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Two events featured in this edition highlight the increasing importance of nurturing socially oriented and conscientious organizations: The Judiciary Service Week and a corporate social responsibility (or creating shared value) event organized by Kenya Law in Marigat, Baringo County. The bigger picture is that all institutions, whether public or private, big or small, profit-based or humanitarian, criminal enterprise or religious charity, exist to solve a social problem. Invariably, that problem can be reduced to the simplest of terms: how to maximize the welfare and enrichment of the organization’s stakeholders. Somewhere in the rat-race of strategic plans and performance targets, we dropped the notion that at heart, all institutions are welfare institutions.

We have an opportunity reclaim that notion. It is an opportunity for social innovation to take the centre stage in organizational planning. For creative ideas that re-orient the organization towards bringing positive societal transformation. It is time for organizations to look themselves in the mirror and frankly ask themselves: what social problem are we established to solve?

For a Judiciary, I would imagine that the enlightened answer would be: ‘we exist to work for a just society governed by the rule of law’. I would not imagine it to be anything less for a law reporting institution. This visioning or paradigm leap helps us to define our social mission beyond the mundane tasks that are our job description – deciding cases, publishing legal information – and gives us a frame of reference that inspires us to be the change we want to see in society.

I witnessed this social innovation when at the height of the Judiciary Service Week, judicial officers spent what would otherwise have been their ‘summer’ vacation hearing and disposing of thousands of pending criminal appeals and when staff from our law reporting department mentored and supported vulnerable and socio-economically disadvantaged school girls.

These two activities have triggered our thinking about our role in social justice and how we can positively impact society through a conscientious fulfillment of our organizational mandate.
CJ’s Message

Chief Justice’s Statement at the Launch of the Judiciary Service Week at the Kamiti Maximum Security Prison, Nairobi, on October 11, 2013


Today’s event is a manifest demonstration of the phenomenal achievements that can be made when institutions work together. Let me begin with a little background.

Last year, judges, magistrates, kadhis and judicial staff stepped out of the courtrooms and onto the streets across the country to explain how they work and receive feedback on how to do their work better. The Judicial Marches Week was unprecedented as an outreach initiative, and it has yielded greater public participation in the Judiciary as decreed by the Constitution.

On October 7, 2013, the Judiciary delivered judgments in the last seven election petitions. The only election matters now pending are appeals in the Court of Appeal and the High Court. As you are aware, the pressure of the elections this year was such that no judge or magistrate was able to take annual leave. Over 190 election petitions were filed across the courts in Kenya – from the magistrates’ courts up to the Supreme Court. This week, High Court judges completed the last of the 118 petitions before them. Magistrates had concluded another 70 petitions before. It is an unprecedented achievement in the country’s history that each judge hearing an average of two election petitions can conclude them and deliver judgment in six months. The judges and magistrates who have made this achievement possible deserve our gratitude and my personal congratulations. I want to acknowledge the hard work of the Judiciary Working Committee on Election Preparations in planning ahead, as well as the judicial officers and staff who worked throughout the year, sacrificing their vacation and leave to deliver on schedule. Your service to your nation is deeply appreciated.

The six-month constitutional deadline for concluding election petitions, now fully discharged, has also introduced another burden on the Judiciary. Criminal appeals that require two judges, or even a single judge, have been held back, causing great frustration for all concerned. There were 10,289 criminal appeals carried over from last year, and an additional 3,325 filed this year, bringing the total to 13,614. Judges have volunteered to deal with this burgeoning problem through a week of intensive service, hence the Judicial Service Week. I wish to thank the Principal Judge of the High Court as well as all the judges for their sacrifices and dedication. We recognise with deep humility that the Judiciary cannot work alone.

Justice is a chain in which each of the players is as strong as the weakest link. Under the National Council on the Administration of Justice, actors in the justice chain are coming together during the Service Week. I recognize and appreciate the support of the Prisons Service, which is evident by the fact that they have hosted us here, the Probation Department, who have rallied to support the decongestion of prisons, the Director of Public Prosecutions, who has made state counsel available at short notice, and the Law Society of Kenya, who have provided pro bono services and agreed to accommodate the Judiciary for two weeks during the Service Week. I also note and appreciate the technical team representing the various agencies that worked on the preparations for the Service Week.

Starting October 14 until October 18, therefore, judges will listen to appeals in criminal cases emerging from the magistrates’ courts. The Service Week is a make-good initiative in place of the Judicial Marches launched in 2012 to bring the Judiciary closer to Kenyans. Sitting in twos over 808 cases and as single-judge benches in 720 cases in every High Court station in Kenya, the judges will hear and decide whether to uphold or overturn convictions in 1,528 cases. It means that on
average, every judge will hear 15 cases this week — five as a member of a two-judge bench, and 10 alone.

On August 15, 2013, the chairman of the Community Service Order sent me a report showing that prisons were congested by over 94 per cent. Many Kenyans are aware that there have been complaints and hunger strikes in prisons here at Kamiti, as well as in Nakuru over delayed cases. I thank the prisoners who have lodged appeals for their patience and understanding as judges worked to conclude election petitions. Of the 33,194 inmates in prison, 12,704 of them are first-time light offenders who qualify for release under the Community Service Orders programme. Community Service Orders allow offenders to perform unpaid work for the benefit of the community as an alternative to imprisonment. This allows offenders to maintain family ties while serving their punishment under the supervision of probation and administration authorities.

During the Service Week, some 3,500 people who have been convicted for light criminal offences will have their jail terms revised so that they instead perform unpaid public work for the benefit of the community. Keeping petty offenders out of prison prevents their recruitment into serious crime, reduces prison population and saves the public money.

Often, attempts to decongest prisons are misunderstood by many Kenyans. Let me clear the air by saying that not every inmate qualifies for release. Judges will be especially careful to ensure that in releasing inmates under Community Service Orders, they take into consideration the feelings of the victims of the crimes for which the sentence was handed down. I appeal to fellow citizens not to be hostile to those leaving prison and instead show them leniency and compassion even as they continue to be under the watch of local leaders such as chiefs and village elders. Since feeding one prisoner is estimated to cost Sh175 a day, allowing 3,500 inmates to be home with their families will save the taxpayer Sh223.5 million in a year.

Lastly, I wish to thank the Kenyan people for continuing to place their faith in the courts. In the year 2012/2013, some 54,602 cases were filed in the High Court, up from the previous year’s 37,954. We are honoured by the authority that has been donated to us by the people of Kenya. This year, we will also focus on improving court registries so that they are not an obstacle to accessing justice. A prison study undertaken by the judiciary early this year revealed that out of 3,008 prisoners who complained of case delays, nearly a third, or 900, did not know or have their appeal file numbers. We are streamlining registry processes to create clear accountability lines to reduce such incidents. I assure you of the Judiciary’s commitment under my watch to deliver on our constitutional obligations to deliver expeditious delivery of justice. An audit of all pending cases is under way to determine the exactitude of backlog and also to provide a basis for an information communication technology-based case management strategy.

Next week, I will be formally launching the Performance Management and Measurement Steering Committee, which I appointed this year to study and create benchmarks for service in the Judiciary. Our courts remain open and the early Judiciary Transformation continues. Ladies and gentlemen, it is now my singular pleasure to launch the Judiciary Service Week.

‘‘Thank you.’’

Dr Willy Mutunga, D. Jur, SC, EGH
Chief Justice and President of the Supreme Court of Kenya
Three Branches of Government

D

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Albert Luthuli Professor-at-Large University of Jos, Jos, Nigeria

Andrew D. White Professor-at-Large Emeritus and Senior Scholar in Africanist Studies Cornell University, Ithaca, New York, U.S.A.

Senior Fellow Prince Alwalde Bin-Talal Center for Muslim-Christian Understanding Georgetown University Washington, DC

I begin the lecture with observations about the initial post-Colonial African experience of the three branches of government—the legislative, the executive and the judiciary. As the Colonial era was coming to an end the empowerment of indigenous Africans started with the legislative branch. The legislature on the eve of independence was often referred to as “the Leg.Co.” which was an abbreviation of “the Legislative Council” in British Africa.

The political empowerment of indigenous Africans began with the gradual Africanization of the legislature. The process was gradual, beginning with one or two Nominated Members of Parliament. It took a while before elections for African parliamentarians were gradually implemented.

Those were the days when oratory in the English College had high political value. Kenya’s Tom Mboya became one of the most dazzling orators. He became an international figure. When I met Martin Luther King, Jr. in New York in 1961, and mentioned that I was a Kenyan student, Dr. King immediately started discussing Tom Mboya in friendly terms and with admiration.

In both British and French colonies initial empowerment of Africans started with creating African legislators. The most remarkable aspect of French policy was the admission of colonial Africa into French metropolitan institutions in Paris. Both orators Senghor of Senegal and Felix Houphouët-Boigny were parliamentary deputies in France for many years before the independence of their respective countries.

In Kenya the Africanization of the Executive Branch started when Jaramogi Oginga Odinga struck a blow for democracy in the last days of colonial rule. Odinga was invited to the Residence of the British Governor of Kenya, Sir Patrick Kenyatta, and offered the leadership of the first African government in Colonial Kenya. The event occurred in Government House (now called State House) in Nairobi in 1960. The British Governor and the Kenyan nationalist were both standing when the offer was made. It seemed to be the chance of a lifetime. It turned out to be Oginga Odinga’s last opportunity to become Prime Minister of independent Kenya. Oginga Odinga is reported to have responded as follows to the Governor:

“If I accept your offer, I will be seen as a traitor to my people. The British cannot elect me leader to my people... Kenyatta is around, just here at Lodwar. Release him and allow him to lead us; he is already our choice.

Sir Patrick Kenyatta was temporarily stumped. He then summoned the driver to take Mr. Oginga Odinga back to his native quarters in Nairobi.

We now know that Oginga Odinga struck a blow against external selection of African leaders. He had sacrificed what turned out to be his last opportunity to lead Kenya. His incumbency could have transformed the ethnic configurations of post-colonial Kenya. If Oginga Odinga has accepted the Governor’s offer, the jaramogi could have presided over the release of Jomo Kenyatta, and Kenyatta might have become Odinga’s Vice President instead of the other way round.

Odinga’s first blow in favor of democracy was to reject external selection of African leaders, at enormous cost to his future presidential aspirations. When I met Martin Luther King, Jr. in New York in 1961, and mentioned that I was a Kenyan student, Dr. King immediately started discussing Tom Mboya in friendly terms and with admiration.

Oginga had later prospered under KANU first as Vice-President of the party, then as Minister for Home Affairs (1963–1964) and then as Vice President of Kenya and Minister without portfolio (1965–1966). He had other portfolios, but never became President of Kenya. Jomo Kenyatta was released from detention not long afterwards, in time to lead the Kenya African National Union (KANU) to an electoral victory in 1963. Jomo Kenyatta became Prime Minister of independent Kenya in December of that year.

The 1960s were years of sweeping constitutional change all over Africa. Kenya abolished neo-federalism (majimbo) and became more of a unitary state. The office of President was created in Kenya, Tanzania, Uganda and the other elections became more competitive when the multiparty system was restored, and term limits were instituted.

The elections in 2002 in Kenya defeated KANU for the first time and the KANU’s Presidential candidate, Uhuru Kenyatta was defeated. Mwai Kibaki triumphed to become the third President of Kenya. Uhuru Kenyatta experimented with a second politician called Kenyatta through the electoral process instead of by hereditary succession. Egypt under Hosni Mubarak had been preparing Gamal Mubarak to succeed his father as President. Libya, under Muammar Gaddafi and Jaramogi Oginga Odinga under the Afro-Arab Uprising of 2011–2012.

Political dynasties are families who have exerted disproportionate influence on the politics of their societies. If they are very successful they may produce more than one Head of State or Head of Government. But at the very minimum political dynasties have produced political leaders in varied ranks of the political process.

In the United States, the Bush family has rapidly become a political dynasty. That dynasty has so far produced two presidents—George Herbert Bush and George William Bush. It is probable that there will be a third. But the dynasty produced Jeb Bush following his career as Governor of the State of Florida. The Kennedy family has also been a political dynasty. One brother (JFK) became president; another (Robert) became Senator and then Attorney General, and the third (Edward) has been Senator and would probably have become president but for the tragedy at Chappaquiddick.

The Odingas in Kenya have also become a dynastic family. Jaramogi Oginga Odinga rose as high as Kenya’s Vice-President, and exercised almost equal power as Minister of Home Affairs. But his dream of becoming President of Kenya remained forever elusive—partly because of artificial impediments put in his way by rival political forces.

It has been the politicization of Raila Odinga which has turned the Odinga family into a political dynasty. Raila has become a second Odinga force in Kenya politics. He ran twice for President, but his highest post was that of Prime Minister.

The Odingas, in their turn, could have become a political dynasty. That dynasty has so far produced one president—Mzee Jomo Kenyatta. But Uhuru Kenyatta became for a while a defacto leader of the opposition. In 2013 Uhuru was at last elected the fourth post-colonial President of Kenya. Uhuru Kenyatta is also young enough to ascend, in like manner, to the pinnacle of power in the future.

Asia has experienced a phenomenon which might be characterized as female succession to male martyrdom. A male leader is assassinated in a country like Sri Lanka (previously Ceylon) and a female relative emerges as a political force to take his place. Mrs. Bandaranaike rose to become future Prime Minister. In Pakistan, Zulfiqar Ali Bhutto was executed as Prime Minister...
Minister. Over time his daughter Benazir Bhutto became Prime Minister of Pakistan twice. In Bangladeshi history, Sheikh Mujib Rahman and General Muhammad Zia-ul-Haq were killed. Rahman’s daughter and Zia’s widow rose to exercise ultimate political leadership in Bangladesh. In Indonesia, Megawati Sukarnoputri eventually succeeded her father, the late Sukarno, as Indonesia’s Head of State.

Africa is revealing a pattern of “male succession to male heroism” rather than “female succession to male martyrdom.” This African tendency has included developments in the Democratic Republic of the Congo [DRC]. Assassinated President Laurent Kabila has been succeeded by his son, Major General Joseph Kabila. In the Republic of Togo, the long presidency of His Excellency Gnassingbé Eyadema was succeeded [by fair means or foul] by the Presidency of his son, Faure Gnassingbé.

Both the DRC and Togo have been cases of interfamilial succession by military means. The rise of Raila Odinga and Uhuru Kenyatta to national prominence in Kenya have been through the forces of democratization rather than through military intervention.

THE JUDICIARY IN A TRANSITION

The post-colonial judiciary in post-colonial Africa was the slowest to be Africanized or indigenized among the three branches of government. Sometimes this resulted in the Pan-Africanization of the judiciary. Judges could be hired from other parts of Africa to serve in countries other than their own.

Milton Obote’s Uganda hired Sir Udo Udona from Nigeria to serve as the Chief Justice of Uganda. Julius Nyerere had for a while an open door policy for lawyers from global Africa to practice in Tanzania.

Non-indigenous citizens of East Africa [such as local Europeans or local Asians] rose very high in the legal profession long before indigenous citizens could compete. The Chief Justice of Kenya was for a while a European. Kenya had Indian lawyers like Inamdar competing. The Chief Justice of Kenya was for a while a British lawyer. Nairobi, the capital of Kenya, had Indian lawyers like Inamdar going back to the 1940s.

Why were the executive branch and the legislative branch easier to Africanize or indigenize than the judiciary? Legislative and Executive branches always consist of politicians. These politicians could be drawn from almost any area of expertise. Politicians in Africa have been drawn from the commercial class, from academic especially in the social sciences, from Trade Unions, from among farmers, and indeed from lawyers. In short, Politicians come from diverse backgrounds.

On the other hand, the Judiciary is drawn from lawyers, a more specific expertise. The law itself has a variety of sub-fields, but not as wide a range as that of politicians. Indigenous Africans were much slower to be trained in the law than were local Indians or local Europeans.

But we should bear in mind that some African countries created indigenous African lawyers much earlier than other countries did. British West Africa did so earlier than did British East Africa. French-speaking Africa had fewer lawyers than did Commonwealth Africa.

But even within East Africa alone Uganda in the 1960s had more African lawyers than either Kenya or Tanzania. But a remarkable contradiction developed in Uganda. The Judiciary had been Pan-Africanized with the appointment of a Nigerian as Chief Justice [Sir Udo Udona].

But did the Chief Justice legitimize tribalism within Uganda following the 1966–1967 political upheaval? Sir Udo Udona helped Milton Obote justify his ouster of President Sir Edward Mutesa. Obote’s imposition of a new Constitution in 1967 was also legally legitimized by the Judiciary.

At stake was whether the executive branch at the center under Obote had the Constitutional qualifications to abolish such sub-state kingdoms as the Kabakaship of Buganda and the provincial monarchs of Banyoro, Toro, and Busoga.

After 1966 Uganda demonstrated the paradox of entrusting the Judiciary to a Nigerian Chief Justice—who in turn lent legitimacy to sub-national ethnic confrontations.

But with regard to the abolition of the Uganda monarchies by the 1967 Constitution, Abu Mayanja, a distinguished lawyer, was prophetic about the consequences. He argued that those who abolished the small kingdoms of others ended up creating a mega-kingdom for themselves. A Uganda without traditional kings could become a Uganda with a super artificial king [Parliament under Obote July 6–7, 1967].

But on the whole Abu Mayanja regarded the 1962 Constitution as a whole as a liberal achievement worth defending. Hence his careful professional critique of the 1967 alternative Constitution which Obote rushed through Parliament after the crisis of 1966.

Contrary to widespread belief, Abu Mayanja was not detained because of his critique of the 1967 Constitution—a critique which was published in Transition Magazine. He was detained because of a letter he published in Transition accusing the Obote government of nominating new judges on the basis of tribalism. Abu Mayanja pretended that he did not believe the rumors which alleged that the Uganda Judiciary was being tribalized. But it was obvious to the reader of the letter that Abu Mayanja believed those rumors and was in the process of spreading them.

He and Rajat Neogy, The Editor of Transition, were promptly detained. I issued at Makerere a statement denouncing me for teaching sedition at Makerere. In Uganda radio that night was full of the President’s denunciation of my teaching sedition. The President’s speech and the attack on “the Professor of Political Science.” In those days I was Uganda’s only Professor of Political Science. I attended some diplomatic party that night. Obote’s speech was the talk of the evening. Chief Justice Sir Udo Udona was astonished when I told him I had been summoned by the President’s Office to attend the Presidential reprimand. His theory was that Obote summoned me for a public reprimand in order to avoid having to expel me or detain me. Obote was under pressure to be tougher with me. Sir Udo Udona suggested that the President probably expected me to seek a private audience with him. The next day I asked to see the President, and the request was promptly granted.

I spent several hours at the President’s Office. My brief was not a plea for Abu Mayanja and Rajat Neogy as prisoners, but a plea for freedom of expression in Uganda. I genuinely regarded the event as a major step backward in the story of Uganda as an open society. Obote was surprised that I had not gone just to beg for the release of my friends, but to argue that the whole approach of locking up writers and editors for the views they expressed was a major deterioration of the quality of intellectual life in Uganda. The executive was detaining without trial.

I suspect that was the origin of a decision made by the government to ask the Mayor of Kampala to arrange a public debate in the Town Hall between Akena Adoko, Head of Intelligence, and myself about “The Role of African Intellectuals in the African Revolution.”

But at my actual meeting with Obote following the detention of Abu Mayanja and Rajat Neogy, Obote explored another idea. Why did I not take over Transition and edit it myself? It did not occur to Obote that he was asking me to stab Rajat and Abu in the back. I simply said that was impossible. I was subsequently allowed to visit both Neogy and Abu in detention.

Neogy was stripped of his Uganda citizenship and then tried in a court of law. The Judiciary was sufficiently independent that Neogy was acquitted. He and his magazine went into exile in Ghana. Abu Mayanja was eventually released.

As for the subsequent debate between Akena Adoko and me in the Kampala Town Hall, it did become a major political and national event. Some Kampala schools were closed so that students could attend. There were loud speakers outside the Town Hall because of the massive crowds. It was during that debate that I defined an intellectual as “a person who has the capacity to be fascinated by ideas, and has acquired the skills to handle some of those ideas effectively.”

Akena was the most powerful member of President Obote’s family. To Akena Adoko’s argument that African intellectuals had to be politically committed, I replied, “Perhaps, but political commitment should not be confused with political conformity.”
Akena Adoko was at the time the second most powerful civilian after Milton Obote. But in January 1971 that power configuration ended. Idi Amin staged a coup, and Uganda entered a whole new phase of history. Abu Mayanja became a Minister under Idi Amin. One evening Mayanja came to my house at Makerere to ask if I would agree to serve as a special Political Adviser to President Amin. Was I prepared to be the equivalent of Henry Kissinger if Idi Amin was the equivalent of Richard Nixon? Could I play Kissinger to Amin’s Nixon? Although Idi Amin himself did not use that analogy, Abu told me the invitation to me was from Idi Amin himself. In those days one did not say “NO” to Idi Amin outright. I asked for time. I said I had lecturing engagements in Britain. Could I respond to the invitation upon my return? Abu and I agreed that if I did not want to play such a role, I would simply be silent on the issue upon my return. Idi Amin was bound to have moved to other ideas by that time. When I returned from England, I told Abu my real answer of “NO”—but silence was a better answer to Amin.

Idi Amin did move to something else relevant to this saga between rulers and intellectuals. Idi Amin started a dialogue with apartheid South Africa. One of his ideas was to send to South Africa brilliant African minds to convince White people that Black people could think. Ali Mazrui was supposed to be Exhibit A. I was in the audience in the Main Hall at Makerere waiting to be convinced. I have a right that these wants should be provided for this wisdom. . . . It is not that a lawyer tells me what I may do, but what humanity, reason and justice, tell me I ought to do.” —Edmund Burke, Reflections on the Revolution in France.

The Western legal tradition leans towards the open society. The Sharia and African customary law lean towards the compassionate society. That is a major reason why the Muslim Brotherhood triumphed in the first free and fair elections in Egypt’s history. For decades the Muslim Brotherhood had operated as a charitable and compassionate organization among the poor. Free elections in Tunisia had also been won by Islamist parties.

While Arab Africa is experiencing this contest between secularists and Islamists in Constitution-making, South Africa after apartheid has embraced Western liberalism more completely in its own Constitution. Indeed, the South African constitution has been widely described as the most liberal in the world, and not merely in Africa. South Africa has even embraced gay rights and same-sex unions, when most of the Western world and most of the States in the United States are still hesitating in recognizing same-sex unions.

Ironically, South Africa’s neighbor, Zimbabwe, under Robert Mugabe has been close to being homophobic. Mugabe himself has personally denounced homosexuality, although independent Zimbabwe had for a while a homosexual President, President Banana. Africa has extremes of legal attitudes to homosexuality. The most homophobic seems to be Uganda, which had at one time even considered making homosexual practices liable to the death penalty. But international outrage finally led to the withdrawal of the death penalty.

More recently Uganda has been considering whether to criminalize even knowing a homosexual without reporting him or her to the police. But on the whole, African laws against homosexuality are seldom enforced against lesbians. On the contrary, African customary law has sometimes accepted some versions of same-sex lesbian marriages. It is mainly male homosexuality that is regarded as repugnant. It is worth considering that for centuries Great Britain legalized lesbianism while outlawing male homosexuality. But post-apartheid South Africa has now legalized both.

**FROM THE IMPEACHMENT GAP TO THE MILITARY COUP**

It may be one of the major constitutional gaps in post-colonial constitutions that the impeachment process was not available for remaining members of the Executive or Judicial branches short of the experimentation. When Khware Nkrumah wanted to get rid of his Chief Justice he unilaterally sacked him—instead of using an impeachment process in parliament.

Even worse was the situation in Idi Amin’s Uganda. His dissatisfaction with his Chief Justice led to tragedy, only partly because of the absence of an impeachment process. Chief Justice Benedict Kiwanuka was kidnapped in broad daylight by Idi Amin’s thugs from the Chief Justice’s office. Justice Kiwanuka was never heard of again.

Would Kenya’s outbreak of violence in 2007–2008 have been thwarted if there was an impeachment process available to deal with the executive branch in controversy?

The impeachment process was not available to be invoked against Africa’s Heads of State either. What could be done whenever there was acute dissatisfaction with the performance of such Head of State as Robert Mugabe? Has it been unfortunate that African constitutions have not had the impeachment option to invoke?

In the British tradition the impeachment started as far back as the fifth century. But the imperial impeachment of Warren Hastings for his performance as a colonial Governor of India occurred in the eighteenth century, led by the brilliant political philosopher Edmund Burke. The impeachment was in the House of Commons, while the trial was in the House of Lords. Edmund Burke articulated brilliant responsibilities for colonies which ruled other societies. British governors of colonies could be impeached.

The process of impeachment declined in the British system of government at home. In the post-colonial era the impeachment idea was sometimes made difficult because the legislature in the colonies was not necessarily bicameral. A single legislative house could not differentiate between the Lower House which impeached and the Upper House which tried.

In the United States the impeachment process continues for both the Executive and the Judicial branches. The last great impeachment in the United States was of Bill Clinton when he was President. Like Warren Hastings centuries earlier, Bill Clinton was impeached by the Lower House but acquitted by the Upper House. The struggle continues. In the absence of impeachment did Africa experience more military coups instead? Some African countries were particularly coup prone. These have indeed included Uganda, Nigeria, Butkina Faso, Sudan, Ethiopia, and Somalia.

On the other hand, some African countries have been coup-proof. These have included Kenya, Tanzania, Zambia, Senegal, and indeed Zimbabwe in spite of the economic collapse. Tanzania and Zambia have escaped the coup for more than fifty years. Would we have had more coup-proof African countries if we had experimented with the impeachment process in countries like Ghana in the earlier years? May the impeachment process be inaugurated in the later years of the post-colonial Africa.
“...From a broad purposive view of the Constitution, the intent of the drafters as regards the exercise of legislative powers was that any disagreement as to the nature of a bill had to be harmoniously settled through mediation. An obligation was thus placed on the two Speakers, where they could not agree between themselves, to engage the mediation mechanism.” Supreme Court Judges W M Mutunga, CJ; K H Rawal, DCJ; P K Tunoi, M K Ibrahim, J B Ojwang, S C Wanjala & N S Ndungu, SCJJ in Speaker of the Senate & another v Attorney General & 3 others

It was a legal and constitutional obligation of any Court, from the basic level to the highest level, to preserve and protect the adjudicatory forum of governance, and to uphold decorum and integrity in the scheme of justice delivery. It followed that the Supreme Court’s jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in safeguarding the scheme of the rendering of justice, would not be exhausted until the Court was satisfied and declared as much. Supreme Court Judges W M Mutunga, C J & P; K H Rawal, D C & V-P; P K Tunoi, M Ibrahim, J B Ojwang, S Wanjala, N S Ndungu in Raila Odinga & 5 others v Independent Electoral and Boundaries Commission

“section 16(2) (b) of the Supreme Court Act is beyond the domain of the Court. That leaves section 16 with sub-section (1) and (2) (a), as the appropriate provisions. Considering closely the aforesaid provisions, it appears that it simply reiterates (i) the fundamental principle of interest of justice, which is a pivotal aspect of the function of any Court; and (ii) the matter of public importance, which is in any event clearly stipulated in article 163(4) (b). Retaining this provision, especially section 16(1) and 2(a) will, in my humble opinion, restrict the meaning of interest of justice, which inherently is a broad concept. In the premises, I would like to recommend to the Hon. Attorney-General that an amendment be effected in the said provision of the Act” Supreme Court Judge K Rawal Deputy CJ in Malcolm Bell v Daniel Toroitich Arap Moi & another

“Strict approaches to constitutional ouster clauses could not be applied to every case. In fact, an ouster could be unwrapped where strong and compelling reasons existed. Breaches of fundamental human rights and breaches of the rules of natural justice were enough to satisfy the test of strong and compelling reasons and where such breaches were alleged, an ouster clause could be ignored.” Court of Appeal Judges P O Kiage, J Mohammed & Odek, JJ. In the Majority decision in Law Society of Kenya v Centre for Human Rights and Democracy & 13 others

“The purpose of including the ouster clause which excluded the jurisdiction of the High Court, over matters handled by the Judges and Magistrates Vetting Board, was to prevent and avoid the mischief whereby the judges and magistrates through the courts, would become the judge and jury in their own cause. If the vetting process had not been insulated from the supervision of the High Court, then there would have been clear issues of conflict of interest.” Court of Appeal Judges S K Murgor, F Sichale, in the Dissenting Decision in Law Society of Kenya v Centre for Human Rights and Democracy & 13 others

“A look at all the provisions of the law that imposed the death sentence showed that these were couched in mandatory terms using the word ‘shall’. It was not for the Judiciary to usurp the mandate of Parliament and outlaws a sentence that had been put in place by Kenyans or purport to impose another sentence that had not been provided in law.” Court Of Appeal Judges J W Mwera, M Warsame, P Kigeyo, S Gatembu-Kairu & J Mohammed, JJA in Joseph Ng'ang’a Mwaara & 2 others v Republic

“...The Court would be encroaching on the Executive function were it to purport to direct the Executive on how to perform its foreign relations, including the signing and ratification of treaties, or to purport to allow or not allow the President or his Deputy to co-operate or not co-operate with the ICC by attending or failing to attend the hearing of their cases at the ICC.” High Court Judge M Ngugi, in National Conservative Forum v Attorney General

“The Respondents had failed to demonstrate concrete policy measures, guidelines and the progress made by the government towards the realization of economic rights and particularly the right to education...the Government had to be seen to take firm steps in achieving the right to education generally. This was despite the fact that there was a policy dubbed “the free primary education”programme which did not cover secondary education. It was important and fundamental for the government to demonstrate its political and financial commitment in that regard and the actions taken towards the progressive realization of the right to education in a holistic manner.” Justice Isaac Lenaola in Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 others
A New and Improved Case Law Database

By Njeri Githanga
Law Reporting Department

The New Case Law Database

Kenya Law has launched a new Case Law database that meets the highest standards of database design and quality. Kenya Law recently upgraded its Case Law database that runs on its main website www.kenyalaw.org which contains cases collated from the superior courts of record of Kenya (the Supreme Court, the Court of Appeal, the High Court of Kenya and other courts and tribunals established under the Laws of Kenya).

