrity, transparency and accountability.”

Statutory Instruments Act Number 23 of 2013

Section 11 (1)
“Every Cabinet Secretary responsible for a regulation-making authority shall within even (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament.”

Section 11 (4)
“If a copy of a statutory instrument that is required to be laid before Parliament is not lain in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid without prejudice to any act done under the statutory instrument before it became void.”

Held

1. Failure by the Cabinet Secretary to table the subject Regulations in Legal Notice Number 219 of 2013 before Parliament pursuant to the said legal provisions rendered the same null and void. It followed that the said Regulations, having not complied with the mandatory provisions of the law were, as properly recognised by the Respondents in Judicial Review No. 124 of 2014, rendered null and void by operation of law. There was therefore no point in waiting for the lapse of the grace period of 60 days granted therein.

2. Where a Court gave the party “liberty to apply” it meant that the Court still retained general superintendence of the matter and that the order was a preliminary order pending further action. In that event the parties would be at liberty to apply to the court for any directions necessary to give effect to the order. Such application was not an application for review in the strict sense of the word but was meant to ensure compliance with the earlier orders. The Court would retain the jurisdiction to extend the time for compliance with the earlier orders if it became necessary or even to discharge the same. (Re: Leisure Lodges Limited Nairobi (Milimani) HCCC No. 28 of 1996.)

3. A Court of law always retained residual powers to implement its orders. To contend that the Court had no power to give orders whose effect would be to implement the decision given by the Court was a misconception. (Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005) The Court had the duty to ensure that its orders were at all times effective and that the orders it issued were not issued in vain (Nicholas Mahihu vs. Ndima Tea Factory Ltd & another Civil Application No. Nai. 101 of 2009)

4. Every advocate and every person otherwise entitled to act as an advocate was an officer of the Court and was subject to the Court’s jurisdiction. Therefore the Chief Justice or any of the judges of the Court was empowered to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge.

5. While there was nothing inherently wrong in revoking Legal Notice No. 219 of 2013 upon
realising the same was unlawful, to keep a studious silence and to lull the Court and the country into a false sense of security that the said LN no. 219 of 2013 was still in force was highly dishonest on the part of the 1st Respondent.

6. The duty of good faith and candour lying in a party in relation to both the bringing and defending of a judicial review application was well established. The duty imposed on public duties and not least on central government was a very high one. If the Executive were free to cover up or withhold material or present it in a partial or partisan way the citizen’s proper recourse to the court and his right to a fair hearing would be frustrated. Such a practice would engender cynicism and lack of trust in the organs of the State and be deeply damaging of the democratic process, based as it was upon trust between the governed and the government.

7. A breach of the duty of candour and the failure by the Executive to give a true and comprehensive account struck at the heart of a central tenet of public law that the court as the guardian of the legal rights of the citizen should be able to rely on the integrity of the executive arm of the government to accurately, fairly and dispassionately explain its decision and actions. (Quark Fishing Limited vs. Secretary of State for Foreign Affairs [2002] EWCA 149 para 50)

8. The Constitution required candour on the part of government. What was involved was not simply a matter of showing courtesy to the public and to the courts but was a question of maintaining respect for the constitutional injunction that a democratic government be accountable, responsive and open. The courts should have never had to find themselves disempowered by lack of information from making a determination. Openness of government promoted both the rationality that the rule of law required, and the accountability that multi-party democracy demanded. (Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (1) [CCT73/05] [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC))

9. Where a party knew that a matter was pending before a Court of law and the party proceeded to take an action whose effect was to remove the rag from the feet of the Court as it were, such an action would well be construed as having been calculated to steal a match on both the Court and the parties. Good practice would dictate that the party moved the Court for recording of appropriate orders so as not create the impression that the action was meant to circumvent the judicial process. Otherwise, the Court would view such action as being contumacious and an affront to judicial process. Judicial process ought not to be misused by parties in order to achieve collateral ends. (Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009)

