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Contents

1. Editor’s Note......................................................... 01
2. CJ’s Message.......................................................... 02
3. Cityzen Nenkai....................................................... 03
4. What they Said...................................................... 04
5. Facebook timeline................................................... 07
6. Knowledge Exchange with the Judiciary of South Sudan........ 08
7. Sustainable Nationhood Amidst Diversity: Kenya’s Electoral Experience Under a Democratic Constitution........ 12
8. Re: Reclaiming Lost Jurisprudence - Call for Judicial Decisions.................. 18
9. Enhancing Access to Public Legal Information.......................... 19
10. International Comparative Jurisprudence.............................. 23
12. Implementing the revised Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013 Legal Notice No. 114 of 18th June, 2013 and the Public Procurement and Disposal (County Governments (Regulations), 2013........ 38
13. Volunteerism in the Judiciary............................ 41
14. Continuous In-House Training for Law Reporting Department on Editorial Processes........................................ 43
15. Plato’s World of Justice......................................... 46
16. Why Death Penalty should be scrapped from our statute books; A case study of the Kenyan Penal System........ 49

Highlights

43 | Continuous In-House Training for Law Reporting Department on Editorial Processes

72 | The Internal Launch of the Kenya Law Brand

76 | Kenya Law Mobile App. – Coming Soon
# Contents

17. Government Directive on Refugee Encampment Undermines their Fundamental Rights and Freedoms


20. Bills Legislative Updates

21. Digest of Recent Legal Supplements on Matters of General Public Importance

22. Human Resources and Administration Department Report

23. The Internal Launch of the Kenya Law Brand

24. Kenya Law Mobile App. – Coming Soon

25. The New Case Law Database


27. 2 Cents To Financial Freedom

28. Store Management Theory

29. The Beauty of Change: Team Oasis Soaks in Glory

30. Organizational transformation

31. Spot New Opportunities for Success

32. Caseback

33. Cases

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- Public legal information is common property and should be accessible to all;
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Editor’s Note

As we continue to celebrate the unveiling of our new brand identity, I would not say that its highlight is our new-look and (hopefully) improved website which features major (and I mean m-a-j-o-r) improvements to our databases for case law, Laws of Kenya, Kenya Gazette and Kenya Law Journal. Rather, I think that the highlight is more of an idea.

That idea is the renewed understanding of our place and role in the universe (yes, that’s how big our frame of reference is) and the idea is based on a simple analogy – the alphabet. The English alphabet has 26 letters. From this base of 26 visual symbols with unique sounds, humanity has constructed over a million words that now comprise the world’s most widely spoken language. Further, these words have been used in various combinations to construct phrases and sentences that communicate feelings, ideas, knowledge, poetry, music and the broad range of phenomena that define the human experience. All this is possible because the English alphabet is property in the public domain – it is the common heritage of humanity, free for all to use and no royalties have to be paid to a so-called ‘inventor’ of the alphabet.

Public legal information is the alphabet of access to justice. As Kenya Law, we understand that the establishment of the rule of law, which is a key element in the advancement of a civilized society, is only possible in a society where citizens not only have free access to public legal information but where they understand and use that information. Therefore, unfair restrictions on the use of that information would bring as much paralysis and stagnation in the justice system as the commercial appropriation of alphabets would bring to the human experience.

Our mission, therefore, is not merely to provide access to public legal information. It is higher than that. It is to play our part in establishing and advancing a fair and just society governed by the rule of law. This is the premise of our new identity; this is the promise of the Kenya Law experience.
C J’s Message

Statement by the Chief Justice & Chairman on the Kenya Law Rebrand

In our new brand identity, we are making a bold promise. Understanding our role as the agency through which Kenya's robust, indigenous, patriotic and progressive jurisprudence will be monitored, reported and also packaged as a product for export to other jurisdictions, and acknowledging our social justice obligation to provide public legal information that is open and accessible, we will be the gold standard by which law reporting and access to public legal information is measured. The people of Kenya, from whom our mandate is derived, the letter and spirit of the Constitution of Kenya, 2010 and the Judiciary Transformation Framework requires nothing less of us.

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

We have renewed our minds and rededicated ourselves to the national values and principles of public service set out in the Constitution of Kenya, 2010 and we have re-engineered our systems and processes to exceed the expectations the people, the Judiciary, our partners and our stakeholders. The essence of this renewal is expressed in a new brand identity – KENYA LAW.
Cityzen Nenkai

I learnt about my moral and physical limitations when my neighbour stole my goats' food. How was that?

I went to his home and wanted to call him names in front of his children, but morally I couldn’t stoop that low...

...then I walked to his farm and wanted to milk all his goats but physically I couldn’t stoop that low.

©M. Murungi. Illustration: E. Obare
“The Supreme Court, as an apex Court, could indeed depart from its previous decision, for good cause, and after taking into account legal considerations of significant weight. Such a latitude for departure from precedent existed not only in principle, and from well-recorded common law experience, but also by virtue of the express provision of the Constitution”. Supreme Court Judges W.M. Mutunga CJ, K.H. Rawal DCJ, P.K. Tunoi, J.B. Ojwang, S.C. Wanjala & N.S. Ndungu in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2013] eKLR, in upholding the court’s decision in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR that section 14 of the Supreme Court Act was unconstitutional, insofar as it purported to give the Supreme Court a ‘special jurisdiction’.

“The law requires that a woman who has been arrested should be searched by another woman, with strict regard to decency. In this case, given the fact that the petitioner was dressed as a woman, it was, in the circumstances, reasonable for the search to be conducted by a woman.” High Court judge Mumbi Ngugi in A.N.N v Attorney General [2013] eKLR, in awarding Kshs. 200,000 for breach of the constitutional rights of privacy and dignity to the petitioner, who apparently had Gender Identity Disorder and had been stripped of clothes by police officers in the presence of media ostensibly to establish the petitioner’s gender.
What they Said

“The description that the Court of Appeal exercises “original jurisdiction” under Rule 5(2)(b) [of the Court of Appeal Rules which gives that Court the power to order a stay of execution or an injunction or stay of proceedings against a decision of the High Court pending appeal] is what has brought confusion on the true nature of the powers under that rule. Taken at face value, it creates the false impression that the Court of Appeal has an original jurisdiction like the original jurisdiction of the High Court and that that jurisdiction exists and is exercisable independent of the jurisdiction conferred on the Court by the Constitution to hear appeals. The fact of the matter is that the Court of Appeal cannot assume or exercise jurisdiction in an application under rule 5(2)(b) unless a competent notice of appeal has been filed”.

“An issue touching on a procedure challenging the constitutionality of statutory law was not a matter of procedural technicality. It was a matter of procedural substance. The procedure towards the declaration of Section 14 of the Supreme Court Act as unconstitutional was a substantive procedure that went to the core of the constitutionality of a legislative activity. Thus, the declaration of Section 14 as being unconstitutional lacked the procedural substantive requirement, and it ought not to be left to stand as a precedent”.
– Supreme Court Judge M. Ibrahim in his dissenting opinion in Jasbir Singh Rai & 3 Others v Tarlochan Siggh Rai & 4 others [2013] eKLR
“The High Court is entitled to conduct a review of appointments to State or Public Office to determine the procedural soundness as well as the appointment decision itself to determine if it meets the constitutional threshold. The rationality test is a judicial review standard fashioned specifically to accommodate the doctrine of separation of powers, and its application must generally reflect that understanding. Such review by the court is however not an appeal over the opinion nor does it amount to a “merit review” of the decision of the appointing body. Thus, the High Court misapplied the rationality test in adopting a standard of review antithetic to the doctrine of separation of powers”. Court of Appeal Judges P. Kihara Kariuki - PCA, W. Ouko, P. O. Kiage, S. Gatembu Kairu & A. K. Murgor in Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others [2013] eKLR

“A suit could not be “dismembered” by a party so that one limb would get heard by the Environment and Land Court and another limb by the High Court. That would amount to an absurdity and miscarriage of justice and was not intended by the Constitution. Where a dispute fell within the jurisdiction of both the High Court and the Environment and Land Court, any of the two courts would be able to adjudicate upon it and make a determination”. - High Court Judge OA Angote in Tasmac Limited v Shalin Chitranjan Gor [2013]eKLR
By: Nelson Tunoi & Robert Basweti
Knowledge Exchange with the Judiciary of South Sudan

By Michael M. Murungi
CEO/Editor

Mr. Michael M. Murungi, the CEO/Editor of National Council for Law Reporting (left) with the Chief Justice of the Republic of South Sudan The Hon. Justice Chan Reec Madut, at the first capacity building retreat for the Judiciary of South Sudan - May 2012

As part of a bilateral agreement between the Republics of Kenya and South Sudan, the National Council for Law Reporting has been sharing its knowledge and experience in the establishment of a system for official law reporting and law revision with the Judiciary of South Sudan. This capacity building was conducted through a series of seminar-style knowledge exchange retreats held between May 2012 and May 2013. The retreats were organized by the Kenya-South Sudan Liaison Office (KESSULO) and involved the Judiciary of Kenya and the Kenya School of Law and a rich diversity of stakeholders in the Kenyan legal and justice sector.

South Sudan – A Country and a Judiciary in Transition

Between 9 and 15 January 2011, a referendum was held to determine whether South Sudan should declare independence from Sudan. 98.83% of the population voted for independence. The now-defunct Southern Sudan Legislative Assembly ratified a transitional constitution shortly before independence on 9 July 2011.

Earlier in March 9, 2007, the Government of Kenya (GoK) and the then Government of South Sudan, now the Republic of South Sudan (RoSS), had signed a Memorandum of Understanding, whereby the GoK undertook to provide technical assistance and capacity building for the RoSS.
The Transitional Constitution of The Republic South Sudan, 2011 in Part Seven establishes “The Judiciary of South Sudan” (JOSS) as an independent arm of government. It is headed by the Hon. Chief Justice Chan Reec Mandut and his deputy the Hon. Justice Reuben Madol.

Historically, the larger Sudan applied the Common Law until 1993 when the Khartoum government abolished it and introduced continental/Sharia Law. However South Sudan has returned to the Rule of Common Law and its Judiciary has seen the need for capacity building on the English principles and practices of the Common Law.

Though a lot has been done in terms of capacity building through other development partners in the Judiciary of South Sudan, the transition from the application of Continental Law to Common Law has been slow and challenging. One of the major contributing factors is the shift from use of Arabic to English as the official language of transacting court business.

Mr. Cornelius Lupao, a Senior Law Reporter at the National Council for Law Reporting (right) showcases some of the Council’s publications to Judges of South Sudan - May 2013.

A majority of the Judges though very keen to see the success of the transformation of the Judiciary of South Sudan, needed a deeper appreciation and a refreshed understanding of the integral elements of the administration of justice in a Common Law legal system.

Kenya’s choice as a capacity building and knowledge exchange destination for the Republic of South Sudan is based not only on its geographical proximity but on its many decades of experience in the administration of justice in a English/Common Law legal system.

The hierarchy of courts in the Republic of South Sudan is as follows:

**The Supreme Court**

The President of the Court is The Chief Justice who is deputised by a Deputy Chief Justice. The Court is comprised of other associate judges who should not be less than nine in number. The Power and jurisdiction of
the Supreme Court is provided for in Article 126 of Part Seven of the Transitional Constitution.

The Court of Appeal
The Court of Appeal is headed by a President who constitutes panels of at least three Justices each, presided over by the most senior judge.

The High Court
The President of the Supreme Court establishes one High Court in each of the ten states of the Republic.
The County Courts
These are equivalent to Kenya’s subordinate courts or Magistrates Courts. However in South Sudan, the judicial officers presiding over these courts carry the title of ‘Judge’ as opposed to the title of ‘Magistrate’ which is used in Kenya.

The Payam Courts
These are Courts established at the county level with jurisdiction limited to presiding over prosecutions for criminal offences punishable by up to one year imprisonment and a fine not exceeding 300 South Sudanese Pounds (SSD), and civil cases in which the value of the subject matter does not exceed 500 SSD.

Other Courts
These are such other Courts or Tribunals as deemed necessary to be established in accordance with the provisions of the Interim Constitution of South Sudan.

Adopted with modification from a concept paper originally prepared by the Kenya School of Law.
Sustainable Nationhood Amidst Diversity: Kenya’s Electoral Experience Under a Democratic Constitution

Address made before the Central Student Representative Council of the University of the Free State of South Africa, on the occasion of a leadership Tour, Nairobi, 19 June 2013

By The Hon. Justice (Prof.) J. B. Ojwang
Justice of the Supreme Court of Kenya

1. Introduction
3. The National Elections of 4th March 2013
4. Aftermath: The presidential Election and the Petition
5. The Judiciary and the Constitutional Order: Reflections

Introduction

The African continent has, in the last two decades, come up to fateful new experiences in the domain of governance: in the management of the public affairs, of citizens, through institutions set for targeted results – institutions that make a claim to legitimacy.