Who is Kenya Law?
Kenya Law is the brand name of the National Council for Law Reporting, an award-winning service state corporation in the Judiciary, established under the National Council for Law Reporting Act, Cap.1A.

The mandate of Kenya Law is:
• To monitor and report on the development of Kenyan jurisprudence through the publication of the Kenya Law Reports;
• To revise, consolidate and publish the Laws of Kenya; and
• To undertake such other related publications and perform such other functions as may be conferred by law.

Kenya Law is led by Council of Members chaired by the Chief Justice and has a secretariat with members of staff led by a Chief Executive/Editor.

What are the features of the new case law database?

a) Scalability:
This new database is built on a scalable architecture that can contain and manage huge amounts of documents and metadata and which represents the best international standards in openness, interoperability and technology neutrality, including Semantic Web and conformity to Akoma Ntoso 2.0 eXtensible Markup Language (XML) Schema.

b) Workflow Management
The new database collapses the workflow processes for the collection, inventorying, editing and online publishing of judicial opinions into a stable, robust, user-friendly and secure user interface and an administrator’s back-end with a variety of features such as:
• capture of the workflow processes and mapping them seamlessly into the backend
• has a rich modern web-based functionality for creation and editing of content with rich text editing capabilities, dynamic content previews, tagging and/or classification and immediate feedback of saved content,
• support of simultaneous log-ins by multiple users with role based user access with clear separation of various functions and editing abilities of users,
• system audit log to trace user activities on the system, and provide notification and task scheduling on the document processing chain through alerts, reminders and escalation notes,
• provides a mode through which back-end users can generate reports.

What is Case Search?

This is the service that enables the user to access the most comprehensive and authoritative collection of Kenyan case law from the superior courts of record dating from 1980 to date by a click of a button.

For our end users, they will be able to:

- Enjoy a friendly web 2.0. Compliant user interface with powerful built-in search module where they will be able to perform simple and advanced search and filtering of cases such as, 1. Full-text search, 2. Boolean search, 3. and be able to restrict search to metadata or the content of the document.
- Search results are paginated
- Search terms in context are highlighted in search results
- Search button and search options available on all user/front-end pages

How are the judicial opinions displayed?

• judicial opinions/documents are displayed along with metadata
• the database also enables publishing of the eventual case laws into both relational database and XML formats

Are the judicial opinions downloadable?
Yes, the end user can download the judicial opinions and has the following other options:
1. Option to print
2. Option to share individual document by email and on social media platforms
3. Option to export document to a variety of formats, including XML, current and previous versions of MS Word, PDF

The database provides uniform formatting of exported, shared or downloaded documents including but not limited to optional display of metadata in exported document

Can I access the judicial opinions in Swahili language?
Yes, a number of selected case summaries have been translated to Swahili. We are also in the process of translating cases on public interest matters

How Interactive is the case law database?

- It allows the user to post comments with moderation by the admin,
- It allows the user to share/post content to social media.

How can I access the Case Law Data Base?

(a) Cost:
The case search is provided free of charge on www.kenyalaw.org/caselaw
(b) Accessibility:
The Case Law database conforms to the international standards for the accessibility of web content by persons of all abilities as outlined in Web Content Accessibility Guidelines version 2.0 (WCAG 2.0) developed by the World Wide Web Consortium (W3C). It is based on an open and interoperable technology (XML), can be accessed using a variety of devices and technology platforms and has features that make it easily accessible to persons with visual disabilities.

Can I access the Case Law database on my mobile device?
The front-end is optimized for access by a variety of media, including desktop computers, tablets, computers and mobile devices. We are also in the process of integrating the case law data base to a mobile application that will run on Android.

Is the Case Law Database Search engine optimized?
The database lends itself to easily be crawled by internet search engines

How often will the Case Law Database be updated?
The Case law database is updated on a daily basis.

What other online publications can I access?
Kenya Law Case Updates

The “Kenya Law Case Updates” is an exclusive weekly newsletter that alerts its subscribers of precedent setting cases from the superior courts of record. The Case Updates contain cases that cover substantive and procedural issues as well as points of law of public
Kenya Law Weekly e-Newsletter

The “Kenya Law Weekly e-Newsletter” is an online publication featuring write-ups of judicial opinions from the superior courts of record. Such judicial opinions are considered on the basis that they meet the guidelines under the Kenya Law Editorial Policy and that they advance Kenya’s indigenous jurisprudence. A selected judicial opinion for publication usually termed “Case of the Week”.

The Weekly e-Newsletter also contains excerpts of Gazette Notices from the Kenya Gazette (both weekly and Special Issue editions). These are selected gazette notices that touches on issues of public interest e.g. Public and State appointments, revocation of land titles, Practice Directions issued by the Chief Justice, etc.

How do I subscribe to these two publications?
The subscription is FREE. Once a person has navigated the site to the publications page, all they are required to do is key-in their email address in a tab provided and they will receive an email prompting them to confirm their subscription.

What is Creative Commons and what is its association with Kenya Law?
Creative Commons (CC) (www.creativecommons.org) is a non-profit organization dedicated to expanding the range of creative works available for others to share and build on legally. The organization has released a number of information labels (called licences) designed to enable the publishers and creators of other works to communicate with clarity and simplicity what copyright restrictions, if any, apply to their work.

Kenya Law is an affiliate and partner of Creative Commons and a member of the Creative Commons-Kenya team. Kenya Law is also a member of the Free Access to Law Movement (www.worldlii.org). In these two roles, Kenya Law embraces and champions the open sharing of information, knowledge and creativity.

What copyright restrictions apply to the use of the Laws of Kenya?
As a member of the Free Access to Law Movement, at Kenya Law we believe that:

- Public legal information is part of the common heritage of humanity and maximizing access to this information promotes Justice and the Rule of Law;
- Public legal information is common property and should be accessible to all;

By law, no person may claim copyright to the text of the Laws of Kenya. In that regard, while the text of the Laws of Kenya is in the public domain, the design, structure, metadata and format of the Laws as presented by Kenya Law is subject to a few restrictions and it is licensed under a Creative Commons Attribution-ShareAlike License. This means that:

You are free:
• to Share — to copy, distribute and transmit the work
• to Remix — to adapt the work to make commercial use of the work

Under the following conditions:
• Attribution — You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work).
• Share Alike — If you alter, transform, or build upon this work, you may distribute the resulting work only under the same or similar license to this one.

With the understanding that:
Waiver — Any of the above conditions can be waived if you get permission from the copyright holder.
Public Domain — Where the work or any of its elements is in the public domain under applicable law, that status is in no way affected by the license.
Other Rights — In no way are any of the following rights affected by the license:
Your fair dealing or fair use rights, or other applicable copyright exceptions and limitations;
The author’s moral rights;
Rights other persons may have either in the work itself or in how the work is used, such as publicity or privacy rights.

Notice - For any reuse or distribution, you must make clear to others the license terms of this work. For more information go to: http://creativecommons.org/licenses/by-sa/3.0/

Poverty Levels

It was very sad to learn that the index on poverty levels has gone up from 54% to 88%.

As an organization that has the public mandate to publish public legal information, we should not impose unfair restrictions on the use and reuse of that information by other persons.

Law Reporting Department’s Inaugural Community Social Responsibility (CSR) Law Reporting Department gives back to the society

By Lizper Njeru & Catherine Moni

Law reporting Department.

On the 1st of November 2013, the Law Reporting Department carried out its inaugural Community Social Responsibility (CSR) activity in Marigat – Baringo County. This was arrived at following a documentary that was aired on Citizen TV on the 26th of August 2013 highlighting the plight of the girl child in this County. It was shocking to learn how the girls’ monthly natural cycles are inextricably tied to the poverty cycle, as one in ten girls is absent from school during their menstrual periods and miss up to 20% of their school days. Some of these girls opted to use feathers and animal skin while others would stay at home during their menses for fear of shame/sharing themselves in school.

In view of this, the Law Reporting Department held a meeting and brainstormed on how to assist these girls as our way of giving back to the society. We agreed to donate sanitary towels, innerwear, clothes and shoes. We also set a target and a deadline towards this end. An organizing committee was formed to spearhead this initiative. This noble idea was shared with other departments who embraced it and generously supported us with their donations. The team spirit of Law Reporting Department and Kenya Law as a whole was evident as we surpassed our target.

We partnered with two NGOs: Path to Womanhood and Hope for Teenage Mothers who had previously undertaken such ventures so that they could advise us on the logistics, schools and the number of students to target. We were able to buy 107 cartons of sanitary towels and 1500 pieces of innerwear at a subsidised price thanks to Flasherve Enterprises Ltd who were introduced to us by our partners.

Next we got in touch with the District Education Officer Marigat district together with her deputy who linked us up with Madam Beatrice, who had played a key role in highlighting the plight of these girls to the media. Having put everything in place, a team of representatives was selected across various departments of Kenya Law to travel to Marigat. The journey began on Thursday 30th October, 2013 at 3.00pm. We spent the night at Nakuru and left at 6.00 am the following morning for Marigat.
All these could not have been possible without the great support of the Kenya Law management team, the organising committee, Law Reporting department team and the Kenya Law Family. We shall forever remain grateful to them.

Marigat. Our first stop was at the District Education Office where we paid a courtesy call.

We were warmly received by the District Education Officer (Mrs Mabakali Adelaide), her deputy (Mr Suleiman Megiri) and Madam Beatrice Nasimiyu Wafuka. The District Education Officer briefed us on the challenges the girls and the community at large are facing. After the briefing, the Deputy District Education Officer led us to Kampi ya Samaki Primary School where we met pupils from both this school and Kokwa Island Primary School.

Our programme had various sessions. We had a mentorship session where the girls were given a talk by Magdalene Wambui of Hope for Teenage Mothers and our very own Geoffrey Andare both on the dangers of teenage pregnancies and disruption of studies by staying out of school to engage in other activities.

In the second session the girls got a demonstration on how to use the sanitary towels, after which we had a question and answer session, which was very interactive.

The last session was more inclusive as both boys and girls participated. At this point we distributed the towels, innerwear, clothes and shoes that members of staff had donated. The District Education office and the teachers were not left behind in our CSR activity; they received the pocket size constitution. The smiles on the pupils’ faces and all those who were present were a clear indication that our undertaking was well received and an encouragement to us to make it a sustainable project.


Prenuptial agreements as proposed under the Matrimonial Property Bill are a violation of the principle of equality

By Victor L. Andande. Intern Law reporting Department.

When parties enter into a marriage none of them foresees a possibility of any intervening factor that may frustrate their relationship; that’s where the “till death do us part” comes in. During the taking of the vow and the joy that flows as the parties walk down the aisle no one can predict tough times ahead. However, a survey done by Infotak for the Nation Saturday in 2010 revealed that only 40 per cent of Kenyans were happily married, the rest were either unhappy or not sure how to describe their unions. Six out of every 10 married Kenyans said the only bond keeping their marriage together was the children, while 45 per cent said they were hanging on because of the money and property. This state of affairs can hardly be contemplated during courtship or any time before the couple takes the oath of “till death do us part”.

Therefore, basing on the prevailing atmosphere before the inception of marriage, it would not be advisable that parties be free to enter into agreements of whatever nature. In my own opinion, I believe that the intending spouses don’t have “contractual capacity” since at that material time they are not apprehensive of any form of disagreements in the foreseeable future. It is on this premise that I base my disagreement with the proposed Matrimonial Property Bill that allows parties to an intended marriage to enter into agreements defining their property rights. Such agreements entered into by spouses before marriage are what are referred to as prenuptial agreements.

Prenuptial agreements (also known as antenuptial agreements) are contracts entered into by prospective spouses to determine their property rights and spousal support obligations in advance of marriage. Legalizing prenuptial agreements will be a big step backwards to the era of inequality since parties may not be at meeting minds (consensus ad idem) at the time of such agreements. This may however be hard for one to prove since the circumstances surrounding such a contract based on love and affection may be different from other normal contracts. This is notwithstanding the fact that some parties especially women may be under pressure from their kinsmen to get married and thus do anything possible so as not to be a disappointment to the society. Thus, what those in support of prenuptials should know is that such agreements can never assume the status of normal contracts between individuals such as business agreements.

Prenuptial agreements are contracts entered into by prospective spouses to determine their property rights and spousal support obligations in advance of marriage.

In some jurisdictions that allow premarital agreements, there have been obvious injustices that have been sanctioned at the seat of justice in the name of upholding prenuptials. In the English case of Radmacher v Granatino, for example, the Supreme Court of England for the first time backed the enforceability of prenuptial agreements in what was seen as a landmark ruling for family law. The judgment meant that the UK’s top Court in an eight-to-one verdict gave weight to the use of a prenuptial agreement in a divorce case. The couple had entered into a prenuptial agreement, several months before they wedded in London. Granatino challenged the validity of the prenuptial agreement, claiming he had no idea of his wife’s fortune which had been estimated at more than £100m and that he had not been properly advised by a lawyer.

The lone dissenting judge in the Radmacher ruling, Lady Hale, who was also the only family lawyer and the only woman on the Supreme Court Bench observed thus:

“...the object of an antenuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually, although by no means invariably, she – would otherwise be entitled.”

I would comfortably concur with the sentiments of Lady Hale and state that the learned judge must have had in mind the lack of equal bargaining power at the time of making a prenuptial agreement. It is this all important aspect of furthering equality that the framers of the Matrimonial Property Bill failed to foresee or blatantly disregarded.

The issue of matrimonial property has been in the limelight in Kenya for the better part of the last two decades. There have been several frantic efforts over the years especially from those agitating for women rights to have a legislation that will determine the rights of spouses upon dissolution of their union. The rationale behind the outcry for legislation on this issue has been premised on the prevailing circumstances in the Kenyan family setting where women have a weaker bargaining status. This is attributable to the fact that most communities are still rigidly pursuing the course of their fore fathers which to a large extent focused on demeaning the girl child. It is upon this background that several efforts have been made to have a legislation that governs the issue of matrimonial property upon the dissolution of a marriage.

The biggest challenge to equality in marriage remains patriarchy grounded on deep rooted culture that subordinates women to men. Within the political context, one of the factors that underpin family law in almost all societies is the heritage of gender inequality, which redefines marriage laws aimed at redressing to create a normative standard of equality of parties in marriage.

The 2010 Constitution can be termed as a turning point in the area of ownership of matrimonial property. Article 45(3) provides for equal rights of parties at marriage, during the marriage and at dissolution of the marriage. This constitutional provision just came in at the right time since there has been a lot of discontent over a period of time with regard to the ownership of property among couples. Article 40 of the Constitution guarantees the right to property whereby Article 40(2) prohibits enactment of any law that denies ownership of property on the basis of grounds specified under article 27(4) which include inter alia on the basis of sex.

The foregoing constitutional provisions are obviously a major safeguard to women who are a vulnerable group in the society. It would thus be an open absurdity for any person or body (parliament included) to try to circumvent these constitutional safeguards in whatever manner possible. This is what the drafters of the Matrimonial Property Bill are seen to perpetrate.

I may not be a Women Rights Activist, but as a lawyer I believe that the constitutional safeguards ought to be promoted at all costs. That’s why, in my view, the Matrimonial Property Bill, by allowing prenuptial agreements, is in total disregard of the spirit behind the 2010 Constitution. The framers of the Constitution must have had in mind the patriarchal nature of our society that necessitates the protection of women. In most cases that involve marital breakdown, women, despite being the weaker parties, are left to bear the huge burden of taking care of the children. It is on this basis that it was paramount that there be some protection to their property rights which the drafters of the Constitution remedied through article 45(3).

After the promulgation of the 2010 Constitution, it was eminent that the status of matrimonial property had to change. Indeed this was a time bomb that was waiting to explode. The framers of the Constitution must have had in mind the historical injustices that Kenyan women had faced in the midst of uncertainty in regard to their matrimonial property rights. This can be deduced from the various judicial opinions that had over a long period of time endeavored to define the status of matrimonial property upon dissolution of marriage. The most notorious case on the subject of matrimonial property is the case of Echaria v Echaria which emphasized the principle of direct contribution in purchase of matrimonial property in determining property rights of spouses upon divorce. This case has been widely applied in our courts in the recent
past which has seen many women leave a broken marriage empty handed notwithstanding their indirect role in acquisition of the property. The case of Echaria overruled an earlier case of Kivuitu v Kivuitu which had recognized the issue of indirect contribution by a spouse in acquisition of Matrimonial property.

In my opinion, the Matrimonial Property Bill in legalizing premarital agreements is in blatant violation of the rights of women as enshrined in the Constitution and the various International Instruments on equality.

In the recent past, our courts have breathed life into the constitutional provisions on equality especially Article 45(3) in regard to distribution of matrimonial property. This can be inferred from various decisions which have furthered the principle of equality in distribution of matrimonial property. The first landmark decision in regard to the issue of matrimonial property in consonance with the Constitution was the case of Z.W.N. v P.N.N. Civil suit No. 10 of 2004. Here, the Court observed thus:

“This court notes and appreciates that the principle of law set by the Court in Echaria v Echaria stems from provisions of the legislation subordinate to constitutional provisions, meaning that the constitutional provisions enshrining the principle of equality when it comes to distribution of matrimonial property have primacy over the principle of law enunciated by the decision in Echaria v Echaria which stems from an ordinary legislation”

In my own analysis, the case of Z.W.N clearly shows that constitutional provisions have primacy over all subordinate legislations thereto. To this extent therefore, even if the Matrimonial Property Bill sees the light of the day, it may not salvage the situation.

The most recent case to apply equality in distribution of matrimonial property is the celebrated case of C.M.N v A.W.M (ECC Case No. 208 of 2012). In this case the husband had labored to prove that the former wife was a mere joy rider who had not contributed to the acquisition of the property in question. Lady Justice Mary Gitumbi in this case promoted the spirit of equality enshrined under the Constitution by ordering equal sharing of the matrimonial property. The judge reiterated the importance of parties to a marriage being accorded equal status in regard to distribution of matrimonial property. In her words she observed thus;

“It has been established without a doubt that the Plaintiff is the one who met all the financial requirements towards the acquisition of the Suit Property. However, the legal landscape has since changed so that it is no longer a question of how much each spouse contributed towards the purchase of a matrimonial property which matters…the legal provision in force now requires this court to apply the principle of equality instead. This court is duty bound to share the Suit Property equally between the Plaintiff and the Defendant”

In conclusion therefore, the Matrimonial Property Bill, in legalizing prenuptial agreements, is a blow to the principle of equality of spouses in regard to distribution of property upon dissolution of marriage. I am aware of those who will tell me off basing on the principle of freedom of contract, I must realize that all agreements parties to prenuptials can never enjoy the same status as those in normal contracts.

Lake Natron

Lake Natron is a salt lake located in northern Tanzania, close to the Kenyan border, in the eastern branch of the East African Rift. Temperatures in the lake can reach 60 °C (140 °F), and depending on rainfall, the alkalinity can reach a pH of 9 to 10.5 (almost as alkaline as ammonia).

**Why the Law Society of Kenya Dress Code undermines the Kenyan Culture and Spirit.**

By Obura Paul Michael, Intern

**Law Reporting Department, Kenya Law**

Despite the old adage “you can’t judge a book by its cover,” the fact is human beings respond very strongly to visual stimuli – we make snap decisions in less than a few seconds and then spend the next few minutes trying to confirm our initial impression. Malcolm Gladwell confirms that human power of thin-slicing and snap judgment is extraordinary. As such, while physical dress may have little to do with being a good lawyer and may not in substance hinder the administration of justice, it is a need that people’s judgment is not only based on ones skills and abilities, but also on the image one projects.

Because Courts are the point of immediate contact between society and a Government’s laws, leaders have often changed their Judges’ attire to portray an image of dignity, strength, authority, wealth, or populism that they choose to project on their citizens. Formal changes in recent years often have occurred as a result of thorough research and citizen interaction, as opposed to the unilateral whims of leaders. Despite this trend that we are seeing in the world, Kenya still remains a fairly conservative country in dressing and in this circumstance, the dressing in the legal fraternity.

If you want to act the part, you have to look the part. Dress code is a part of the dress code is a part of a plethora of rules of etiquette and decorum, designed in order to enhance respect and maintain dignity of the legal profession; key to facilitate the smooth and orderly functioning of the justice system. The Law Society of Kenya (LSK) Council is empowered to regulate the practice of law and conduct of lawyers in Kenya, which include the dress Code. Section 4(a) of the Law Society of Kenya Act’ provides that one of the objects of the Society is to maintain and improve the standards of conduct and learning of the legal profession in Kenya.

**The dress code**

In January 2013, the LSK Council prepared a revised Dress Code that was intended to give guidance to Advocates concerning matters of dressing for purposes of appearance in Court in Kenya. The revised Dress Code provides that all dress must be modest and of a nature that lends itself to the dignity of the legal profession. The Dress Code bars female lawyers from wearing revealing clothes including sleeveless shirts or dresses. Advocates are expected to maintain a neat appearance.

Looking at the history of judicial attire, it is evident that Governments have been concerned with providing access to justice for their citizens. Governments’ intentions for enhancing judicial formality can be said to have been for purposes of reflecting their reign. Today’s regime would change the judicial attire to show that they are different from yesterday’s regime. Therefore, formal attire did not symbolize access to justice for the public.

The Law Society of Kenya Dress Code does not in any way respect the Kenyan culture. It is a mere imitation of the British Code which is not only demeaning to the sovereignty of Kenya as a country but also culturally insensitive. Article 111(1) of the Constitution of Kenya 2010, provides that: This Constitution recognizes culture as the foundation of national identity.

- **Dress Code**
  - A dress code is part of a plethora of rules of etiquette and decorum, designed in order to enhance respect and maintain dignity of the legal profession; key to facilitate the smooth and orderly functioning of the justice system.

3. Cap 18,Laws of Kenya
of the nation and as the cumulative civilization of the Kenyan people and nation. (2) The State shall—
(a) Promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.

This Constitutional provision is totally unrealized in the court premises save for the Supreme Court that has changed its attire to reflect the Kenyan Culture. It has been 50 years since Kenya got independence and it’s about time we restructured our colonial institutions in order to give us a true sense of nationhood.

Furthermore Article 10(2) provides that the national values and principles of governance include—
(a) patriotism, national unity, sharing and devotion of power, the rule of law, democracy and participation of the people;
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized

In revision of the Dress Code, Lawyers were not in any way consulted so that they could air their grievances on the attendant pitfalls of the Dress Code and how they would prefer it to be adjusted to suit the majority. Lawyer Andrew Barney Khakula on January 24 2013, sued the Law Society of Kenya and the Attorney General arguing that lawyers were not consulted in the process of revising the Dress Code and this violated Article 47 of the Constitution that guaranteed fair administrative action. However the Court dismissed the petition on grounds that it neither stated how his rights had been infringed nor identified the manner in which the dress code infringed on his personal rights and fundamental freedoms.

It was further held that courts should not enforce the dress code.

This begs the question: What of the religious beliefs and practices of Advocates from the Akorino community from Central Kenya or the Legio Maria from Nyanza? who have to don specific attire and colours? What of an Advocate who professes the Islamic faith and who is expected to appear in court on a Friday? The LSK Dress Code is not sensitive to such circumstances and is in clear violation of Articles 28, 32(2) and 33(1) of the Constitution.

The climate in most of the European countries is cold and people are white. Therefore, dark formal wear is suitable for them. Kenya’s diverse geography means that temperatures vary widely from a minimum of 14°C - 18°C, to a maximum of 30°C - 36°C throughout the year. In the semiarid areas of Northern and Eastern Kenya, temperatures vary from highs of up to 40°C during the day to less than 20°C at night. Most of our courts don’t have air conditioners.

Given the fact that temperatures could go as high as 40°C, attending court in dark attire that absorbs heat is not only uncomfortable but also poses health risks. Nalini Karunakaran, an Ayurvedic Physician in India points out that dark colours especially black are very unhealthy. Being speedy absorbers of heat, they could lead to a breakdown of health in the long run and may also result to skin and orthopedic complications. Redesigning the Dress Code according to suitability of climate as well as culture will not hinder administration of justice neither would it diminish the standard of the profession.

McPherson7 does not see dress as the issue, but rather the dressing tradition that has been long established. He thinks that in the American society, dress was “something that was not open to discussion but rather ingrained in American culture that certain dress was considered appropriate in those professions.” Similarly, the drafters of the LSK Dress Code ought to have considered our dressing tradition in general, so as to align the Code according to the letter and spirit of our Constitution.

Reinventing the Dress Code

“The Door to Hell”

Darvaza is a village in Turkmenistan of about 350 inhabitants, located in the middle of the Karakum Desert, about 260 km north of Ashgabat. While drilling in 1971, Soviet geologists tapped into a cavern filled with natural gas. The ground beneath the drilling rig collapsed, leaving a large hole with a diameter of 70 metres. To avoid poisonous gas discharge, it was decided the best solution was to burn it off. Geologists had hoped the fire would use all the fuel in a matter of days, but the gas is still burning today. Locals have dubbed the cavern “The Door to Hell”. 

Darvaza Crater “Door to Hell”

could disgrace a profession: “Casual dressing may be the result of a return to elegance as a way of conveying professionalism.”

The real problem could be with what people understand by casual. Is it cotton trousers or shorts for men? Horn explained this problem, “Casual, a word whose meaning is much abused these days, too often means slack and slovenly. In this context, it is a short step from a business suit to a sports jacket.” Sweeney10 believes the more comfortable people are, the more productive they are.

I concur entirely with these views with nothing useful to add.

CONCLUSION

It seems the whole point of a dress code is to ensure that the reputation of the profession is not demeaned. Demeaned in whose eyes and what is that dignity that the legal profession has achieved through dress?

Some rules with regard to dress code, serve only to reinforce tradition and to promote the majority’s taste and preferences. When rules of etiquette serve only to reinforce the majority’s taste, an individual’s freedom of expression is curtailed. That individual cannot express his own unique lifestyle which may differ from traditional views or the majority’s preferences. In my view a balance, therefore, must be met between allowing a profession to maintain its dignity and permitting freedom of an individual’s lifestyle.

The challenge that will often face the enforcers of the Dress Code is a generational change. Every generation will have something unique about its dressing, although the uniqueness may be as little as a man with a stud, or the acceptance of dreadlocks as smart hair do.
Kenya Law welcomed Mr. Longet Terer, Deputy CEO/Senior Assistant Editor on October 14, 2013, Ms. Edna Kuria, Corporate Affairs Officer on November 5, 2013, Mr. Josephat Mose Ratemo and Mr. Kenneth Samiji Momanyi as the Assistant Procurement Officer and Network Admin Assistant respectively on October 5, 2013.

CSR ACTIVITY BY HUMAN RESOURCES DEPARTMENT

“The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide for those who have too little.”

In the month of September the department became involved in the Inua Dada campaign as part of department’s corporate social responsibility. This was an initiative aimed at raising funds for sanitary towels and underwear for vulnerable girls who the Kenya Red Cross had identified in Marigat, Baringo County, to keep them in school for at least a year. The project aimed at making sanitary pads available to girls, especially from marginalised areas. To ensure that the girls’ confidence is build and that they have a sense of pride in embracing womanhood. The project was inspired by a feature story done on Citizen TV about “periods of shame” which highlighted the plight of girls who couldn’t access sanitary towels and instead had to use rags and other paraphernalia.

The HR department partnered with the members of staff and particularly the Marketing and Communications Department and the LG Divas, a women’s group to which one of the members of staff was involved in outside the office. Together, members of staff and the LG Divas raised funds and purchased 30 cartons of sanitary towels which were donated at the Redcross Offices in Nairobi on October 16, 2013. Receiving the donation, Redcross officials led by Faith Osore, Program Assistant, Health and Social Services, she appreciated the generosity and dedication of Kenya Law and the LG Divas and assured the team that the donation would go a long way in keeping underprivileged girls in school.

The abundance of those who have much; it is whether we provide for those who have too little.”

“Bloom where you are planted. You are an assignment for such a time as this. When you face challenges, be like an Eagle who has tunnel vision and will not run from the storm, but charges through to rise above it. Think it, say it, act it and it will happen”

I wish everyone in the world can be this happy and bright.

Yvonne Kirina, Group Leader, Team Morans

Mine is to say “All things bright and Beautiful” I decided to come up with this phrase from the picture below of our two happy colleagues and how

When there seems to be no hope, dare to find some.
When you’re feeling tired, dare to keep going.
When times are tough, dare to be tougher.
When love hurts you, dare to love again.
When someone is hurting, dare to help them heal.
When another is lost, dare to help them find the way.
When a friend falls, dare to be the first to extend a hand.
When you cross paths with another, dare to make them smile.
When you feel great, dare to help someone else feel great too.
When the day has ended, dare to feel as you’ve done your best.
Dare to be the best you can –

Christian Ateka, Group Leader, Oasis Team

“Work for a cause, not for applause. Live your life to express, not to impress, don’t strive to make your presence noticed, just make your absence felt.”

When you feel great, dare to help someone else feel great too.
When the day has ended, dare to feel as you’ve done your best.
Dare to be the best you can –

Martin Andago, Group Leader, Ipad Team

Today, more and more individuals have embraced the use of technology in their day to day tasks. From E-mail to Facebook, Youtube to Skype – people both young and old are now considered part of the Digital Era. The question is; are we learning / gaining anything new from these applications and gadgets? Or are we just letting time pass us by?

“Before you become too entranced with gorgeous gadgets and mesmerizing video displays, let me remind you that information is not knowledge, knowledge is not wisdom, and wisdom is not foresight. Each grows out of the other, and we need them all.” Sir Arthur C. Clarke

WELFARE COMMITTEE

The staff welfare has been involved in a number of activities during the year. Key among them has been celebrating newborns and weddings which are key objectives of the welfare as it seeks to continue...
meeting its mandate of ensuring the wellbeing of all its members.

On behalf of the welfare I would like to wish all the members the best festive season as we look forward to taking your welfare issues to another level Says Erick Obiero, Assistant Secretary Welfare.