10. Where a person mischievously set out on a course meant to obstruct the course of justice by rendering the outcome of a matter pending in Court illusory, such action could not be said to have been taken in a manner compatible with the principle of service to the people of Kenya. A person who set out on such a perilous and off tangent voyage did so at his own risk and when along the way he found that his path was fraught with calamitous consequences, he ought not to have offloaded such consequences onto the shoulders of the people of the Republic of Kenya. Therefore, anyone who demeaned the justice system in the country offended the people of the Republic of Kenya from whom the executive derived its authority and legitimacy. Such actions ought not to be visited upon the taxpayers since to do so would amount to penalising the public twice for no wrongdoing on its part. (Republic vs. The Attorney General & Another ex parte James Alfred Koroso)

11. The Government Proceedings Act Cap 40 only applied to civil proceedings by and against the Government. It did not apply to proceedings which were not of a civil nature such as criminal proceedings. With respect to judicial review proceeding, they were neither criminal nor civil. (Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 4)

12. The decision to award costs and from where was an exercise of the discretion of the court. Inherent power was not governed by Section 3A of the Civil Procedure Act. It simply reserved the jurisdiction which inhered in every court. The court’s inherent jurisdiction was not created by legal provisions. They only manifested the existence of such powers. (Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675)
13. The Court had power under its inherent jurisdiction to make orders that would be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that that repository power was necessary to be there in appreciation of the fact that the law could not make express provisions against all inconveniences.

14. The principle of accountability mandated that State and public officers were prepared to face the consequences of their actions whenever their actions were manifestly taken with impunity and malafides. It was only when such officers were personally made to take the responsibility for their actions that the rule of law was to be upheld. The Courts had a duty and a responsibility to ensure that the public did not suffer at the expense of actions or inactions of officers deliberately designed to bring judicial process into disrepute and turn Courts of law into circuses.

15. To blatantly and brazenly disregard legal processes or to turn them into a mockery in the execution of executive authority was an affront to the rule of law, an assault on the Constitution and constitutionalism and a recipe for chaos and anarchy.

16. In exercising its judicial authority the Court was led by Article 159(2)(e) of the Constitution and the need to protect and promote the purpose and principles of the Constitution, one such principle being good governance which dictated that the public ought not to unduly shoulder the burdens of persons whose actions were themselves contrary to their expectations.

Legal Notice No. 219 of 2013 declared null and void and thereby quashed

**Circumstances in which orders for the freezing of assets would be granted**

**International Air Transport Association & another v Akarim Agencies Company Limited & 2 others**

Civil Case No 15 of 2014
High Court of Kenya at Nairobi
Milimani Commercial & Admiralty Division
F Gikonyo, J
March 11, 2014

*Reported by Beryl A Ikamari*

**Brief facts**

The 1st plaintiff and the 1st defendant entered into a Passenger Sales Agency Agreement on March 30, 1994. In the agreement, the 1st defendant was to sell tickets for air passenger transportation, to hold the proceeds of the sales in trust for the 1st plaintiff and to keep records, accounts and supporting documents in relation to the sales. The sale of air passenger tickets included all activities necessary to provide a passenger with a valid contract of carriage. The travel agent, the 1st plaintiff, could also be authorised to sell ancillary services, under the agreement.

The 2nd plaintiff provided insurance to the 1st defendant against losses that could occur from default in making payments to the 1st plaintiff. However, the 2nd plaintiff, an insurance company, claimed that the insurance policy was obtained fraudulently by the 1st defendant. Additionally, the 2nd and 3rd defendants entered into indemnity agreements in relation to the payment of the proceeds of ticket sales to the 1st plaintiff by the 1st defendant.

Between the period of September and October 2013, the 1st defendant sold tickets amounting to Kshs. 115, 633, 360.60/- and USD $ 1, 446, 906.06/-. There was a default in remitting the money to the 1st plaintiff and the Passenger Sales Agency Agreement was terminated.