Up to about half a century since the end of the colonial era, or of imposed governance systems, every African country today faces the veritable challenge of rationalizing its institutions, and establishing a direction such as befits the legitimate purposes of self-sustaining nationhood.

The foundations of such a progressive order must be built around core public institutions and processes: those of law-making; programming, management and norm-implementation; and of dispute settlement. And such institutions and processes must enjoy legitimacy.

Such institutions and processes, as experience shows, will operate either on the basis of popular expressions of choice and designation, or of selection, conducted with perceived rationality and fairness. Thus, as is well recognized, the machinery of governance will rest upon two broad types of institutions: majoritarian, and non-majoritarian. The two have a complementary role: the first category bearing the very face of free governance by the citizens themselves; the second category serving as the professional and legitimate conciliator and arbiter, when the motions of majoritarianism fall into conflict, confrontation or disorder.

Today, we are concerned with the majoritarian institutions: those that are set up through the electoral process. More specifically, we are concerned with an instance of the electoral process, in its contribution to the evolution of nationhood, in conditions of diversity.

“Diversity” is thus defined in Black’s Law Dictionary:
“….Ethnic, socioeconomic, and gender heterogeneity within a group; the combination within a population of people with different backgrounds.”

Most countries of Africa are typical case-studies in diversity, in particular: ethnic, racial, religious, cultural and linguistic, social and economic. This is a major challenge, to all initiatives of arriving at some medium of the “good life”, upon which the schemes to facilitate democratic and progressive governance may be predicated. Indeed, achieving the true democratic
intent, in such a context, is a great deal more burdensome, than assuring equitable and legitimate governance in the highly-industrialised nations of the West. This is the real challenge to any political-party platform acceding to State power, in popular elections, in most of Africa. Diversity, thus, poses one of the main challenges to the majoritarian platform, in the scheme of governance.

Against this background, I will give a short profile on the design of the Constitution of Kenya, 2010 before making reflections on the general elections which took place on 4th March, 2013.

A. THE CONSTITUTION OF KENYA, 2010: PRINCIPLES AND INSTITUTIONS OF GOVERNANCE

As compared to the earlier Constitutions – that of 1963 and that of 1969 (with its radical alterations by way of amendment, which resulted in an Executive structure minimally accountable) - Kenya’s Constitution of 2010 represents a major paradigm shift, with the people, democracy, human rights and rule of law as its watchwords. The Constitution begins by declaring “the sovereignty of the people”:

“All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.”

It annexes the processes of sovereignty to democratic choice:

“The people may exercise their sovereign power either directly or through their democratically elected representatives.”

The sanctity of “the people” and their entitlement, are consolidated in the largest part, which is devoted to the Bill of Rights, and which declares itself to be:

“an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies”.

Those entrusted with the task of interpretation of the Constitution, notably the courts, are required to adopt interpretations that promote –

“The values that underlie an open and democratic society based on human dignity, equality, equity and freedom”.

Falling under the Bill of Rights are political rights, which sanctify the role of the citizen in the establishment of the majoritarian scheme of governance:

“(1) Every citizen is free to make political choices, which includes the right–
(a) to form, or participate in forming, a political party;
(b) to participate in the activities of, or recruit members for, a political party; or
(c) to campaign for a political party or cause”.

Such guarantees of rights for the citizen are to be seen in the context of declared “national values and principles of governance”; these include: national unity [signalling commitment to the consolidation of nationhood]; the rule of law; democracy and participation of the people; human dignity; equity; social justice; equality; inclusiveness; human rights; non-discrimination; protection of the marginalized.

The political effect of such progressive terms of the Constitution, must stand or fall on a single event: interpretation. The draftspersons were mindful of this question, and they thus provided:

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

The foregoing backcloth of principles and values focuses its light on the electoral process; the majoritarian agencies emanating therefrom; and the judicial (non-majoritarian) role in relation to the electoral process. Such is the context in which Kenya’s general elections – including the Presidential elections – of 4th March, 2013 took place.

B. THE NATIONAL ELECTIONS OF 4TH MARCH, 2013

(a) Context

If the promulgation of the Constitution on 27th August, 2010 marked a signal achievement in the
democratization struggle, the attainment would remain unaccomplished, but with the inaugural elections to bring to life the institutions of governance, namely: the Presidency; the Senate; the National Assembly; the gubernatorial offices; the County Assemblies.

The elections of 4th March, 2013 therefore, were not ordinary elections; they were institution-building elections, upon which the course of implementation of the Constitution, for the future, depended.

(b) The Conduct of Elections

It is, firstly, to be noted that the elections of 4th March, 2013 were the broadest, and the most challenging ever, in the history of Kenya. It goes without saying that all agencies involved in the nominative and elective processes were tested to the limit, and, as beginners, they cannot claim perfection in the way in which they executed the electoral process. At this moment, hundreds of petitions are running in the Courts all over the country, in which election losers are contesting the outcome as declared, following the counting of votes. The most remarkable of the election contests was that in respect of the Presidency; and this will be the climax of my presentation.

D. AFTERMATH: THE PRESIDENTIAL ELECTION AND THE PETITION

(a) The Law

Whereas the numerous petitions over election-outcomes have been lodged in a wide range of Courts, notably the High Court, the jurisdiction in respect of Presidential election is exclusively vested in the Supreme Court. As an exception to the general principle that the Supreme Court is the ultimate appellate Court, the Constitution provides that:

“The Supreme Court shall have –

(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140…..”

The said Article 140 is concerned with “questions as to validity of presidential election”, and provides as follows:

“(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

“(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

“(3) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination”.

The general constitutional significance of the Supreme Court's decision, at the end of the election-petition proceedings, is clear, as it determines whether or not a swearing-in ceremony is to take place. The Constitution provides:

“The President-elect shall be sworn in on the first Tuesday following –

……………

(b) the seventh day following the date on which the court renders a decision declaring the election to be valid, if any petition has been filed under Article 140.”

(b) Elections of 4th March, 2013, and the Presidential Election Petition

The first national elections under the new Constitution entailed still more complications. The public agency responsible for the conduct of elections, the Independent Electoral and Boundaries Commission (IEBC) was, for the first time, endeavouring to rely on certain technologies: biometric voter registration (BVR), at the stage of voter registration; electronic voter identification (EVID), on polling day; and electronic
results transmission system (RTS), during vote-tallying.

The voter–registration exercise began on 19th November, 2012 ending with the registration of approximately 14 million voters, for a national population of about 40 million. A record 86% of the registered voters turned up at the polling stations, and cast their votes, on 4th March, 2013. Thereafter, IEBC immediately set upon the task of vote-tallying, culminating in the public announcement of results.

Mr. Issack Hassan, the Chairman of IEBC, on 9th March, 2013 announced the votes received by each of the Presidential election candidates. Mr. Uhuru Kenyatta had received 6,173,433 votes out of a total of 12,338,667 votes cast – that is, 50.07% of all the votes cast; and the runner-up, Mr. Raila Odinga had received 5,340,546 votes – that is 43.31% of all the votes cast. On that basis, and pursuant to Article 138 (4) of the Constitution, Mr. Hassan declared Mr. Uhuru Kenyatta as the President-elect.

(c) Election Petitions

The declaration of election outcomes sparked a set of petitions:

(i) by Petition No.3 of 2003, persons who had not been candidates in the Presidential election, Moses Kiarie Kuria, Denis Njue Itumbi and Florence Jematiah Sergon contending that the decision taken by IEBC to include “rejected votes” in the final tally had had a prejudicial effect on the percentage of votes won by Mr. Uhuru Kenyatta. The petitions contended that the actions of IEBC were in contravention of Articles 36 (b) and 138(c) of the Constitution, and Rule 77(1) of the Elections (General) Regulations, 2012;

(ii) by Petition No.4 of 2013, Gladwell Wathoni Otieno and Zahid Rajan brought their case against IEBC, its Chairman, Mr. Uhuru Kenyatta as the declared President-elect, and Mr. William Ruto as the declared Deputy President-elect: the allegations being that the voter register was not properly maintained; and that IEBC failed to meet “the mandatory legal requirement to electronically transmit election results”; (iii) by Petition No. 5 of 2013, Mr. Odinga moved against IEBC, its Chairman, Mr. Uhuru Kenyatta and Mr. William Ruto, disputing the validity of the declared election results, on the basis that “the electoral process was so fundamentally flawed that it precluded the possibility of discerning whether the Presidential results declared were lawful”; it was contended that IEBC failed to carry out a transparent, verifiable, accurate and accountable election as required under Articles 81, 83 and 88 of the Constitution.

The Supreme Court directed that the three Petitions be consolidated and heard as one, with the last Petition serving as the pilot file. The issues in the petitions, after consolidation, disclosed one fundamental cause: Whether Mr. Uhuru Kenyatta and Mr. William Ruto were validly elected and declared as President-elect and Deputy President-elect, respectively.

Within the rigidly-defined time-frames of the Constitution, the matter was intensively heard, on the basis of sworn statements and the submissions of counsel.

(d) The Presidential Election Petitions: Determination by the Supreme Court

The matter was vigorously canvassed before the Supreme Court. Thereafter the Court considered the evidence of merit, and the submissions of counsel, prefacing its decision as follows:

“The evidence in the consolidated Petition has been laid out in detail, and is the primary basis for disposing of the several prayers. The Court has also considered various questions of law and of general constitutional principle, upon which the Petitioners rely ....... As such broader foundations to the cases concerned specific prayers, and as the relevant issues were squarely canvassed by counsel, we were able to make our findings, and embody the same at various stages in this Judgment.

“But, ultimately, the primary issue is the claim made by the Petitioners in Petitions No. 4 and No. 5; and these resolve into the issue in Petition No. 5, namely: Must
the certificate of election as President-elect, issued
to the 3rd Respondent, be cancelled; and should an
Order be made for a fresh Presidential election to
take place in Kenya?”

The Court thus set the context in which the Presidential
election, in the context of the evidence on record,
should be perceived:

“An alleged breach of an electoral law, which leads to
a perceived loss by a candidate, as in the Presidential
election which has led to this Petition, takes different
considerations. The office of President is the focal
point of political leadership, and, therefore, a critical
constitutional office. This office is one of the main
offices which, in a democratic system, are constituted
strictly on the basis of majoritarian expression. The
whole national population has a clear interest in
the occupancy of this office which, indeed, they
themselves renew from time to time, through the
popular vote.”

Quite in departure from the well known American case,
Bush v. Al Gore in which all credible account,
shows the Supreme Court Judges to have had definite
lines of political preference, the Kenyan Supreme
Court took a different course, thus expressing itself in
unanimity:

“As a basic principle, it should not be for the Court
to determine who comes to occupy the Presidential
office; save that this Court, as the ultimate judicial
forum, entrusted under the Supreme Court Act, 2011
(Act No. 7 of 2011) with the obligation to ‘assert the
supremacy of the Constitution and the sovereignty
of the people of Kenya’ [s. 3(a)], must safeguard the
electoral process and ensure that individuals accede
to power in the Presidential office, only in compliance
with the law regarding elections”.

On these same lines of perception and reasoning, the
Court further pronounced itself:

“We take judicial notice that Kenya, thanks to the
relentlessness of the people’s democratic struggles, has
recently enacted for herself the current Constitution,
which assures for every citizen an opportunity for
personal security and for self-actualization in a free
environment. The Judiciary in general, and this
Supreme Court in particular, has a central role in the
protection of that Constitution and in the realization
of its fruits so these may inure to all within our
borders; and in the exercise of that role, we choose
to keep our latitude of judicial authority unclogged:
so the Supreme Court may be trusted to have a
watchful eye over the play of the Constitution in the
fullest sense. Even as we think it right that this Court
should not be a limiting factor to the enjoyment of
free political choices by the people, we hold ourselves
ready to address and to resolve any grievances which
flow from any breach of the Constitution, and the
laws in force under its umbrella.”

While noting that, “by no means can the conduct of
this election be said to have been perfect”, the Court
found no evidence laying out a case for orders of
annulment. The Court posed the question:

“Did the petitioner clearly and decisively show the
conduct of the election to have been so devoid of
merits, and so distorted as not to reflect the expression
of the people’s electoral intent?”

The Court asserted that:

“It is this broad test that should guide us in this kind
of case, in deciding whether we should disturb the
outcome of the Presidential election.”