With growth comes change; Kenya Law to move to its new office building at the Bishop’s Annex Plaza.
Organizational Change: Leadership and Vision as instrumental gears of change.

By Evelyne Anyokorir Emasa,
Laws of Kenya Department

The importance of organizational change

Organizations need change for effective operations. Organizations must embrace change because we are living in times of high competition and ever changing technologies and global trends. In order to respond to these changes and remain relevant it is good for organizations to understand, adopt and implement change. The significant benefits attributed to change among others include competitiveness, financial performance, employee and customer satisfaction.

Leadership and vision as change instruments

Leadership of an organization is all about the ability of management to get and protect the company benefits by realizing employee needs and company targets and manage to get and protect the company benefits. Leadership of an organization is all about the ability of leaders to understand how to refreeze the changes because if refreezing is incomplete or not managed properly the change will be ineffective and the pre-change behaviors will be resumed. Refreezing always encourages the possibilities of the further changes.

The Process of Change

The change process is very challenging and important for organizations and can lead an organization to success. It can also make an organization meet future demands and to effectively compete in the market. Organizational change must be managed in order to keep organizations moving toward organizational new vision and its target goals and objectives. When embarking on an organizational change initiative, it is wise to carefully plan strategies and anticipate potential problems.

A method such as force-field analysis proposed by Edwin is the beginning step of any planned change. It is a method of listing, discussing, and evaluating the various forces for and against a proposed change, this method helps one look at the bigger picture by analyzing all of the forces impacting the change and weighing the pros and cons. This makes it easy in developing strategies that help reduce the impact of the opposing forces and strengthen the supporting forces. He outlines three steps:

The assessment of the current scenario: It determines the forces that can facilitate the desired change and the forces that will resist and deter the change.

The creation of a preferred scenario: This is often accomplished through the team effort in brainstorming and developing alternative futures. Teams come up with various suggestions and ideas which are all considered for thorough evaluation.

Designing a plan that moves the system from the current to the preferred scenario: this level requires effective strategies. Leaders come up with a plan that will assist in overcoming the forces against change. This process requires individuals to harness and utilize power. Power is necessary for change to occur it assists individuals in accomplishing their goals. Benveniste in his recent book “Mastering the Politics of Planning”, states that even well-thought-out plans for change can be derailed when the politics of implementation are not considered. Change leaders therefore must gather support for the desired change throughout the organization, using both formal and informal networks. He notes that multiplier or bandwagon effect is necessary to rally enough support for the change.

Resistance to Change

Every transition or change effort begins with an ending which is the end of the current state. The first step toward change is going through the process of ending. Endings must be accepted and managed before individuals can fully embrace the change. Even if the looming change is desired, a sense of loss will occur. Because our sense of self is defined by our roles, our responsibilities, and our context, change forces us to redefine ourselves and our world. This process is not easy. William Bridges in his book “Transitions”, has discussed the process of individual change. In describing the process of ending, Bridges presents the following four stages that individuals must pass through in order to move into the transition state and effective change:

1. Disengagement: The individual must make a break with the “old” and with his or her current definition of self.
2. Disidentification: After making the break, individuals should loosen their sense of self, so that they recognize that they aren’t who they were before.
3. Disenchantment: In this stage, individuals further clear away the old, challenging assumptions and create a deeper sense of reality for themselves. They perceive that the old way or old state was just a temporary condition, not an immutable fact of life.
4. Disorientation: In this final state, individuals feel lost and confused. It’s not a comfortable state, but a necessary one so that they can then move into the transition state and to a new beginning.
Organizational Resistance
Organizations irrespective of size are composed of individuals and individuals are crucial in organizational change. The degree to which individuals within the organization can appropriately manage change represents the overall organizational capacity for change. Other organizational factors which can hinder the change process include:

Inertia: The day-to-day demands of work can diminish the urgency of implementing the change effort until it slowly vanishes within the organization.

Lack of Clear Communication: If information concerning the change is not communicated clearly throughout the organization, individuals will have differing perceptions and expectations of the change.

Low-risk environment: organizations that don’t promote change and tend to punish mistakes will make individuals to develop resistance to change, preferring instead to continue in safe, low risk behaviors.

Lack of sufficient resources if the organization does not have sufficient time, staff, or other resources to fully implement the change, the change efforts will be sabotaged.

Conclusion
The vision of an organizational leader, its innovative ideas and leadership qualities is reason for successful organizational change. These attributes are very important not only in facilitating change but also in handling employee resistance. The characteristics enable leaders to constructively deal with human emotions to perceive resistance in an efficient manner and respond appropriately to get the teams commitment. Leaders who enhance followers’ confidence and skills to devise innovative responses and to be creative, are more likely to facilitate an effective changeover processes in organization.

The Constitution of Kenya, 2010 under Article 6(3) provides that a national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.

It is in line with this provision that Kenya Law as a national legal agency seeks to create a strategic partnership with counties, not only to pursue its slogan, “where legal information is public knowledge”, but also to ensure the observance of Articles 33 on access to information, Article 174(h) on facilitation of the decentralisation of State organs, their functions and services, from the capital of Kenya, Article 185(2) which provides that a county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule and Article 196(b) where the County assembly is to facilitate public participation and involvement in the legislative business of the assembly.

This is geared towards realizing Kenya Law’s Vision that envisions an enlightened society through accessible public legal information.

Kenya Law’s Partnership with Counties: The Role of Kenya Law in the Counties’ Legislative Development Agenda
By Moses Wanjala,
Laws of Kenya Department

Kenya Law officers have been visiting counties to bring the above principles into practice and so far 41 counties have been visited with only six remaining of which the visit will proceed as from January 2014.
Kenya Law as the official publishers of the Laws of Kenya therefore seeks to publish all County legislations from all the 47 Counties hence the need for partnership.

This would ensure easy access to county laws by members of respective Counties and Kenyans at large. There is therefore need to keep track of what is happening in County Assemblies countrywide and to this end we have obtained contacts from each County Assembly and County Executives to liaise with in forging this crucial process ahead.

The partnership as well intends to ensure that County Legislations churned out by various county assemblies conform with the universal standards of universal accessibility, quality and the general principles of legislative Drafting.

Kenya Law in partnership with Training and Consulting Associates in reaffirming its commitment to this cause, organised a one week training on Policy Formulation and Legislative Drafting which various Counties participated.

The training aimed at capacity building of counties in the area of legislative drafting which is of essence in the drafting of Bills at the County Level.

Going forward, Kenya Law will be seeking to partner with other National Agencies such as the Ministry of Devolution, Kenya Law Reform Commission, Centre for Parliamentary Studies, Kenya School of Government and the Government Press in forging a strong partnership with counties that will in the end translate into easy access and delivery of County Legislations to Kenya Law for publication.

This will aid in advancing the Doctrine of Public Participation which is a key constitutional principle provided by the Constitution of Kenya for public engagement in the counties’ legislative process.
Our temperament and vocational aptitudes
By Naomi W. Mutunga
Laws of Kenya Department

All through the Bible the work ethic is exalted. If a man will not work he shall not eat (2 Thess. 3.10).

We need to work because it is good for us. There is something self enriching in a job well done. The unemployed are miserable not just because they don't have money but also because they don't have an opportunity to work productively.

We know of hardworking individuals who retire at the age of 65 and die before their 67th birthday. The real reason, not the one that appears on their death certificate, is because they could not handle the emotional vacuum brought about by lack of productivity.

Other than lack of employment, the next worst thing that can happen to someone is to have a wrong job. It is incredible how many people despise their work, no wonder it becomes such a drudgery to them. One of the way to avoid vocational frustration, or feeling like a round peg in a square hole, is to know your temperament and its natural vocational possibilities, then find work or profession that allows you to express your natural temperament characteristics. Examine these four temperaments vocational aptitudes and see if they sound familiar.

Sanguines

The world is enriched by sanguines with their cheeriness and natural charisma. They make excellent salesmen and more than any other temperament seem attracted to that profession. Sanguines are so convincing they can sell rubber crutches to people who are not even crippled.

In addition to being good salesmen, sanguines make excellence actors, entertainers, and preachers (particularly evangelists). They are outstanding masters of ceremonies, auctioneers, and sometimes leaders if blended with another temperament). Because of our mass media today they are increasingly in demand within the political arena where natural charisma has proven useful.

In areas of helping people, sanguines excel as hospital workers. Doctors who are sanguines have the best bedside manners. You may be on the verge of death, as white as the sheet you are lying on when the bubbly doctor makes appearance. Before he leaves, he will lift your spirit by his natural charm.

No matter what work the sanguine does, it should give him extensive exposure to people. I think his chief contribution to life is making other people happy. Certainly someone should be assigned that job in such uncertain times.

Cholerics

Any profession that requires leadership, motivation and productivity is open to a choleric provided it does not require too much attention to details and analytical planning. Committee meetings and long-range planning bore them, for they are doers.

Most entrepreneurs are choleric. They formulate the ideas and are venturesome enough to launch out in new directions. They don't limit themselves to just their own ideas, sometimes they act on a creative ideas they overheard from someone who is not adventurous enough to initiate a new project.

Rarely will you find a predominantly choleric as a surgeon, dentist, philosopher, inventor or watchmaker. Cholerics interests thrive upon activity, bigness, violence and production. He is so optimistic, rarely anticipating failure, that he rarely fails. – EXCEPT AT HOME. He fails miserably as a family man.

Melancholy

As a general rule, no other temperament has a higher IQ, creativity or imagination than a melancholy, and no one else is as capable of perfectionism as a melancholy. Most of the world’s greatest composers, artists, musicians, inventors, philosophers, theologians, scientists and dedicated educators have been predominantly melancholies.

Any vocation that requires perfection, self sacrifice and creativity is open to a melancholy. However they tend to place self imposed limitations on their potential by underestimating themselves and exaggerating obstacles.

All doctors are either predominantly melancholy or at least secondarily a melancholy. It would almost require a melancholy’s mind to cope with the rigors of medical school.

Analytical ability required to design a building lay out a landscape, or look at the acreage requires melancholy. But when it comes to supervision, they had better hire a choleric project supervisor because they become frustrated by the usual personnel problems and with their unrealistic perfectionist demands adds to them.

Phlegmatic

The world has benefitted greatly from the gracious nature of phlegmatic. In their quiet way they have proved to be a fulfiller of dreams of others. They are masters at anything that requires meticulous patience and daily routine.

Most nursery school teachers are phlegmatic. They have the patience required to teach babies how to read. A sanguine will spend the whole day telling them stories, a melancholy will criticize them so much they would be afraid to read aloud and you cannot even imagine a choleric as a nursery school teacher! The students would leap out the class windows.

Another field that appeals to phlegmatic is engineering. They are attracted to planning and calculation. They make good structural engineers, sanitation experts, chemical engineers and statisticians. They also make good watch and camera repairers. Because they are diplomatic and unabrasive, they make excellent supervisors and foremen if they are experienced.

Next to salvation, marriage and your family, vocation is the most important thing in your life. Choose it wisely.
Feedback For Caseback Service

By Emma Mwobobia Senior Law Reporter

Nelly Kariuki

Thanks for the feedback. I appreciate the same. However, I have forwarded the decision to the concerned judicial officer, Hon. T Kariuki. I’m N. Kariuki, Resident Magistrate Homa Bay Law Courts.

Thanks. Kind regards,

Lucy Gitari

Thank you for the information. I acknowledge receipt.

Regards,

James N. Mwangi

Thanks so much for feedback on our cases appealed against. We are learning a lot. Keep them coming and keep the good work. God bless you.
The applicant was the registered owner of the suit property located in the Kabarak area of Nakuru, adjacent to Moi High School Kabarak. The property was transferred to him pursuant to the will of his deceased father, Walter Bell, through a transfer and assent dated April 11, 2000 and registered on May 19, 2000.

The applicant was aggrieved and appealed to the Court of Appeal. At the Court of Appeal, the matter was heard by a bench of three judges but judgment was written out in article 184 of the Constitution.

The Court of Appeal allowed the appeal and set aside the orders of the High Court.

The applicant was the registered owner of the suit land through adverse possession. That the second respondent had acquired title to the land through adverse possession.

The applicant was the registered owner of the suit land through adverse possession. That the second respondent had acquired title to the land through adverse possession.

In January 2004, the applicant instituted proceedings in Kabarak High School time-barred.

Agrieved by the said judgment, the respondents sought leave of the Court of Appeal, to appeal further to the Supreme Court. The Court granted leave on the grounds that the suit raised matters of general public importance, and also, that substantial miscarriage of justice had occurred or would occur, if the proposed appeal was not heard by the Supreme Court.

For the respondents, it was contended, each judge at the Court of Appeal ought to have written a separate reasoned judgment, and there should have been no concurring opinion: and this was urged before the Court to bring the intended appeal under the category of "matters of general public importance", meriting a hearing before the Supreme Court.

Scope of Supreme Court's appellate jurisdiction
Malcolm Bell v Daniel Toroitich Arap Moi & another
Application No 1 of 2013
Supreme Court at Nairobi
K Rawal, DCJ; P K Tunoi, M Ibrahim, J B Ojwang, N S Ndungu, SCJ
October 24, 2013
Reported by Njeri Githiang'a Kamau & Victor L Andande

The Supreme Court had affirmed its position on the basis that the matter was of general public importance and possible miscarriage of justice – whether in the circumstances the Court of Appeal had rightfully granted leave to appeal – Constitution of Kenya, 2010, article 163.

Jurisdiction – appellate jurisdiction – appellate jurisdiction of the Supreme Court – where the Court of Appeal had granted the respondents leave to appeal to the Supreme Court on the ground of a matter of general public importance and possible miscarriage of justice – whether in the circumstances the Court of Appeal had rightfully granted leave to appeal – Constitution of Kenya, 2010, article 163.

Jurisdiction – appellate jurisdiction – appellate jurisdiction of the Supreme Court – certification to appeal to the Supreme Court on the basis that the matter was of general public importance – which court between the Supreme Court and the Court of Appeal had jurisdiction to grant certification for an appeal to the Supreme Court – Constitution, 2010, article 163(4)(b).

Section 16(1) and (2)(b) of the Supreme Court Act, 2011 (Act No. 7 of 2011) provided that:

"(1) The Supreme Court shall not grant leave to appeal to the Court unless it is satisfied that it is in the interests of justice for the Court to hear and determine the proposed appeal, certify that a matter of general public importance is involved, subject to clause 5.

(2) It shall be in the interests of justice for the Supreme Court to hear and determine a proposed appeal – (a).... (b) a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard."

Held

1. Article 163 (4)(b) required that appeals lie from the Court of Appeal to the Supreme Court upon certification, on the basis that a matter was one of general public importance. Such certification could be done either by the Court of Appeal itself, or by the Supreme Court.

2. The Supreme Court had affirmed its position on the instances in which its appellate jurisdiction would be invoked. One, on an appeal from the Court of Appeal, as a matter of right, in a matter involving the application or interpretation of the Constitution; and two, on an appeal from the Court of Appeal on a matter certified as involving a matter of general public importance.

3. The application for certification had to be made in the Court of Appeal first before a party could seek certification from the Supreme Court, as the former was privy to the proceedings and issues before it on first appeal, and would be aptly placed to determine whether the matter was of general public importance.

4. The Supreme Court, as the ultimate judicial agency, had to exercise its powers strictly within the jurisdictional limits prescribed; it also had to safeguard the autonomous exercise of the respective jurisdictions of the other courts and tribunals. In the instant case, the Court could not assume jurisdiction which, by law, was reserved to the Court of Appeal, and which that Court has duly exercised and exhausted.

5. As a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court was not to be invoked save in accordance with the terms of the Constitution and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law.

6. The question or questions of law must have arisen in the Court or courts below, and must have been the subject of judicial determination for them to become a matter of general public importance meriting the Supreme Court's appellate jurisdiction. By its very nature, a matter could not be tangentially adverted to, without a trial focus or a clear consideration of facts in the other Courts would often be found to fall outside the proper appeal cause in the Supreme Court.

7. Not only was the adverse-possession question a subject sufficiently settled in law as to lend itself to normal interpretation and disposal by superior courts, but that appeal to the Supreme Court, but the Court of Appeal had conscientiously and judiciously applied its mind to the subject. It was no longer a proper subject on any account, and least of all as a matter of general public importance, to be the subject of an appeal before the Supreme Court.

8. Interests of justice as a criterion of decision-making by the Supreme Court and other Courts,
was already declared by the Constitution in the national values and principles of governance under article 10. Such values included the rule of law; human dignity; equity; social justice; equality; human rights; non-discrimination; and the protection of the marginalised. As the jurisdiction to render justice was thus clearly conferred by the Constitution, it was not to be attributed to the provision of section 16(1) of the Supreme Court Act.

9. The Supreme Court had to operate within the constitutional limits. It could not expand its jurisdiction through judicial craft or innovation. Nor could parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. The instant appeal was one invoking a jurisdiction that did not coincide with the Constitution's donation.

(Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others, Sup. Ct. Appl. No. 2 of 2011.)

10. Not only did section 16(1) and (2) (b) of the Supreme Court Act appear to vest a diffuse kind of appellate competence in the Supreme Court, it was contrary to the mandatory appellate-jurisdiction clause in article 163(4)(b) of the Constitution.

Rule 32 of the Court of Appeal Rules 2010 did not prescribe the length of judgment, nor did they inhibit the rendering of a concurring opinion by a judge. There was, thus, nothing judicially unbecoming for a judge to turn in a concurrence which indicated she had read the opinion of another judge and agreed in full measure.

12. The question as to whether, in the absence of one judge the remaining ones in a collegiate Bench had to each formulate a fully detailed and reasoned judgment, fell in an ordinary case, and did not raise any matter of general public importance and therefore merited such an appeal, had been elaborated in the case Hermanus Phillipus Steyn v Giovanni Cnechchi- Rascone, Sup. Ct. Appl. No. 4 of 2012 and the proposed appeal in the instant case failed the test, notwithstanding that its subject-matter was landed property.

16. All questions pertaining to claims under adverse possession fell squarely within the Court of Appeal's jurisdiction, and there would be no basis for invoking the Supreme Court's jurisdiction in that regard.

17. Obiter per K Rawal DCJ. The Court has observed that the provision of section 16(2) (b) is beyond the domain of the Court. That leaves section 16 with sub-section (1) and (2) (a), as the appropriate provisions. Considering closely the aforesaid provisions, it appears that it simply reiterates (i) the fundamental principle of interest of justice, which is a pivotal aspect of the function of any Court; and (ii) the matter of public importance, which is in any event clearly stipulated in article 163(4) (b). Retaining this provision, especially section 16(1) and 2(a) will, in my humble opinion, restrict the meaning of interest of justice, as well as the discretion of the Court to develop the scope of interest of justice, which inherently is a broad concept. In the premises, I would like to commend to the Hn. Attorney- General that an amendment be effected in the said provision of the Act.

Application allowed the certification for appeal overturned.

Supreme Court has jurisdiction to hear a case arising from summons issued during the hearing of another case that has since been determined

Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others

Supreme Court of Kenya at Nairobi
Petition No 5 of 2013
W M Mutunga, C J & P; K H Rawal, D C & V-P; P K Tunoi, M Ibrahim,
J B Ojwang, S Wanjala, N S Ndungu, SC JJ
October 24, 2013

Reported by Njeri Githang’a Kamau & Victor L Andande

Brief facts
This case arose during the hearing of the Presidential Election Petition involving Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others. The Petition had elicited keen public interest and generated endless media coverage and commentary.

Due to the highly charged environment, the Supreme Court issued certain directions whereby everyone was ordered to desist from prosecuting the merits and demerits of the case in any forum other than the Supreme Court.

During the hearing of the petition, the Court noted a news item published in the Daily Nation Newspaper, which was attributed to Mr. Eric Mutua, the Chairman of the Law Society of Kenya (LSK). The said article was faulting the Supreme Court's rejection of the 839 page affidavit filed by Coalition for Reforms and Democracy.

Further, in another report on the same page, Mr. Mutua had indicated of LSK's intention to determine circumstances that led to the failure of the technology system used in the elections.

After considering the contents of the said publications, the Supreme Court issued summons to Mr. Mutua to appear before it on a date to be notified by the Registrar of the Court.

Thereafter, the Registrar of the Supreme Court issued Summons dated July 22, 2013 to Mr. Mutua directing him to appear before the Court on August 1, 2013. Learned counsel appearing for the Law Society of Kenya, however, raised certain preliminary issues to be heard and determined before the Court could proceed with the intended clarification from Mr. Mutua.

Thereafter, the Court directed all the parties present to make their respective written submissions to enable the Court to make its Ruling.

Issues
(i) Whether the Supreme Court had jurisdiction

(ii) What could be said to amount to a preliminary objection in law?

Jurisdiction – jurisdiction of the Supreme Court – where the summons to appear had been issued in the course of the Presidential Election Petition – claim that the Supreme Court did not have jurisdiction to hear the case since the petition had already been heard and finally determined.

Held
1. A preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings, and which if argued as a preliminary point would dispose of the suit. Examples were an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or to refer the dispute to litigation.

2. The issue in the instant case emanated not from the substantive facts or issues raised in the Petition, but from an ancillary order issued by the Court during the proceedings totally unrelated to the main cause of action. That order had not been acted upon or perfected, and the Summons issued pursuant thereto by the Registrar of the Supreme Court, was meant to give effect to the Court’s observation and consequent directions made on 28th March, 2013.
The Senate had a role to play in the processing of the Division of Revenue Bill

Speaker of the Senate & another v Attorney General & 3 others

Advisory Opinion Reference No 2 of 2013
Supreme Court at Nairobi
W M Mutunga, CJ; K H Rawal, DCJ; P K Tunoi, M K Ibrahim, J B Ojwang, S C Wanjala & N S Ndungu, SCJJ
November 1, 2013

Reported by Njeri Githanga & Victor Andande

Brief facts

The Reference herein was occasioned by the act of the Speaker of one parliamentary Chamber, the National Assembly, reversing his action of referring a legislative matter to the other Chamber, the Senate, and having the National Assembly alone conclude deliberations on a Bill, which was then transmitted to the President for assent and which thereafter became enacted law. This was the Division of Revenue Bill, providing for a sharing in finances between the national and county governments. Whereas the National Assembly’s stand was that the Bill was only concerned with the financing of county government by the national government, and therefore was the exclusive legislative responsibility of the National Assembly, the applicants maintained that as the county governments had a major interest in the monies in question, service of that interest, as the county governments had a major interest in the monies in question, service of that interest, would not be exhausted until the Court was satisfied and declared as much.

Issues

i. What was the scope of the Supreme Court’s jurisdiction to render an advisory opinion?

ii. Whether the Supreme Court had jurisdiction to render an Advisory Opinion regarding the constitutional process attending the enactment of the Division of Revenue Act, 2013 (Act No. 31 of 2013).

iii. What was the Senate’s role in the legislative process for Bills concerning county government?

iv. When and how did a question for the consideration of the two Speakers in the two houses arise under Article 110(3) of the Constitution?

v. What was the role of the National Assembly vis-à-vis the Senate in the origination, consideration and enactment of the division and allocation of revenue bills?

vi. Whether the Supreme Court had jurisdiction to determine a dispute arising between the Senate and the National Assembly.

vii. Whether the Supreme Court could interfere with the Parliament’s legislative authority, and if so in what circumstances.

Jurisdiction – Supreme Court – advisory opinion – jurisdiction of the court to give an advisory opinion – where the applicants moved the Supreme Court for an advisory opinion regarding the role of the Senate in legislative process leading to the enactment of the Division and Allocation of Revenue Act – claim by the interested parties that the relevant issues properly fell within the domain of the litigated cause rather than that of the advisory opinion – whether in the circumstances of the case the Supreme Court had jurisdiction to render an advisory opinion – Constitution of Kenya, 2010, article 163(6); Supreme Court Act, Section 3(d).

Constitutional law – devolution – the role of the Senate in legislation – where the concerned division of revenue – whether the Senate had a role to play in the enactment of the Division and Allocation of Revenue Act – Constitution of Kenya, 2010, articles 110(3) & 112

Held

1. The Division of Revenue Bill (which had since become an Act) made provision for the division of revenue that was nationally collected, and for its sharing between the two levels of government. It certainly had a significant impact on the county governments. In the circumstances, therefore, the Reference in the instant case properly fell under Article 163(6) of the Constitution, as a matter that concerned county governments. The Supreme Court thus, had to exercise its discretion in favour of rendering an Advisory Opinion.

2. A matter qualified to be regarded as one of county government only where: that was the case in the terms of the Constitution; it was the case in the terms of statute law; it was the case in the perception of the Court, in view of the function involved or the relation created as between the national government and its processes, on the one hand, and the county governments and their operations on the other. In the last instance, the Court would conscientiously consider the relationship between the two units as this emerged from the governance operation in question, or from any pertinent scenarios of fact.

3. An Opinion from the Supreme Court would not only resolve procedural uncertainties in the deliberation upon and passing of Bills, but would also chart out the proper constitutional path, and establish lines of legality. This was not a proper matter for litigation in the High Court. The public interest consideration was a relevant factor as to the issue whether the Supreme Court would, in the circumstances of the case, proceed to give an Advisory Opinion.

4. The separation of powers concept had to take into account the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution.

5. The Supreme Court had the responsibility for casting the devolution concept and its instruments in the shape of county government, in the legitimate course intended by the people. It devolved upon the Court to signal directions of compliance by state organs, with the principles, values and prescriptions of the Constitution; and as regards the functional machinery of governance which expressed those values, such as devolution and its scheme of financing, the Court had the legitimate charge of showing the proper course.

6. The context and terms of the Constitution of Kenya 2010, vested in the Supreme Court the mandate when called upon to consider and pronounce itself upon the legality and propriety of all constitutional processes and functions of State organs. The effect was that the Supreme Court’s jurisdiction included resolving any question touching on the mode of discharge of the legislative mandate.

7. It would be illogical to contend that as the Standing Orders were recognized by the Constitution, the Supreme Court, which had the mandate to authoritatively interpret the Constitution itself, was precluded from considering its constitutionality merely because the Standing Orders are an element in the internal procedures of Parliament. As a legal and constitutional principle, Courts had the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation.

8. The scope for the Supreme Court’s intervention
in the course of a running legislative process had to be left to the discretion of the Court, exercised on the basis of the circumstances of each case. The relevant considerations could be factors such as the likelihood of the resulting statute being valid or invalid; the harm that could be occasioned by an invalid statute; the prospects of securing remedy, where invalidity was the outcome; the risk that would attend a possible violation of the Constitution.

9. Kenya’s legislative bodies had an obligation to discharge their mandate in accordance with the terms of the Constitution, and they could not plead any internal rule or indeed, any statutory scheme, as a reprise from that obligation. The Supreme Court recognized the fact that the Constitution vested the legislative authority of the Republic in Parliament. Such authority was derived from the people. This position was embodied in Article 94(1) thereof

10. Article 93(2) provided that the national Assembly and the Senate were to perform their respective functions in accordance with the Constitution. It was therefore clear that while the legislative authority lay with Parliament, the same was to be exercised subject to the dictates of the Constitution.

11. While Parliament was within its general legislative mandate to establish procedures of how it conducted its business, it had always to abide by the prescriptions of the Constitution. It could not operate besides or outside the four corners of the Constitution. The Supreme Court would not question each and every procedural innovation that would occur in either of the Houses of Parliament. The Court could not supervise the workings of Parliament. The institutional comity between the three arms of government could not be endangered by the unwarranted intrusions into the workings of any one arm by another.

12. Where a question arose as to the interpretation of the Constitution, the Supreme Court, being the apex judicial organ in the land, could not invoke institutional comity to avoid its constitutional duty, Parliament had to operate under the Constitution which was the law of the land.

13. Where the Constitution decreed a specific procedure to be followed in the enactment of legislation, both Houses of Parliament were bound to follow that procedure. If Parliament violated the procedural requirements of the supreme law of the land, it was for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution.

14. The Supreme Court would be averse to questioning Parliamentary procedures that were formulated by the Houses to regulate their internal workings as long as the same did not breach the Constitution. Where however, as in the instant case, one of the Houses was alleging that the other had violated the Constitution, and moved the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering the Opinion, the Court would not be violating the doctrine of separation of powers. It would simply be performing its solemn duty under the Constitution and the Supreme Court.

15. Whereas all State organs, for instance, the two Chambers of Parliament, were under obligation to discharge their mandates as described or signalled in the Constitution, there came a time when the prosecution of such mandates raised conflicts touching on the integrity of the Constitution itself. All reading of the Constitution would agree that the ultimate judge of right and wrong in such cases, short was only the Courtsand, ultimately, the Supreme Court. Therefore, the Supreme Court had the jurisdiction to hear and determine the dispute which arose between the two Chambers of Parliament.

16. A Bill concerning county government could be categorized as special or ordinary. Article 110(3) provided that prior to a consideration of the Bill, the Speakers of the National Assembly and Senate had to jointly resolve any question as to whether it was a Bill concerning counties and, if so, whether it was a special or an ordinary Bill.

17. The Division of Revenue Bill was a Bill bearing provisions that dealt with equitable sharing of revenue which would certainly affect the functioning of county government. The Bill dealt with equitable allocation of funds to the counties, and so any improper design in its scheme would certainly occasion inability on the part of the county-units to exercise their powers and to discharge their functions as contemplated under the Constitution.

18. The Senate had a clear role to play, in the processing of the Division of Revenue Bill. The Speaker of the National Assembly should have complied with the terms of Article 112 of the Constitution; and the National Assembly should have considered the deliberations of the Senate on record and, failing concurrence on legislative choices, the matter should have been brought before a mediation committee, in accordance with the terms of Article 113 of the Constitution.

19. The internal parliamentary mechanism for coordination and supervision to establish procedures of how it exercised subject to the dictates of the Constitution. It could also conduct its business, it had always to abide by the prescriptions of the Constitution. It could not conduct its business, it had always to abide by the prescriptions of the Constitution. It could not simply be performing its solemn duty under the Constitution and the Supreme Court it was entitled to establish procedures of how it conducted its business, it had always to abide by the prescriptions of the Constitution. It could not conduct its business, it had always to abide by the prescriptions of the Constitution. It could not simply be performing its solemn duty under the Constitution and the Supreme Court. Therefore, the Supreme Court recognized the fact that the Constitution vested the legislative authority of the Republic in Parliament. Such authority was derived from the people. This position was embodied in Article 94(1) thereof.