The plaintiffs sought remedies against the loss of the proceeds of the sales, which was property held in a trust situation by the 1st defendant. The remedies sought included, the rendering of accounts, delivery of documents or records, orders for the freezing of assets and orders for issuance of a warrant of arrest.

**Issues**

Circumstances in which orders for the freezing of assets would be issued to prevent the dissipation or loss of property.

Whether the grant of orders for disclosure, production and inspection of documents, in civil proceedings, would be a breach of the right against self-
Circumstances in which orders of arrest would be issued to prevent a defendant from absconding or leaving the court's jurisdiction or disposing or removing property from the court's jurisdiction.

Civil Practice & Procedure - injunction-freezing of assets-the circumstances in which the court would grant injunctive relief to prevent the dissipation or loss of assets-Civil Procedure Rules 2010; order 40 rule 7.

Constitutional Law - fundamental rights and freedoms-enforcement of fundamental rights and freedoms-right to a fair hearing-right against self-incrimination-disclosure, production and inspection of documents-whether the grant of orders for disclosure, production and inspection of documents, in civil proceedings, would be a breach of the right against self-incrimination-Constitution of Kenya 2010; article 50(2)(l).

Civil Practice & Procedure-arrest & attachment before judgment-circumstances in which the court would issue orders to prevent a defendant from absconding or leaving the court's jurisdiction or disposing or removing property from the court's jurisdiction-Civil Procedure Rules 2010; order 39 rule 1 & 5.

Held
1. Generally, the right against self-incrimination would not arise where there was a contractual or fiduciary relationship in which the defendant was required to keep records and provide documents relating to all transactions constituting the contract or the trust. Generally, the entire regime of discovery, disclosure, production and inspection of documents was permissible in civil proceedings.
   The restriction arising from the right against self-incrimination would not apply to the enforcement of contractual obligations. The Constitution did not restrict the ability of parties to a contract to agree on the keeping of records and the production of documents.

2. Order 39 rule 1 & 5 of the Civil Procedure Rules 2010 related to the furnishing of security for appearance and the production of property, respectively. The rules required evidence to be adduced to demonstrate that the defendant had absconded or left the court's jurisdiction or had disposed or removed property from the court's jurisdiction. The rule would also apply where there was a real possibility that the defendant was about to abscond or leave the court's jurisdiction or to dispose or remove property from the court's jurisdiction.

3. Order 39 rule 1 & 5 of the Civil Procedure Rules 2010 also required the identification of the property that was at risk of disposal or removal. Orders for arrest as provided for in order 39 rule 1 & 5 of the Civil Procedure Rules 2010, would not be issued as the evidence adduced was insufficient to support the grant of such orders.

4. To prevent the abuse of fiduciary authority, trust property or property into which that property was converted, as far as such property was capable of being identified and disentangled, could be followed and traced. Generally, the burden of tracing, identifying and disentangling recoverable property would lie with the applicant. However, where the defendant mixed such property with other assets, the burden of identifying the recoverable assets would fall on the defendant. Such a position would defeat the use of complicated designs to conceal misappropriated or stolen trust property.

5. The threshold for the grant of a freezing order required the existence of the following factors, namely;
   - The claimant having ‘a good arguable case’ based on a pre-existing cause of action;
   - The claim being one over which the court had jurisdiction;
   - The defendant appearing to have assets within the jurisdiction;
   - The existence of a real risk that those assets could be removed from the jurisdiction or otherwise dissipated if the injunction was not granted; and
   - The existence of a balance of convenience in favour of granting the injunction;
   The court could also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant's assets.

6. The applicant had established the existence of a fiduciary relationship between the 1st plaintiff and the 1st defendant, which arose from a Passenger
Sales Agency Agreement. The agreement created trust property in the form of payments collected from the sale of passenger tickets.

An arguable case for breach of trust and a claim of Kshs. 115,633,360.60/- and USD $ 1,446,906.06/-, as sums of money that were the proceeds of ticket sales and were not remitted by the 1st defendant to the 1st plaintiff.