The Court thus held:

“In summary, the evidence, in our opinion, does not
disclose any profound irregularity in the management
of the electoral process, nor does it gravely impeach
the mode of participation in the electoral process
by any of the candidates who offered himself or
herself before the voting public. It is not evident, on
the facts of this case, that the candidate declared as
the President-elect had not obtained the basic vote-
threshold justifying his being declared as such.”

Consequently, the Supreme Court disallowed the
Petition, and upheld the Presidential-election results
as declared by IEBC on 9th March, 2013.
E. THE JUDICIARY AND THE CONSTITUTIONAL ORDER: REFLECTIONS

If the history of Kenya prior to the Constitution of 2010 had obscured the Judiciary’s vital role in governance, this status quo has changed, a development most pointedly expressed in the recent Presidential-election Petition.

In the current context, the stature of the Judiciary, in my opinion, coincides with the perception in my recent work, *Ascendant Judiciary in East Africa*:

“The judicial remit of interpretation of law is all-important, in any perception of governance powers under the Constitution. That the law is the substratum of all lawful governance-action is axiomatic. It is precisely this principle that assigns to the Judiciary the vital role of guardian of constitutionality and legality – and thus accords this organ the most treasured role in the design of the constitutional process.”

The Presidential election of March 2013 was a prime test for the acceptability of a novel constitutional order; for transition from retrogression in governance, to sustainable democracy; for the institutionalisation of judicialism, and rule of law alongside democratic processes; and for the processes of electoral legitimacy. If Kenya cannot exactly yet be said to have won those vital tests, it is at least arguable that the Supreme Court’s decision in the recent Presidential election Petition has shown real progress towards success. The Supreme Court (and the Judiciary in general) has demonstrated its even keel in resolving a major political-cum-social conflict, in a manner that invites tolerant acquiescence in the country at large. It is a course towards common political perception; towards shared values; towards active nation-building, in conditions of fundamental diversity. This is something positive, socially and politically constructive, emanating from the Kenyan Judiciary. Only to this restrained extent, can the design and purpose of the Kenyan judiciary be perceived in veritable political terms: otherwise, it remains valid to perceive the Kenyan judiciary as essentially an institution of the legal order, for the resolution of disputes by legitimate juridical designs.

Notes
2. Article 1(1).
3. Article 1(2).
4. Chapter 4.
5. Articles 19-59.
6. Article 19(1).
8. Article 38.
10. Article 10(c).
11. Article 259.
12. Article 163(3).
13. Article 141(2)(b).
15. Paras. 298.
18. Para. 299.
19. Para. 301.
20. Para. 304.
21. Ibid.
22. Para. 306.
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We thank you for your continued support.

Sincerely

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Enhancing Access to Public Legal Information

By Nelson K. Tunoi, Esq.
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### Creative Commons Global Summit 2013

The Global Summit brings together the community of experts, academics, and activists who comprise the
Creative Commons affiliate network in a different country every two years. The recently concluded Creative Commons Global Summit was held from August 21 to 24 at the San Martín Cultural Center in Buenos Aires, Argentina, with the support and organization of the locally based Fundación Vía Libre and Wikimedia Argentina.

The event brought together representatives of Creative Commons affiliates from around the world, the Creative Commons Board of Directors and staff, activists, academics, local representatives and others interested in discussing the present and future of the international free culture movement. The summit agenda included more than 60 sessions and panel presentations on topics such as copyright reform; CC licenses in educational, cultural,
and artistic projects; relationships with governments, academia, and civil society; and the development of business models with an open and collaborative structure. The attendees discussed strategies to strengthen Creative Commons and its worldwide community; learnt about the latest developments in the commons movement worldwide; and showcased local and international projects that use Creative Commons licenses.

Creative Commons co-founder Prof. Lawrence Lessig, who is well recognized worldwide both for his work with Creative Commons and as a government reform advocate, gave a keynote address on “Laws That Choke Creativity” at the University of Buenos Aires. Other notable summit attendees included Creative Commons CEO Cathy Casserly, Creative Commons Board of Directors Chairman Paul Brest, Michael Murungi - CC Kenya Legal Lead representative, Isaac Rutenberg - CC Kenya Public Lead representative, Simeon Oriko – Jamlab Co-founder and Alex Gakuru and Tobias Schonwetter - CC Africa Regional Coordinators, among others.
DNA Swabbing of Arrestee’s is Permissible in the United States Where Probable Cause upon Arrest is Established

Maryland v. King Appeal No 12–207.
Supreme Court of the United States
June 3, 2013
Reported by Monica Achode

Issues:
- Whether the procedure of taking and analyzing a cheek swab of an arrestee’s DNA upon making an arrest was reasonable under the Fourth Amendment

Constitutional Law – breach of fundamental bill of rights – infringement of the arrestee’s Fourth Amendment right to be secure in his person – where the arresting officers had taken a DNA swab from the arrestee while detaining him at the station - circumstances under which an arresting officer may take a DNA sample from an arrestee – balance of reasonableness – whether the procedure of taking and analyzing a cheek swab of an arrestee’s DNA upon making an arrest was reasonable under the Fourth Amendment

The Fourth Amendment of the Constitution of the United States of America

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Brief History
After his 2009 arrest on first and second degree assault charges, the respondent, King, was processed through a Wicomico County, Maryland, facility, where booking personnel used a cheek swab to take a DNA sample pursuant to the Maryland DNA Collection Act (Act). The swab was matched to an unsolved 2003 rape, and King was charged with that crime. He moved to suppress the DNA match, arguing that the Act violated the Fourth Amendment, but the Circuit Court Judge found the law constitutional. King was convicted of rape. The Maryland Court of Appeals set aside the conviction, finding unconstitutional the portions of the Act authorizing DNA collection from felony arrestees. Maryland State appealed against this decision.

Held:
(Majority Decision: Kennedy, joined by Roberts, Thomas, Breyer, Alito)

1. When officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee’s DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

2. DNA testing may “significantly improve both the criminal justice system and police investigative practices,” by making it “possible to determine whether a biological tissue matches a suspect with near certainty.”. Maryland’s Act authorizes law enforcement
authorities to collect DNA samples from, as relevant here, persons charged with violent crimes, including first-degree assault.

3. A sample may not be added to a database before an individual is arraigned, and it must be destroyed if, e.g., he is not convicted. Only identity information may be added to the database. Here, the officer collected a DNA sample using the common “buccal swab” procedure, which is quick and painless, requires no “surgical intrusion beneath the skin”, and poses no threat to the arrestee’s “health or safety”. Respondent’s identification as the rapist resulted in part through the operation of the Combined DNA Index System (CODIS), which connects DNA laboratories at the local, state, and national level, and which standardizes the points of comparison, i.e., loci, used in DNA analysis.

4. The framework for deciding the issue presented is well established. Using a buccal swab inside a person’s cheek to obtain a DNA sample is a search under the Fourth Amendment. And the fact that the intrusion is negligible is of central relevance to determining whether the search is reasonable, “the ultimate measure of the constitutionality of a governmental search”. Because the need for a warrant is greatly diminished here, where the arrestee was already in valid police custody for a serious offense supported by probable cause, the search is analyzed by reference to “reasonableness, not individualized suspicion,” and reasonableness is determined by weighing “the promotion of legitimate governmental interests” against “the degree to which the search intrudes upon an individual’s privacy”.

5. In this balance of reasonableness, great weight is given to both the significant government interest at stake in the identification of arrestees and DNA identification’s unmatched potential to serve that interest.

a. The Act serves a well-established, legitimate government interest: the need of law enforcement officers in a safe and accurate way to process and identify persons and possessions taken into custody. “probable cause provides legal justification for arresting a suspect, and for a brief period of detention to take the administrative steps incident to arrest,” “validity of the search of a person incident to a lawful arrest” is settled. Individual suspicion is not necessary. The “routine administrative procedure[s] at a police station house incident to booking and jailing the suspect” have different origins and different constitutional justifications than, say, the search of a place not incident to arrest, “fair probability that contraband or evidence of a crime will be found in a particular place.” And when probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests. First, the government has an interest in properly identifying “who has been arrested and who is being tried.”

Criminal history is critical to officers who are processing a suspect for detention. They already seek identity information through routine and accepted means: comparing booking photographs to sketch artists’ depictions, showing mug shots to potential witnesses, and comparing fingerprints against electronic databases of known criminals and unsolved crimes. The only difference between DNA analysis and fingerprint databases is the unparalleled accuracy DNA provides. DNA is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police.

Second, officers must ensure that the custody of an arrestee does not create inordinate “risks for facility staff, for the existing detainee population, and for a new detainee.” DNA allows officers to know the type of person being detained.

Third, “the Government has a substantial interest in ensuring that persons accused of crimes are available for trials.” An arrestee may be more inclined to flee if he thinks that continued contact with the criminal justice system may expose another serious offense.
Fourth, an arrestee’s past conduct is essential to assessing the danger he poses to the public, which will inform a court's bail determination. Knowing that the defendant is wanted for a previous violent crime based on DNA identification may be especially probative in this regard.

Finally, in the interests of justice, identifying an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned.

b. DNA identification is an important advance in the techniques long used by law enforcement to serve legitimate police concerns. Police routinely have used scientific advancements as standard procedures for identifying arrestees. Fingerprinting, perhaps the most direct historical analogue to DNA technology, has, from its advent, been viewed as a natural part of “the administrative steps incident to arrest.” However, DNA identification is far superior. The additional intrusion upon the arrestee’s privacy beyond that associated with fingerprinting is not significant, and DNA identification is markedly more accurate. It may not be as fast as fingerprinting, but rapid fingerprint analysis is itself of recent vintage, and the question of how long it takes to process identifying information goes to the efficacy of the search for its purpose of prompt identification, not the constitutionality of the search. Rapid technical advances are also reducing DNA processing times.

6. The Respondent’s privacy interests do not outweigh the government's interest.

a. By comparison to the substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is minimal. Reasonableness must be considered in the context of an individual's legitimate privacy expectations, which necessarily diminish when he is taken into police custody. Such searches thus differ from the so-called special needs searches of, e.g., otherwise law-abiding motorists at checkpoints. The reasonableness inquiry considers two other circumstances in which particularized suspicion is not categorically required: “diminished expectations of privacy [and a] minimal intrusion.” An invasive surgery may raise privacy concerns weighty enough for the search to require a warrant, notwithstanding the arrestee’s diminished privacy expectations, but a buccal swab, which involves a brief and minimal intrusion with “virtually no risk, trauma, or pain,” does not increase the indignity already attendant to normal incidents of arrest.

b. The processing of the respondent’s DNA sample’s CODIS loci also did not intrude on his privacy in a way that would make his DNA identification unconstitutional. Those loci came from non-coding DNA parts that do not reveal an arrestee’s genetic traits and are unlikely to reveal any private medical information. Even if they could provide such information, they are not in fact tested for that end. Finally, the Act provides statutory protections to guard against such invasions of privacy.

(Dissenting opinion: Scalia, joined by Ginsburg, Sotomayor, Kagan)

1. The fourth Amendment forbade the searching of a person for the evidence of a crime where there was no basis for believing the person was guilty of the crime or was in possession of incriminating evidence. That prohibition was categorical and without exception; it lay at the very heart of the Fourth Amendment. Whenever the Court had allowed a suspicionless search, it insisted upon a justifying motive apart from the investigation of crime. It is obvious that no such non-investigative motive existed in this case. The Court’s assertion that DNA was being taken, not to solve crimes, but to identify those in the State’s custody, taxed the credulity of the credulous. The Court’s comparison of Maryland’s DNA searches to other techniques, such as fingerprinting, seemed apt only to those who knew no more than what the opinion chose to tell them about how those DNA searches actually worked.

2. If identifying someone meant finding out what unsolved crimes he had committed, then identification was indistinguishable from
the ordinary law enforcement aims that have never been thought to justify a suspicion-less search. The portion of the Court’s opinion that explained the identification rationale was strangely silent on the actual workings of the DNA search at issue here.

3. Taking the DNA samples from arrestees had nothing to do with identifying them and was confirmed not just by actual practice but also by the enabling statute itself. DNA testing did not even begin until after arraignment and bail decisions are already made. The Act forbade the Court’s purpose (identification), but prescribed as its purpose what the suspicion-less search cases forbade (“official investigation into a crime”). Against all of that, it is safe to say that the Court’s identification theory is not wrong.

Appeal Allowed, in light of the context of a valid arrest supported by probable cause the respondent’s expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks.