20. Where a question arose as to the interpretation of the Constitution, the Supreme Court was entrusted with exclusive jurisdiction over matters relating to election to the office of the President (Article 163(6)). The Speaker of the National Assembly was vested with the power to order the Constitutional Court to hear and determine the dispute which arose between the two Chambers of Parliament. The Supreme Court was thus judicially engaged in the constitutional and institutional transition.
31. The devolution provisions in Chapter 11 of the 2010 Constitution were a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompassed elements of political, administrative and fiscal devolution. There was a vertical and horizontal dispersal of power that put the exercise of state power in check. Importantly, the Constitution had created a Senate, an institution that enjoyed direct legitimacy and a popular mandate, commanding it to be the protector of devolution. It would be completely out of order for the Speaker of the National Assembly by only looking at Article 95 of the Constitution, without paying regard to Articles 96 and 110 of the Constitution which unequivocally incorporated the role of the Senate and of its Speaker.

32. The constitutional commitment to protect, and its signal of the search for a more perfect devolution, implied that, in interpreting the devolution provisions, where contestations regarding power and resources arose, the Supreme Court had to take a generous approach. The competing claims were not supposed to descend into institutional anarchy or dysfunctionality as that would compromise the developmental aspirations invested by the people, in devolution. The Supreme Court would not hesitate to pronounce itself with final authority, by laying down the proper juridical structures consolidating the devolution-concept where they are required, and stabilising our Constitution, as was expected.

33. The constitutional clauses on devolution were founded on political compromise by the elites, not sufficient reason to compromise the popular desire for a devolved system of government that empowered communities, and unlocked the developmental potential of the country.

34. Article 96 of the Constitution represented the purpose of the Senate as to protect devolution. There was, when there was even a scintilla of a threat to devolution, and the Senate approached the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court had a duty to ward off the threat. The Court’s inclination would not be any different if some other State organ approached it. Thus, if the process of devolution was threatened, whether by Parliamentary or other institutional acts, a basis emerged for remedial action by the Courts in general, and by the Supreme Court in particular.

35. The politics of formulae yielded the minimum allocation-provision of not less than fifteen per cent, a plain indication that more was anticipated. If there was no expectation for more, the framers would have prescribed not a floor, but an upper ceiling or, in the alternative, a specific and static percentage. However, the justice of formulae, which was the arena of the Supreme Court, moved the Court’s interpretative indicatrix the direction of the Senate/application, which stood for more resources to the counties, in the future.

36. The Division of Revenue Bill was neither classified as an ordinary Bill nor a special Bill, in clear contrast to the County Allocation of Revenue Bill. Article 218 distinguished the purposes of the two Bills. Article 218(1)(a) provided that the Division of Revenue Bill was to divide revenue raised by national government amongst the two levels of government, in accordance with the Constitution. On the other hand, the County Revenue Allocation Bill was to divide among the counties the revenue allocated to the county level of government, on a basis determined by Senate resolution in force under Article 217.

Dissenting Per N.S Ndungu, SCJ

1. The instant case was not one where the Supreme Court’s advisory jurisdiction was exercisable. The drafters of the Constitution no doubt knowingly used the term may under article 163(6), implying that the exercise of this jurisdiction was discretionary. This discretion was to be exercised in a manner that ascertained to the institutional architecture of the Constitution while protecting the authority of the Supreme Court and, effectively utilising the principle of judicial restraint whenever necessary. Restraint covered other activities of judges such as applying strictly the rules of standing, declining to consider a case until the applicant had exhausted other remedies, and avoidance of determinations on political questions.

2. The exercise of powers by the Legislature and the Executive was subject to judicial restraint. However, the Court’s exercise of such power could not be subject to the self-imposed discipline of judicial restraint. (Austerdale & Others v State of Jammu & Kashmir & Others (1989)AIR 1899, 1989 SCR (3) 19).

3. The Legislature was supreme in its own sphere under the Constitution and it was solely upon the Legislature to determine when and in respect of what matter the laws were to be enacted. Accordingly, to render an advisory opinion in this reference would inevitably interfere with the principle of separation of powers between the Judicial and the Legislative arms of government. The Judiciary was only obliged to consider the constitutionality of the substance of the impugned statute but not the legislative process. The instant matter only raised issues of process of arriving at, and not the constitutionality of the content of the subject statute - the Division of Revenue Bill.

4. The Court’s role was to check that the legislature did not overstep its mandate and legislate on matters it was not mandated to legislate on, but the court was not supposed to delve into the legislative process to find out whether the Parliamentary proceedings were carried on as required. This was the separation of powers between the legislative and judicial arm of government to be preserved.

5. The Constitution did not oust the doctrine of separation of powers between the three arms of government. Just as Parliament was expected to operate within its constitutional powers as an arm of government so was the Judiciary. The system of checks and balances that prevented autocracy, restrained institutional excesses and prevented abuse of power applied equally to the Executive, the Legislature, and the Judiciary. No one arm of government was infallible and all were equally vulnerable to the dangers of acting ultra vires the Constitution.

6. The Court’s jurisdiction to render an advisory opinion in a reference of this nature that directly questioned internal workings of the legislature was not to be exercised as it encroached on separation of powers between the legislative and judicial arm of government. Even if the courts were to intervene, they had to satisfy themselves that formal and informal dispute resolution mechanisms had first been fully exhausted.

7. This was a dispute requiring an interpretation of the Constitution, and which had been disguised as a matter for an advisory opinion, in order to come before the Supreme Court. The Applicants requested for an advisory opinion on a matter which was clearly adversarial and which should have followed a number of political judicial processes before reaching the apex court. It left no room for any appeal or review and placed the Court in the difficult and inappropriate position of being arbiter in a dispute, without the distance of the future. There was a clearly a situation in which the Supreme Court had to exercise its discretion not to give an advisory opinion.

8. Judicial resolution was not appropriate where it was clear in a matter such as in the instant case that the political question doctrine would apply. This doctrine was well established by, and has been in practice since, the decision of Marbury v. Madison 5 U.S. 137 (1803), in which the US Supreme Court deemed a question of law inappropriate for judicial review because it could be resolved by the political and not judicial process. Under this doctrine, the interpretation of the Constitution was left to the politically accountable branches of government.

9. The interpretation of the Constitution was not an exclusive duty and preserve of the Courts but applied to all State organs including Parliament. What was exclusive to the Courts was interpretation of the Constitution within a legal context, and not the political processes before a superior court and which was afforded the necessary processes of appeals, right up to the Supreme Court. Disputes, however, did exist in other forms that required not judicial intervention and determination, but rather resolution of a political nature.

10. The division of revenue was a process that concerned the application of national resources to development and indeed how the resources would be allocated. The nature of the question was one of perennial debate and argumentative character. It required a combination of several political processes of demands, negotiations, debates, stand-offs, retreats and finally resolution. These disputes would also be multi-layered, inter-party, intra-
party, inter-regional and even as in the instant case inter-chamber or internal institutional disagreements.

11. It was the National Assembly that determined the appropriation and allocation of revenue at the national level and between the levels of government; conversely it was the Senate that allocated revenue among counties. There was certainly no doubt that the drafters of the Constitution intended on drawing a clear distinction between the functions of the National Assembly and those of the Senate with regard to division of revenue between the national government and the county government.

12. Only Bills that concerned county government would be considered by Senate. All other Bills were to be originated in and considered by the National Assembly, exclusively.

13. The devolved system in Kenya was based on a unitary system of Government that decentralized key functions and services to the county unit. The Kenyan State model was not federal in nature and did not envisage the workings of a county as a politically and financially independent state.

14. For any Bill to be considered as one concerning county government it had to specifically affect the functions and powers of the county governments as set out in the Fourth Schedule of the Constitution. In addition, the provisions of the Bill had to be limited to the ambit of Part 2 of that Schedule which provided for the functions and powers of county governments. In the event that such a Bill went beyond the scope of Part 2 of that Schedule it could not in any way be deemed to be a Bill concerning county government.

15. A Bill that concerned the funding of functions outside of those specified to the Counties under the Fourth Schedule, such as the Division of Revenue Bill would fail the test of being considered as a Bill relating to county government. To Allowing the Senate to participate in the enactment of a Bill that went beyond the parameters of what counties could do within the Fourth Schedule, would certainly be unconstitutional.

16. It was clear that a Money Bill was one that provided for levying taxes, altering taxes or appropriation of the consolidated funds. In quite a number of countries the Speaker of the House that corresponded to the Kenyan National Assembly was the final determinant of what Bill would be considered to be a Money Bill and his decision was final. The Division of Revenue Bill would be considered a money bill and was subject to the same procedure as a Money Bill under article 114, which was the purview of the National Assembly.

17. In the same context the County Allocation of Revenue Act would also be considered a money Bill and could not concern the workings of the entire Government and even cause its collapse.

18. Once the Division of Revenue Bill that divided revenue between the national and county levels of Government was introduced in the National Assembly, Senate had no role to play. The Supreme law clearly gave the Senate an opportunity to make input into the Division of Revenue Bill but only before it was introduced into the National Assembly for debate.

19. Under Article 215 the Senate commanded a majority in the nine-member commission that had five representatives from Senate alone, compared with only two from the National Assembly and only two from the Executive arm of Government. This meant that the Senate commanded a decisive vote with regard to the recommendations that went into the drafting of the Division of Revenue Bill and long before it reached the National Assembly for determination. Any significant deviation from such recommendations would require a written explanation from the Cabinet Secretary responsible for finance, the intention and the rationale of the drafters of the Constitution was to ensure that the Senate had comprehensive input into the allocation of revenue at that stage, deeming unnecessary any more activity at the legislative stage.

20. The process of dealing with inter-chamber deadlock as applied to other Bills under Article 110(3) was not suitable for the Division of Revenue Bill as the mediation process under that Article presupposed a Bill that reached deadlock between the two houses could fail with the possibility of reintroduction after six months. This could not be done with regard to the Division of Revenue Bill as it was not a Bill that could be shelved without precipitating a constitutional crisis that would paralyze the workings of the entire Government and even cause its collapse.

21. The Senate would also canvass for expansion of its mandate by initiating an amendment of the Constitution through referendum as articulated under Article 255(1) of the Constitution. Such an amendment could introduce common constitutional measures as practiced in other bicameral jurisdictions such as the introduction of a suspensive veto, joint sessions of the houses and even the possibility of dissolution of both houses in the event of deadlock.

22. To ask the Supreme Court to give Senate powers that belonged in plain language to the National Assembly would be to seek an amendment to the Constitution in a manner not recognized by the supreme law. The tools for reviewing the Constitution to address restructuring of authority, power and functions of the Legislature and the roles of the Senate and the National Assembly lay squarely in a political and not judicial process. Application allowed.

Why the high court dismissed a petition by media houses in regard to analog Broadcasting switch off.

Royal Media Services Ltd & 2 others v Attorney General & 8 others

Petition No. 557 of 2013
High Court at Nairobi
D. S. Majanja, J
December 23, 2013

Reported by Mercy Ombima

Brief Facts

Kenya ratified the Convention of the International Telecommunication Union (“ITU Convention”) which obligated its members to migrate its television signal transmissions from analogue to digital. The government had, in bid to implement the ITU Convention, set up a taskforce known as the Taskforce on the Migration from Analogue to Digital Broadcasting (“the Migration Taskforce”) to spearhead the migration process. One public broadcaster called Kenya Broadcasting Corporation (“KBC”) had in that regard been granted a conditional signal distribution license. The other Broadcast Signal Distribution (“BSD”) licenses were to be given to private investors by the Third Respondent, the Communications Commission of Kenya (CCK) through a competitive procurement process, when the market conditions were suitable. CCK is a body charged with granting licenses to any person(s) to provide signal distribution services. The Petitioners are limited liability companies engaged in the provision of broadcasting and media services throughout the Republic of Kenya. The First and Second Petitioners, Royal Media Services Ltd and Nation Media Group Limited, through their consortium, National Signal Network, made a bid for the BSD license and lost.

The Petitioners, aggrieved in that regard, instituted a constitutional petition in court to challenge the same. They argued that the issue of the licenses to other licensees to their exclusion was a violation of articles 33 and 34 of the Constitution, on their right of media and establishment as television broadcasters. They were of the view that as established broadcasting houses, they had a right to be granted digital broadcasting licenses as of right. They also argued that the proposed switch off date from analogue television transmission to digital terrestrial television broadcasting, of 13th December 2013, was punitive and against public interest. This was because, they argued, public consumers were required to change their television set boxes from analogue to digital, which sets are more expensive and
unaliable to majority of the average Kenyans. They alleged that the switch off would infringe on their right of establishment as media houses and broadcasters and would disenfranchise the public’s right to receive information.

Issues

i. Whether the migration of the television signal transmission from analogue to digital, infringed on the Petitioners’ right of media and establishment as media houses.

ii. Whether the timing of the switch off of analogue broadcast set on the 13th December, 2013, was unreasonable, being at a period when majority of average Kenyans would be burdened with expenses such as school fees, which are usually due at the beginning of the year.

iii. Whether the migration of television transmission signals to digital broadcasting would contravene citizen’s consumer rights, being that the majority of average Kenyans would be required to change their television set top boxes from analogue to digital at an expensive cost.

iv. Whether the migration of television signal transmission from analogue to digital would disenfranchise the public’s right to receive information, especially for those who would be unable to purchase the digital set top boxes.

v. Whether the issue of Broadcast Signal Distribution licenses through a competitive procurement process was in violation of the petitioners’ freedom of media and right of establishment as broadcasting and media houses.

Constitutional Law – fundamental rights – freedom of the media – right of establishment - where the petitioners, broadcasters and media companies were denied Broadcast Signal Distribution ("BSD") licenses – where the BSD licenses were issued in line with the requirement of migration of television signal transmission from analogue to digital – where the Third Respondent, the Communications Commission of Kenya (CCK) was required to issue the BSD licenses through a competitive procurement process, when the market conditions were suitable – where the First and Second Petitioners, Royal Media Services Ltd and Nation Media Group Limited, had bid for the BSD license and lost – claim that their denial to be issued with the BSD license was in contravention of their fundamental right and freedom of the media and the right of establishment as broadcasting companies – whether the Petitioners were entitled to be issued with the BSD licenses as of right – Constitution of Kenya 2010 articles 2(5); 2(6); 10; 27; 33; 34;35; 227(1), United Nations Declaration on Human Rights article 19

Constitutional Law – fundamental rights and freedoms – right to information – where the government of Kenya adopted the switch off of analogue television transmission signals – where consumers were required to purchase digital set top boxes in order to receive the digital signal, – claim that the digital set top boxes were costly and hence unaffordable by majority of consumers – claim that the digital migration was unreasonably limited and restricted the public’s right to choose between analogue and digital broadcasting in contravention of the Constitution - claim that the digital migration would cause hardship and inconvenience to Kenyans – where the switch off date was scheduled to be on 13th December 2013 – whether the timing of the switch off was reasonable - Constitution of Kenya 2010 articles 2(5); 2(6); 10; 27; 33; 34;35; 227(1), United Nations Declaration on Human Rights article 19

Held

1. Article 34 of the Constitution of Kenya 2010 embodied a free standing freedom of the media. That freedom was intended to buttress the freedom of expression guaranteed under article 33. It supported the democratic nature of the State of Kenya by enhancing the national values and principles embodied in article 10, including among others, participation of the people, good governance, integrity and accountability.

2. The nature of the frequency spectrum was a public resource. It was a scarce public resource allocated by the Communications Commission of Kenya (CCK) in order to ensure utilization in a co-ordinated manner so as to benefit the public as a whole - Royal Media Services Limited v Attorney General and others Nairobi Petition No. 346 of 2012

3. Article 34 of the Constitution did not exclude regulation of electronic media. The article in fact contemplated licensing procedures that were necessary to regulate the airwaves and other forms of signal distribution. There was nothing in article 34 that excluded the Petitioners or any other media house from the purview of regulation that was necessary.

4. Moreover, even though the Petitioners were established prior to the promulgation of the Constitution of Kenya, 2010, their existing licenses were still subject to the regulation that was applicable to all other broadcasting media companies. Such regulation was subject to the Constitution and the values of democracy, human rights, human dignity, non-discrimination, public participation and all the other values set out in article 10 of the Constitution.

5. The process adopted by the CCK to competitively source for the second BSD license through the Public Procurement and Disposal Act found its pedigree in article 227(1) of the Constitution. The article provided that when a state organ or any other public entity contracted for goods or services, it was to do so in accordance with a system that was fair, equitable, transparent, competitive and cost-effective. In enacting the Public Procurement and Disposal Act, Parliament acted in accordance with the mandate donated to it under article 227(2) which required it to enact legislation to provide a framework within which policies relating to procurement and asset disposal should be implemented.

6. Nothing in the Constitution or law entitled the Petitioners, as established media houses, to BSD licenses as of right. Article 34 of the Constitution did not entitle any broadcaster or any person to a BSD license or any other license as a matter of right. It did not give preference to any person or group on the basis of historical and substantial investment in the broadcasting sector. No doubt the petitioners, as many other investors, had made huge contributions to the economic wellbeing of the country. That, however, could not be used to secure a license as of right. It would be unsettling to accept such a proposition and accept a constitutional provision or a justifiable statutory requirement grounding such a venture. The court could not be used to advance such a course.

7. Licensing was a process that was subject to certain conditions governed by the relevant statutory framework underpinned by the Constitution. A finding that the Petitioners had a legitimate expectation to a license would be inconsistent with the Petitioners participation in the Migration Taskforce. It would be contrary to the fact that the First and Second Petitioners, as a consortium, bid for the license when the same was put up by CCK and the fact that they were given a further opportunity to apply for a license on the basis of affirmative action, which opportunity they did not avail themselves. A finding in favor of the Petitioners, that the nature and extent of investment in broadcasting infrastructure established a legitimate expectation, that they would be granted a broadcasting license of another kind in the future as of right would be inconsistent with constitutional principles and values under article 10 of the Constitution.

8. Conversely, if the legitimate expectation argument was to be claimed, it would be used in favor of the Respondents and other investors who, based on the publized government’s digital migration policy, had strived to align their business accordingly and had invested heavily to take advantage of the anticipated changes. Those players had also acquired rights which could not be glossed over. Granting the Petitioners a favorable position based on their substantial previous investment would, without more, violate the right to equality and freedom from discrimination from prospective players, in the media and broadcasting industry. It would thus amount to a breach of article 27 of the Constitution. Such an approach would injure the spirit of competition by giving the Petitioners an unjustified and unfair advantage over other media players, and hence undermine the values and principles
of national governance by entrenching the privilege of incumbency.

9. Further, the failure to obtain the BSD license would not hinder the Petitioners’ ability to broadcast. All they were required to do was to enter into a contract with signal distributors to distribute their content. That requirement was not an unreasonable imposition on the Petitioners as it was intended to meet the policy objectives in the Migration Taskforce Report.

10. The digital migration was going to cause some hardship to the Petitioners’ business and other inconvenience to Kenyans. But that was not the kind of hardship or inconvenience that could be put on hold indefinitely. No date for the switch off would be convenient and perfect either then or in the future. What remained a constant was that technology continued to evolve and the framework for adapting to that change had been developed by the Second and Third Respondents with the participation of the Petitioners. That could not hold back the clock for three reasons;

a. First, the date of switch off was not one that was arrived at unilaterally but was one in which the Petitioners’ representatives had a say in.

b. Second, the migration process was being implemented in phases, beginning with Nairobi and then gradually spreading throughout the country.

c. Third, although the issue of availability and affordability of the digital set-top boxes was a valid concern, the Respondents would do well to consider mitigating as the process was implemented.

11. The resolution of teething problems could be done once the problems were identified, and that could only be done once the switch off was implemented. There was no reason for the court to step in and forestall the digital migration process merely on the basis of the anticipated challenges, whether real or perceived.

12. Many investors were waiting for the digital migration to be concluded so that they could realize their investment. Other investors had already invested in digital transmission through importing and selling the digital set-top boxes while others are preparing to begin investment in broadcasting content. Digital migration had been implemented on the basis of a programme rolled out by the Digital Television Committee. All the activities undertaken were dependent on a certain and predictable policy environment which the Ministry and CCK were expected to engender and maintain. The Petitioners could not call upon the court to review policy decisions that had been taken on a consultative basis by applying specific experiences from other countries.

13. While the Petitioners were right that television was an important medium of communication, the Constitution did not prescribe the kind of technology to be used in broadcasting. The manner in which broadcasting was carried out, whether on an analogue or digital platform, was a matter of policy. The frequency spectrum was not an infinite resource and policy makers had the obligation to adopt, through licensing procedures, technologies that led to optimum utilization of the frequency spectrum.

14. The bodies charged with formulating and implementing policies had examined the challenges and opportunities and had concluded that on the whole, the benefits of digital migration outweighed any difficulties in implementing such a policy. The Petitioners, as broadcasters, were involved in the entire process and as a result they had the opportunity to align their businesses to anticipated policy and technology changes. Businesses had to adapt to changes in technology or risk extinction. Neither the Constitution nor the Court could insulate the Petitioners’ business against the changes in technology which had been embraced and implemented through a participatory, open and transparent process.

Petition Dismissed With Costs

Whether the overriding objective principle enshrined in section 3A and 3B of the Appellate Jurisdiction Act could be applied retrospectively

Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates

Civil Appeal No. 161 of 1999

Court of Appeal at Nairobi

E.M. Githinji, R.N.Nambuye, M.K. Koome, JJA

October 11, 2013

Reported by Lynette A. Jakakimba

Brief facts

Abok James Odera t/a A.J Odera & Associates (the appellant) rendered professional services to Kenya Posts and Telecommunications Corporation (the Corporation) as it was then called, amounting to Kshs. 296,019,767.80. The appellant and the respondent executed an agreement via which John Patrick Machira t/a Machira & Co. Advocates (the respondent) was retained to recover Kshs. 296,019,767.80 at agreed professional fee of 8% of the amount intended to be recovered. The respondent filed a suit against Kenya Posts & Telecommunications Corporation, seeking recovery of the sum of Kshs. 296,019,767.80 with interest at the rate of 35% per annum. Kenya Posts and Telecommunications Corporation then filed a defence and made an application seeking to refer the dispute to arbitration, which application was allowed by the High Court. Negotiations were thereafter commenced between the appellant and the Corporation culminating in a consent endorsed by the parties settling the appellant’s claim at Kshs. 101,955,962.88.

The respondent then issued a demand letter to the appellant and subsequently filed a claim recovery of Kshs.23, 681,581.35 being 8% of Kshs.296, 019,769.80, the alleged agreed professional fees with interest at the bank rate of 25% per annum. The appellant paid the respondent Kshs.4, 000,000.00 before complying with the provisions of order III rule 9(1) of the Civil Procedure Rules and made an application seeking orders to strike out the respondents’ suit with costs to the appellant.

The trial court made a ruling in which the appellant’s application for striking out the respondent’s suit was dismissed with costs, but the respondent’s application for summary judgment was allowed. The appellant was aggrieved by that decision and appealed on the grounds that the summary judgment was erroneously based on the amount originally claimed by the appellant of Kshs.296,019,767.80 which the respondent never recovered for the appellant, that the proceedings leading to the entry of summary judgment were a nullity as the learned trial judge erroneously allowed the respondent to argue the application in person before complying with the provisions of order III rule 9(1) of the Civil Procedure Rules and lastly that interest ought not to have been allowed at 25% as prayed for in the plaint as the rate of interest was never catered for in their retainer agreement.

Issues

i. Whether the Court of Appeal had jurisdiction to hear matters arising out of decisions made pursuant to the provisions of section 45(2) of the Advocates Act on agreements on fees between advocates and clients.

ii. Whether the Court of Appeal had jurisdiction to hear appeals arising from a determination of an application for summary judgment under order 36 of the Civil Procedure Rules.

iii. Whether the overriding objective principle enshrined in section 3A and 3B of the Appellate Jurisdiction Act could be applied retrospectively.

iv. Whether the lack of inclusion of a memorandum of appearance in a record of appeal was a fatal omission.

v. Whether a party to a suit who had an advocate on record could be allowed to argue their application in person notwithstanding that they had not filed a notice to act in person.

vi. What amounted to an admission in a claim?

vii. Whether the non-payment of stamp duty on agreements that were subject to payment of stamp duty affected the enforceability of such agreements.
**Civil Practice and Procedure**

**Court of appeal—Court of Appeal jurisdiction to hear matters on disputes arising out of agreements between advocates and clients on remuneration—Court of appeal jurisdiction to hear appeals arising from a determination of an application for summary judgment—Advocates Act section 45—Civil Procedure Rules order 36**

**Civil Practice and Procedure—overriding objective principle—whether the overriding objective principle could be applied retrospectively—Appellate Jurisdiction Act section 3 A and 3B**

**Civil Practice and Procedure—representation-personal representation—whether a party to a suit who had an advocate on record could be allowed to argue their application in person notwithstanding that they had not filed a notice to act in person—Civil Practice and Procedure Act section 3 A and 3B**

(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—
   
   (a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate’s remuneration in respect thereof;
   
   (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate’s instruction fee in respect thereof or his fees for appearing in court or both;
   
   (c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate’s fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.

(2) A client may, within six months after the date of any agreement made by virtue of this section, apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years’ standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the court, whose decision shall be final, shall have power to order—
   
   (a) that the agreement be upheld; or
   
   (b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or
   
   (c) that the agreement be set aside; or
   
   (d) that the costs in question be taxed by the Registrar and that the costs of the application be paid by such party as it thinks fit.

An agreement made by virtue of this section, if made in respect of contentious business, shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other than the advocate, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to the rules for the time being in force for the taxation thereof.

Provided that, in the case of a client changing his advocate, the Court shall have regard to the circumstances in which the change has taken place and, unless of opinion that there has been default, negligence, improper delay or other conduct on the part of the advocate affording to the client reasonable ground for changing his advocate, shall allow the advocate the full amount of the remuneration agreed to be paid to him.

(3) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48.

**Appellate Jurisdiction Act**

**Section 3A**

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.
(1) In all suits where a plaintiff seeks judgment for—

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

Held

1. The Court had jurisdiction to determine the appeal as the proceedings that gave rise to the appeal had not been undertaken by way of a chamber summons directed to and determined by a single High Court Judge sitting with two assessors pursuant to section 45(2) of the Advocates Act. The appeal arose from a determination of an application for summary judgment under order XXV of the Civil Procedure Rules as it was then. Such decisions were appealable to the Court of Appeal as of right under the provisions of order XII rule (1) and (2) of the Civil Procedure Rules.

2. The aim of the overriding objective principle was to enable the courts to achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. Its application did not operate to uproot established principles and procedures but to embed the court to be guided by a broad sense of justice and fairness. There was also a mandatory requirement that the Court of Appeal rules of procedure had to also be construed in a manner which facilitated the just, expeditious, proportionate or affordable resolution of appeals. (Deepak Manlal Kamami and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009)

3. A ruling in favour of sustaining the current appeal would therefore be in line with the overriding objective principle because if the appeal was struck out on account of incompetence, the striking out order would not finally determine the issues in controversy as between the parties. It would simply restore the parties to the pre-appeal stage before the alleged offending notice of appeal was filed. The net effect of this restoration would be that the appellant would be at liberty to reinitiate the appellate process a fresh. Such an action was likely to lead to a delay in the disposal of the real issues in controversy as between the appellant and the respondent. There would also be considerable costs to be borne by both parties both for these proceedings and the proceedings to be reinitiated. This would also result in the conclusion of the proceedings as the reinitiated appeal would have to be re-presented to this same Court based on the same set of facts and as soon as it was presented it would start competing for time for disposal.

4. The lack of inclusion of the memorandum of appearance in the record of appeal could not be used to fault the entire record of appeal considering that entry of appearance or lack of it was not one of the issues in controversy in the High Court nor in the present appeal, as neither the High Court nor the present court was and or had been invited to make a determination on the appellants appearance filed in the High Court. Such an omission could not be held to be so fundamental as to upset and or override the need to do justice to the parties by disposing off the appeal on its merits.

5. Order III rule 9(1) Civil Procedure Rules did not make provision for penal consequences for noncompliance with that provision. It simply provided in part that where a party intended to act in person in the cause or matter he had to give a notice stating his intention to act in person. The appellant had also not demonstrated any existence of any prejudice or injustice suffered by reason of the said personal representation by the respondent. Neither had he asserted that the learned trial Judge would have arrived at a contrary decision had the respondent been represented by a counsel. There was therefore no fault in the learned trial Judge's action in allowing the respondent to argue the application in person notwithstanding that he had not filed a notice to act in person under the said Rule.

6. An admission to a claim had to be premised on the provisions of order XII rule 6 Civil Procedure Rules as it was then (now order 13 rule 2). The pleadings presented by a party against whom the relief was sought had to be those that did not contain specific denials and no definite refusals to admit allegations; demonstration that there were allegations of facts made by one party and not traversed by the other which were deemed to be admitted; demonstration that there had been implied admission of facts inferred from pleadings in instances where the defendant had specifically failed to deal with allegations of fact in the plaint, the truth of which he did not admit or instances where a defendant had evasively denied an allegation in the plaint; demonstration that there were admission of facts discerned from correspondences or documents which were admitted or that there was an oral admission as the rules used the words “or otherwise”.

7. Although the suit agreement was subject to the Stamp Duty Act and duty was payable on it, failure to comply with the Stamp Duty Act was not fatal to the enforcement of the said agreement. The court was enjoined under section 19(3)(a),(b) and(c) of the said Act to not reject such an agreement in toto, but to receive it and either assign the duty itself and direct that it be paid. Or alternatively the court could impound such an agreement and direct that it be delivered to the stamp duty collector for him to assess the stamp duty payable and demand its payment.