7. Therefore, the claim was not frivolous. The risk of dissipation of assets could be inferred from dishonest or unlawful conduct. The evidence adduced was adequate to establish the risk of dissipation of assets and it had shown:

- The existence of a fiduciary relationship, in which the trust property was cash.
- That the trust property was cash and it could easily be dissipated.

8. In the circumstances of the case, the balance of convenience favoured the grant of the freezing order. Additionally, the court could also order disclosure of documents or the administration of requests for further information for purposes of ascertaining the location of the defendant's assets.

Application allowed in part. (Orders for arrest were not granted but orders for the freezing of assets worth Kshs. 350,000,000/- and disclosure, were issued.)

Jurisdiction of the Environment & Land Court in Claims arising from transboundary agreements

Friends of Lake Turkana Trust v Attorney General & 2 others
ELC Suit No 825 of 2012
Environment & Land Court at Nairobi
P Nyamweya, J
May 19, 2014
Reported by Beryl A Ikamari & Karen Mwende

Brief facts
The petition concerned an alleged memorandum of understanding between the Government of Kenya and the Government of Ethiopia, entered into in the year 2006, for the purchase of 500MW of electricity from Gibe III as well as an $800 million grid connection between Kenya and Ethiopia. For purposes of generating the electricity, the Government of Ethiopia constructed dams in River Omo, which entailed a dominant source of water for Lake Turkana.

The Petitioner’s contention was that the construction of Gibe III Dam would cause environmental concerns and have an adverse impact on Lake Turkana. The Petitioner elaborated that Lake Turkana was vital to the livelihood, lifestyle and cultural heritage of the communities living around the lake.

The Petitioner explained that the proposed dam construction could cause a violation of the right to life and human dignity and also the right to a clean and healthy environment.

It was also the Petitioner’s claim that the government had failed to provide information on the nature of agreements it had with Ethiopia for the supply of electricity to Kenya. The Petitioner thus claimed that there had been a breach of the right to access information as provided for in article 35 of the Constitution of Kenya, 2010.

Issues
Whether the Environment and Land Court had jurisdiction over claims arising from an agreement entered between the Kenyan Government and a foreign government.

Whether there had been, or there would be, violations of the right to life, the right to human dignity and the right to a clean and healthy environment arising from the construction of the dams for purposes of electric power generation.

Whether there was a violation of the right to access information as concerned the agreement on electric power supply between Kenya and Ethiopia.

Constitutional Law - fundamental rights and freedoms-enforcement of fundamental rights and freedoms-the right to life, the right to human dignity and the right to a clean and healthy environment-allegations of environmental harm and breaches of fundamental rights and freedoms in the generation of electric power, for purposes of a power supply agreement between Kenya and Ethiopia-Constitution of Kenya 2010, articles 26, 28 & 42.

Constitutional Law - fundamental rights and freedoms-enforcement of fundamental rights and freedoms-the right to access information-access to information as relates to agreements entered between the Kenyan Government and foreign governments-access to information as related to a claim touching on environmental harm caused by the generation of electric power, for purposes of a power supply agreement between Kenya and Ethiopia-Constitution of Kenya 2010, articles 35 & 69(1).

Held
1. It was an accepted general principle and presumption in national law and public international law that the jurisdiction of states and courts was territorial and that there was need for a substantial and genuine connection between the subject matter and territorial base in cases that concerned a foreign element. No state would have jurisdiction over another state and no state was allowed to exercise jurisdiction through its courts over another state, unless that state expressly consented to that jurisdiction or a state had resorted to sanctions which were allowed in international law.

2. Both parties to the petition were Kenya entities. Additionally, the Petitioner's claim entailed alleged violations of fundamental rights and freedoms recognized by the Kenyan Constitution by the Respondents. The fact that the alleged violations arose from a transboundary agreement between Kenya and Ethiopia would not limit the court's jurisdiction.