Properties Vested in Companies Are Held on Trust for a Husband and are Subject to Distribution as Matrimonial Property in the United Kingdom

Prest v Petrodel Resources Limited & Others [2013] UKSC 34
Supreme Court of the United Kingdom
Lord Neuberger (President), Lord Walker, Lady Hale, Lord Mance, Lord Clarke, Lord Wilson, Lord Sumption
June 12, 2013
Reported by Monica Achode

Issues:
- Whether the court has power to order the transfer of properties to the wife given that they legally belong not to the husband but to his companies

Family Law – marriage – dissolution of marriage – distribution of matrimonial property – where several of the assets were vested in a company owned by a husband – legal bases on which the assets of the companies might be available to satisfy the sum order against the husband - whether the court has power to order the transfer of these properties to the wife

Section 24(1)(a) of the Matrimonial Causes Act 1973 (“the 1973 Act”), the court may order that “a party to the marriage shall transfer to the other party...such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion.”

Brief History
This appeal arose out of proceedings for financial remedies following a divorce between MP and YP. The appeal concerned the position of a number of companies belonging to the Petrodel Group, which were wholly owned and controlled by MP, the husband. One of the companies was the legal owner of five residential properties in the UK and another was the legal owner of two more. The question on this appeal was whether the court had power to order the transfer of these seven properties to the wife given that they legally belonged not to the husband but to his companies.

In the High Court, Moylan J concluded that there was no general principle that entitled him to reach the companies’ assets by piercing the corporate veil. He nevertheless concluded that a wider jurisdiction to pierce the corporate veil was available under section 24 of the 1973 Act. In the Court of Appeal, three of the companies challenged the decision on the ground that there was no jurisdiction to order their property to be conveyed to the wife. The majority in the Court of Appeal agreed and criticized the practice of the Family Division of treating assets of companies substantially owed by one party to a marriage as available for distribution under section 24 of the 1973 Act.

Held:
1. There were three possible legal bases on which the assets of the companies might be available to satisfy the lump sum order against the husband:
   a. that this was a case where, exceptionally, the Court could disregard the corporate veil in order to give effective relief;
   b. that section 24 of the 1973 Act conferred a distinct power to disregard the corporate veil in matrimonial cases;
or

c. that the companies held the properties on trust for the husband, not by virtue of his status as sole shareholder and controller of the company, but in the particular circumstances of the case.

2. There was a principle of English law, which enabled a court in very limited circumstances to pierce the corporate veil. It applied when a person was under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evaded or whose enforcement he deliberately frustrated by interposing a company under his control. The court could then pierce the corporate veil but only for the purpose of depriving the company or its controller of the advantage which they would otherwise have obtained by the company's separate legal personality. The principle had no application in the case because the husband's actions did not evade or frustrate any legal obligation to his wife, nor was he concealing or evading the law in relation to the distribution of assets of the marriage upon its dissolution.

3. The Court rejected the argument that a broader principle applied in matrimonial proceedings by virtue of section 24(1)(a) of the 1973 Act. The section invoked concepts of the law of property with an established legal meaning, which could not be suspended or taken to mean something different in matrimonial proceedings. Nothing in the statutory history or wording of the 1973 Act suggested otherwise. General words in a statute were not to be read in a manner inconsistent with fundamental principles of law unless this result was required by express words or necessary implication. The trial judge's reasoning cut across the statutory scheme of company and insolvency law which were essential for protecting those dealing with companies.

4. The only basis on which the companies could be ordered to convey properties to the wife was that they belonged beneficially to the husband, by virtue of the particular circumstances in which the properties came to be vested in them. After examining the relevant findings about the acquisition of the seven disputed properties, the most plausible inference from the known facts was that each of the properties was held on resulting trust by the companies for the husband. The trial judge found that the husband had deliberately sought to conceal the fact in his evidence and failed to comply with court orders with particular regard to disclosing evidence. Adverse inferences could therefore be drawn against him. The Court inferred that the reason for the companies' failure to co-operate was to protect the properties, which suggested that proper disclosure would reveal them to beneficially owned by the husband. It followed that there was no reliable evidence to rebut the most plausible inference from the facts.

The Supreme Court unanimously allowed the appeal by YP and declared that the seven disputed properties vested in the companies were held on trust for the husband on the ground that these properties were held by the husband's companies on a resulting trust for the husband, and were accordingly “property to which the [husband] was entitled, either in possession or reversion”.

NGO's Based in the U.S.A Must Have Policies Explicitly Opposing Prostitution in Order to Receive Federal Funding for Programs to Combat HIV/AIDS

Agency for International Development et. al. v. Alliance for Open Society International Inc et. al.


June 20, 2013

Reported by Monica Achode

Issue:

- Whether the requirement by Congress that non-governmental organizations institute an explicit anti-prostitution policy in order to receive federal funding violated the First Amendment

Constitutional Law – breach of fundamental bill of rights – infringement of the petitioners First Amendment right
to freedom of speech and to petition the government for a redress of grievances – where Congress had authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to combat HIV/AIDS worldwide – where recipients of the funds had to adhere to two conditions imposed by Congress - whether the requirement by Congress that non-governmental organizations institute an explicit anti-prostitution policy in order to receive federal funding violated the First Amendment

In the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), Congress authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to combat HIV/AIDS worldwide. The Act imposed two related conditions:

1. No funds “may be used to promote or advocate the legalization or practice of prostitution,” and

2. No funds may be used by an organization “that does not have a policy explicitly opposing prostitution,”

The Policy Requirement mandates that recipients of Leadership Act funds explicitly agree with the Government’s policy to oppose prostitution and sex trafficking. It is, however, a basic First Amendment principle that “freedom of speech prohibits the government from telling people what they must say. As a direct regulation, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition of federal funding.

The respondents, recipients of Leadership Act funds who wished to remain neutral on prostitution, sought a declaratory judgment that the Policy Requirement violated their First Amendment rights. The District Court issued a preliminary injunction, barring the Government from cutting off the respondents’ Leadership Act funding during the litigation or from otherwise taking action based on their privately funded speech. The Second Circuit affirmed, concluding that the Policy Requirement, as implemented by the agencies, violated the respondents’ freedom of speech.

US Constitution First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Held:
(Majority Decision: Roberts, joined by, Kennedy, Ginsburg, Breyer, Alito and Sotomayor, JJ)

1. The Policy Requirement violated the First Amendment by compelling as a condition of federal funding the affirmation of a belief that by its nature could not be confined within the scope of the Government program. The Policy Requirement mandated that recipients of federal funds explicitly agree with the Government's policy to oppose prostitution. The First Amendment, however, prohibited the government from telling people what they must say. As a direct regulation, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition of federal funding.

2. The Spending Clause granted Congress broad discretion to fund private programs or activities for the general welfare, including authority to impose limits on the use of such funds to ensure they are used in the manner Congress intended. As a general matter, if a party objected to those limits, its recourse was to decline the funds. In some cases, however, a funding condition could result in an unconstitutional burden on First Amendment rights. The distinction that emerged was between conditions that defined the limits of the Government spending program - those that specify the activities Congress wanted to subsidize - and conditions that sought to leverage funding to regulate speech outside the contours of the federal program itself.

3. The distinction between the conditions that defined a federal program and those that reached outside it was not always self-evident, but the Court was confident that the Policy Requirement fell on the unconstitutional side of the line. To begin with, the Leadership Act’s other funding condition, which prohibited Leadership Act funds from being used “to
promote or advocate the legalization or practice of prostitution or sex trafficking” ensured that federal funds would not be used for prohibited purposes. The Policy Requirement thus had to be doing something more—and it was. By demanding that funding recipients adopt and espouse, as their own, the Government’s view on an issue of public concern, the Policy Requirement by its very nature affected “protected conduct outside the scope of the federally funded program.” A recipient could not avow the belief dictated by the condition when spending Leadership Act funds, and assert a contrary belief when participating in activities on its own time and dime.

4. The Government suggested that if funding recipients could promote or condone prostitution using private funds, “it would undermine the government’s program and confuse its message opposing prostitution.” But the Policy Requirement went beyond preventing recipients from using private funds in a way that would undermine the federal program. It required them to pledge allegiance to the Government’s policy of eradicating prostitution. That condition on funding violated the First Amendment.

(Dissenting opinion: Scalia, joined Thomas)

5. The Leadership Act provided that any group or organization that did not have a policy explicitly opposing prostitution and sex trafficking could not receive funds appropriated under the Act. This Policy Requirement was nothing more than a means of selecting suitable agents to implement the Government’s chosen strategy to eradicate HIV/AIDS. That was perfectly permissible under the Constitution. The First Amendment did not mandate a viewpoint neutral government. Government must choose between rival ideas and adopt some as its own. Moreover, the government could enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or did not support the ideas. That seemed a matter of the most common sense.

6. The argument was that this commonsense principle would enable the government to discriminate against, and injure, points of view to which it was opposed. Of course the Constitution did not prohibit government spending that discriminated against, and injured, points of view to which the government was opposed; every government program, which took a position on a controversial issue, did that. The constitutional prohibition at issue here was not a prohibition against discriminating against or injuring opposing points of view, but the First Amendment’s prohibition against the coercing of speech. It was dubious that a condition for eligibility to participate in a minor federal program such as this one ran afoul of that prohibition even when the condition was irrelevant to the goals of the program. Not every disadvantage was coercion.

7. The majority could not credibly say that this speech condition was coercive, so it did not. It tread softly around the lack of coercion by invalidating the Leadership Act for requiring recipients to profess a specific belief and demanding that funding recipients adopt—as their own—the Government’s view on an issue of public concern. The Government’s “requiring” and “demanding” had no coercive effect. In the end, and in the circumstances of this case, compelling as a condition of federal funding the affirmation of a belief was no compulsion at all. It was the reasonable price of admission to a limited government-spending program that each organization remained free to accept or reject. Section 7631(f) “defined the recipient” only to the extent he decided that it was in his interest to be so defined.

8. Congress could, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem. The challenged regulations were simply designed to ensure that the limits of the federal program were observed, and that public funds were spent for the purposes for which they were authorized. The regulations did not prohibit the recipient from engaging in the protected conduct outside the scope of the federally funded program, they did not run afoul of the First Amendment.
9. The Government was not forcing anyone to say anything. What Congress had done - requiring an ideological commitment relevant to the Government task at hand - was approved by the Constitution itself. Americans did not need to support the Constitution; they could be communists or anarchists. But the Senators and Representatives, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, were bound by Oath or Affirmation, to support the Constitution. The Framers saw the wisdom of imposing affirmative ideological commitments prerequisite to assisting in the government’s work.

US Supreme Court Declares Section 3 of the Defense of Marriage Act (DOMA) which Defines Marriage to Exclude Same-Sex Partners, Unconstitutional

United States v Windsor, Executioner of the Estate of Spyer et. al 12-307
Supreme Court of the United States
June 26, 2013
Reported by Monica Achode

Issue:
Whether Section 3 of the Defense of Marriage Act, which defined the term “marriage” for all purposes under federal law as “only a legal union between one man and one woman as husband and wife,” deprived same-sex couples who were lawfully married under the laws of their states (such as New York) of the equal protection of the laws, as guaranteed by the Fifth Amendment to the Constitution of the United States.

Fifth Amendment, US Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 3 of the Defense of Marriage Act (DOMA)

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.

Brief History

Edith Windsor and Thea Spyer, a same-sex couple residing in New York, were lawfully married in Ontario, Canada in 2007 under the provisions set forth in the Canadian Civil Marriage Act. The validity of their marriage was subsequently recognized by New York under common-law principles of comity. The State of New York recognized the marriage. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the federal estate tax exemption for surviving spouses, but was barred from doing so by section 3 of the federal Defense of Marriage Act (DOMA), which amended the Dictionary Act—a law providing rules of construction for over 1,000 federal laws and the whole realm of federal regulations—to define “marriage” and “spouse” as excluding same-sex partners. Windsor paid $363,053 in estate taxes and sought a refund, which the Internal Revenue Service denied.

Windsor brought this refund suit, contending that DOMA violated the principles of equal protection incorporated in the Fifth Amendment. While the suit was pending, the Attorney General notified the Speaker of the House of Representatives that the Department of Justice would no longer defend section 3’s constitutionality. In response, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend section 3’s constitutionality. The District Court permitted the intervention. On the merits, the court ruled against the United States, finding section 3 unconstitutional and ordering the Treasury to refund Windsor’s tax with
interest. The Second Circuit affirmed, whereupon the matter was brought to the Supreme Court.