8. It was now trite that an application for summary judgment was available to a claimant seeking a liquidated demand with or without interest. Under sub rule 2 of order 36, the defendant had leave to show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit, which had to be discerned from the pleadings filed by the parties. In the present appeal the trial judge was right in finding that the suit agreement was validly executed under section 45(2) of the advocates Act and that the same was enforceable. However the trial Judge made an error in awarding interest as prayed in the plaint at the rates of 25% when the same had neither been provided for in the said agreement or justification made for its claim by the respondent both in the plaint filed, affidavit in support of the application for summary judgment and or oral highlights in court at the time of the respondents request for the said summary judgment.

Orders

1. Summary Judgment entered in favour of the respondent as against the appellant at the rate of 8% of Kshs.101,955,962.88 total being Kshs.8,156,477.05 less the Kshs.4,000,000.00 earlier paid.

2. The said sum will carry interest at court rates from the date of filing of the suit till payment in full.

3. The respondent entitled to half the costs of the suit in the High Court as the claim has been substantially reduced.

4. The respondent is directed to submit the said documents to the stamp collector for him to assess the stamp duty payable, which should be paid in the normal manner.

5. The appellant to have half the costs of the appeal.
Only political parties have the mandate to prepare party lists for nomination

Beatrice Nyaboke Oisebe v Independent Electoral & Boundaries Commission & 2 others
Civil Appeal No.179 of 2013
Court of Appeal of Kenya at Nairobi
D K Maraga & J W Mwera, JJA
October 11, 2013

Reported by Teddy Musiga

Brief facts:
The Independent Electoral and Boundaries Commission published the party lists in respect of special seats for the County assemblies in accordance with Regulation 54 of the Elections (General) Regulations 2012. After that the appellant was aggrieved with the decision of IECB to publish the said names complained to the IEBC that she and not the 2nd respondent ought to have been nominated to the Kisii County Assembly. After hearing both parties, the Tribunal dismissed the complaint and held that the respondent was rightly on the list taking into account the priority in the party list as was submitted by the political party. The appellant was dissatisfied with that decision and filed a judicial review reference. The High Court concurred with the Committee’s reason to dismiss the appellant’s argument saying that the list was submitted by the political party which had the core mandate to prepare the lists for nomination hence this appeal.

Issue
1. Who bears the duty to prepare lists for party nomination?

Electoral Law – Membership to the National Assembly & County Assembly – Nomination of members – Political party lists – who bears the duty to prepare lists for party nomination? – Article 90, 177(1)(b)(c) of the Constitution of Kenya, 2010 – Elections Act, section 34(4)

Article 177(1)(b)(c) of the Constitution of Kenya provides that;
“Any County Assembly consists of –

a) …………

b) The number of special seat members necessary to ensure that no more than two thirds of the memberships of the assembly are of the same gender.

c) The number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament.”

Section 34(4) of the Elections Act provides that;
“A political party which nominates a candidate for election under article 177(1)(a) shall submit to the Commission a party list in accordance with article 177(1)(b) and (c) of the Constitution.”

Held:
1. Section 34 of the Elections Act provided that only the political parties were mandated to propose lists for party nominations for special seats to be submitted to the Independent Electoral and Boundaries Commission in order of priority.

2. Such lists were not subject to amendment during the term of parliament or County Assembly. It was not demonstrated that there was any default in the nomination process or that IECB amended the list submitted to it hence the conclusion that the 2nd respondent was validly nominated.

Application dismissed. Costs to the respondents.

Constitutionality of the Death Sentence

Mwendwa Kilonzo & another v R
Criminal Appeal No.209 & 210 of 2004 (consolidated)
Court of Appeal at Nairobi
R. N Namhuya, D. K Maraga & J. W Mwera, JJA
October 18, 2013

Reported by Mercy Ombima

Brief Facts

The case was a consolidated criminal appeal against a charge of robbery with violence contrary to section 296(2) of the Penal Code. The magistrate’s court had found the accused persons guilty and sentenced them to death, which conviction was upheld by the High court. The appellants wanted the death sentence to be reviewed. They argued that the sentence was unconstitutional, since it contravened article 26(3) of the Constitution of Kenya 2010 which provided for the right to life. They also claimed that the sentence was also contrary to article 6(2) of the International Covenant on Civil and Political Rights which prohibited
death sentences.

Issues

i. Whether the penalty of death sentence as provided for under section 296(2) of the Penal Code Cap 63 was contrary to article 26(3) of the Constitution on the right to life

ii. Whether the death penalty allowed for by section 296(2) of the Penal Code Cap 63 contravened the provisions of article 6(2) of the International Covenant on Civil and Political Rights, which prohibited death sentences.

iii. Whether the provisions of the Constitution, the Penal Code and the International Covenant on Civil and Political Rights contradicted each other on the issue of penalty of death sentences.

Criminal Practice and Procedure – sentencing – death sentence – second appeal against conviction and sentence of death on a charge of robbery with violence – claim that the sentence was illegal – where the accused Political Rights article 6(2) to life – claim that the sentence was also in contravention of the International Covenant on Civil and Political Rights prohibiting death sentences - whether the penalty of death as provided for by the Penal Code was contrary to the Constitutional right to life – Constitution of Kenya 2010 articles 26(3), Penal Code Cap 63 Laws of Kenya section 63, International Covenant on Civil and Political Rights article 6(2)

Held

1. Article 6 of the International Covenant on Civil and Political Rights provided that every human being had the inherent right to life. That right would be protected by law and would not be arbitrarily deprived. The article also provided that in countries which had not abolished the death penalty, the sentence of death could be imposed only for the most serious crimes. It was to be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the Covenant or the Convention on the prevention and punishment of the crime of genocide. It was required that that penalty be only carried out pursuant to a final judgment rendered by a competent court

2. Article 6 of the International Covenant on Civil and Political Rights was to be read together with the Constitution of Kenya 2010 and the penal Code. Article 26(3) of the Constitution provided that a person should not be deprived of life intentionally, except to the extent authorized by the Constitution or other written law. That other written law referred to was section 296(2) of the Penal Code. Therefore, all in all a death sentence was not unconstitutional.

3. Kenya had not abolished the death sentence; hence the death sentence meted to the appellants was not contrary to the cited Covenant. The provisions of the case of Godfrey Ngotho Mutiso Vs R (2010) eKLR stipulating that a death sentence was not a mandatory and only sentence under section 203, as read together with sections 204, could be extended to other legal provisions stipulating death sentences. However that was not the case before court.

Appeal Dismissed

KRA’s mandate to impose tax on diversion of goods meant for export to the local market must be exercised after proper investigations

Kenya Revenue Authority v Spectre International Limited

Court of Appeal at Kisumu

Civil Appeal No.215 of 2010

J. W. O. Otieno, F. Azangalala, S. Ole Kantai JJ

October 18, 2013

Reported by Andrew Halonyere & Cynthia Liavule

Brief facts

The appellant, Kenya Revenue Authority (KRA) in exercise of powers donated to it by Section 210 of the East African Community Customs Management Act 2004 and Regulation 104 (22) and (23) of the East African Community Customs Management Regulations, 2006 required the respondent to pay taxes for neutral spirit export that, according to the appellant, had been directed by the respondent to the local market. KRA wrote two letters, the first letter on the day that the consignment was reported missing while the second letter corrected the tax demanded. In both letters it was stated that an offence had been committed and the respondent was required to compound the offence in terms of Section 219 of the said Act.

The respondents submitted that it had released the consignment to the appellants’ officer and the conditions set by the appellant for export of goods to Tanzania or Uganda had not been breached. In addition they had not received an explanation from KRA officers on whereabouts of the goods before taxes were imposed by the appellant.

The respondent filed judicial review proceedings where court held that the appellant had acted unreasonably and unfairly in reaching the decision. The court therefore quashed the appellants’ decision in effect holding that tax and penalties demanded of the respondent were not collectable.

Issue

1. Whether Kenya Revenue Authority could demand tax payment for diversion of goods meant for export to a local market where no investigations had been carried out by its officers

Tax Law–excise duty-mandate of the Kenya Revenue Authority to demand tax where there was alleged diversion of exports to the local market—whether Kenya Revenue Authority officers had carried out investigations sufficient to demand excise duty—

Appeal dismissed
Supervisory jurisdiction of the High Court over the Judges and Magistrates Vetting Board

Law Society of Kenya v Centre for Human Rights and Democracy & 13 others

Civil Appeal No 306 of 2012
Court of Appeal at Nairobi
P O Kiage, A K Murgo, F Sichale, J Mohammed & Odek, J J A
October 18, 2013

Reported by Andrew Halonere, Lynette A Jakakimba, Beryl A Ikamari, Cynthia Liavule and Victor Andande

Brief facts:
An appeal was lodged against the High Court's decision on the court's supervisory jurisdiction as concerned the proceedings and decisions of the Judges and Magistrates Vetting Board. The High Court's judgment was to the effect that the Judges and Magistrates Vetting Board (Vetting Board) had a legal or juristic character, which was akin to that of any tribunal, and was susceptible to the supervisory jurisdiction of the High Court under article 165(6) of the Constitution of Kenya, 2010. Initially, within the appeal, applications for recusals and disqualification of various judges were made. In the end, a bench of five was constituted to hear and determine the appeal.

Issues:

i. Whether the High Court had jurisdiction to review the decisions of the Judges and Magistrates Vetting Board despite the ouster clause in section 23(2) of the sixth schedule to the Constitution, which provided that the Vetting Board's decisions would not be subject to question or review by any court.

ii. Whether transitional and consequential provisions found in the schedules to the Constitution of Kenya, 2010 were of an inferior hierarchical status as compared to other provisions found in the body of the Constitution.

Constitutional Law:
- Jurisdiction - supervisory jurisdiction - High Court's review and supervisory jurisdiction over independent tribunals - where the Constitution provided that the removal of a judge by operation of legislation would not be subject to question or review by any court - whether the High Court had jurisdiction to review decisions of the Judges and Magistrates Vetting Board despite the ouster clause in the Constitution - Constitution of Kenya, 2010; article 20, 165(6),165(7) and section 23 of sixth schedule, and Vetting of Judges and Magistrates Act, No. 2 of 2011; section 22.

Constitutional Law - interpretation of constitutional provisions - the effect of the ouster clause in section 23(2) of the sixth schedule to the Constitution of Kenya, 2010 - whether the ouster clause wouldoust the High Court's jurisdiction to review the decisions of the Judges and Magistrates Vetting Board - Constitution of Kenya, 2010; articles 165(6), 259(1), 262 & section 23 of sixth schedule, and Vetting of Judges and Magistrates Act, No. 2 of 2011; sections 19, 21 & 22.

Constitutional Law - separation of powers - doctrine of political question - whether the doctrine of political question would apply to the vetting process carried on by the Judges and Magistrates Vetting Board.

Constitution of Kenya 2010

Article 165 (6) and (7)
(6) The High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function but not over a superior court.
(7) For the purposes of Clause (6) the High Court may call for the record of any proceedings before any subordinate court or person.

Section 23 of sixth schedule to the Constitution

(1) 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.

(2) A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.

Vetting of Judges and Magistrates Act, No. 2 of 2011

Section 22
(1) Every judge or magistrate who has undergone the vetting process and is satisfied with the determination of the Board may request for a review by the same panel within seven days of being informed of the final determination under section 21(1).
(2) The Board shall not grant a request for review under this section unless the request is based - (a) on the discovery of a new and important matter which was not within the knowledge of, or could not be produced by the Judge or Magistrate at the time the determination or finding sought to be reviewed was made, provided that such lack of knowledge on the part of the Judge or Magistrate was not due to lack of due diligence; or (b) on some mistake or error apparent on the face of the record.

Held

1. Section 23 of the sixth schedule to the Constitution of Kenya, 2010 did not create the Judges and Magistrates Vetting Board. It directed parliament to enact legislation within a year, which would establish the mechanism, procedures and time frame for vetting the suitability of all judges and magistrates sitting at the effective date. Accordingly, the Vetting of Judges and Magistrates Act, No. 2 of 2011, was enacted.

2. Article 162 of the Constitution established the system of courts in Kenya. The Vetting Board was neither part of the court system in Kenya nor was it a local tribunal; it was a sui generis quasi-judicial organ with a precise mandate, time frame and distinct legislative framework. The Board was neither a superior court as defined in article 162 (1) of the Constitution nor a subordinate court as stipulated under article 169 (1) of the Constitution. The Vetting Board as established was unique, transitional in nature with a life span determinable by parliament and it fulfilled the exceptional transitional constitutional role of restructuring the judiciary. That exceptional transitional role was not vested on the courts.

3. There was a misconception that the supervisory jurisdiction of the High Court was only exercisable over inferior tribunals and this had given rise to the unmerited preoccupation and undue emphasis on the submission as to whether the Vetting Board was subordinate or inferior to the High Court. The correct legal position was captured in article 165 (6) of the Constitution wherein the High Court's supervisory jurisdiction was exercisable not only in relation to inferior tribunals but also over any person or body or authority exercising judicial or quasi-judicial powers.

4. The fact that honourable judges of the High Court and Court of Appeal appealed before the Vetting Board did not elevate the Board to a status equivalent to the High Court or make it equal in stature to a superior court.

5. The Vetting Board fulfilled the constitutional mandate.
criteria in article 165 (6) of being a person, body or authority and it was evident from its mandate that the Board exercised quasi-judicial power. The Board had the responsibility of a body charged by statute with a duty of deciding the suitability of Judges and Magistrates to continue holding their offices. The Vetting Board was under a duty to act judicially and was subject to the supervisory jurisdiction of the High Court within the meaning of article 165 (6) of the Constitution. General Medical Council v Spackman [1943] AC 627, 641 & Board of Education v Rice [1911] AC 179,182.

6. It was elementary law that a statutory provision could not oust an express constitutional provision. A statute could neither be used to interpret a constitutional provision nor could it override a constitutional provision. Section 22 (2) of the Vetting of Judges and Magistrates Act could not be used to interpret a constitutional provision, to wit, section 23 (2) of the sixth schedule to the Constitution. In the same vein section 22 (2) of the Vetting of Judges and Magistrates Act, being a statutory provision, could not supersede the provisions of article 165 (6) of the Constitution and neither could it override section 23 (2) of the sixth schedule to the Constitution. A schedule to the Constitution could neither be utilized in interpreting the main provisions in the body of Constitution nor could a schedule be used to oust main provisions in the body of the Constitution.

7. The “review” contemplated under section 22 (2) of the Vetting of Judges and Magistrates Act was not the same kind of “judicial review” that the High Court exercised in a supervisory jurisdiction under article 165 (6) of the Constitution and order 53 of the Civil Procedure Rules. The High Court in its supervisory jurisdiction exercised the power of “Judicial Review” and not “review”. Section 22 (2) of the Vetting of Judges and Magistrates Act was on the same subject matter as order 45 rule 1 of the Civil Procedure Rules and the two provisions were to be construed in the same way. Just as order 45 rule 1 of the Civil Procedure Rules was different from order 53 of the Civil Procedure Rules, it followed that the meaning, purport and object of section 22 (2) of the Vetting of Judges and Magistrates Act had to be construed differently from order 53 of the Civil Procedure Rules which governed Judicial Review.

8. Section 23 (2) of the sixth schedule was a constitutional ouster clause. However, what was ousted by the constitutional ouster clause was the jurisdiction of any court to question and review the decisions of the Vetting Board. The word “review” in that constitutional ouster clause had to be interpreted as a term that had the same meaning as the term “review” as used in article 50 (2) (a) of the Constitution, section 22 (2) of the Vetting of Judges and Magistrates Act and order 45 Rule 1 (b) of the Civil Procedure Rules.

9. The control which was exercised by the High Court over inferior tribunals was of a supervisory nature but not of an appellate nature. It enabled the High Court to correct errors of law if they were revealed on the face of the record. The control could not, however, be exercised if there was some provision which prohibited its exercise. But it was well-settled that such a clause would be of no avail if the inferior tribunal acted without jurisdiction, or exceeded the limits of its jurisdiction.

10. Strict approaches to constitutional ouster clauses could not be applied to every case. In fact, an ouster could be usurped where strong and compelling reasons existed. Breaches of fundamental human rights and breaches of the rules of natural justice were enough to satisfy the test of strong and compelling reasons and where such breaches were alleged, an ouster clause could be ignored.

11. Apart from being a fundamental right enshrined in the Constitution, the right to a fair hearing was one of the more far-reaching principles of natural justice. A breach of the principles of natural justice opened up the decision of the tribunal to review even if there was an ouster clause. The violation of a principle of natural justice amounted to an excess of jurisdiction.

12. The preclusive section of the Constitution was inapplicable and ineffective in ousting the section of the Constitution that provided for the right to apply to the High Court for the enforcement of fundamental rights and freedoms. The question as to whether a tribunal or body had exceeded its jurisdiction or breached the rules of natural justice was for the courts to decide. Further, the right to a fair hearing or a tribunal under those circumstances could not be precluded by the ouster clause.

13. There was nothing in the ouster clause that suggested, even remotely, that any of the rights and fundamental freedoms of the Judges were to be alienated, diluted or limited. Moreover, by virtue of article 20(1) of the Constitution, the Bill of Rights applied to all law and bound all state organs and all persons.

14. The right to enforce one’s fundamental rights and freedoms through the courts was so basic and so essential a feature of the rule of law, in a democratic society, that it could not be suggested that any group of persons, senior judges no less, could be shut out from exercising it.

15. The fact that the court heard and determined the application was proof that the filing of applications by the judges per se could not lead to the chaos that the appellant seemed to fear. It was not reasonable to expect, nor was it borne out by experience, that every complaint on violation of rights would find favour with the High Court.

16. Article 25 trumped every other provision of the Constitution including section 23 of the sixth schedule. The importance given to the Bill of Rights was such that even when there was a justification for limiting or derogating from rights, the process for lawfully doing so was carefully and closely circumscribed under article 24 of the Constitution. Even then, it was still recognized that some rights, could not, under any circumstances be limited. The non-derogable rights would include the right to a fair trial. That right was provided for in article 50 of the Constitution and it would include the right to have a dispute capable of being settled by application of law tried by a fair and impartial court or tribunal.

17. The High Court was right when it decided that it was possessed of the jurisdiction necessary to handle the matters pending before it and it was proper for it to proceed to hear and determine the matter.

18. The Vetting Board remained the only statutory body clothed with the mandate to determine the suitability of a judge or magistrate to continue serving in the judiciary. The Vetting Board was under a duty to act judicially and was subject to the supervisory jurisdiction of the High Court within the meaning of article 165 (6) of the Constitution and the Vetting of Judges and Magistrates Act.

19. There was a legitimate expectation that the Vetting Board would carry out its mandate in accordance with the Constitution and the Vetting Act. The supervisory jurisdiction of the High Court only came in when there were allegations that the Vetting Board was not carrying out its mandate in accordance with the Constitution and the Vetting Act.

20. The Vetting Board was given finality in that it was the only body that could determine the suitability of judges and magistrates to continue serving in the judiciary. The judiciary or any other body did not have that jurisdiction.

21. The doctrine of “political question” emanated from the concept of separation of powers. The political question doctrine was to the effect that certain issues could not be decided by courts because their resolution was committed to another branch of government or because those issues were not capable, for one reason or another, of judicial resolution. Its purpose was to distinguish the role of the judiciary from that of the legislature and the executive, preventing the former from encroaching on either of the latter. Under that rule, courts could choose to dismiss cases even if they had jurisdiction over them. Baker et al v Carr et al 369 US 186 [1962], R v Cambridge Health Authority ex PB [1995] 2 ALL ER 129.

22. The Constitution itself was a political document and yet it was justiciable and enforceable. Therefore, not all political issues were non-justiciable and the political question doctrine did not confer blanket immunity from court inquiry to all political issues. In the context of the instant appeal, the political question doctrine was inapplicable as the Vetting Board was not one of the arms of government. Political issues were subject to the rule of law, good governance and the supervisory
jurisdiction of the High Court. Upon inquiry, the courts could decide on whether an issue came under the ambit of the political question doctrine.

23. Where the High Court had exercised its supervisory jurisdiction and made a finding that the Vetting Board exceeded its power or jurisdiction, the High Court would be required to remit the matter back to the Vetting Board for a determination on the suitability of judge or magistrate, to continue serving in the judiciary. Such a remittal would discard the perception that the exercise of supervisory jurisdiction by the High Court would hijack the vetting process, by allowing High Court judges to serve as judges in their own case.

24. There would be no lacuna in the event that the Vetting Board ceased to exist or in the event that the time frame provided for the vetting process lapsed. Any individual judge or magistrate whose finding and determination by the Vetting Board was be quashed through the supervisory jurisdiction of the High Court would be deemed not to have been vetted. The relevant constitutional provisions for a judge or magistrate who had not been vetted would accordingly apply to such a judicial officer.

Dissenting per A K Murgor, F Sichale, JJ A

1. Pursuant to the provisions of article 259(1) of the Constitution of Kenya, 2010, in interpreting the provisions of the Constitution, the courts were obliged to promote the Constitution's purpose, values and principles, the rule of law, the Bill of Rights, the development of the law and good governance.

2. The plain and ordinary meaning of section 23(2) of the sixth schedule to the Constitution was that the court's jurisdiction to review the decisions or process of the judges and Magistrates Vetting Board was emphatically ousted.

3. Furthermore, section 23(1) of the sixth schedule to the Constitution provided that the legislation to be enacted, for vetting judges and magistrates, would operate in a different context from other provisions which dealt with the judiciary and the tenure of office for judicial officers. Article 168 of the Constitution which dealt with the removal of a judge from office would apply in respect of those not serving before the effective date while section 23(2) would apply in respect of those who were serving before the effective date.

4. The intention expressed in section 23 was that the process of vetting judges and magistrates was to be carried on by a body distinct from the courts. The vetting process was to be carried on within a limited time-frame and the vetting of each judge was to be carried on with the result being a final decision which the courts could not review.

5. The purpose of including the ouster clause which excluded the jurisdiction of the High Court, over matters handled by the Judges and Magistrates Vetting Board, was to prevent and avoid the mischief whereby the judges and magistrates through the courts, would become the judge and jury in their own case. If the vetting process had not been insulated from the supervision of the High Court, then there would have been clear issues of conflict of interest.

6. The promulgation of the Constitution of Kenya, 2010, entailed the creation of a new constitutional order, in which the will of the Kenyan people and sovereignty of the people was recognized. The vetting of judges and magistrates was a response to public perceptions concerning the need for reform within the judiciary. There were perceptions of delays, rampant corruption, incompetence and lack of independence, in the dispensation of justice.

7. Article 1(1) of the Constitution of Kenya, 2010, provided that all sovereign power belonged to the people of Kenya and had to be exercised in accordance with the Constitution. Further, article 2(3) of the Constitution stated that the validity or legality of the Constitution was not subject to challenge by or before any court or other state organs. Article 3 obliged every person to respect, uphold and defend the Constitution. The inclusion of section 23(2) of the sixth schedule to the Constitution was an exercise of the people's constituent power and by dint of article 2(3) of the Constitution, its validity or legality was not to be challenged.

8. Section 23 of the sixth schedule, was part of the transitional and consequential provisions found in the schedules to the Constitution of Kenya, 2010. In article 262 of the Constitution such provisions were deemed to be an integral part of the Constitution. Transitional clauses were placed in the schedules because their usage was to be for a limited time period of time and such placement would prevent the existence of numerous provisions whose applicability was temporary within the body of the Constitution. The placement of transitional provisions in schedules was not intended to relegate the provisions to a status that was inferior to other substantive provisions of the Constitution.

9. In a situation of conflict between the provisions in the schedules to the Constitution and the other constitutional provisions, article 262 of the Constitution of Kenya, 2010, did not specify which of the provisions would prevail. However, during the transitional period, any substantive constitutional provision which created a challenge to a transitional measure would be suspended in order to enable the transitional process to be dispensed of expeditiously, and to aid the full operationalization of the Constitution, including its values and principles.

10. The suspension of constitutional provisions, as a transitional measure, could include the suspension of fundamental rights and freedoms. Whether the suspension of a right was justified, would depend on the nature of the right in question.

11. There were complaints that the right to a fair trial was negatively impacted in the vetting process in question. However, the Vetting of Judges and Magistrates Act, No. 2 of 2011 made provisions safeguarding the right to a fair trial. Section 19 of the Act provided for the procedure to be followed in vetting a judge or magistrate and section 21 provided for determinations including the suitability of the vetted judicial officer to continue serving in office. Further, section 22 provided for review as concerns the first decision made on the suitability of a judge. It provided that the review decision would be final.

12. The Judges and Magistrates Vetting Board was established by statute, with constitutional authority prescribed by section 23 of the sixth schedule to the Constitution of Kenya, 2010. It was to be an independent judicial body, sui generis, of unusual hierarchical status, arising from its origins in section 23 of the sixth schedule.

13. The Judges and Magistrates Vetting Board had special and extensive jurisdiction to vet judges and magistrates and such jurisdiction was akin to the jurisdiction of the Industrial Court and the Environment and Land Court. The Judges and Magistrates Vetting Board, for purposes of article 165(6) of the Constitution of Kenya, 2010, would not be a subordinate court over which the High Court could exercise supervisory jurisdiction.

14. The House of Lords decision in the Anisminic case entailed the locus classicus on statutory outer clauses. The House of Lords held that despite the existence of an outer clause in section 4(4) of the Foreign Compensation Commissions Act 1950, the court's jurisdiction would not be ousted where the determination of a tribunal was considered a nullity. (Anisminic v Foreign Compensation Commission [1969] 2 AC 157).

15. The jurisprudence in the United Kingdom and the West Indies was that the principles espoused in the Anisminic case were applicable irrespective of whether the outer clause in question was a statutory provision or a constitutional provision. However, it was noteworthy that the United Kingdom had an unwritten Constitution and the West Indies, which continued to prefer its appeals to the Judicial Committee of the Privy Council, would follow the House of Lords decision as a precedent. Such a historical context and circumstances were not applicable to Kenya.

16. In Kenya, the decision made in the Anisminic case would not apply to an outer clause, such as section 23(2) of the sixth schedule.
The existence of a valid kikuyu woman-to-woman marriage is dependent on proof that the requisite ceremonies took place

Eliud Maina Mwangi v Margaret Wanjur Gachangi
Court of Appeal at Nairobi
Civil Appeal No. 281A of 2003
R. N. Nambyane, W. Karanja, K. M’oino JJA,
October 11, 2013
Reported by Emma Kinya Mwobobia and Obura Paul Michael

Brief facts
This appeal relates to the Estate of Keziah Wanjur Kahiga (deceased) who died in 1993. The central question was whether the respondent, Margaret Wanjur Gachangi, was married to the late Keziah Wanjur Kahiga in a woman-to-woman marriage under Kikuyu customary law to entitle her to a grant of letters of administration of the estate of the deceased and to inherit the deceased's property.

Both Keziah Wanjur Kahiga and Margaret Wanjur Gachangi were previously married with husbands who predeceased them. Keziah had no children with her husband while the Margaret had four children with her husband.

When the Keziah's husband died, Margaret moved with her four children into Keziah's house where they lived till the time she died.

Upon the deceased's death, the respondent and her brother jointly applied for grant of letters of administration, which was granted and confirmed by the High Court on the basis that she was the widow to the deceased. She had also listed her four children as beneficiaries.

The appellant on the other hand was the deceased's brother-in-law, who applied for summons of revocation of the grant but was dismissed by the same High Court.

Words and phrases: General custom- rights common to any considerable class of persons

Rule 64 of the Probate and Administration Rules provided:
"Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African customary law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross-examination."

Held
1. The existence of a woman-to-woman marriage was a matter of fact which was to be proved with evidence. Under section 51 of the Evidence Act, opinions of persons who were likely to know of the existence of any general
custom or right were admissible where the court was required to form an opinion of the existence of such custom or right.

2. Kikuyu customary marriages involved elaborate rites and ceremonies. The essential steps and ceremonies must be performed, irrespective of the form in which they are performed. The following procedures, rites and ceremonies were involved in a typical woman-to-woman marriage:

   I. A proposal is conveyed to the girl.
   II. Girl’s parents are invited to the home of the prospective husband to partake in the njohi ya njario, the beer of asking the girl’s hand.
   III. First installment of the ruracio is taken to the girl’s father. Further Installments follow until a sufficient amount has been offered and accepted.
   IV. A day is fixed for the engagement ceremony ngurario i.e the pouring out of the blood of unity.
   V. A ram ngoima ya ngurario is slaughtered and girl eats kidneys as a sign of consent to the betrothal.
   VI. The ngurario is followed by a further ceremonial feast guthinja ngoima. This feast is attended by members of the parties clan.

3. Where a husband died leaving a childless widow, who was past childbearuing age, the widow may marry a wife. The widow pays ruracio to the family of the woman selected and arranges for a man from her deceased husband’s age set to have intercourse with her. Children resulting from such intercourse would be regarded as the children of the widow’s deceased husband.

4. No marriage would be valid unless the ngurario was slaughtered and that there could be no valid marriage under Kikuyu law unless a part of the ruracio has been paid.

5. From the respondent’s evidence, it occurred that one of her witness was not related to the deceased or even from the same clan but was merely from the same village as the deceased. There was also non-involvement of the deceased’s relatives or members of her clan in the purported marriage ceremonies.

6. The respondent only brought one woman to support her cause. Under the Evidence Act, the matter in issue could be proved by a single witness. However, since the central dispute was whether a valid Kikuyu customary woman-to-woman marriage was contracted between the deceased and the respondent, it would have been expected that more of the alleged participants in those essential ceremonies would be called as witnesses.

7. The purpose of customary woman-to-woman marriage was to preserve and perpetuate clans and their lineages. What was presented in this appeal was not such preservation, but rather, the translocation of the entire family of the respondent into the deceased’s clan. It was more of a mass adoption of the respondent’s family rather than a customary woman-to-woman marriage.

8. The respondent failed to prove that she had contracted a valid kikuyu woman-to-woman marriage with the deceased.

9. There was evidence that the deceased had taken the respondent’s children into her family as her own children within the meaning of section 29 of the Law of Succession Act and was maintaining them immediately prior to her death.