3. The petition concerned the obligations of the Kenyan Government towards its citizens whilst entering into international agreements. It concerned claims of environmental harm, the violation of the right to life, the right to a clean and healthy environment and the right to access information. Effectively, the court was not making determinations that would bind the Ethiopian Government.

4. The Petitioner produced reports which indicated that there was likelihood that the Gibe III hydroelectric power project would have an adverse impact on Lake Turkana and the communities who depended on the lake for their livelihood. However, there was no sufficient evidence tendered to establish the impact of the electricity generation project and the violation of rights to life, dignity, livelihood and cultural heritage and the right to a clean and healthy environment.

5. Pertaining to the right to access environmental information, article 69(1)(d) of the Constitution of Kenya 2010 placed an obligation on the state to encourage public participation in the management, protection and conservation of the environment. Public participation would only be possible where the public had access to information and was facilitated in terms of their reception of different views.

6. Access to environmental information was a prerequisite to effective public participation in decision making and monitoring governmental and public sector activities on the environment. The risk of environmental harm posed by the importation of electric power from Ethiopia placed a duty on the Kenyan Government to provide information on the importation and transmission of electric power from Ethiopia.

7. The Kenyan state, as the trustee of the environment and natural resources, had a duty and obligation to ensure that the resources of Lake Turkana were sustainably managed, utilized and conserved. Furthermore, the state had a duty to prevent any environmental harm that could arise from the agreements and projects entered into with the Government of Ethiopia.

8. The decision on whether or not to enter into an agreement with the Ethiopian Government would be influenced by economic and political
judgments which the court was not equipped
to decide on. However, the Petitioner’s interests
could be safeguarded by providing access to
information and facilitating public participation in
the making of such decisions.

Petition partially allowed. (An order of mandamus was
issued to compel the Respondents to make full and
complete disclosure of the agreements or arrangements
entered into with the Government of Ethiopia for purposes
of the supply of electric power. The Government of Kenya
was also directed to take steps to ensure that the natural
resources of Lake Turkana were sustainably managed,
utilized and conserved in any engagement, agreement
or arrangement entered into with the Government of
Ethiopia. The order of prohibition which would prohibit
the making of the power supply agreement with the
Government of Ethiopia was not issued.)
## Product Catalogue and Price list