Held:
(Majority opinion by Kennedy, Ginsburg, Breyer, Sotomayor and Kagan)

1. The Court had jurisdiction to consider the merits of the case. It clearly presented a concrete disagreement between opposing parties that was suitable for judicial resolution in the District Court, but the Executive's decision not to defend section 3's constitutionality in court while continuing to deny refunds and assess deficiencies introduced a complication. Given the Government's concession, amicus contended, once the District Court ordered the refund, the case should have ended and the appeal been dismissed. But this argument elided the distinction between Article III's jurisdictional requirements and the prudential limits on its exercise, which were essentially matters of judicial self-governance. Here, the United States retained a stake sufficient to support Article III jurisdiction on appeal and in this Court. The refund it was ordered to pay Windsor was a real and immediate economic injury, even if the Executive disagreed with section 3 of DOMA. Windsor's ongoing claim for funds that the United States refused to pay thus established a controversy sufficient for Article III jurisdiction.

2. Prudential considerations, however, demanded that there be concrete adverseness, which sharpened the presentation of issues upon which the court so largely depended for illumination of difficult constitutional questions. Unlike Article III requirements—which had to be satisfied by the parties before judicial consideration was appropriate—prudential factors that counsel against hearing this case were subject to countervailing considerations that might outweigh the concerns underlying the usual reluctance to exert judicial power. One such consideration was the extent to which adversarial presentation of the issues was ensured by the participation of amici curiae prepared to defend with vigor the legislative act's constitutionality.

3. BLAG's substantial adversarial argument for section 3's constitutionality satisfied prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agreed. This conclusion did not mean that it was appropriate for the Executive as a routine exercise to challenge statutes in court instead of making the case to Congress for amendment or repeal. But this case was not routine, and BLAG's capable defense ensured that the prudential issues did not cloud the merits question, which was of immediate importance to the Federal Government and to hundreds of thousands of persons.

4. DOMA was unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States. Congress had enacted discrete statutes to regulate the meaning of marriage in order to further federal policy, but DOMA, with a directive applicable to over 1,000 federal statues and the whole realm of federal regulations, had a far greater reach. Its operation was also directed to a class of persons that the laws of New York, and of 11 other States, sought to protect. Assessing the validity of that intervention required discussing the historical and traditional extent of state power and authority over marriage.

5. The State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. But the Federal Government used the state-defined class for the opposite purpose—to impose restrictions and disabilities. The question was whether the resulting injury and indignity was a deprivation of an essential part of the liberty protected by the Fifth Amendment, since what New York treated as alike the federal law deemed unlike by a law designed to injure the same class the State sought to protect. New York's actions were a proper exercise of its sovereign authority. They reflected both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

6. By seeking to injure the very class New York sought to protect, DOMA violated basic due process and equal protection principles applicable to the Federal Government. The
Constitution’s guarantee of equality had to at the very least mean that a bare congressional desire to harm a politically unpopular group could not justify disparate treatment of that group. DOMA could not survive under these principles. Its unusual deviation from the tradition of recognizing and accepting state definitions of marriage operated to deprive same-sex couples of the benefits and responsibilities that come with federal recognition of their marriages. This was strong evidence of a law having the purpose and effect of disapproval of a class recognized and protected by state law. DOMA’s avowed purpose and practical effect were to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

7. DOMA’s history of enactment and its own text demonstrated that interference with the equal dignity of same-sex marriages, conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. BLAG’s arguments were just as candid about the congressional purpose. DOMA’s operation in practice confirms this purpose. It frustrated New York’s objective of eliminating inequality by writing inequality into the entire United States Code. DOMA’s principal effect was to identify and make unequal a subset of state-sanctioned marriages. It contrived to deprive some couples married under the laws of their State, but not others, of both rights and responsibilities, creating two contradictory marriage regimes within the same State. It also forced same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.

The judgment of the Court of Appeals for the Second Circuit affirmed.

(Dissenting Opinion by Roberts joined by Scalia, Thomas, Alito)

8. Per Roberts: The Supreme Court lacked jurisdiction to review the decisions of the courts below. On the merits of the constitutional dispute Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress’s decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world.

9. The majority extensively chronicled DOMA’s departure from the normal allocation of responsibility between State and Federal Governments, emphasizing that DOMA rejected the long-established precept that the incidents, benefits, and obligations of marriage were uniform for all married couples within each State. But there was no such departure when one State adopted or kept a definition of marriage that differed from that of its neighbor, for it was entirely expected that state definitions would vary, subject to constitutional guarantees, from one State to the next. Thus, while the State’s power in defining the marital relation was of central relevance to the majority’s decision to strike down DOMA, that power would come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too would the concerns for state diversity and sovereignty that weigh against DOMA’s constitutionality in this case.

10. The Supreme Court would in the future have to resolve challenges to state marriage definitions affecting same-sex couples. That issue, however, was not before the court in the case, and it lacked jurisdiction to consider it.

11. Per Scalia & Thomas: The case was about power in several respects. It was about the power of the people to govern themselves, and the power of the Court to pronounce the law. The opinion aggrandized the latter, with the predictable consequence of diminishing the former. The Supreme Court had no power to decide the case. And even if it did, it had no power under the Constitution to invalidate this democratically adopted legislation. The Court’s errors on both points sprung forth from the same diseased root: an exalted conception of the role of this institution in America.

12. The judicial Power was not, as the majority
believed, the power to say what the law was giving the Supreme Court the “primary role in determining the constitutionality of laws. The majority must have had in mind one of the foreign constitutions that pronounced such primacy for its constitutional court and allowed that primacy to be exercised in contexts other than a lawsuit. Judicial power was the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government or other private persons. Sometimes (though not always) the parties before the court disagreed not with regard to the facts of their case (or not only with regard to the facts) but with regard to the applicable law—in which event (and only in which event) it became the province and duty of the judicial department to say what the law was.

13. **Per Alito**: What Windsor and the United States sought was not the protection of a deeply rooted right but the recognition of a very new right. They sought this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges had cause for both caution and humility. Judges were certainly not equipped to make such an assessment. The Members of the Court had the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be its duty to enforce that right. But the Constitution simply did not speak to the issue of same-sex marriage. In the American system of government, ultimate sovereignty rested with the people, and the people had the right to control their own destiny. Any change on a question so fundamental was to be made by the people through their elected officials.

14. The approach that Windsor and the United States advocate was misguided. The equal protection framework, upon which Windsor and the United States relied, was a judicial construct that provided a useful mechanism for analyzing a certain universe of equal protection cases. But that framework was ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turned on what marriage was.

15. Underlying the equal protection jurisprudence was the central notion that a classification had to be reasonable, not arbitrary, and had to rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced would be treated alike. The modern tiers of scrutiny—on which Windsor and the United States relied so heavily—were a heuristic to help judges determine when classifications had that fair and substantial relation to the object of the legislation.

16. The so-called rational-basis review applied to classifications based on “distinguishing characteristics relevant to interests the State had the authority to implement.” The equal protection of the laws had to coexist with the practical necessity that most legislation classified for one purpose or another, with resulting disadvantages to various groups or persons. As a result, in rational-basis cases, where the court did not view the classification at issue as inherently suspect, the courts were been very reluctant, as they ought to have been in the federal system and with the respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.

In a 5–4 decision issued on June 26, 2013, the Supreme Court found Section 3 of DOMA to be unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment.
**Procedure to be Followed by the United Kingdom Government When Dealing with Under Age Immigrants**

R (on the Application of AA) v Secretary of State for the Home Department [2013] UKSC 49

Supreme Court of the United Kingdom

Lord Neuberger (President), Lord Clarke, Lord Wilson, Lord Carnwath and Lord Toulson

July 10, 2013

Reported by Monica Achode

**Issue:**

Whether section 55 of the Immigration Act 1971 rendered the Appellant’s detention for a period of 13 days unlawful, in circumstances in which the Respondent acted in the mistaken but reasonable belief that the Appellant was aged over 18.

**Background to the Appeal**

The Immigration Act 1971, Schedule 2, paragraph 16(2) ("paragraph 16") empowered the Respondent, acting through immigration officers, to detain a person if there was reasonable ground to suspect that he was liable to be removed as an illegal entrant to the United Kingdom. Section 55 of the Borders, Citizenship and Immigration Act 2009 ("section 55") imposed duties regarding the welfare of children on the Secretary of State and immigration officers in all immigration matters. The issue on this appeal was whether section 55 rendered the Appellant’s detention for a period of 13 days under paragraph 16 unlawful, in circumstances in which the Respondent acted in the mistaken but reasonable belief that the Appellant was aged over 18.

The Appellant, born in Afghanistan, arrived in the United Kingdom on 8 October 2008 whilst concealed in a lorry. When caught and arrested, he said that he was aged 14 and claimed asylum. However, the following day he was assessed as being over the age of 19 by social workers from Hampshire County Council. He was granted temporary admission and released from immigration detention, but on 6 November 2008 the Respondent refused his asylum claim and issued a decision to remove him as an illegal entrant. On 1 March 2010 the Immigration and Asylum Chamber of the First Tier Tribunal dismissed his appeal against that decision, during the course of which it concurred with the view that the Appellant was aged over 18.

On 7 July 2010, the Respondent detained the Appellant under paragraph 16 and set directions for his removal to Afghanistan on 20 July 2010. On the latter date, the Appellant sought judicial review in relation to several matters based on his assertion that his age had been wrongly assessed. On the same day, the implementation of his removal was stayed and he was released from detention into the care of Cardiff City Council ("Cardiff"). In August 2010, Cardiff carried out a fresh age assessment, as a result of which they accepted that the Appellant was born on 1 February 1993. Assuming that to be correct, the Appellant would have been aged 15 upon his arrival in the United Kingdom and aged 17 when detained on 7 July 2010. The Respondent accepted Cardiff’s fresh age assessment. Cardiff duly provided him with accommodation and associated support in accordance with his status as a child.

Had the Respondent known of the Appellant’s true age, she would not have detained him on 7 July 2010, as to do so would have been contrary to the Respondent’s policy in relation to minors. The Respondent proceeded with his claim for judicial review against the Secretary of State. His case was that the fact of his age at the time of his detention made that detention unlawful under section 55 as his welfare was not taken into account, and that the Respondent’s reasonable belief that he was over the age of 18 was no defence to that claim. His claim was dismissed by the High Court and subsequently by the Court of Appeal, whereupon he appealed to the Supreme Court.

**Held**

1. It was well established that the courts took a strict approach when construing statutory powers of executive detention. Against that background, as there was no dispute that the Appellant fell within the ambit of paragraph 16, the question was whether there was a material breach of section 55. If there was, the Appellant’s detention was unlawful.

2. Under section 55, the Respondent had a direct and a vicarious responsibility. With regard to the former, she had to make arrangements for a specified purpose, namely that immigration functions were discharged in a way which had regard to the need to safeguard and promote the welfare of children ("the welfare
principle”). Though not an easy thing to achieve, this included establishing proper systems for arriving at a reliable assessment of a person’s age. With regard to her vicarious responsibility, the Respondent was responsible for any failure by those exercising her functions on her behalf, such as immigration officers, to have regard to the guidance given by her or to the welfare principle.

3. The relevant guidance in place for assessment of a person’s age in relation to the Respondent’s immigration functions, which was careful and detailed, complied with her direct responsibility under section 55 to safeguard and promote the welfare of children in the context of her immigration functions. Further, the Respondent’s vicarious responsibility has been discharged appropriately, as there was no basis in this case for finding that there was a failure by any official to follow the Respondent’s guidance. It followed that there had been no breach of section 55 and that her exercise of the detention power under paragraph 16 was lawful.

4. The Court was not persuaded that section 55 required to be interpreted in the way that the Appellant contended for in order to provide adequately for the welfare principle. Further, its natural construction did not render it inconsistent with article 5 of the European Convention on Human Rights or article 3 of the United Nations Convention on the Rights of the Child. Though the risk of an erroneous age assessment could never be eliminated, it could be minimized by a careful process. In that regard, the Respondent’s guidance required that the benefit of the doubt be given to the claimant at the stage of the initial assessment and that the Respondent consider any fresh evidence arising thereafter. Further, a particular age assessment could be challenged by way of judicial review. Detention of a child under paragraph 16 in the mistaken but reasonable belief that he was over 18 was therefore not in itself a breach of section 55.

5. An ancillary question was whether, in the event that a claimant sought judicial review of his detention solely in respect of the Respondent’s actions in detaining him and not in respect of those of the local authority whose social services team carried out the age assessment, the court could freshly determine the age of the claimant rather than simply determining whether the Respondent had acted lawfully. Though that question did not arise directly for decision in this case, the Court was sympathetic to the view that the habeas corpus jurisdiction of the court, which had provided a remedy against unlawful detention since ancient times, would indeed allow it to make a fresh determination of claimant’s age. Such a determination would necessarily impact on the lawfulness of the claimant’s detention.