Orders

The order of the High Court dismissing the appellant’s summons for revocation of grant was set aside and substituted for an order allowing the summons for revocation or annulment of the grant, to pave way for the respondent and her children to file, if they so wished, an appropriate application before the High Court as dependants of the deceased. It would also provide an opportunity for the appellant to be heard. Each party to bear its own costs.

Publications relied on:


Scope of issuance of warrants for criminal investigations

Kenya Anti-Corruption Commission v Republic & 4 Others

Civil Appeal No.284 of 2009

Court of Appeal Kenya at Nairobi

R N Nambuye, P O Kiage & S Gatembu Kairu, JJA

October 18, 2013

Reported by Teddy Musiga

Brief facts:

The appellant made an application to the Chief Magistrate’s court at Kilimba under section 180 of the Evidence Act and section 23 of the Anti-Corruption and Economic Crimes Act. It sought a warrant to be issued to investigate, inspect and lift copies of statements, bankers books and an original cheque in respect of the 5th respondent (Giro Bank) held in the names of the 4th respondent (ABC Mettallurgics Limited). The application based on the ground that Kenya Pipeline Company paid Kshs. 45 Million to the 4th Respondent (ABC Mettallurgics Ltd) for services not rendered. The Chief Magistrate granted the orders as prayed on June 19, 2009.

The 4th respondent (ABC Mettallurgics Ltd) became aggrieved by the said ex parte orders and instituted Criminal Revision proceedings seeking to reverse the ex parte orders of the Chief Magistrate court on the basis that they were erroneously issued. During the pendency of the ruling on revision, the appellant presented another ex parte application under the same provision of law seeking to investigate and access copies of statements, bankers book, original cheque and banker cheques in the name of ABC Mettallurgics Ltd. The orders sought were granted on July 30, 2009.

The 4th respondent was aggrieved by the orders of July 30, 2009 granting the appellant the second warrant and he filed Judicial Review application No. 469 of 2009 seeking first an order of certiorari to quash the order of July 30, 2009 and second an order of prohibition directed at the appellant prohibiting it from further investigating the said account. Two rulings were issued on separate days. The first related to the Criminal Revision proceedings by Warsame, J where the judge held that the orders made on June 19, 2009 were properly issued and had in fact been executed. The Second was delivered on October 16, 2009, by Onyancha, J in respect of the Judicial Review application where the judge granted orders of prohibition and certiorari to the 4th respondent as had been prayed for. This ruling aggrieved the appellant hence the subject of the present appeal.

Issues

I. Whether warrants for investigation of corruption offences can be issued ex parte.

II. Whether the reliefs of certiorari and prohibition could be issued where warrants to investigate were issued ex parte.

Criminal Law – Corruption & Economic crimes

Criminal offences – issuance of warrants to investigate for corruption offences – where warrants for investigation of corruption offences were issued ex parte – section 180(1), Evidence Act, section 23(1) Anti-Corruption and Economics Crimes Act.

Judicial Review – Prerogative orders – certiorari – prohibition – whether the court was justified to issue orders of certiorari where the court quashed the warrants earlier issued to investigate the acts of corruption – whether the court was justified to issue orders of prohibition to prohibit any further investigations into the corruption offences.

Section 180 (1) of the Evidence Act provides that;

“Where it is proved on oath to a judge or magistrate that in fact or according to reasonable suspicion, the inspection of any bankers books is necessary or desirable for the purpose of an investigation into the commission of an offence, the judge or magistrate may by warrant authorise a police officer or other person named therein to investigate the account of any specified person in any bankers books, and such warrant shall be sufficient authority for the production of any such bankers book as may be required for scrutiny by the officer or person named in the warrant, and such officer or persons may take copies of any relevant entry or matter in such bankers books”

Section 23(1) of the Anti-corruption and Economic Criminal Act Provides:-
"The Director or a person authorized by the Director may conduct an investigation on behalf of the commission.

(2) Except as otherwise provided by this part, the powers conferred on the commission by this part may be exercised for the purpose of an investigation by the Director or any investigator.

(3) 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."

Held:
1. The trial court erred in granting the relief of prohibition because;
   a) The relief of prohibition as framed in general terms did not make any specific invitation to the trial court to make specific orders regarding the orders issued by the chief magistrate’s court allowing the appellant to commence investigation against the respondents.
   b) The warrant issued by the chief magistrate court had already been executed as at the time the prohibition order was given.
   c) The process applied by the appellant to apply for the first warrant was legal, proper and within the law.
   d) The trial court erred by acting suo moto in trying to curtail the warrants issued by the chief magistrate court to the appellant in the absence of specific invitation to do so.
   e) There was no finding by the trial court that the warrants issued by the Chief Magistrate was issued in excess of the mandate of the first instance court (Chief Magistrate court) or that it was devoid of such mandate.
   f) There was no proven breach of the rules of natural justice on both occasions when the first and second warrants were issued as the provisions of law under which the appellant applied for both the first and second warrants made no provision for the affected party (in this case, the 4th respondent) to be heard before a decision could be made by the Chief Magistrate as to whether to grant or withhold the issuance of the warrants whenever applied for.

2. Therefore, the relief of prohibition issued to the 4th respondent by the High Court in respect of the Judicial Review application ought not to have been granted.

3. The appellant’s right not to be heard in the response to the judicial review application was unjustifiably withheld.

4. Nothing could have barred the appellant from seeking a second warrant to investigate the 4th respondent, considering that the first warrant simply sought access and lifting of copies of account opening documents, bank statements and the original copy of a cheque alleged to have been representing payment to the 4th respondent for goods and or services allegedly not delivered. While in the second warrant, the appellant sought access to documents relating to transactions arising from entries in the bank account statements that they had accessed using the first warrant, which entries had demonstrated that there were other beneficiaries of that account other than the 4th respondent whom the appellant wanted to investigate to find out how those other persons had become beneficiary of funds allegedly corruptly obtained.

5. In the absence of a legal requirement from the above cited enabling provisions of law that required the appellant to seek all the documents that they wanted from the 4th respondent in one warrant only. Therefore, there was no justification for the trial judge to fault the appellant’s application for a second warrant in the manner done.

6. In the premises, the appellant acted within the law and on sound basis supported by sufficient facts when they applied for the second warrant. Issues of duplicity of warrants and their purpose had not been demonstrated to exist. Since the appellants had sought to establish the authenticity of the original payments to the 4th respondent, there was nothing wrong in the appellant to seek to establish the authenticity of payments made out of the said bank accounts to other beneficiaries.

7. Therefore, there was nothing on the record which could qualify to be termed an act either in excess of, or devoid of jurisdiction, or amounting to error of law on the face of the record. Breach of natural justice did not arise considering that the enabling provisions of law through which the appellant accessed the relief permitted such orders to be obtained ex parte, thus leaving no room for the respondent to be heard before the warrants applied for were issued. There were also no allegations of the second warrant having been obtained on the basis of fraud, collusion or perjury. Resultantly, there was no basis for the trial court to grant an order of certiorari to the 4th respondent.

Death Sentence is Constitutional and Mandatory
Joseph Njuguna Mwaura & 2 others v Republic
Criminal Appeal No 5 of 2008
Court of Appeal at Nairobi
J W Mwere, M Warsame, P Kgae, S Gatembu-Kairu & J Mohammed, JJA
October 18, 2013
Reported by Lynette A. Jakakimba

Brief facts
The appellants had been found guilty of two counts of robbery with violence and sentenced to death as provided for in section 296 (2) of the Penal Code by the trial Magistrate. On their first appeal they faulted the trial magistrate’s reliance on the identification evidence by the Prosecution witnesses and stated that it was not sound, and could not be relied on, as the witnesses were terrified during the attack and that as a result, the circumstances were not conducive to proper identification. The first appellate court, after considering the arguments proffered by the appellants, disagreed that the identification evidence was unsound. It dismissed the appeals, upheld the conviction and affirmed the sentences imposed on each of the appellants.

The appellants subsequently lodged a second appeal to the Court of Appeal. The appellants argued that the first appellate court failed in its duty to re-evaluate and reconsider the evidence on record. In this regard they alleged that all that the High Court did was to summarise the evidence without analysis, which constituted a fundamental error.

The appellants further premises their appeal on the argument that the charge against them as framed was defective as the appellants were charged under section 296 (2) of the Penal Code instead of section 295 as read with section 296 (1) and (2) of the Penal Code because it was section 295 of the Penal Code that defined robbery. The appellants argued that sections 296 (1) and (2) merely prescribed the punishments for the offence of robbery and the offence of robbery with violence.

The appellants further appealed against death sentence, they submitted that the death sentence was outlawed by the Constitution of Kenya, 2010 as it violated the right to life and it amounted to degrading and inhuman treatment.

Issues
1. Whether the failure by an appellate court to re-evaluate and reconsider the evidence on record...
practice, a charge or information shall, subject to this

The following provisions shall apply to all charges and

Section 137

Criminal Procedure Code

Penal Code

Section 295

Any person who steals anything, and, at or immediately before or immediately after the
time of stealing it, uses or threatens to use actual violence to any person or property in
order to obtain or retain the thing stolen or to prevent or overcome resistance to its being
stolen or retained, is guilty of the felony termed robbery.

Section 296

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years together
with corporal punishment not exceeding twenty-eight strokes.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company
with one or more other person or persons, or if, at or immediately before or immediately after the
time of the robbery, he wounds, beats, strikes or uses any personal violence to any person,
he shall be sentenced to death.

Constitution, Repealed

Section 77

(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the
case shall be afforded a fair hearing within a reasonable time by an independent and
impartial court established by law.

(2) Every person who is charged with a criminal offence—
(a) shall be presumed to be innocent until he is
proved or has pleaded guilty;
(b) shall be informed as soon as reasonably
practicable, in a language that he understands
and in detail, of the nature of the offence with
which he is charged;
(c) shall be given adequate time and facilities
for the preparation of his defence;
(d) shall be permitted to defend himself before
the court in person or by a legal representative of
his own choice;
(e) shall be afforded facilities to examine in person or by his legal representative the
witnesses called by the prosecution before the court and to obtain the attendance and carry
out the examination of witnesses to testify on his behalf before the court on the same
conditions as those applying to witnesses called by the prosecution; and
(f) shall be permitted to have without payment
the assistance of an interpreter if he cannot understand the language used at the trial of the
charge,

and except with his own consent the trial shall
not take place in his absence unless he so
conducts himself as to render the continuance of the proceedings in his presence impracticable
and the court has ordered him to be removed and the trial to proceed in his absence.

(3) When a person is tried for a criminal offence, the accused person or a person authorized
by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as
may be prescribed by law, be given within a reasonable time after judgment a copy for the
use of the accused person of record of the proceedings made by or on behalf of the court.

(4) No person shall be held to be guilty of a criminal offence on account of an act or omission
that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed
for a criminal offence that is severer in degree or description than the maximum penalty that
might have been imposed for that offence at the time when it was committed.

(5) No person who shows that he has been tried by
a competent court for a criminal offence and
either convicted or acquitted shall again be
tried for that offence or for any other criminal
offence of which he could have been convicted
at the trial of that offence, save upon the order
of a superior court in the course of appeal or
review proceedings relating to the conviction
or acquittal.

(6) No person shall be tried for a criminal offence
if he shows that he has been pardoned for that
offence.

(7) No person who is tried for a criminal offence
shall be compelled to give evidence at the trial.

(8) No person shall be convicted of a criminal offence
unless that offence is defined, and the penalty therefor is prescribed, in a written law:

Provided that nothing in this subsection shall prevent
a court from punishing a person for contempt
notwithstanding that the act or omission constituting
the contempt is not defined in a written law and the penalty therefor is not so prescribed.

**Constitution of Kenya, 2010**

**Article 2**

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorised under this Constitution.

(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

**Article 25**

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus.

**Article 26**

(1) Every person has the right to life.

(2) The life of a person begins at conception.

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

**Article 29**

Every person has the right to freedom and security of the person, which includes the right not to be—

(a) deprived of freedom arbitrarily or without just cause; or

(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(c) subjected to any form of violence from either public or private sources; or

(d) subjected to torture in any manner, whether physical or psychological;

(e) subjected to corporal punishment; or

(f) treated or punished in a cruel, inhuman or degrading manner.

**Article 159**

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

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

**Held**

1. The duty of the first appellate court was to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. Failure to properly re-evaluate the evidence on record would be a serious omission on the part of the first appellate court and could warrant interference by the Court of Appeal. There were instances where the first appellate court could, depending on the facts and circumstances of the case come to the same conclusions as those of the lower court. It could rehash those conclusions and there was nothing objectionable in doing so, provided it was clear that the court had considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision. (David Njguni Wainimu v Republic [2010] eKLR ; (Okemo v R [1972] EA. 32. Mohamed Rama Aliani & 2 Others v Republic, Criminal Appeal No 223 of 2002)

2. The allegation that the first appellate court merely summarised the evidence on record was not tenable. There was no set format for re-evaluation of evidence and the court needed not to use the words re-evaluate, reconsider and analyse, in order to fulfil its duty. The first appellate court properly addressed itself to the identification evidence and came to the correct conclusion. The identification evidence against the appellants was sound, and both the trial court and the first appellate court were correct in basing the guilt of the appellants on it.

3. The offence of robbery with violence was totally different from the offence defined under section 295 of the Penal Code, which provided that any person who stole anything, and at, or immediately before or immediately after the time of stealing it, used or threatened to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge.

4. Section 137 of the Criminal Procedure Code would be complied with if an accused person was charged under section 296(2) of the Penal Code. Section 137 required one to be charged under the section creating the offence and in the case of robbery with violence section 296(2) of the Penal Code created the offence by giving it the ingredients required before one was charged under it and it also spelt out the punishment.

5. This being a second appeal, the Court of Appeal had no jurisdiction to entertain matters of fact and under section 361 of the Criminal Procedure Code severity of sentence was a matter of fact. Unless a sentence had been enhanced by the High Court, which was not the case in the present appeal, or unless the subordinate court had no power under the law to pass that sentence, the Court of Appeal had no mandate to determine on the issue of sentence. The court also had no jurisdiction to hear and determine questions on constitutional matters as these were matters of law.

6. By virtue of article 2 of the Constitution, international treaties and conventions to which Kenya was a party, as well as the rules of international law formed part of our law only in so far as they were not inconsistent with the Constitution.

7. At the time of passing sentence against the appellants, the repealed Constitution was in place, and it provided for the right to life which could be curtailed, a fact recognised by the Court in Godfrey Nghoto Mutisio v R [2010] eKLR Criminal Appeal 17 of 2008.

8. Since both the repealed and the current Constitution envisaged that the right to life was not absolute, the state could limit it in accordance with any written law. The law in this case was the Penal Code. Indeed some of the international instruments such as the International Covenant on Civil and Political Rights (ICCPR) envisaged a situation where the right to life could be curtailed in furtherance of a sentence imposed by a court of law. Kenya had been party to ICCPR however was not a party to the Second Optional Protocol to the ICCPR which aimed at abolition of the death penalty. This was instructive because it pointed out that under our law as it stood the death sentence continued to be a valid sentence that could be passed by a court of law.

9. Cruel, inhuman and degrading punishment was that which was done for sadistic pleasure in order to cause extreme physical or mental pain and
that was disproportionate to the crime so that it caused moral outrage within the community. The death sentence did not fall within that definition. The death sentence was not done for the sadistic pleasure of others. It could not also be said to be shocking to the moral sense of the community due to the fact that it had now been endorsed by the people of Kenya by the fact that it continued to exist in Kenya's statute books with a Constitutional underpinning.

10. The deprivation of life as a consequence of unlawful behavior was also not grossly disproportionate. In Kenya, death was a penalty for what could be considered as the most serious of crimes. It was a proportionate punishment for the offences committed which in many cases resulted in the loss of life and the loss of dignity for the victims. Among the purposes of punishment was retribution so that equal harm was done to the offender, securing justice for the victims of the crime. In addition, the punishment had to serve as a deterrent and in this case the punishment fitted the crime.

11. In Godfrey Ngotho Mutiso v R [2010] eKLR Criminal Appeal 17 of 2008 the court after evaluating the position in various jurisdictions, found that nowhere in the Constitution was it stated that the mandatory sentence for the offence of murder was death. The import of that decision was that mitigation was required to determine the purposes of punishment was retribution so that equal harm was done to the offender, securing justice for the victims of the crime. In addition, the punishment had to serve as a deterrent and in this case the punishment fitted the crime.

12. A look at all the provisions of the law that imposed the death sentence showed that these were couched in mandatory terms using the word ‘shall’. It was not for the Judiciary to usurp the mandate of Parliament and outlaw a sentence that had been put in place by Kenyans or purport to impose another sentence that had not been provided in law.

13. It was incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice and that was jurisdiction. The authority of the court was determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence jurisdiction was the first hurdle that a court would cross before it embarked on its decision making function. (The Owners of Motor Vessel “Lillian 5”. v Caltex Oil Kenya Ltd [1989] KLR 1).

14. The decision in the Godfrey Ngotho Mutiso case was per incuriam in so far as it purported to grant discretion in sentencing with regard to capital offences. The offences of murder contrary to section 203 as read with 204 of the Penal Code, treason contrary to section 40 of the Penal Code, administering of oaths to commit a capital offence contrary to section 60 of the Penal Code, robbery with violence contrary to section 296 (2) of the Penal Code and attempted robbery with violence contrary to section 297 (2) of the Penal Code carried the mandatory sentence of death.

Appeal dismissed.

Affidavit evidence can only be considered by an election court if subjected to cross examination

Moses Wanjala Lukoye v Bernard Alfred Wekesa Sambu & 3 Others

Election Petition No 2 of 2013

High Court at Bungoma

F Gikonyo, J

September 30, 2013

Reported by Teddy Musiga

Issues

I. Whether affidavit evidence not subjected to cross examination could be considered by an election court.

II. Whether or not there were election malpractices committed by the respondents and whether or not they affected the results of the election.


Section 83 of the Election Act stated that:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and that written law or that the non-compliance did not affect the results of the election.”

Held

1. Election disputes carried remedies of a public character and had to be decided not only between the parties but also with reference to the wider interest of the electorate. Therefore, to strike out the petition for being unprocedurally amended would be a negation of the Constitution and would not be prejudicial to the substratum of the case.

2. Where affidavits had been filed and witnesses failed to attend court for purposes of cross examination, those affidavit evidence remained dead appendages of the record of trial. Therefore, the court could not resort to evidence which had not been tested in cross examination without causing extreme injustice to the parties.

3. In situations where parties filed affidavits with damaging evidence then failed to call the deponent to testify then the only safeguard in law was either that the court did not consider such evidence at all or exercised its discretion under section 80(1) and (2) of the Elections Act and summoned the witnesses to attend court for cross examination.

4. Rule 12 of the Elections Rules was deliberately tailored that affidavits filed in an election petition were by persons whom the petitioner intended to call as witnesses. Election petitions were not interlocutory applications but substantive causes, therefore affidavit evidence had to be tested in cross examination unless the parties consented to the admission of the evidence without calling the maker. Therefore, courts would not consider the evidence of witnesses who were not called to testify.

5. Section 64 of the Elections Act established the offence of bribery. Its material acts were: promise, offering, giving, solicitation, acceptance and receipt of bribe had to be proved. The petitioner did not establish to the required standard of proof that the 1st respondent bribed voters.

6. Every element of bribery had to be established in relation to the use of CDF cheques to bribe and influence voters. The intention to bribe and the act of bribery was essential. That was because issuance of cheques was a statutory obligation and mandate of CDF Committee. Discharge of that function could never be illegal per se simply because it was during campaign period declared by IEC. Without doubt operations of the CDF activities were not affected by the election campaign period. Therefore, the allegation of bribery by use of CDF cheques was not proved.

7. Under section 68 of the Elections Act, a
candidate who used public resources for the purposes of campaign in an election committed an election offence and had to be proved beyond reasonable doubt. No formal document was tendered to prove ownership of the alleged public school buses as stated in the petition. Likewise, there was no evidence to show that the buses were used by the 1st respondent for campaign purposes except that the petitioner wrote protest letters and that he saw buses ferrying voters. Those voters were neither identified nor called as witnesses. Therefore, that allegation was not proved beyond reasonable doubt and hence failed.

8. Section 62 of the Elections Act created an offence of treating of voters. That offence required that the petitioner had to prove that the candidate corruptly, for purposes of influencing a voter to vote or refrain from voting for a particular candidate or for any political party at an election, gave or undertook to reward, or provided any food, drinks, refreshment or provision of money etc., to any person for the purpose of influencing that person or any other person to vote or refrain from voting for a particular candidate at the election. The petitioner’s witness testimony of allegedly attending a party did not prove there was a party in the first place let alone any treating of voters as required by law. Corrupt intention to induce and influence voters to vote for a particular candidate or political party was visibly missing in that evidence. The allegation was not proved beyond reasonable doubt and thus failed.

9. No evidence was tendered to identify the particular voter who was issued with two sets of ballot papers.

10. The petitioner did not call any evidence to prove that the agents were denied an opportunity to sign or to record reasons for refusal to sign Form 35.

11. The irregularities which were established by the petitioner in some Form 35 and Form 36 were not widespread or fundamental or shown to be of a nature that would constitute non-compliance with the law which would compel the court to hold that the elections were not conducted in accordance with the principles laid down under electoral laws.

Petition dismissed.

Costs to the 1st, 2nd and 3rd respondent – Ksh. 1,500,000/= and 4th Respondent – Ksh. 1,000,000/=.

Validity of charge instruments executed before enactment of Land Act, 2012

Patrick Waweru Mwangi & another v Housing Finance Co. of Kenya Ltd

High Court at Nairobi
Civil Suit No.595 of 2012
J B Havelock, J
October 3, 2013

Reported by Andrew Haloneye & Cynthia Liavule

Brief facts

The applicants took out a loan facility with the Respondent Company which was secured by the suit premises. The applicants were indebted to the respondent. However, the main basis upon which the application for temporary injunction was premised was the 1st applicant’s employer’s action to suspend his pay. It was further submitted that the applicant had not deliberately defaulted in the repayment of the outstanding mortgage facility, but due to the actions of his employer, who were the subject matter pending determination in Court. The applicants purported to establish a prima facie case by adducing the provisions of section 103 (1) (c) of the Land Act and 84 of the Land Registration Act. Their claim was that the Land Registration Act, forborne, and indeed barred the respondent from exercising its statutory accrued right of acquisition and disposition of the suit premises, as it was matrimonial property, protected under article 45 of the Constitution of Kenya. It was submitted that the disposition of the suit premises would deprive the applicants of their right to shelter, a home and a safe environment.

Issue

1. Whether the provisions of the Land Act, 2012 and Land Registration Act, 2012 applied to charge instruments executed and entered into before their enactment.


Section 78—Application of Part to charges

(1) This Part applies to all charges on land including any charge made before the coming into effect of this Act and in effect at that time, any other charges of land which are specifically referred to in any section in this Part.

(2) References in this Part to “the charged land” shall be taken to mean and include a charged land, a charged lease and sublease and a second or subsequent charge.

Section 90—Remedies of a chargee

(1) If a chargee is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—

(a) the nature and extent of the default by the chargor;
(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may—

(a) sue the chargor for any money due and owing under the charge;
(b) appoint a receiver of the income of the charged land;
(c) seize the charged land, or if the charge is of a lease, sublease the land;
(d) enter into possession of the charged land; or
(e) sell the charged land.

Land Registration Act, Act 3 of 2012

Section 107—Savings and transitional provisions with respect to rights, actions, dispositions

(1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

(2) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.

Held

1. The savings and transitional provisions with respect to rights, actions, dispositions in relation to land were provided under sections 107 (1) & (2) of the Land Registration Act and sections 106 (1) & (2) of the Land Act of 2012. Both regimes of the law provided that unless the contrary was specifically provided for, any rights, interests, obligations acquired, accrued, or established before the commencement of the Act would continue to be governed by the law applicable. This was the saving transitional clause for the transition into the new laws with the repeal of all previous land laws. The “contrary provision” aspect that the Land Act provided for was the issue of the matrimonial home.
2. Section 78 (1) and by extension Part VII of the Land Act, were applicable in the circumstances since the applicants had to establish a prima facie case with probability of success on the issue of protection of matrimonial property under sections 90 (1) as read with sub-section (3), and section 107 (1) & (2) of the Land Registration Act and sections 106 (1) & (2) of the Land Act. Court was empowered under section 91 (2) of the Land Act, to stop the commencement of any proceedings, until a chargee had exhausted all remedies available to it, under section 90 (3).

3. Under section 103 (1) (c) of the Land Act an application for interim relief could be made by a spouse of the chargor. It did not state that it was incumbent upon the Court to allow such an application. Section 104 of the Land Act, gave the Court complete discretion as to whether or not to grant an order or any relief against the operation of a chargee’s remedy that the circumstances of the case required.

4. The plaintiffs were not entitled to further interim or status quo orders, despite the suit premises being matrimonial property. The 2nd Plaintiff had all along been aware of the position as regards the property being charged as evidenced in the supporting affidavit to the application.

Application dismissed

Compensation awarded for the 2006 Raid at Standard Group’s Premises

Standard Newspapers Ltd & another v Attorney General & 2 others

Petition No. 113 of 2006

High Court of Kenya at Nairobi

Constitutional and Human Rights Division

Mumbi Ngugi, J

October 17, 2013

Reported by Beryl A. Ikamari

Brief facts

About fifteen minutes past midnight, on March 2, 2006, armed police officers raided offices at I & M Bank Tower in Nairobi, in which the Kenya Television Network (KTN) operated. They destroyed KTNS’s equipment including broadcasting equipment and consequently shut down the transmissions of KT N. It was alleged that the officers confiscated some equipment and proceeded to arbitrarily arrest, detain, torture and degrade employees at the I & M Bank Tower. On the same morning at around 0120 hours, armed police officers raided Standard Group’s premises on Likoni road. They broke down doors and gained access to Standard Group’s printing press and seized items from the premises.

Issues:

1. Whether a raid carried on by police officers at the petitioners’ printing and broadcast premises, in which items which included printing and broadcast equipment were seized, was a violation of the right to privacy and freedom from arbitrary search, freedom of expression, freedom from torture, inhuman and degrading treatment and the right to property.

2. Whether exemplary damages were available as a remedy for a violation of human rights.

Constitutional Law—fundamental rights and freedoms—enforcement of fundamental rights and freedoms—the right to privacy and freedom from arbitrary search, freedom of expression, freedom from torture, inhuman and degrading treatment and the right to property—whether a midnight to early morning raid, allegedly carried on in the interests of national security at a media house’s premises, in which printing and broadcast equipment was seized, amounted to a violation of constitutional rights—Constitution of Kenya (Repealed); section 70, 74, 75, 76 & 79, Penal Code (Cap 63); section 66, Criminal Procedure Code (Cap 75); sections 118 & 119, Police Act (Cap 84) (Repealed); section 19 & 20, and Interpretation and General Provisions Act (Cap 2); section 58.

Held

1. Section 76 of the repealed Constitution safeguarded the right to privacy and provided protection from arbitrary searches and unauthorized entry into private premises.

2. It was alleged that the raid, in question, was prompted by the suspicion that an offence penalized under section 66 of the Penal Code (Cap 63) was being committed. The section criminalized the publication of alarming matter including false statements, rumours, or reports which were likely to cause fear and alarm in the public or to disturb public peace. Such a possibility could be a legal basis for carrying on a search on premises where such publications were suspected to be kept.

3. The statutory procedure for conducting a search and seizure was provided for in section 118 of the Criminal Procedure Code (Cap 75). Under the provision, for a police officer to lawfully enter and search premises, three requirements would have to be met, namely: first, the officer would need to obtain a search warrant from a judicial officer, after having provided proof on oath as to the existence of reasonable suspicion of the commission of an offence; secondly, the police officer seeking the warrant would bear the burden of establishing that the grant of the search warrant was necessary, and thirdly, the evidentiary material obtained from the search, if the warrant was granted, was to be placed before the court and the court would make determinations on the manner in which such evidence would be disposed.

4. Additionally, section 19 of the Police Act (Cap 84) (Repealed) provided that a police officer, on the basis of any lawful complaint against any person, could make an application before a magistrate for summons, a warrant, a search warrant or such other legal process.

5. A search could be carried on by a police officer without a search warrant pursuant to the provisions of section 20 of the Police Act (Cap 84) (Repealed) where the circumstances were such that an application for a search warrant would create a delay that could prejudice investigations. However, in such a context, the police officer would be required to provide identification in the form of a certification of appointment to persons at the premises to be searched and would be required to produce any object seized in the search before a magistrate, in whose jurisdiction the object was seized.

6. Under section 119 of the Criminal Procedure Code (Cap 75) a search warrant could be issued on any day and executed on any day between the hours of sunrise and sunset but a court could authorize the search to be conducted at any hour.

7. It would be the duty of any resident or person in charge of a building, concerning which a search warrant had been issued, to allow a police officer free entry and exit from the premises and to afford all reasonable facilities for the carrying out of the search.

8. After carrying on the search on the petitioners’ premises, the officers involved did not produce the seized objects before a magistrate. It was contended on their behalf, that there was no time-frame for the production of seized objects before a magistrate. Where there was no time-frame fixed for the performance of a legal requirement, it would be expected that such performance would be done without unreasonable delay, as provided for in section 58 of the Interpretation and General Provisions Act (Cap 2).

9. The police officers, contrary to constitutional and statutory requirements, did not apply for a search warrant, did not follow due process in conducting the search and did not produce the material seized in the search before a magistrate, without unreasonable delay. Their activities amounted to a violation of the right to privacy and freedom from arbitrary search.

10. Police officers had a duty to prevent crime but they were also required to abide by the law and there had to be due process in the carrying on of their mandate.

11. It would be required that the manner of carrying on a search and seizure would be such that it would not expose persons to further violations of their rights. The right to privacy would not be
absolute but it would be balanced against the intended purpose of intrusion.

12. While it was alleged that during the raid at I & M Bank Tower, some of the petitioners’ members of staff were subjected to torture, inhuman and degrading treatment, there was no evidence adduced to establish the allegation.