<table>
<thead>
<tr>
<th>Product</th>
<th>Status</th>
<th>Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1  Keny Law Reports 1976-1980</td>
<td>Available</td>
<td>6,000/=</td>
</tr>
<tr>
<td>2  Keny Law Reports 1981</td>
<td>Out of stock</td>
<td></td>
</tr>
<tr>
<td>3  Keny Law Reports 1982</td>
<td>Out of stock</td>
<td></td>
</tr>
<tr>
<td>4  Keny Law Reports 1983</td>
<td>Out of stock</td>
<td></td>
</tr>
<tr>
<td>5  Keny Law Reports 1984</td>
<td>Out of stock</td>
<td></td>
</tr>
<tr>
<td>6  Keny Law Reports 1985</td>
<td>Out of stock</td>
<td></td>
</tr>
<tr>
<td>7  Keny Law Reports 1986</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>8  Keny Law Reports 1987</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>9  Keny Law Reports 1988</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>10  Keny Law Reports 1989</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>11  Keny Law Reports 1990</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>12  Keny Law Reports 1991</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>13  Keny Law Reports 1992</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>14  Keny Law Reports 1993</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>15  Keny Law Reports 1994</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>16  Keny Law Reports 2000</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>17  Keny Law Reports 2001</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>18  Keny Law Reports 2002 Vol. 1</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>19  Keny Law Reports 2002 Vol. 2</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>20  Keny Law Reports 2003</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>21  Keny Law Reports 2004 Vol. 1</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>22  Keny Law Reports 2004 Vol. 2</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>23  Keny Law Reports 2005 Vol. 1</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>24  Keny Law Reports 2005 Vol. 2</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>25  Keny Law Reports 2006 Vol. 1</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>26  Keny Law Reports 2006 Vol. 2</td>
<td>Available</td>
<td>4,500/=</td>
</tr>
<tr>
<td>27  Keny Law Reports 2007 Vol. 2</td>
<td>Available</td>
<td>4,500/=</td>
</tr>
<tr>
<td>28  Keny Law Reports 2008</td>
<td>Available</td>
<td>4,500/=</td>
</tr>
<tr>
<td>29  Keny Law Reports 2009</td>
<td>Available</td>
<td>4,500/=</td>
</tr>
<tr>
<td>30  Keny Law Reports 2010 Volume 1 &amp; 2</td>
<td>Available</td>
<td>4,500/=</td>
</tr>
<tr>
<td>31  Laws of Kenya Grey Book</td>
<td>Available</td>
<td>7,200/=</td>
</tr>
<tr>
<td>32  Land Law Volume</td>
<td>Available</td>
<td>7,200/=</td>
</tr>
<tr>
<td>33  Public Finance Volume</td>
<td>Available</td>
<td>7,200/=</td>
</tr>
<tr>
<td>34  Family Law Volume</td>
<td>Available</td>
<td>4,500/=</td>
</tr>
<tr>
<td>35  Commercial Law Vol. 1</td>
<td>Available</td>
<td>7,200/=</td>
</tr>
<tr>
<td>36  Commercial Law Vol. 2</td>
<td>Available</td>
<td>7,200/=</td>
</tr>
<tr>
<td>37  Laws of Kenya Land Law CD (featuring new Land Laws)</td>
<td>Available</td>
<td>1,500/=</td>
</tr>
<tr>
<td>38  Kenya Law Review 2007 Vol. 1</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>39  Laws of Kenya Consolidated CD ROM</td>
<td>Available</td>
<td>1,500/=</td>
</tr>
<tr>
<td>40  Keny Law Reports [Gender Based Violence]</td>
<td>Available</td>
<td>4,500/=</td>
</tr>
<tr>
<td>41  Keny Law Reports (Family &amp; Gender)</td>
<td>Available</td>
<td>4,500/=</td>
</tr>
<tr>
<td>42  Keny Law Reports [Environment &amp; Land] Vol. 1</td>
<td>Available</td>
<td>3,000/=</td>
</tr>
<tr>
<td>43  Keny Law Reports [Election Petitions] Vol. 1</td>
<td>Available</td>
<td>4,500/=</td>
</tr>
<tr>
<td>44  Keny Law Reports [Election Petitions] Vol. 2</td>
<td>Available</td>
<td>4,500/=</td>
</tr>
<tr>
<td>45  Keny Law Reports [Election Petitions] Vol. 3</td>
<td>Available</td>
<td>4,500/=</td>
</tr>
<tr>
<td>48  Keny Law Reports [Gender Based Violence]</td>
<td>Available</td>
<td>4,500/=</td>
</tr>
<tr>
<td>49  Keny Law Reports Weekly e-Newsletter</td>
<td>Available</td>
<td>Free by email subscription</td>
</tr>
<tr>
<td>50  Bench Bulletin</td>
<td>Available</td>
<td>Free</td>
</tr>
<tr>
<td>51  <a href="http://www.kenyalaw.org">www.kenyalaw.org</a></td>
<td>Always available</td>
<td>Free</td>
</tr>
</tbody>
</table>

**Available at Our Offices**

ACK Garden Annex, 5th Floor, 1st Ngong Avenue, Ngong Road, Upper Hill P.O Box 10443 - 00100, Nairobi - Kenya  
**Tel:** +254 (020) 2712767, 2011614, 2719231 **Mobile:** +254 718 799 464, 736 863 309

www.kenyalaw.org  mykenyalaw  @mykenyalaw  Mykenyalaw

National Council for Law Reporting (Kenya Law) - A service state corporation in the Judiciary