The Supreme Court unanimously dismissed AA’s appeal.

Haters will broadcast your failure but whisper your success.
~ Pokot Proverb
Impact Sourcing, a concept developed by the Rockefeller Foundation under the PRIDE initiative, is the socially responsible arm of the Business Process Outsourcing (BPO) and Information Technology Outsourcing industry, that intentionally employs people who have limited opportunity for sustainable employment—often in low-income areas.

In July 2013, Kenya Law signed a contract with DDD an Impact Sourcing Service Provider, i.e. to convert current and past editions of the Kenya Gazette into a format that makes them easily publishable and accessible on Kenya Law’s website. The work was part of an initiative in Kenya Law titled Improving Public Access to Information through Impact Sourcing – IMPACT-IS that is supported by a grant from the Rockefeller Foundation’s Poverty Reduction through Information and Digital Employment (PRIDE) initiative.

This was the first initiative in the government of Kenya to employ impact sourcing principles. Kenya’s Public Procurement (Preference and Reservations) Regulations, 2011 and Legal notice number 114 of 2013 allows for government institutions that seek to procure goods and services to give preference to enterprises owned by the youth, women and people with disabilities. More recently, the regulations have been amended to make it mandatory for government institutions to allocate at least thirty percent of their procurement budget for the purposes of procuring goods, works and services from such enterprises. With Impact Sourcing, this has been made available to Kenya Law.

Why Impact Sourcing? -- The Issue – Rising World Population in Need of Employment

One of the extreme issues facing Kenya is an increasing population in need of employment. Nearly half (46%) of Kenyans live below the poverty line. It is estimated that vulnerable persons, who include persons with disabilities, orphans and vulnerable children, the elderly, offenders and ex-offenders, widows, widowers, internally and externally displaced persons, marginalized persons and pastoralists living in the Arid and Semi Arid Lands (ASAL), comprise about 40% of the total population. By 2006 estimates, the primary working-age population (15-64 years) in Kenya was about 19.2 million, which is 54.2% of the total population. Out of these, 14.6 million were labour market participants of which 11.9 million were employed while 1.7 million were openly unemployed. 1.3 million (72%) of the unemployed were young people below the age of 30 years while 51% of the unemployed were below 24 years of age. This shows that there is a rapid growth rate of the young entering the labour force creating a substantial percentage of the population. To increase employment, Vision 2030 targets the creation of an additional 3.5 million jobs within the next five years. To engage youths entering the workforce and help minimise unemployment among the young by 5%, over 700 million jobs will need to be created by 2020.

Kenya Law has played its part by partnering with DDD to provide employment opportunities to the socially economically disadvantaged. Digital Divide Data (DDD), through this project, has built the skill sets of its staff (approximately 16 staff in total).
and helped them establish promising professional careers in the global economy, in the information technology sector.

**So, What Next?**

In order to move this enterprise onward and for it to advance impetus and develop a vital part of the outsourcing sector, a number of activities need to be taken.

1. **Increase awareness of Impact Sourcing.** Kenya Law needs to, and is in the process of engaging with other professional organizations, particularly those in the field of outsourcing to help spread the understanding of the Impact Sourcing model, and show how organizations, and especially in the public sector can engage these services fruitfully.

2. **Broader Community Impact**

Kenya Law will continue, through the new reservations and regulations law, to provide increased access to meaningful jobs to increase the livelihood opportunities of the disadvantaged individuals as well as their surrounding community.

3. **Expand the definition of Impact Sourcing.** Impact Sourcing at Kenya Law will focus on sourcing employees from uniquely disadvantaged groups at any organization, rather than only focusing on outsourcing, as per the Procurement Reservations and Regulations.

4. **Seek to scale Impact Sourcing.** Kenya Law will leverage alliances with other players in the industry, such as the KITOS, and the BPO working group and other large-scale traditional outsourcers who have access to large client contracts, and focus Impact Sourcing operations with an intention to scale in areas with an established outsourcing center.

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When a child is asleep, a mother’s attention is on the child’s stomach. ~**African Proverb**
Parliament recently passed a new Procurement Preference and Reservation Bill through legal notice No. 114 of 18th June, 2013, and the Public Procurement and Disposal (County Governments (Regulations), 2013. This is an important endeavour for Kenya Law since it complements the Impact Sourcing initiatives Kenya law has been implementing for the last few years. The objectives of this P&R scheme are:

- To ensure youth have economic opportunities
- To ensure the minorities and the marginalized have special economic opportunities
- To facilitate the promotion of the local industry and economic development
- To protect persons, groups previously disadvantaged by unfair competition or discrimination,
- To promote equitable development and special provision for marginalized groups/areas.

These are made possible through the following regulations:

1. Public Procurement and Disposal (Preference and Reservations) Regulations, 2011
3. Public Procurement and Disposal (County Governments (Regulations), 2013.

Overview of the Public Procurement and Disposal Act, 2005 & its attendant regulations

The target groups include

- Small enterprises
- Micro enterprises

- Disadvantaged groups (Physically disabled, youth & women)
- Citizen contractors
- Local contractors; and
- Citizen contractors in Joint Venture or Sub-Contracting arrangements with foreign suppliers

Eligibility Criteria for these groups

- Tenderer must have legal capacity, qualifications, experience and resources where applicable
- Must belong to a target group
- Registered with the national treasury: For the purpose of benefiting from preference and reservations schemes, an enterprise owned by youth, women or persons with disabilities shall be a legal entity that—(a) is registered with the relevant government body; and (b) has at least seventy percent membership of youth, women or persons with disabilities and the leadership shall be one hundred percent youth, women and persons with disability, respectively. Note Registration is by National treasury or county treasury: both lists to be submitted to the Authority for consolidation & publication
- Is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;
- If foreigners; must be in joint-venture or sub-contracting arrangements with citizens
- Not debarred under part IX of the Act
- Not precluded under Section 33 of the Act

Local Preference and Reservations

Implementing the revised Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013 Legal Notice No. 114 of 18th June, 2013 and the Public Procurement and Disposal (County Governments (Regulations), 2013.

By Lydia Midecha
Strategic Planning Department
Groups into lots, quantities affordable is highly encouraged.
• Only Tender Securing Declaration required instead of tender security
• Target group candidate entitled to such benefits for a period of five years renewable for a further one more term.
• Competition is limited to target group and same requirement must be stated in invitation notice
• Procuring Entities shall use framework contracting arrangement with SMEs and disadvantaged groups where applicable
• A procuring entity shall allocate at least 30% of its procurement spend for the purposes of procuring goods, works and services from micro and small enterprises owned by youth, women and persons with disability.
• A procuring entity shall implement the requirement above through its budgets, procurement plans, tender notices, contract awards and submit quarterly reports to the Authority.
• For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as a preliminary evaluation criteria for all foreign tenderers’ participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender
• Compliance Monitoring:
  • PPOA shall monitor the schemes and maintain a register of SMEs and disadvantaged groups
  • Procuring Entities shall integrate schemes in procurement plans and submit the relevant part to PPOA within 60 days of commencement of Financial Year
  • All procurement awards where preference or reservations schemes are applied must be reported to PPOA on quarterly basis

In nutshell, what is expected of Kenya Law as an Organisation is;
1. Ensure that SMEs or Disadvantaged Group are registered with the Ministry of Finance - this can be done directly at the national treasury or through the County supply chain offices;
2. Ensure that we incorporate the preference and reservations in the eligibility & evaluation Criteria at the bid document preparation
3. Facilitate for financing of local purchase or service orders
4. Prompt payment of performed contracts (within 30 days)
5. Integrate preference and reservations schemes in their procurement plans;
6. Submit to the Authority the part in its procurement plan demonstrating application of preference and reservations schemes in relation to the procurement budget within (60) sixty days after commencement of the financial year;
7. Report procurement awards by procuring entities where a preference or reservation scheme was applied shall be reported to the Authority on a quarterly basis

What Next for Kenya Law?
Kenya Law, in its bid to implement and institutionalize these regulations, will implement the following measures:

a. Procurement Plan
Ensure that it specifies, in its procurement plan, (which is to be sent to PPOA 60 days after the budget has been read), that it will use the preference and reservations methods in 30% of its procurement throughout the year. In its procurement plan, the organisation can specify which types of work can be given to the target groups that are general e.g. supply of stationery

b. Documents and Documentation
Ensure that it maintains a list of the target groups and rotate provision of opportunities. Through documenting this, Kenya Law will have a database of possible suppliers in its tender documents, adverts and RFP’s the organisation has to ensure specifications are made clear on the document. For example, the advert can restrict bidders to youth owned organisations, or other target groups, to encourage competition.

c. Unbundling
Kenya Law will, where possible, unbundle specific works into smaller portions to ensure maximum participation of disadvantaged groups, small and micro-enterprises. This can be done by establishing cost, and economy and efficiency of procurement of such unbundled quantities and basing the quantities on the assessed technical and financial capabilities of target groups and factor the same in procurement plan.

A family is like a forest, when you are outside it is dense, when you are inside you see that each tree has its place.~ African Proverb
Volunteerism in the Judiciary

By Stanley Mutuma.

[Legal researcher, Office of the Chief registrar of the Judiciary], Volunteer as Chairman of the Kenya sports for the visually impaired association

It was decided that Kenya, being a major sporting nation not only in Africa but competing favorably in the world, combined with the prevailing peaceful environment and comparatively better facilities it would be a good place to begin renaissance of blind sports in Africa.

I received invitation to travel to the general assembly conference in Copenhagen, Denmark as the chairman of the Kenya blind sports association. Sports is a big tool for development, economically, socially and also as a tool for harmonizing the society. One can attribute much value to be gained through the development and participation of sports whether as a player or spectator, professional or amateur.

During the general assembly conference, I made a presentation basing it on our current position in Africa and where we want to be in the future. I argued the position for Kenya, and the reasons it should be considered to be the hub for Blind sports in the region.

The new IBSA board has seen to rectify the situation. During the IBSA, policy meeting held in Nairobi, prior to the IBSA general assembly also held in Nairobi, from the 19\textsuperscript{th} to 21\textsuperscript{st} of July, several resolutions were passed after fruitful deliberations with the major stakeholders involved in the sector. The policy framing meeting involved stakeholders including the African Paralympic committee, key potential partners/ sponsors, African IBSA, members etc. The policy framing meeting was important coming a couple of weeks before the general assembly, in order to have the continent matters/issues pointed out to the conference members at the general assembly.

Why volunteerism in the judiciary?
The judiciary as an arm of the government should not only be concerned about settling dispute and promotion of the rule of law and other judicial functions to which it is mandated to perform. As an integral part of society and government, the judiciary is also made up of persons, who make up part of the society. To this end it is also tasked with the responsibility of ensuring that the personnel working here and also the public at large perceive the institution as one that is people centered. A notion that is in line with one of its
pillars to be; a people’s centered judiciary.

Therefore beholding the staff of the judiciary to volunteer personally and the judiciary as an institution in activities that are beneficial to the society at large in a model of a company’s “corporate social responsibility program”

The benefits of an individual or a corporate to engage in such activities are many and varied. Firstly it is a way of giving back to the society, especially in the African context. A society is deemed to be the center of our lives and it is the society that one is brought to serve in whatever capacity or talent he is endowed with. Secondly, it helps play a mentorship role to the younger generations showing an example of leadership and responsibility. A virtue that is most necessary and vital if the health and wellbeing of a society and nation is to be maintained and perpetuated. Thirdly, the society can then identify with the individual and organization that is supporting such worthy causes and thus endearing the party to the society/community.

Notably one need not be wealthy or rich in order to be part of a volunteer activity. The intention coupled with the will often acts as the impetus to do so. i.e. one can offer their services, time and experience and in all this causes one notes that, finances are not mentioned. The bottom line is; that one can always find a role that will be of great value, to the organization which he or she is donating their efforts to. Not to mention there is much to benefit for the donor including but not limited to value of gaining new friendship and acquaintances, spiritual fulfillment, inspiration etc.

Volunteerism is a virtue that has been practiced in many parts of the world, and is now being managed in a more professional way in order to derive maximum benefits for both parties. The term now being referred to is “partnership” as opposed to “sponsorship”. The reason being that it is a relationship which should be based on both parties developing together in different capacities. Therefore this is a rallying call for all in the judiciary to embrace the virtue of volunteerism in any capacity for a better tomorrow and also boost the image of the judiciary in the society.