13. Although it was conceded that the police officers carrying on the raid took away some equipment, the evidence concerning the items that were taken away was contested. The petitioners alleged that they were not allowed to take an inventory while the respondents claimed that an inventory was made but the petitioners refused to sign it. Under the circumstances, a finding relating to a violation of the right to property could not be made.

14. The conduct of the state towards the promotion and enforcement of human rights had improved considerably and there was no need to punish the state with exemplary damages or to burden the tax payer with a high award of damages.

Petition partly allowed. (The court found that the respondent’s actions amounted to an arbitrary search and seizure in which there were violations of the right to privacy and freedom of expression. On the other hand, the court found that there was insufficient evidence to establish violations of the right to property and freedom torture, inhuman and degrading treatment. Additionally, the petitioners were granted a compensatory award of Kshs. 5,000,000/=)

High Court has no jurisdiction to stop the President and Deputy President from attending their ICC trials

National Conservative Forum v Attorney General
Petition No 438 of 2013
Constitutional & Human Rights Division
High Court at Nairobi
M. Ngugi, J
October 17, 2013

Issues

i. Whether the constitutional provision in article 2(6) that provided that any treaty or convention ratified by Kenya would form part of the law of Kenya meant that treaties or conventions would be enforced regardless of their inconsistency with or contravention of the Constitution itself.

ii. Whether the Rome Statute establishing the ICC was inconsistent with the Constitution of Kenya.

iii. Whether the High Court had jurisdiction to declare the acts of the State with regard to the ratification of treaties unconstitutional.

iv. Whether the constitution contemplates a scenario where both President and the Deputy President could be outside the country at the same time.

v. Whether an imbalance of power would be caused if the President and the Deputy President were outside the country at the same time attending their trial at the International Criminal Court.

Jurisdiction—High Court—jurisdiction to stop the president and the deputy president from attending their trials at the ICC- Constitution of Kenya, 2010 article 165

Constitutional Law—supremacy of the Constitution—whether treaties or conventions would be enforced regardless of their inconsistency with or if they contravened the Constitution- Constitution of Kenya, 2010 article 2

Constitutional Law—president and deputy president—whether the President and the Deputy President could be outside the country at the same time- whether a power imbalance would be caused if the President and the Deputy President were outside the country at the same time attending their trial at the International Criminal Court

Constitution of Kenya

Article 159
(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

Article 165
(1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body
or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

Section 7 of the Transitional and Consequential Provisions of the Constitution

(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

2) If, with respect to any particular matter—

(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

Held

1. The jurisdiction vested in the High Court to interpret the Constitution was not exercised in a vacuum there had to be a real controversy or dispute between parties before the court in order for it to exercise its jurisdiction. John Harun Mwau & Others v The Attorney General. United States Supreme Court in Maskrat v United States 219 US 346 (1911). Marbury v Madison 5 US 137; 2 L.Ed 60 (1803) 1 Cranch.

2. The present petition was not based on any facts or actual events that had occurred to precipitate its filing. It was based on the petitioner’s apprehensions with regard to what could happen at some point in the future if the President and the Deputy President happened to be outside the country at the same time, which according to the petitioner could create a vacuum in government and lead to an imbalance in power.

3. Although such a scenario as contemplated by the petitioner would be an undesirable situation, it was yet to materialize. Further nothing had been placed before the court that would suggest the possibility that both the President and the Deputy President would be out of the country at any point at the same time attending the hearing of their trials at the ICC. At best, the petition could be described as based on hypothesis and speculation. It did not raise any real issue or controversy that the court could be called upon to determine.

4. The court did not have jurisdiction to declare the Rome Statute and the International Crimes Act unconstitutional. The petitioner had not placed before the court anything that demonstrated that the Rome Statute or the domesticating legislation was inconsistent with the Constitution. Further the Constitution did not have retrospective application, its provisions could not be used to declare unconstitutional that which was constitutional and lawful prior to its enactment and promulgation. Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others Supreme Court of Kenya Application No 2 of 2011 [2012] eKLR

5. Section 7 of the Transitional and Consequential Provisions of the Constitution provided a guide on what would happen if there was need to bring any legislation into conformity with the Constitution. However there was nothing that indicated that the International Crimes Act required any alterations or modifications in order to bring it into conformity with the Constitution.

6. Moreover nothing had been placed before the court that would suggest that the state or Parliament failed to adhere to the process, then in force for the signing and ratification of treaties provided under the former constitution and legislation made thereunder.

7. The doctrine of separation of powers required that the executive function of the state was to be performed by the Executive and the legislative function by Parliament and the judiciary could only interfere in very limited circumstances. (Trusted Society of Human Rights v The Attorney General High Court Petition No 292 of 2012. Mumo Matemu v Trusted Society of Human Rights Alliance & Others Court of Appeal Civil Appeal No 290 of 2012)

8. The Court would be encroaching on the Executive function were it to purport to direct the Executive on how to perform its foreign relations, including the signing and ratification of treaties, or to purport to allow or not allow the President or his Deputy to co-operate or not co-operate with the ICC by attending or failing to attend the hearing of their cases at the ICC.

9. It was not within the jurisdiction or power of the court to take the country and its President and Deputy President out of the situation which many, such as the petitioner, saw as an unhappy and, doubtless, an undignified one. Had a need to reconsider the presence of the International Crimes Act in our statute books arisen, that was something that lied within the power and mandate of the legislature which, at the time of its enactment, thought it a wise and necessary legislation to enact.

10. In so far as the court was concerned, unless it could be shown clearly that any part of the International Crimes Act which domesticated the Rome Statute establishing the International Criminal Court was inconsistent with the Constitution the court had no basis for interfering with it, or with anything done pursuant to or consequent upon the application of its provisions.

Petition dismissed with no orders as to costs.

The government must ensure the realization of right to education within the available resources

Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 others

Petition No 133 of 2013
High Court at Nairobi
Isaac Lenola J
November 1, 2013

Reported by Njeri Githang’a & Victor Andande

Brief facts

The Petitioner complained that the respondents were determined to deny his son his right to education as provided for under article 43(1) and article 53 (1) (b) of the Constitution and he believed that the respondents had no interest in his socio- economic situation and condemned that his son had a right to seek bursary from the respondents because under the Constitution and the Basic Education Act, the respondents were tasked with the responsibility of providing free and compulsory education as well as cushioning vulnerable families like his. Further, that he tried to apply for a bursary from the Constituency Development Fund in his locality but found that the kitty only offered a maximum of Kshs.4,000 per year yet his son’s school fees. That in the event there was another bursary kitty other than the CDF one, then the respondents ought to inform him about it and the form and manner of applying for the same. He concluded that education was the process by which people acquired knowledge, skills, habits, values or attitudes and helped one develop an appreciation of their cultural heritage and live more satisfying lives and therefore to deny his son this right was unconstitutional, illegal and malicious.

Issues

i) What was the scope of the government’s role in providing accessibility to socio-economic rights?

ii) Whether the government could rightfully rely on the issue limited resources where the petitioner alleged that his son’s right to education and sought that the respondents pay the costs of the petition so that he could utilize the same for his son’s fees. That in the event there was another bursary kitty other than the CDF one, then the respondents ought to inform him about it and the form and manner of applying for the same. He concluded that education was the process by which people acquired knowledge, skills, habits, values or attitudes and helped one develop an appreciation of their cultural heritage and live more satisfying lives and therefore to deny his son this right was unconstitutional, illegal and malicious.

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Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 others

Petition No 133 of 2013
High Court at Nairobi
Isaac Lenola J
November 1, 2013

Reported by Njeri Githang’a & Victor Andande

Brief facts

The Petitioner complained that the respondents were determined to deny his son his right to education as provided for under article 43(1) and article 53 (1) (b) of the Constitution and he believed that the respondents had no interest in his socio- economic situation and condemned that his son had a right to seek bursary from the respondents because under the Constitution and the Basic Education Act, the respondents were tasked with the responsibility of providing free and compulsory education as well as cushioning vulnerable families like his. Further, that he tried to apply for a bursary from the Constituency Development Fund in his locality but found that the kitty only offered a maximum of Kshs.4,000 per year yet his son’s school fees. That in the event there was another bursary kitty other than the CDF one, then the respondents ought to inform him about it and the form and manner of applying for the same. He concluded that education was the process by which people acquired knowledge, skills, habits, values or attitudes and helped one develop an appreciation of their cultural heritage and live more satisfying lives and therefore to deny his son this right was unconstitutional, illegal and malicious.

Issues

i) What was the scope of the government’s role in providing accessibility to socio-economic rights?

ii) Whether the government could rightfully rely on the issue limited resources where the petitioner alleged that his son’s right to education and sought that the respondents pay the costs of the petition so that he could utilize the same for his son’s fees. That in the event there was another bursary kitty other than the CDF one, then the respondents ought to inform him about it and the form and manner of applying for the same. He concluded that education was the process by which people acquired knowledge, skills, habits, values or attitudes and helped one develop an appreciation of their cultural heritage and live more satisfying lives and therefore to deny his son this right was unconstitutional, illegal and malicious.
government’s failure to give him adequate bursary.

**Constitutional law – fundamental rights and freedoms – socio-economic rights – right to education – where the petitioner argued that the respondents had an obligation of providing free and compulsory education to his son – argument by the respondents that the realization of socio-economic rights by the state was subject to the availability of resources at the state’s disposal – what was the scope of the respondents’ duty of ensuring realization of socio-economic rights – Constitution of Kenya, 2010, articles 21(2), 23, 43 & 53(1)(b).

The Constitution of Kenya, 2010 Provided:-

**Article 20(5)**

“In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—

(a) it is the responsibility of the State to show that the resources are not available;

(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.”

**Article 21 (2)**

“(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.”

**Article 43**

“(1) Every person has the right —

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.

(2) A person shall not be denied emergency medical treatment.

(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.”

Held

1. For a very long time socio-economic rights were regarded as secondary rights while civil and political rights were considered absolute. With the advent of various International Covenants such as the International Covenant on Economic Social and Cultural Rights socio-economic rights became part of Kenya’s primary law through the Constitution of Kenya, 2010 and they became at par with other fundamental rights. They were thus provided for under article 43 of the Constitution.

2. Article 21 had to guide the court while looking at the government’s efforts in achieving the progressive realization of the socio-economic rights: legislative steps, policy and other measures and the setting of standards. While socio-economic rights were therefore clearly justiciable, states were required to apply as much practicability as possible in the realization of these rights and within the available resources and allocation thereof.

3. The Respondents had failed to demonstrate concrete policy measures, guidelines and the progress made by the government towards the realization of economic rights and particularly the right to education. While there would have been a department within the Education Ministry which handled cases of needy students, the Government had to be seen to take firm steps in achieving the right to education generally. This was despite the fact that there was a policy dubbed “the free primary education” programme which did not cover secondary education. It was important and fundamental for the government to demonstrate its political and financial commitment in that regard and the actions taken towards the progressive realization of the right to education in a holistic manner.

4. The fact that realization over time, or in other words progressively, was foreseen under the International Covenant on Economic Social and Cultural Rights were not to be misinterpreted as depriving the obligation of all meaningful content. It was on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase had to be read in light of the overall objective of the Covenant which was to establish clear obligations for states parties in respect of the full realization of the rights in question. It thus imposed an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources (Government of the Republic of South Africa v GroothoomCCT 11/00).

5. Measuring a State’s performance in the implementation of the right to education was an onerous task in the absence of generally accepted criteria, benchmarks and methodology for evaluating the adequacy and effectiveness of steps taken towards its realization. Developing the core competence for measuring implementation was decidedly crucial considering all variables involved and the different spheres of Government involved in this determination.

6. Whereas this was not the right case to expound on the meaning of the right to education under article 43(1), the issue was limited to the right to a bursary and the arguments made were very narrow. Therefore, the following issues had to be brought to the attention of the Respondents while formulating policies towards the realization of that right:

   i) the obligation of progressive achievement existed independent of the increase in resources. This meant that the State had to effectively use the resources available and not wait for increased resources before implementing the right to education.

   ii) it was no excuse for the State to claim that one socio-economic right was subordinated to another; for example that the right to basic education (and the laptop project for example) had to override the right to housing or that the right to basic education was more important than the right to further education. Policies had to be designed and resources applied in a meaningful, practical and result based formulae than the focus on one for political or other reasons.

   iii) there could be need for the Ministry of Education to adopt an incremental approach to implementation as was happening but it needed a structure publicised framework.

7. The Respondents could avoid mass litigation by setting out clear policies that were indicative of their appreciation that socio-economic rights were there to stay. The defence of progressive realization could not be used for too long. Article 43 of the Constitution was indeed alive and had started the run towards full realisation as opposed to a slow shuffle in the name of progressive realisation.

8. In the instant petition, the only information before court was that there was a bursary fund at the national and constituency level while the Petitioner stated that the CDF Bursary Kitty was only willing to offer Kshs.4,000 per annum. Whether this amount is reasonable enough in gearing towards the goal to attain the progressive realization of the right to education was not a question that could be answered by the court but by the relevant Ministry, because very many considerations must have gone into place to establish the criteria and that criteria had not been placed before court.

9. It was the duty of the Petitioner to demonstrate that his son’s right to education had been infringed in a way that would call for the express intervention of the court. This was because a constitutional petition had to state, with reasonable precision, the provisions
Orders

(i) The 1st and 3rd Respondents to file a report within 30 days indicating what measures they had taken upon the Petitioner’s application for a bursary for his son’s school fees.

(ii) The Petitioner to file a report within 30 days indicating the responses from his local CDF on any assistance to him for purposes of paying school fees.

(iii) Final orders to be made upon receipt of the reports.

(iv) No party had succeeded or lost and so each had to pay its own costs.

Public participation and Kenya’s entry into international agreements

Kenya Small Scale Farmers Forum & 6 others v Republic & another

Petition 1174 of 2007

High Court of Kenya at Nairobi

Constitutional and Human Rights Division

Isaac Lenaola, Mumbi Ngugi & D S Majanja, JJ

October 31, 2013

Reported by Beryl A Ikamari

Brief facts

The Cotonou Partnership Agreement entailed an aid and trade agreement, entered into on June 23, 2000, between 77 African, Caribbean and Pacific (ACP) countries and the European Union. Kenya was within the category of African, Caribbean and Pacific countries that were signatories to the Cotonou Partnership Agreement (CPA). Consequent to the agreement, Kenya engaged in negotiations which were to culminate in the ratification of a reciprocal free trade agreement known as the Economic Partnership Agreement (EPA). The EPA was intended to create rapid and almost absolute trade liberalization amongst the signatories to the Cotonou Partnership Agreement. For purposes of the negotiations, Kenya was in a category of 16 countries known as East and Southern Africa (ESA). The categorization was based on the geographical location of the countries.

The petitioners had grievances concerning the negotiations for the Economic Partnership Agreements (EPA). They asserted that the EPAs would bring a host of negative effects including loss of revenue amounting to 6 to 9 billion Kenya shillings, loss of competitive edge for Kenyan industries and manufactured goods, difficulties relating to market access for agricultural and non-agricultural products, increased competition from industries based in the European Union, challenges to Kenya’s major food commodities and restrictions on the movement of persons.

The petitioners complained that the negotiation process was being carried on in a non-inclusive way as there was neither access to information on the negotiations, nor an opportunity afforded to the public to express their views, as relates to the EPA. Generally, it was alleged that public participation was not achieved or facilitated.

Issue

i. Whether Kenya’s negotiations for Economic Partnership Agreements with the European Union, failed to meet the constitutional requirements for public participation.

Constitutional Law - national values and principles of governance-public participation-public participation as concerned entry into an international agreement-whether the process of negotiation for Economic Partnership Agreements with the European Union was carried on without public participation-Constitution of Kenya, 2010; articles 1 & 10, and Treaty Making and Ratification Act, No. 45 of 2012.

Held

1. The questions as to whether the Economic Partnership Agreement would be suitable for Kenya and whether or not it would have a positive impact, entailed matters of policy which the court would not be best suited to handle. Furthermore, the court’s intervention in the activities of other arms of government would be circumscribed by the doctrine of separation of powers.

2. Negotiations for the Economic Partnership Agreements were dealt with by the political arms of government and the courts were required to exercise restraint, in handling such matters, in view of the doctrine of separation of powers. However, the court would be empowered to consider issues of breaches of constitutional provisions or violations of fundamental rights and freedoms, emerging from such negotiations and agreements.

3. Where a petitioner sought relief from the court for a breach of fundamental rights and freedoms, the petitioner would be required to set out, with precision, the rights concerning which a violation was alleged and the manner in which the violation had been carried on in relation to the petitioner. However, in filing their petition, the petitioners had not clearly stated the nature of the right which was alleged to have been violated and the manner in which the violation was conducted.

4. Public participation in governance entailed an expression of sovereignty of the people and the manifest will of the people. The national values recognized in article 10 of the Constitution of Kenya, 2010, included inclusiveness and the participation of the people. Particularly, in the creation of new laws, public participation was expressly provided for by the Constitution.

5. Initially when the negotiation process for the EPA began, there was no express provision requiring public participation; there was no legislative or constitutional framework requiring the state to employ direct public participation in policy matters and the Constitution of Kenya, 2010 had not been promulgated.

6. The state could not be found to be in breach of provisions that did not exist at the time that the negotiation process for Economic Partnership Agreements began.

7. There was still room for public participation as concerned the Economic Partnership Agreements (EPA). The Treaty Making and Ratification Act, No. 45 of 2012, provided for various levels of approval and appraisal before an international agreement could be ratified by parliament. These levels of approval would provide room for public participation in the making of the Economic Partnership Agreement.

Petition allowed in part. (The court made orders requiring the state to create mechanisms to facilitate the participation of stakeholders in the process leading to the making of the Economic Partnership Agreement.)
Striking out vis a vis Dismissing a suit, in relation to filing a fresh suit

Enock Kirao Muhanji v Hamid Abdalla Mbarak

High Court at Malindi
Civil Suit No 58 of 2012
October 31, 2013
O. A Angote J
Reported by Andrew Halonyere

This was an application brought before the High Court pursuant to order 3 rule 15 (1) (d) of the Civil Procedure Rules seeking orders of striking out a suit. The application was premised on the ground that the suit was initially “dismissed” by the Magistrate’s Court for want of jurisdiction.

Issue
1. Whether a party could institute a fresh suit after the initial suit had been struck out for lack of jurisdiction.
2. Can a fresh suit be instituted where the court had erroneously used the words “dismissed” instead of “struck out”?
3. Whether the suit before the High Court was res judicata.

Civil practice and procedure – striking out of a suit – where a suit has been struck out. The mere fact that the Magistrate’s court used the words “dismissed” did not expressly mean that a fresh suit could not be filed if indeed the court meant that the suit should have been “struck out” so as to allow a party to file a fresh suit.

Civil practice and procedure – res judicata – where issues before the Magistrate’s court were never heard and determined – whether a subsequent suit was res judicata – Civil Procedure Rules order 3 rule 15 (1) (d)

Held
1. When a suit is dismissed, one might not be allowed to file a fresh suit unlike in a situation where a suit has been struck out.
2. The words “dismissed” and struck out” are terms of art and are not supposed to be used interchangeably in a Ruling or Judgment. However, more often than not, the terms are used interchangeably by the litigants and the courts.
3. When the court was called upon to determine whether a party could file a fresh suit after the first one had been dismissed or struck out, the court should look at the circumstances of each case to arrive at a decision. The mere fact that the Magistrate’s court used the words “dismissed” did not expressly mean that a fresh suit could not be filed if indeed the court meant that the suit should have been “struck out” so as to allow a party to file a fresh suit.

Application dismissed.

Court explains qualifications for election to the National Assembly

John Harun Mwau v Independent Electoral and Boundaries Commission & another

Petition No 26 of 2013
High Court at Nairobi
Isaac Lenaola, J
November 1, 2013
Reported by Njeri Githang’a Kamau & Victor L Andande

Issues
i. Whether having coalitions and mergers violated provisions of articles 99 and 137 of the Constitution which specifically prohibited one political party from campaigning or promoting the values of another political party.
ii. Whether section 24(1) of the Elections Act was unconstitutional for setting out certain qualifications for persons desirous of contesting for election as Member of Parliament.
iii. Whether regulations 16, 18 and 19 of the Elections (General Regulations) were discriminatory for setting unequal requirements on presidential candidates nominated by political parties and independent candidates.
iv. Whether the educational qualifications for nomination as a Member Parliament under section 22 (1) (b) of the Elections Act could be said to be unconstitutional.
v. Whether IEBC by setting lower nomination fees for women and youth candidates had violated the principle of equality as established by article 27 of the Constitution.
vi. Whether it was proper to include names and photos of Deputy President and Deputy Governor on ballot papers.

Constitutional law – elections – qualification for election – education qualifications – whether the education requirements for those vying for election as Members of Parliament were unconstitutional – Constitution of Kenya, 2010, article 99; Political Parties Act No. 1 of 2011, sections 10 & 11; Constitutional law – fundamental rights and freedoms – equality – where the petitioner argued that setting lower nomination fees for the women and youth candidates had violated the principle of equality under the Constitution – whether in the circumstances setting of lower nomination fees for women and youth was discriminatory – Constitution of Kenya, 2010, article 27.

Section 24(1) of the Elections Act provided as follows:

“(1) Unless disqualified under subsection (2), a person qualifies for nomination as a Member of Parliament if the person-

a) is registered as a voter;
b) satisfies any educational, moral and ethical requirements prescribed by the Constitution and this Act; and
c) is nominated by a political party, or an independent candidate who is supported

i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or

ii) in the case of election to the Senate, by at least two thousand registered voters in the county.

Held
1) Regulation 19 was neither discriminatory nor did it offend article 27 in anyway. This was because the Constitution, though it clearly provided for equality and freedom from
between the Constitution and sections 10

Pursuant to this Provision, the Political Parties
92 to enact legislation on political parties.
for political merger or political coalitions but
interfere with that right.
merge or form coalitions to attain political
It was good practice for Political Parties to
the Constitution.
to discrimination and a violation of article 27of
law. It did not necessarily mean that different
between the claimant and others, the claimant had
that because of the distinction made between
of article 27of the Constitution had to establish
the requirements of regulation 19that youth,
not demonstrated how he was aggrieved by
The Petitioner, being a seasoned politician had
advantages suffered by individuals or groups
programs and policies designed to redress any
Presidential candidates nominated by political
year that youth, women and persons with disability
pay less in nomination fees. This was reasonable
due to obtaining socio-economic and political factors.
but they were not to be used to discriminate
amount
different fees may have
compromised or curtailed his participation in the
election as a candidate.
It was clear that a person alleging a violation
of article 27of the Constitution had to establish
that because of the distinction made between
the claimant and others, the claimant had
been denied equal protection or benefit of the
it did not necessarily mean that different
treatment or inequality would per se amount
to discrimination and a violation of article 27of
the Constitution.
It was good practice for Political Parties to
merge or form coalitions to attain political
strength and dominance and as long as no

7) Section 24(1) of the Elections Act was a replica
of article 99(1) of the Constitution which set
out the qualifications for persons desirous of
contesting for election as Members of
Parliament. Therefore, section 24(1) could
ever be challenged nor could it be said to
be unconstitutional because article 2(3) of
the Constitution barred the Court or anyone else
from challenging the validity or legality of the
Constitution. The Constitution articulated the
collective will, aspiration and values of its
people. It was the supreme law and laid the
framework for a democratic society.

8) There was no law or power that allowed
the Court to declare a provision anchored
in the Constitution to be unconstitutional
when weighed against another constitutional
provision. To do so would be absurd,
dramatic and chaotic. This was because
there was no single provision that had more
power or authority over another. It was also
a well established principle of constitutional
interpretation that each constitutional provision
sustained the other and none was greater than
the other. This was popularly known as the
harmonization principle.

9) The regulations did not impose any
discriminatory or unequal requirements on
presidential candidates nominated by political
parties or even independent candidates. These
regulations were enacted by IEBC pursuant
to powers conferred on it by section
109 of Elections Act which empowered the
Commission to make regulations for the better
carrying out of the purposes and provisions of
the Act.

10) Article B4 of the Constitution mandated all
persons and political parties to comply with
among others the code of conduct prescribed
by the IEBC. Therefore, all candidates and political
parties had to comply with the regulations and
consequently the code of conduct made by
the IEBC. It followed thus, that regulations 16,
17 and 18 were not unconstitutional.

11) The Elections Act was enacted by Parliament
pursuant to the provisions of Article 81(1)(b)
of the Constitution and the requirements for
independent candidates were anchored in
section 33 of the Elections Act. Therefore, all
these provisions were fair and were enacted for
the orderly conduct of elections. The choice
given to candidates was also uninhibited and
was certainly not discriminatory.

12) The nature of the duties and functions
performed by the National Assembly and the
Senate required higher educational
qualifications, skills and wide exposure which
were gained through higher education. It was
important that a representative to either House
understood the proceedings, nature of business
being carried out and most important be in a
position to make his/her contribution to the
discussion and debates in Parliament. It must also
be understood that the elected persons represents
the people who appointed them and they
should therefore be able to execute that duty
without any difficulties.

13) Article 99(2) was misconstrued to mean that
a person would not be eligible to run for certain offices if they did
not meet the criteria set by Parliament. While
the Constitution did not set any educational
criteria, it imposed a duty on Parliament to
enact legislation setting that criteria and this
was what had been done under the Elections
Act. This Article envisaged a situation where
Parliament prescribed an educational threshold
for those who sought to be elected as Members
of Parliament. Thus, in its wisdom, Parliament
prescribed the provision of a post secondary
qualification. This qualification was not
unreasonable or unattainable by all in Kenya.

14) A reading of article 148 (1), (2) and (3) and
180 (5) and (6) revealed that a person vying
to be President or Governor was to nominate
a deputy. The deputies were not to be subjected
to a nomination exercise and were to be declared
elected by IEBC in the event the person who
nominated them was elected. It was clear that
these Articles did not require that the names or
photos of deputies appear on the ballot paper.
However, it was good practice and good order
for their names and photos to appear on the
ballot paper for following reasons:-
a) These deputies were not nominated by the
electorate but by the person vying who
could have been nominated by members
of a political candidate or an independent
candidate who may have been nominated
by the requisite number of registered voters.
It was therefore good practice and it was
only logical that their names and photos be
on the ballot paper.
b) National values and principles of democracy,
good governance, accountability,
participation and transparency as established
by article 10 of the Constitution required
that the voters elect their representatives in
a transparent manner. Therefore, printing of
the names and photos of deputy president
and governor ensured that the voters
participated in electing their deputy as well.

Petition dismissed with no order as to costs
The power of the High Court to intervene and stay criminal proceedings before the Magistrate's Courts

Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 2 others
Petition No 153 of 2013 consolidated with Petition No 369 of 2013
High Court at Nairobi
D S Majanja, J
November 1, 2013
Reported by Long’et Terer & Njeri Githang’a

Issues

i. Whether the High Court could review the decision of the Director of Public Prosecution (DPP) to charge an accused person by considering the quality and sufficiency of the evidence gathered to support the charge.

ii. Whether section 58 of the ACECA was unconstitutional and violated the right to a fair trial by contravening the principle of presumption of innocence guaranteed by Article 50(2)(a) of the Constitution.

iii. Whether the penalties (imprisonment, fines and disgorgement of ill-gotten gains through corruption) prescribed under the ACECA constituted cruel and degrading treatment.

iv. Whether adverse media pre-trial publicity jeopardized the trial and impeded the right to a fair hearing.

v. Whether the incomplete composition of the Board of Ethics and Anti-Corruption Commission (EACC) and the fact that the employees of the EACC have not been vetted as required jeopardizes the outcome of any activity undertaken by the organization.

vi. Whether the preferment of criminal charges against a public officer amounted to an infringement of the protection that was accorded to public officials as stated in Article 236 of the Constitution.

vii. Whether the preferment of criminal charges against a public officer amounted to an infringement of the protection that was accorded to public officials as stated in Article 236 of the Constitution.

viii. Whether the delay of 4 years from the date of the subject transaction to the date of charges being preferred constituted unreasonable delay and hence a violation of the right to fair trial under Article 50 of the Constitution.

ix. Whether the right to be informed of the charge, with sufficient detail to answer it as provided under Article 50(2)(b) of the Constitution required that the accused be provided with all prosecution material including witness statements and evidentiary materials before plea taking.

x. Whether the delay of 4 years from the date of the subject transaction to the date of charges being preferred constituted unreasonable delay and hence a violation of the right to fair trial under Article 50 of the Constitution.

xi. Whether the right to be informed of the charge, with sufficient detail to answer it as provided under Article 50(2)(b) of the Constitution required that the accused be provided with all prosecution material including witness statements and evidentiary materials before plea taking.

Judicial Review - jurisdiction of a judicial review court - whether the High Court could review the decision of the Director of Public Prosecution (DPP) to charge an accused person by considering the quality and sufficiency of the evidence gathered to support the charge - whether the High Court had the power to inquire into the competency of charge sheets and direct for their amendment.

Held

1. The State’s prosecutorial powers were vested in the DPP, who in the exercise of that function was not subject to the direction or control by any authority. However, the discretionary power vested in the DPP was not an open cheque and such discretion had to be exercised within the four corners of the Constitution. It had to be exercised reasonably, within the law and to promote the policies and objects of the law which were set out in section 4 of the Office of the Director of Public Prosecutions Act.

2. The court could intervene where it was shown that the impugned criminal proceedings were instituted for other means other than the honest enforcement of criminal law, or were otherwise an abuse of the court process.

3. The High Court was not the right forum to tender the justifications concerning the subject transaction let alone test the nature and veracity of the allegations as it was the trial court which was best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would...
be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.

4. It was the EACC’s duty to investigate and make recommendations for prosecution to the DPP. The DPP applied his mind independently and made the decision to prosecute. Any defects in the process of investigation including incompetence of the investigator could not be attributed to the DPP’s decision to charge the petitioners unless the petitioners could demonstrate that the DPP had not acted independently or had acted capriciously, in bad faith or had abused the process in a manner to trigger the court’s intervention.