Do not look where you fell, but where you slipped. ~ African Proverb
Continous In-House Training for Law Reporting Department On Editorial Proccesses

By Lisper Njeru
Law Reporting Department

In line with the Editorial Transformation Framework the Council facilitated an in-house training for members of the Law Reporting department at the Ole Sereni Hotel on the 27th of May 2013. The training involved identifying law reform issues, capturing cases raising difference in judicial reasoning, capturing lost jurisprudence and anonymising cases which was presented by Linda and Monica of the Research and Development Department.

The rest of the training was mostly conducted by members of the Law Reporting Department who included Emma Kinya who trained on the case back service offered to all judicial officers informing them of their previous decisions which have been considered by a court of higher jurisdiction or where a case has been partly heard by one judge and later concluded by another judge. Andrew Halonyere and Phoebe Jumah also trained on anonymisation processes and guidelines and technical proofreading respectively.

Members of the inventory unit were also trained on how to use the new Case Law database. This database will enable the easy inventorying of cases and publishing them online as we receive them. Previously we would receive cases, inventory them, then on another platform do their formatting before sending them to the ICT department to upload them to our website. This would lead to delays in having cases put up on our website. With the new system, we shall be receiving
cases, inventorying them then publishing them to our website immediately. This will ensure that cases are put up immediately as no delays on recent cases shall be experienced. The public too shall be able to access cases on our website as they come in.

The new database shall also make work easier by generating reports. Previously, if a judge requested for a report on the number of cases that he or she had delivered, we would manually go through the database trying to get the exact number by going through the pages. With the new database, when judge requests for cases he has heard at a certain period of time, we are able to generate a report immediately.

The new database enables members of the department to track cases and determine the person who worked on the same. When there are errors, one is able to flag back a case to the originator who is required to rectify the error and send it back for continuation of the workflow process.

On the overall, the new database is user-friendly, and we hope that with it, we shall be able to serve the public in a better way.

**CAUSE LIST TRAINING**

The cause list has come a long way since the beginning of the Council. Way back, we only used to upload only Nairobi law courts, Milimani Commercial Courts High Courts, Tax division and Nairobi Magistrates’ courts cause lists only. Today, Kenya Law
boasts uploading almost 90% of cause list around Kenya, both High Court and Magistrates Courts. This necessitated the Council to upgrade in the way we upload the cause list.

The members of staff who upload the daily cause list attended a training where they were taught how to upload the cause lists that come in table format so that they appear complete with the table. Previously, the cause lists that came in table format would be copied and pasted from MS Word to notepad. This would make the tables disappear. The layout would look disorganized and one would not easily understand where the cases should appear.

In the new system, we shall be using HTML and dream weaver softwares. This will ensure that the tables are captured and when uploaded, they will look much neater.

The cause list will be much user-friendly and the public will be able to easily search for their matters.
It is amazing that children at a tender age have a sense of justice. The sight of a little girl at Kibagare slums in Nairobi, Kenya, using a bottle top to divide a plate of rice among her friends equally, trivial as it may seem left a mark on me. It opened my eyes to the realization that justice is a virtue which can be cultivated with time and age. What is the true essence of justice? One of the most renowned Dialogues of Plato, The Republic, delves into the topic of justice.

The essence of the ‘Republic’ in the Dialogues of Plato is the quest for the meaning of justice. It seeks to find whether justice is good in itself and what laws should be enacted to ensure the carriage of justice. In a broader sense, he seeks to define what constitutes Justice in a given State and whether the concept can be determined by citizens of the State. Today, there are varied answers as to what justice really constitutes but the appreciation of the thinking of Socrates, Plato and many of their followers at the time gives a benchmark as to the truth about justice. It cannot be overlooked by modern philosophers and the legal fraternity.

In Book 1 of the Republic, Plato poses the question what is justice? Is justice to give back what is owed to each person? How does a son repay his father for an inheritance? Is it injustice if he does not repay him in the instance of death? Is the essence of justice to do well to friends and to do ill to enemies? Is justice useful even in peace? When is the just man more useful than the others? All these questions are geared towards defining justice with its answer being the ultimate answer to the other questions posed above.

During Plato’s time, the argument that prevailed was that it was just to benefit your friends and injure your enemies. In the ‘Aristotle on Friendship’ by Aristotle, it is clear that true friendship is based on virtue and depends more on loving than being loved. It is possible to have friendships on a superficial level and still call them friends. Is the refusal to do good to such friends justifiable because there is nothing to gain from the friendship? What difference then does it make to call them enemies because they do not reciprocate the good done to them? Remaining at the level of doing good to our friends and evil to our enemies does not make us manlier. Man can go out of himself and do well even to those who do wrong to him because his heart has been created to love. Once in a while one needs to look at whether their life is aimed at the minimum fulfillment of their duties towards others or whether they can give more by getting out of their comfort zone. There is nothing to lose by practicing virtue. It perfects man because good actions often mean good choices.

The discussion in Book 1 of the Republic continues when Plato’s master, Socrates highlights that no one chooses to rule, and take other people’s troubles in hand to set right willingly. A person who means to practice his art properly never does what is best for himself, rather he does what is best for the subject. This is the art of practicing the virtue of justice. This followed Thrasymachus’ declaration that justice is nothing but the advantage of the stronger.
rather than what gives him satisfaction. A virtuous leader should for example come up with laws that are geared towards the good of the human person irrespective of the sector of the economy. Taking advantage of their position to manipulate laws to their ends is a manifestation of selfishness and neither draws good from them nor their citizens. The result is necessarily an unjust society. At the end of the dialogue what comes out is that justice is virtue and wisdom while injustice is vice and ignorance. Justice gives friendship and a single mind. However, there is still no definition of justice. What mark does Plato leave in your mind in defining justice?

In Book II of The Republic, Glaucon asks Socrates whether there is a kind of good which people should be glad to have for its own sake. He states that no one is just willingly but only under compulsion. Does justice really have a value for its own sake and does true success depend on being as unjust as possible? Socrates suggests that the nature of justice is more easily to be discovered in the macrocosm, the state, than in the microcosm, the individual. This opens the mind in our modern times as to what is the true measure of our success? Is it justifiable for a man to achieve material success while trampling on the needs and rights of other people? Does he achieve true happiness? Does the question of achieving success in a just manner ever cross our minds? The how is critical because the more virtuous man is necessarily happier because virtue tends him towards his ultimate end. Justice like other virtues is good in itself because it perfects man.

Book III of The Republic still concerns itself with the question of the definition of justice and how it profits a man. In the quest for defining justice Socrates challenges his students to think whether to hold true opinions is to possess the truth. What is the meaning of truth? Does the realization of the conformity of reality with intellectual knowledge define truth for you and I? Does one become just by understanding the truth about justice? If justice is well understood then it makes it easier to cultivate it and practice it by people. A proper understanding would be reflected in our actions. Justice is compared to other Arts with Socrates stating that Literature must deal only with suitable subjects and only in a suitable manner. Other arts should also be similarly regulated and the result a noble art. By learning to appreciate the good and the beauty of art, people will learn to love them in life. Socrates gives the example of persons well learned in a specific art; just leaders or rulers of the city should be chosen by the best of the older men, selected for their devotion to the State by various tests and carefully groomed for office. Today, lack of formation of the conscience makes many people fail to appreciate the true essence of a virtue such as justice. If individuals don’t appreciate it on a personal level, then on the level of the governance, the electorate as well as the State leaders may have misconceptions. It is evident in individualism and subjectivism in society when it comes to election of leaders.

A positive example of how justice can profit a man is an employee who tries his level best to fulfill his duties. Apart from giving him personal satisfaction, the rendering of his due services to the employer serves the society as a whole. Work well done is service to society and is both an act of justice and charity. Work can therefore be raised to a school of virtues and the practise of these virtues makes man happy. Working well is a first practical step to practicing justice.

In Book IV, the question explored is whether the possession of justice can make a man happy. There is also the proposition that justice is doing one’s business and not meddling in other people’s business. A just person or ruler in the context is defined as one endowed with wisdom, courage and temperance. Such a person has a sort of harmony with a certain mastery of his pleasures and desires so that he is stronger than himself. Injustice therefore arises when in the settling of things, one part rules and one part is ruled by another contrary to nature. Justice can hence be equated to happiness of the whole rather than the parts. It is important to always look at man’s ultimate good even in small contexts. If a person is a master of their own then both body and soul become important in doing their business.

Plato was of the opinion that in a State justice depends on equal shares for all, physical limit of size and the recognition of merit regardless of birth. The ideal or perfect city for him contains justice, wisdom, courage and temperance. The state according to him should
have three classes which are reflected in the three elements in the soul; reasoning, the desiring and the producers. Justice is therefore the arrangement of these three elements in their proper element; Reasoning rules, with its auxiliary, the spirited part over the desiring part.

In summary, the first four books of The Republic define justice as a virtue which entails duly rendering what is due to each person. However, just like other virtues, it should help man to be more manly. Whether in the economic, political or technological spheres, man should remain the source, the focus and aim of such development and in a just way. The words of a modern intellectual in our minds and hearts in the quest for justice, “… authentic and just development necessarily means to do more, have more, in order to be more…” Charity therefore goes beyond justice and helps man understand the essence of true justice.

When the fish gets rotten, it all starts from the head. ~ Namibia Proverb
Death penalty is the taking away of a person’s life after conviction on a capital offence by a competent court. This form of punishment has existed in almost all civilizations although the modes of its execution have varied from country to country. Common methods of execution that have been employed include crucifixion, stoning to death, burning or boiling alive, hanging, beheading, electrocution, shooting and use of lethal injection.

Death Penalty is as old as human generation and is codified in most religious books such as the Bible in the book of Exodus. However, in the same Bible we see a paradigm shift in the New Testament where Jesus did not advocate for imposition of the Mosaic Law in a case of an adulterous woman. Jesus, in showing how wrong it was, challenged the would be executioners by asking any one of them who had not sinned to cast the first stone. This is notwithstanding the fact that the predominant religion in Kenya is Christianity. What drives the support by majority of Kenyans is the impermanent emotion of outrage. Therefore, emotion, not reason, seems to be the key behind support for capital punishment in Kenya. This is why public opinion should not be the basis for retaining death penalty in our statute books.

Most people tend to support the old biblical saying of “an eye for an eye”, whereby to them, those who commit heinous crimes should receive punishment in equal measure; but can two wrongs make a right? Thus, in my view, it is just as wrong for society to kill as it is for an individual to kill. Experience has it that our judicial systems are not perfect with several failures being evident in our trial systems. This may be attributed to corruption or genuine human error which often leads to innocent individuals being handed death sentence. Those supporting the death penalty are aware of the inherent failures in the judicial systems. They are acutely aware of the fact that miscarriages of justice can be found anywhere in the world and therefore you will find cases where a person who is innocent is mistakenly sentenced to be hanged and ends up being hanged. The trouble is that when facts emerge which confirm that a person is innocent the process cannot be reversed. Unlike other custodial and non custodial sentences, death is a finality and can never be reversed. Once a person is hanged, there's no remedy incase it is later found out that he or she was not responsible for the crime.

One of the most notorious cases of miscarriage of justice relates to three men who were sentenced to 15 years imprisonment in the UK for murder. Years later, the advent of technology enabled law enforcement officers to confirm beyond doubt that the three men were all innocent hence they had to be released from prison. However, they had already served 9 years in prison. Had they been handed death sentences the three would have been killed by the state.

It is my considered opinion that even those who strongly support death penalty are in the same status as those in the biblical story who wanted to stone the adulterous woman. This is so because as human beings we may do some things due to high tempers which we later regret. Sometimes even murderers feel remorseful and regret their actions immediately as they come to their senses. This is why the Kenyan Court of Appeal in following the Ugandan decision of Susan Kigula & 416 ors vs AG observed that mandatory death penalty is unconstitutional. This was in the case of Godfrey Ngotho Mutiso vs. AG wherein the court emphasized the importance of those convicted for capital offences
being allowed to say something in mitigation. The court was apprehensive of the fact that the mandatory nature of the death penalty denied the accused a chance to disclose factors that would show remorse.

Suffice to mention that no executions have been carried out in Kenya since 1987. Despite this state of affairs thousands of Kenyans have been handed the death penalty and are still languishing in the death row syndrome. Some have criticized this state of affairs, but according to me, until our laws are amended the Kenyan courts in handing out death penalty are just fulfilling their mandate. It is upon the concerned authorities to look into this question since keeping convicts on death row for such a long time causes the death row syndrome which is cruel and inhuman.

If I may be asked on constitutionality of death penalty in Kenya, I will comfortably state that it is constitutional. This is because the right to life under the Constitution has a limitation as can be deduced from the same Constitution. Article 26(3) provides that; “A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.” This means that unless the Constitution and our statute books are amended death penalty is still constitutional. It would therefore be wrong for someone to move the court challenging constitutionality of death penalty.