5. The DPP exercised discretionary power and what was required was a reasonable basis for the exercise of the discretion. It would be crossing the line of independence of the Office of the DPP to descend into the arena to finding whether or not there was a prima facie case against those other persons, who were not even parties to the petition, quite apart from the fact that meandering along that path would usurp the jurisdiction of the trial court.

6. The legislature was entitled to adopt different levels of penalties to satisfy certain policy objectives. The question of severity of punishment could not of itself render a statute unconstitutional. The legislature was entitled to adopt different levels of penalties to satisfy certain policy objectives.

7. The presumption in section 59 of the Anti-Corruption and Economic Crimes Act on authenticity of documents did not interfere or diminish the right to a fair trial as it only created a rule of evidence that the accused bore the burden of proving that there had been unreasonable delay in charging them to the extent that a fair trial was impaired and would thus have to satisfy a “relatively high threshold” before the delay could be categorized as unreasonable.

8. The penalties prescribed by ACECA, including imprisonment, fines and disgorgement of ill-gotten gains through corruption were within the normal human standards of decency even though they may occasion mental anxiety and discomfort. They were within the legislative competence and could not be considered as cruel and inhuman in light of the Constitutional and legislative policy on corruption and economic crimes.

9. Article 236 of the Constitution which provided for the protection of public officers in the discharge of their official duties did not immunize or indemnify public officers including the petitioners against investigation or prosecution. The provisions re-emphasized the need for due process in dealing with a public officer.

10. The suspension of a public officer who had been charged with an offence under section 62 of the ACECA did not amount to a penalty but merely amounted to the suspension of certain rights pending determination of the trial. In the event the person was acquitted the full benefits were restored. If the person was convicted, then the suspension merged into a penalty. Section 62 of the ACECA had to be read in context of its purpose, the overall purpose of the Act and the spirit enshrined in Chapter 6 of the Constitution.

11. The competency of a charge sheet was a matter perfectly within the jurisdiction of the trial court. The matter was catered for under sections 89(5), 137 and 214 of the Criminal Procedure Code. The applicants only needed to move the trial magistrate to strike out the charge for being incompetent or the prosecution could seek to substitute the charges. The fact that the charge was defective did not raise a Constitutional issue.

12. The right to trial without unreasonable delay was one of the components of a fair trial under Article 50. However, what constituted ‘unreasonable delay’ was not a matter capable of mathematical definition but one dependent on the facts and circumstances of the particular case. The general approach to the determination whether, the right had been violated was not by a mathematical or administrative formula but rather by judicial determination whereby the court was obliged to consider all the relevant factors within the context of the whole proceedings. The petitioner’s bore the burden of proving that there had been unreasonable delay in charging them to the extent that a fair trial was impaired and would thus have to satisfy a “relatively high threshold” before the delay could be categorized as unreasonable.

13. The right to be provided with material the prosecution wished to rely on was not a one-off event but was a process that continued throughout the trial period from the time the trial started when the plea was taken. The matter was easily dealt with during the trial as the magistrate was entitled to give such orders and directions as were necessary to effect the right, including granting the accused sufficient time and opportunity to prepare their defence when the fresh material was provided.

14. The applicants would be tried by qualified, competent and independent judicial officers who were not easily influenced by statements made by politicians to the press. There was hence no basis for the applicant’s fears of adverse media pre-trial publicity.

15. The fact that the Board of the EACC lacked a chairman and that the employees of the EACC had not been vetted did not invalidate the work that had been undertaken by the Commission as that situation was catered for by section 53 of the Interpretation and General Provisions Act which provided that the powers of the board, commission, committee or similar body shall not be affected by: a vacancy in the membership thereof; or, a defect in the appointment or qualification of the person purporting to be a member thereof.

16. Where the DPP had exercised his independent discretion to charge the petitioners, any defect in the composition of the EACC would not arise because the decision of the DPP to prefer charges was undertaken independently, based upon available evidence.

Centrality of issuance of notices in claims for Compulsory acquisition

Mathatani Limited v. Commissioner of Lands & 5 others

Petition No. 262 of 2011

High Court of Kenya at Machakos

B T Jaden, J.

September 16, 2013

Reported by Teddy Musiga

Issues:

I. Whether issuance and service of Gazette notices is a prerequisite before commencement of compulsory land acquisition.

II. Whether a Director of a company has the locus standi to institute suits on behalf of the company?

III. Whether the High Court has jurisdiction to entertain a matter that has been determined at the Land Acquisition Compensation Tribunal where there is an allegation of breach of fundamental rights and freedoms.


Land Law – compulsory acquisition – requirement for issuance and service of Gazette Notices for parcels of land earmarked for compulsory acquisition claim by the petitioner that he was not served with the mandatory preliminary notices in the Kenya Gazette – petitioner’s claim challenging the award of compensation on grounds of the legality of the process – Land Acquisition Act (repealed), sections 3, 9, 333(c), 151.

Consolidated petitions dismissed with each party bearing their own costs.
“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation–

a) Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

b) Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that–

i. Requires prompt payment in full, of just compensation to the person; and

ii. Allows any person who has an interest in, or right over, that property a right of access to a court of law.”

Section 3 of the Land Acquisition Act (repealed) provided that:

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.

Section 9 of the Land Acquisition Act (repealed) provided that:

“The Commissioner shall appoint a date not earlier than thirty days and not later than twelve months after the publication of the notice of intention to acquire, for the holding of an inquiry for the hearing of claims to compensation by persons interested in the land, and shall

a) Cause notice of the inquiry to be published in the Gazette at least fifteen days before the inquiry; and

b) Serve a copy of the notice on every person who appears to him to be interested or who claims to be interested in the land.”

Section 333(c) of the Land Acquisition Act (repealed) provided that:

“A Notice which may be given under this Act may be served on a person–

a) By delivering it to the person personally; or

b) By sending it by registered post to the person’s last known address or his last known address in Kenya; or

c) If the whereabouts of the person or his address cannot, after reasonable inquiry, be ascertained, by leaving it with the occupier of the land concerned or, if there is no occupier, by affixing it upon some prominent part of the land; or

d) If the person is a body corporate, society or other association of persons, by serving it personally on a secretary, director or other officer thereof or on a person concerned or acting in the management thereof, or by leaving it or sending it by registered post addressed to the body corporate, society, or, if there is no registered office, at any place where it carries on business, or, if there is none, by leaving it with the occupier of the land concerned or, if there is no occupier, by affixing it upon some prominent part of the land.”

Held:

1. The burden of proof fell on the respondents to ensure the petitioner was served with notice of compulsory acquisition. No affidavit had been exhibited in court to demonstrate that any attempt to effect personal service was made and access denied. There was also no evidence of service by any other methods of service provided for under section 33(d) of the Land Acquisition Act (repealed). Therefore, the petitioner was not served with the notice of compulsory acquisition.

2. The Gazette Notice in question failed and/or omitted to identify the petitioner as the registered proprietor of the suit property and the public body for which the land was being purchased. That gazette notice simply stated the land reference number and the area to be acquired.

3. That Gazette notice issued in accordance with section 9(1) of the Land Acquisition Act (repealed) calling on all interested parties to attend an inquiry for the hearing of the claims in compensation also failed to identify the petitioner as the registered owner of the suit property. The petitioner was not served of the said Gazette Notice and came to learn of the said inquiry after the same had been concluded. Therefore, notice of the inquiry was not served.

4. Both Gazette Notices (notice of acquisition/ that earmarking the petitioner’s land for compulsory acquisition and that calling for attendance of inquiry respectively) failed to state the registered proprietors of the suit property. That failure or omission rendered the said Gazette Notices invalid.

5. The requirements/ test for compulsory acquisition must be satisfied at the outset and not with aid of subsequent evidence. (Re Kisima [1978] KLR 36)

6. Article 22(1) of the Constitution of Kenya, 2010 provided that every person had the right to institute court proceedings claiming that a right or freedom in the Bill of rights had been denied, violated or infringed or was threatened. Therefore the Director of the petitioner’s company had the locus standi to institute the proceedings in court.

7. Article 23(1) of the Constitution of Kenya, 2010 provided that the High court had jurisdiction in accordance with article 165, to hear, and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights. The availability of an alternative remedy was not a bar to a party to invoke fundamental rights and freedoms of the Constitution. (Otieno Clifford Richard v R [2006] EKLR)

8. The requirements of the Constitution and of the Land Acquisition Act were not complied with by the Commissioner of Lands. Consequently, the rights of the petitioner not to be arbitrary deprived of its property by the state as guaranteed under the Constitution were violated. The petitioner’s right to a lawful and fair administrative action and right to information as guaranteed under the constitution were also violated.

9. The mandate to carry out compulsory acquisition was bestowed upon the Minister through the Commissioner of Lands. The Commissioner of Lands therefore bore the responsibility of ensuring that all procedures related to compulsory acquisition of the petitioner’s land were complied with.

10. The 3rd, 4th, 5th and 6th respondents had no such responsibility placed on their shoulders by the Constitution and any Act of Parliament that required prompt payment in full, of just compensation to the person; and allowed any person who has an interest in, or right over, that property a right of access to a court of law.
A Statutory Notice under the Land Act is limited to demands expressly provided for under the Charge instrument.

Kisimani Holdings Limited & another v Fidelity Bank Limited
Civil Case No 744 of 2012
High Court of Kenya at Nairobi
J B Havelock, J
October 31, 2013
Reported by Nelson K Tuoii & Beatrice Manyal

Brief Facts
The defendant advanced a term loan facility to the 2nd plaintiff as regards one of its account in the maximum principal amount of Kshs. 22 million. The loan was conditional upon the 1st plaintiff agreeing to execute and register a Legal charge over the suit property in favour of the defendant. The 1st plaintiff at the request of the 2nd plaintiff had agreed to charge the suit property as security for repayment of the facility advanced to the 2nd plaintiff.

Two statutory notices were subsequently sent to the 2nd plaintiff over and above the principal amount of Kshs. 22 million. The loan was tied the suit property for the repayment of any sums that had to be paid to rectify the overall default of the 2nd Plaintiff not just the Term Loan default.

Cases

Civil practice and procedure -injunction- interlocutory injunction -application by plaintiffs to restrain the respondents from selling the suit property -where the suit property was charged to the defendants - where the applicants defaulted on payment - applicable principles - whether the applicant established a prima facie case

Land law -charges - contract of guarantee - bank loan to 2nd plaintiff - loan given on security of land loan facility guaranteed by 1st plaintiff charged on his property - where the 2nd plaintiff defaulted in the repayment of the facility and the defendant attempted to realize the charged property - property in the name of the guarantor - liability of guarantor - whether the loan agreement enabled a chargee to realize the security offered by the chargor from monies lent to a third-party borrower without the chargor's express consent

Land law -charges - tacking - whether it was possible under the Land Act 2012 for the chargee to tack on to a Charge instrument further advances that were made to a third party borrower without the Charger's consent and, as a result, whether it was possible to enforce a Charge to cover advances made to any other person.

Land law - charges - exercise of statutory power of sale - statutory notice of sale - form of such notice - whether a Statutory Notice under the Land Act could contain demands other than those expressly provided for under the Charge instrument - Land Act section 96(1)

Held
1. There was nothing whatsoever in the charge instrument that either expressly or implicitly tied the suit property for the repayment of any principle sums lent by the defendant Bank to the 2nd plaintiff over and above the principal sum of Kshs. 22 million.

2. The other lending to the 2nd plaintiff, by way of overdraft on its current account and US dollar account, was not covered by the charge instrument.

3. The statutory notices referred to monies other than those due and owing under the said charge instrument. It detailed sums that had to be paid to rectify the overall default of the 2nd Plaintiff not just the Term Loan default.

4. The defendant Bank could not separate out the Term Loan default from the default on the other two accounts and persuade the High Court that the Statutory Notice sufficed for the Term Loan default. As a consequence, both Statutory Notices were invalid and of no effect. Section 82 of the Land Act, 2012 specifically provided that there was no right to tack further advances or credit in relation to a charge instrument, otherwise in accordance with that section. The defendant bank had not complied with the provisions of that section.

5. Section 84 of the Land Act, 2012 as regards the variation of interest rates provided that where it was contractually agreed that the rate of interest was variable, the rate of interest payable under a Charge instrument could be reduced or increased by a written notice giving the chargor at least 30 days' notice of the reduction or increase in the rate of interest. The 1st Plaintiff's had never received any such notice from the defendant bank hence the 40% contractual rate as claimed by the defendant Bank in the said Statutory Notices could not suffice.

6. The Land Act, 2012 allowed the amount secured by a charge to be reduced or increased but by a memorandum which had to be endorsed on or annexed to the Charge instrument which varied the Charge in accordance with the terms of the memorandum. The memorandum had to be signed in the case of a reduction by the chargee or, in the case of an increase, by the chargor. It had to also state that the principal funds intending to be secured by a charge instrument were reduced or increased, as the case could be, to the amount specified in the memorandum. It was clear that by not specifically (by memorandum) increasing the amount covered by the Charge instrument, the defendant was in breach of that sub-clause by including in its statutory demand, the amount of the 2nd plaintiff's current account overdraft and its US dollar account.

7. The 1st Plaintiff's had made out a prima facie case with a probability of success.

8. As both Statutory Notices were invalid, the defendant bank's statutory power of sale had not crystallized. Accordingly, it was not necessary to consider whether damages were an adequate remedy as regards the sale of the suit property. Any such sale, at the present time, would be illegal as regards non-compliance by the Defendant Bank with the Land Act, 2012.

9. The High court had jurisdiction to determine the matter as it related to banking transactions as between the 2nd Plaintiff and the defendant bank with the 1st Plaintiff as guarantor therefor. The suit before Court was not a dispute relating to land as claimed by the defendant and the High Court was therefore properly sized with jurisdiction as opposed to the Environment and Land Court.

10. No payments had been made towards the 2nd plaintiff's, Term Loan facility and the US dollar account since 19th January 2012 and its KES Current account since 14th May 2012. Although this was an obligation lying with the 2nd Plaintiff, the plaintiffs shared common directors. And although the Plaintiffs were separate legal entities, the 1st Plaintiff had to be aware of the defaults of the 2nd Plaintiff and had not been open and straightforward with the High Court as regards thereto. Such behavior by the 1st Plaintiff could only go against it at the hearing of the suit in due course.

Application allowed with no order as to costs.
Whether a retainer of an advocate amounted to an employer/employee relationship

Mwalimu Kalimu Gamunu & 35 others v Coastline Safaris Limited & 2 others

Cause No. 31 of 2013
Industrial Court at Mombasa
Radido Stephen J
September 27, 2013
Reported by Mercy Ombima

Brief Facts

The Claimants were former employees of the First Respondent, a limited liability company which had unfairly terminated the Claimants. They complained that the Second Respondent, the advocate concerned, had been paid sums of money as compensation for the Claimants, but he had failed to account for the funds. They wanted the court to compel the respondents to reimburse them the monies. The respondents however raised a preliminary objection arguing that the relationship between the Claimants and the Second Respondent was one of advocate and client, such that the Industrial Court did not have jurisdiction to determine the dispute.

Issues

i. Whether a retainer of an advocate amounted to an employer/employee relationship.

ii. Whether a contract between an advocate and a client constituted a contract of service or a contract for services.

iii. What were the fundamental rights of employees and basic conditions of employment?

Advocate – advocate/client relationship – whether a contract between an advocate and his client constituted a contract of employment or a contract of service - whether a contract between an advocate and his client constituted a contract of service or a contract for services – where the Claimants instituted an industrial course to recover monies owed to them by their advocate – claim that the suit was not proper since the advocate was not an employee of the Claimants – where the court discussed the nature of an advocate/client relationship.

Jurisdiction – jurisdiction of the Industrial Court – jurisdiction to determine a dispute involving reimbursement of client’s monies – where the claimants’ employment was unfairly terminated by the First Respondent, (a limited liability company) – where the claimants were compensated in court for the unfair termination - claim that the Second Respondent, the advocate concerned, had failed to account for the sums allegedly received from the First Respondent as settlement – where the advocate had been instructed and retained by the Claimants – where the respondents claimed that the dispute in question was not an industrial dispute – whether the industrial court had jurisdiction to determine the dispute - Constitution of Kenya 2010 article 162(2), Industrial Court Act Number 20 of 2011 section 12

Held

1. Under the Advocates Act, the Chief Justice is required, on the recommendation of the Council of the Law Society of Kenya to prescribe and regulate the remuneration of advocates in respect of professional business. The Act did not define remuneration but rather defined ‘costs’ to include fees, charges, disbursements, expenses and remuneration.

2. The Industrial Court Act had defined who an ‘employee’ and ‘employer’ was. An employee was defined as a person employed for wages or a salary. An employer was defined as any person, public body, firm, corporation, or company who or which had entered into a contract of service to employ any individual. The same definitions were replicated in section 2 of the Employment Act and section 2 of the Labor Relations Act.

3. Several questions arose from the definitions of employee and employer. One was whether an advocate was employed by the client for wages or salary. Wage and salary had not been explicitly defined in any of the primary labor statutes, but remuneration had been defined in the Employment Act. According to that definition, ‘remuneration’ meant the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee.

4. A contract of service was defined in the Employment Act to mean, an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time.

5. When an advocate took instructions or retainer from a client, it was ordinarily in respect of a specific case or brief. There were cases where advocates were retained for specified periods to act on legal instructions from the client during the defined period. However, the instructions were not to provide professional and legal services but not as an employee.

6. Clients paid advocates costs and fees and not wages or salary. Therefore on that limb, an advocate did not fit the definition of employee in the Industrial Court Act and the Employment Act. An advocate did not fit in with the definition of either an employee of a client as defined in the labor statutes, nor did a client fit in with the definition of an employer within the statutes dealing with employment or labor relations in Kenya.

7. The Employment Act, in its preamble provided that its purpose was to declare and define the fundamental rights of employees, to provide basic conditions of employment. Some of those fundamental rights and basic conditions of employment were a written contract of service after three months of service, stating employment particulars such as inter alia, job description, date of commencement of employment, form, payment of wages and duration of contract.

8. An employer under the Act had also disciplinary control over the employee, and was required to follow prescribed procedures before terminating the contract of service. If the contract was unfairly terminated remedies were provided. There were also requirements to keep employment records.

9. Advocates did not enjoy those fundamental rights and the basic conditions of employment did not apply them. The client had only limited control over the manner the advocate exercised his skills or work. The client had no disciplinary control over the advocate as would be expected in the normal employer/employee relationship. The client could not dictate when the advocate went on holiday neither could the advocate sue the client on the ground of unfair termination.

10. Apart from the limited control over the advocate, an advocate was on business on his own account. When retaining and or employing the services of an advocate, it was the advocate who bore the financial risks of his practice. The advocate was more of an independent contractor.

11. The relationship of advocate and client was not a contract of service but a contract for services. Any complaints or disputes arising out of that contract were subject to determination in other fora applying not employment law but law of contract/commerce.

Words & Phrases – definition – definition of the terms ‘employer’ and ‘employee’ – definition according to section 2 of the Employment Act and section 2 of the Labor Relations Act

Persons with the authority to terminate the employment contract of the Postmaster General

Fred A Odhiambo v Attorney General & another

Cause No 312 of 2010
Industrial Court of Kenya at Nairobi
Mathews N Nduma, J
October 25, 2013
Reported by Beryl A Ikamari

Issues

i. Whether the Minister for Information and Communications (the minister) had the authority to terminate the employment contract of the Postmaster General of the Postal Corporation of Kenya.

ii. Whether the termination of the contract of...
employment of the former Postmaster General of the Postal Corporation of Kenya was lawful.

employment of the former Postmaster General of the Postal Corporation of Kenya was lawful.

**Employment Law**-termination of employment contract-persons with the authority to terminate an employee's employment contract—whether the Minister for Information and Communications had the authority to terminate the employment contract of the former Postmaster General of the Postal Corporation of Kenya-Postal Corporation of Kenya Act, (Cap 441); section 6(1)(b) and Interpretation and General Provisions Act (Cap 2); section 51.

**Employment Law**-termination of employment contract-employee's right to be heard and application of disciplinary procedures-allegations that an employee was terminated by surprise and without the application of an organization’s disciplinary procedures—Employment Act, 2007; section 41.

**Held**

1. Section 6(1)(b) of the Postal Corporation of Kenya Act (Cap 441), was to the effect that the minister for information and communications in consultation with the board of directors, would appoint the Postmaster General of the Postal Corporation of Kenya. Further, section 51 of the Interpretation and General Provisions Act (Cap 2) provided that where a duty was imposed on a person to make an appointment, unless there was a contrary opinion expressed, that same person would have the power and duty to suspend, dismiss or revoke the appointment.

2. Therefore, it was the minister for information and communications who had the power to appoint and terminate the employment contract of the Postmaster General upon the recommendation of the board of directors of the Postal Corporation of Kenya.

3. An audit report was prepared detailing allegations of lack of capacity and misconduct against the claimant. It was alleged that the Posta Pay EFT System collapsed due to mismanagement while the claimant was in charge of the Postal Corporation of Kenya.

However, the claimant was not given an adequate opportunity to respond to the allegations and the termination notice was received by him in surprise. The disciplinary procedures applicable within the organization were not utilized.

4. For termination of an employment contract to be valid, both a valid reason for termination and the application of a fair procedure leading up to the termination would be required.

5. A fair hearing for purposes of a termination, as per the terms of section 41 of the Employment Act, 2007, would require:

   a) an explanation of the grounds of termination in a language understood by the employee;
   
   b) the reason for which the employer is considering termination;
   
   c) the entitlement of an employee to a representative who may be a fellow employee or a shop floor union official to be present during the session; and
   
   d) the employer to hear and consider any representations by the employee on the grounds and reason for termination.

6. In a wrongful termination claim, the employer would have to establish a prima facie case that a wrongful or unfair termination had taken place. After the establishment of such a prima facie case, the employer would bear the burden of showing that on a balance of probability, the reason for termination was justified.

7. The claimant's employer, on a balance of probability, failed to demonstrate that the claimant was terminated for a valid reason and that the termination was carried out in compliance with the applicable procedural requirements.

**Judgment entered for the claimant.** (The claimant was awarded 10 months gross salary amounting in total to Kshs. 7, 400,000=)

**Court rules on the appointment of persons to Public Bodies without the appointments being done with regard to constitutional provisions and employment laws**

**Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company**

Petition No 5 of 2013

Industrial Court at Nakuru

Byram Ongaya, J

November 8, 2013

Reported by Phoebe Ida Ayaya and Derrick Nzioka

**Brief Facts:**

The petition herein was brought by the Trusted Society of Human Rights Alliance against the Nakuru Water and Sanitation Services Company. It challenged the process of shortlisting, interviewing, recruiting and appointment of persons to the positions of GIS officer, human resource manager, senior credit controller and internal auditor, claiming that it was opaque, clandestine, riddled with nepotism, tribalism and contrary to articles 10 and 73 of the Constitution of Kenya, 2010 hence unconstitutional and consequently null and void.

**Issues:**

1. Whether the petitioner was a person in law with necessary legal capacity to initiate and continue legal proceedings.
2. Whether the petitioner had the locus standi (right to be heard) to initiate and prosecute the petition.
3. Whether the Industrial Court had jurisdiction to hear and determine a petition touching on a constitutional issue.
4. What the law governing recruitment by the 1st respondent was.
5. Whether the recruitment exercise as undertaken complied with the applicable law.

**Constitutional Law**—constitutional petition—claim that the actions of a public body were unconstitutional—where the petitioner brought a petition in the public interest—where the petitioner claimed that the process of recruitment and appointment of persons to various positions was unconstitutional and hence null and void—where the respondent claimed that the Industrial Court had no jurisdiction to hear a constitutional petition—whether the Industrial Court had jurisdiction to hear a petition touching on constitutional issues—Constitution of Kenya, 2010 articles 3(2), 10, 73, 162 & 165(3)(d); Industrial Court Act, section 12.

**Employment Law**—recruitment and appointment—claim that the process undertaken by a public body was irregularly done and in contravention of the Constitution and Employment laws—where the petitioner claimed that the respondent had abdicated its duty to respect and uphold the constitution and being a public body, it was duty bound to uphold the provisions of the law—whether the respondent had complied with the provisions of the law in the recruitment and appointment process that it undertook—Employment Act, Public Officers Ethics Act, Industrial Court Act

Section12(1) The court shall have 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 written 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 organizations;
(f) disputes between an employers’ organization and a trade union;
(g) disputes between a trade union and a member thereof;
(h) disputes between an employer’s organization 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.

2. 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 employer, a trade union, an employer’s organisation, with the Court by or against an employee, an unincorporated association were a body incorporated or unincorporated. An association or a federation and a member thereof; disputes between an employer’s organisation and a member thereof;

3. The Nakuru Water and Sanitation Services Company (1st respondent) had acted in contravention of articles 10 on national values and principles of governance and article 73 on responsibilities of leadership and in view of that, the petitioner had a valid claim that the constitution has been contravened or was threatened with contravention and accordingly, it had locus standi under article 258 as read with article 3 of the Constitution.

4. The 1st respondent was a public body whose recruitment and other employment decisions were regulated by constitutional provisions and was therefore a matter of public interest. It was threatened with contravention; accordingly, the court had jurisdiction therefor under section 12 of the Employment Act and was therefore a matter of public interest. It was threatened with contravention; accordingly, the court had jurisdiction therefor under section 12 of the Employment Act and was therefore a matter of public interest. It was threatened with contravention; accordingly, the court had jurisdiction therefor under section 12 of the Employment Act and was therefore a matter of public interest.

5. In every court or decision maker had jurisdiction to determine whether it had jurisdiction in any particular case and in that sense, jurisdiction was more times than not a preliminary issue for determination by the court or other decision makers.

6. However the issue of jurisdiction may not be obvious and may only be resolved after significant consideration of the issues in dispute and in such instances, the issue of jurisdiction ceased to be a preliminary point and it became a substantive issue for determination by the court or other decision makers.

7. In mapping out the boundaries to determine jurisdiction, the court had to consider the four crucial traditional elements of jurisdiction namely parties, territory/geographical area, remedies that may issue and subject matter in dispute. Unless any of the four resulted in a bar to jurisdiction in the given case, presence of any of the four as permitting jurisdiction would be sufficient for the court to assume jurisdiction and proceed to entertain and determine the case at hand.

8. Presently there was no dispute on territorial/ geographical jurisdiction as constitutionally, the court was vested with jurisdiction attached to the Industrial Court with respect to disputes relating to employment and labour relations. The dispute herein was about a recruitment process undertaken by the respondent, the respondent had been moved against in its capacity as an employer.

9. Relating to jurisdiction by subject matter, article 162(2)(a) of the Constitution and section 12(1) of the Employment Act were elaborate that jurisdiction attached to the Industrial Court and was therefore a matter of public interest. It was threatened with contravention, and accordingly, the court had jurisdiction therefor under section 12 of the Employment Act because although the petitioner was not in an employer-employee relationship with the respondent, the respondent had been moved against in its capacity as an employer.

10. Relating to jurisdiction by subject matter, article 162(2)(a) of the Constitution and section 12(1) of the Employment Act were elaborate that jurisdiction attached to the Industrial Court and was therefore a matter of public interest. It was threatened with contravention, and accordingly, the court had jurisdiction therefor under section 12 of the Employment Act because although the petitioner was not in an employer-employee relationship with the respondent, the respondent had been moved against in its capacity as an employer.

11. Furthermore, the court was vested with constitutional jurisdiction to protect the Constitution under article 258 and to enforce the Bill of Rights in disputes relating to employment and labour relations pursuant to the constitutional and statutory standards of officers under the constitutional provisions.

12. As for jurisdiction based on remedy, the court had substantially prayed for declarations which were remedies the court was authorized to make under section 12(3)(iv) of the Employment Act and thus the court had jurisdiction on that account.

13. Persons subject to employment through a recruitment process were not subject to procurement process like goods and services in the public procurement and disposal legislation. The persons were employees under the provisions of the Employment Act and public officers under the constitutional provisions. Thus the law governing employment in a public body included the constitutional provisions on employment generally such as article 41 of the Constitution, the provisions on public service engagement such as articles 10 and 73, the values and principles of public service in article 212 of the Constitution, the provisions of Chapter 13 of the Constitution on the public service, the general labour legislations such as the Employment Act and for a public body the Public Officer Ethics Act.

14. Essentially the 1st respondent was constitutionally expected and legislatively obligated to draw objective, shortlisting and interviewing instruments that reflected the criteria set out in articles 73 and 232 on recruitment and appointment, as well as section 22 of the Public Officer Ethics Act. Instruments were to take into account objective measures that achieved fair competition, merit integration of diversity and principles of public service engagement such as articles 10 and 73, the values and principles of public service applied in the petition and findings made in this judgment. There was need to oversee the 1st respondent’s discretion to develop yet mandatory to achieve the constitutional and statutory standards of public procurement and disposal legislation. The persons were employees under the provisions of the Employment Act and public officers under the constitutional provisions. Thus the law governing employment in a public body included the constitutional provisions on employment generally such as article 41 of the Constitution, the provisions on public service engagement such as articles 10 and 73, the values and principles of public service in article 212 of the Constitution, the provisions of Chapter 13 of the Constitution on the public service, the general labour legislations such as the Employment Act and for a public body the Public Officer Ethics Act.

16. There was need to oversee the 1st respondent in its undertaking of the recruitment exercise in issue and in view of the concerns raised in the petition and findings made in this judgment. Article 232(2)(b) was clear that the values and principles of public service applied to state corporations like the 1st respondent. On the other hand, articles 234(2)(c) and (d) empowered the Public Service Commission to promote the values and principles in articles 10 and 232 and to investigate, monitor and evaluate
the organisation, administration and personnel practices of the public service. Therefore, the commission is the constitutional institution that should oversee the 1st respondent's compliance with the constitutional values and principles of public recruitment and appointment.

*Application allowed, the recruitment and appointment process to be repeated with the Public Service Commission to be an overseer. A copy of the judgment to be served on the Public Service Commission.*
This volume contains decisions emanating from the 2007 General Elections from the Court of Appeal of Kenya and the High Court of Kenya.

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