The right to life is so important that the abolition of the death penalty requires specific progressive measures by the State to eventually expressly effect such abolition. This has been done by many countries all over the world who have specifically provided for no death penalty in their Constitutions, or who have acceded to the Optional Protocol on the Abolition of the Death Penalty. Some Constitutions have not qualified the right to life and it has been easy for the courts to rule that the death sentence is unconstitutional as happened in South Africa with the Makwanyane case. Due to the foregoing state of affairs, it is my humble submission that the framers of the Constitution should have made the right to life absolute instead of qualifying it. Therefore, as things stand today, death penalty is not a violation of the right to life since the Constitution itself contemplates circumstances under which the right to life may be limited.

The proponents of death penalty argue on the basis of the deterrence effect the sentence has to the would be offenders. I beg to differ from this view basing on the already rising levels of capital offences such as robbery and murder. All these occur despite death sentences being meted out on convicted capital offenders.

China is the world’s largest executor. According to Amnesty International, from 1990 to 1999, 27,599 people were sentenced to death in China, and 18,194 of these were executed. The average annual number of sentences is therefore estimated to be at least 2,759, 1,802 of which are put into effect. Another report by this organisation notes that of the 1,526 people executed in 31 countries in 2002, 1,060 were conducted by the Chinese legal system, which is thought to represent two-thirds of the number of capital punishments carried out worldwide. However, it is important to note that research on the death penalty in China today encounters a good many difficulties. Some aspects of the question are regarded as a state secret. These factors feed into an ethical and political debate that is not greatly amenable to scholarly study in that country. Kenya should thus not go the China way since doing this would be a barbaric approach to eliminating the serious offences in our society. If indeed death penalty is deterrent, then capital offences could be unheard of in the countries that carry out the most executions in the world such as China.

The subject of the death penalty cannot be left for the courts to fill in gaps. The Courts cannot now take on the role of the Legislature to abrogate a substantive provision of the Constitution by a process of interpreting one provision against another. In my view, this is the work of the Legislature who should indeed further study the issue of the death penalty with a view to introducing appropriate amendments to the Constitution. Death penalty may be challenged as inhuman and degrading, which indeed it is, but the same Constitution that outlaws such treatment allows for limitation of the right to life. Thus, in our current legal regime the hands of Kenyan judges are tied since the constitutional provisions must be interpreted as a whole and not in isolation. This can be inferred from the Ugandan case of Susan Kigula & 416 ors vs. AG the Supreme Court judges of that country distinguished the Ugandan situation from the South African situation that led to abolition of death penalty. The judges were clear that the South African Constitution made the right to life absolute unlike the Ugandan Constitution which qualified the right. It can be inferred from the judges’ sentiments that they were at pains in upholding death penalty since they could not declare it unconstitutional.
whereas the same Constitution allowed it.

Proponents of the death penalty assert that it has a deterrent effect on crime in society. However, there has been no proven correlation between the death penalty and deterrence of crimes and countries that still maintain the death penalty in their statutes have not seen a downturn in crime. A survey conducted by the UN in 1998 and later updated in 2002 found no correlation between the death penalty and homicide rates. According to the study, the hypothesis that capital punishment deters crime to a greater extent than does the application of the supposedly lesser punishment of life imprisonment is flawed. In Kenya, for instance, the fact that death sentences are handed down has not deterred commission of crimes for which such sentences are implemented. The key to deterrence is not to apply the death penalty but to increase the likelihood of detection of crime, arrest and conviction. Despite Kenya being a party to the International Covenant on Civil and Political Rights (ICCPR) since 1972, it has neither signed nor ratified the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty. It is thus my humble opinion that the Kenyan authorities should move swiftly and scrap death penalty from its statute books. This is because death penalty has consistently been shown to be ineffective, unfair, and inaccurate. Its existence in our statute books has been of no significance in reducing the level of capital offences as can be inferred from the rising levels of robbery with violence and murder.

Recently in the case of Wilson Thirimbu Mwangi vs R [2013] eKLR the Court of Appeal was faced with a case touching on death penalty. The judges observed inter alia that; “…it is time the Supreme Court made a determination to guide all and by all we mean the courts, the convicts, lawyers, prosecutors, victims or their relatives, scholars and the wider public generally. It is of concern to all these categories that the status and applicability of the death sentence is made clear, certain and final, if not all the time, for the time being.” Thus basing on the foregoing sentiments of the learned judges of Appeal, it would be important for the highest Court in the land to advice on the way forward towards abolition of the death penalty. It is not enough to declare the mandatory death sentence unconstitutional, but the court should advice on steps towards abolition.

I beg to sign out, but before doing so I would urge the proponents of death penalty to figure out the moral lesson behind the story of the adulterous woman in the bible. Reason, rather than emotion, should be the way to go in dealing with the topic of death penalty. In doing this, we will all be happy in preserving the sanctity of life whereby death penalty can be replaced by life sentence.
The promulgation of the Constitution of Kenya in 2010 was a great milestone in Kenya’s push towards realization of human rights and fundamental freedoms. The purpose of the bill of rights was to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

The inclusion of all the rights in the Constitution effectively meant that for each and every individual, such rights and freedoms belonged to them and not in exclusion to any others that were not included therein. They were to be exercised in conformity with the law, except to the extent of their inconsistency with the Constitution and subject only to constitutional limitations.

The provisions that protected the rights also had to be infused with the values and principles of governance articulated in article 10, which included human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

Furthermore, in considering the nature and extent of the rights, the court was obliged by article 259(1) to interpret the Constitution in a manner that promoted its purpose, values and principles, advanced the rule of law and the human rights and fundamental freedoms in the bill of rights, permitted development of the law and contributed to good governance.

The Government of Kenya, on 18th December 2012, through the Department of Refugee Affairs issued a press release to the effect that it had decided to stop reception and registration of urban refugees and close down all registration centres in urban areas with immediate effect. All asylum seekers/refugees would be hosted at the refugee camps. In a letter dated 16th January 2013, the refugees residing in urban areas were to be relocated to the Dadaab and Kakuma Refugee Camps and ultimately to their home countries after the necessary arrangements were put in place.

The directive was in response to a number of grenade attacks that had occurred in urban areas, following Kenya’s operation in Somalia in October 2011. The attacks had been widely blamed on the Somali militant group Al-Shabab, although the group had not claimed responsibility.

The Government asserted that the directive was administrative in nature, made in strict compliance with statutory authority and taken in the interest of promoting the welfare and protection of asylum seekers/refugees. It further contended that the establishment of registration centres within urban areas was provisional and was informed by the need to document the refugees and asylum seekers within urban areas and that the registration aspect and the offering of related services was an incentive calculated to facilitate optimum turnout.

The policy was based on the realisation that most refugees in urban areas were not registered or were evading registration and those who had been registered at the refugee camps and had been issued with time-restricted movement passes had not gone back to camps or renewed them thus violating the terms of issue. In addition most asylum seekers/refugees were suffering lawful arrests and prosecution because they were arrested outside the designated areas without movement passes and other travel documents. Most refugees and asylum seekers were holding UNHCR mandate certificates which were not recognised by statute as refugee identification documents or passes.

The government’s position was that the Refugees Act, 2006 particularly section 17(f) and rule 35 of Refugees (Reception, Registration and Adjudication)
Regulations presupposed that all refugees and asylum seekers would ordinarily reside in gazetted refugee camps. In order to leave the refugee camps, a refugee was required to apply to the Commissioner, through a refugee camp officer, for permission to travel outside the refugee camp. Such permission was time limited. A strict application of sections 16, 17 and 25(f) of the Act reflected an encampment policy embraced by the State in the management of refugees/asylum seekers which restricted their movement within Kenya.

The policy was within the mandate of the Commissioner of Refugee Affairs and the Department of Refugee Affairs and as such any consultation with stakeholders was unnecessary and had only been done out of courtesy.

The directive was challenged by Kituo cha Sheria ("Kituo") a non-governmental organization that runs specific programmes designed to address the rights and welfare of refugees/asylum seekers in Kenya. In a petition it filed in the public interest, it sought orders to quash the Government directive and stop its implementation, and a declaration that the directive violated the rights and fundamental freedoms of refugees living in Kenya. Its petition was consolidated with another one, brought by 7 other petitioners who were refugees residing in urban areas, who also challenged the directive and sought similar orders. The two petitioners were determined in favour of the petitioners.

The main issue in the petition was whether the directive to relocate refugees living in urban areas to refugee camps was a threat to their fundamental rights and freedoms.

The law governing refugees was regulated by International Law, and under article 2(5) and (6) of the Constitution, the general rules of international law and any treaty or convention ratified by Kenya formed part of the law of Kenya. Kenya, being a signatory to a host of Conventions and Treaties dealing with refugees and their protection as well as international legal instruments covering international human rights, was under an obligation to ensure that the basic human rights of every person (including refugees) in its territory were met.

The law of rights applied to all persons within Kenyan borders irrespective of how they came into the country. Article 19(1) of the Constitution stated that the bill of rights was an integral part of Kenya's democratic state and was the framework for social, economic and cultural policies. Under article 19(3)(a) the petitioners were entitled to enforce any other rights recognised or conferred by law, except to the extent that they were inconsistent with the Constitution. They were therefore entitled to assert the rights conferred by International law, which was part of Kenya's law by dint of article 2(5) and (6).

The statutory definition of a refugee under the Refugees Act, adopted from the 1951 Convention Relating to the Status of Refugees, illustrated that refugees fell within the category of vulnerable persons recognized by article 20(3) of the Constitution. However, registration was necessary for recognition as a refugee in Kenya, and a recognised refugee and every member of his family living in Kenya was entitled to the rights and was subject to the obligations contained in the international conventions to which Kenya was party and was subject to all the laws in force in Kenya.

As refugees were a special category of persons who by virtue of their situation were considered vulnerable, article 21(3) imposed specific obligations on the State to address their needs. They were therefore entitled to the protections of the Constitution and so a directive to organisations and other bodies not to provide assistance to urban refugees was directly inconsistent with that responsibility and it also undermined the right to dignity. Implementation of the directive would violate State international refugee protection obligations.

Furthermore, aggressive pursuit of such a policy could have the effect of constructively repatriating urban refugees back to the countries from which they had fled. One of the fundamental principles in international refugee protection was the obligation of non-refoulement to be found in article 33(1) of the 1951 Convention. Similarly, article 2(3) of the AU Convention prohibited States from removing, deporting or repatriating refugees from where they were to the States of origin without following due process. Freedom of movement guaranteed under article 39 of the Constitution ought to have been read together with article 26 of the 1951 Refugee Convention in order to give effect the rights of refugees.

Freedom of movement under the Constitution related to everyone, but the right to enter, remain and reside anywhere in Kenya was accorded only to citizens hence the State could reasonably impose conditions upon the right to enter, remain in and reside anywhere in Kenya upon non-citizens. Although the right under article 39(3) was limited to citizens, it did not expressly limit the right of refugees to move within Kenya guaranteed
under article 39(1). Second, it did not expressly recognize the right of refugees to reside anywhere in Kenya but more important the Constitution did not prohibit refugees from residing anywhere in Kenya. Such a right was readily available to refugees by reason of application of the 1951 Convention and application of article 19(3) (b) of the Constitution.

The freedom not being absolute, could be reasonably limited in accordance with the standards that were necessary in an open and democratic society. Section 17 of the Refugees Act did not require that all refugees/asylum seekers to ordinarily reside in camps nor did it preclude the State from providing refugee services in urban centres. The Government Directive which targeted refugees/asylum seekers in urban centres was therefore a threat to their right to movement enshrined in article 26 of the 1951 Convention as read with section 16 of the Refugees Act.

A policy that did not make provision for examination of individual circumstances and anticipated exceptions was unreasonable and in breach of article 47(1) of the Constitution. The directive was unfair and unreasonable within the meaning of article 47(1) in so far as it did not provide for application of due process in adjudicating the rights of persons with refugee status. The affirmative policy of the government to close down registration centres in urban areas in order to force urban refugees into camps undermined the protection and the rights of refugees living in urban areas by imposing a policy of encampment thus denying them an opportunity to renew identity papers.

National security, cited as a reason for imposing restrictive measures on the enjoyment of fundamental rights, meant it was incumbent upon the State to demonstrate that in the circumstances, a specific person’s presence or activity in the urban areas was causing danger to the country and that his or her encampment would alleviate the menace. While national security was important and could not be compromised, the measures taken to safeguard the same had to bear a relationship with the policy to be implemented. Security concerns had to be viewed from the constitutional lens and in this regard there was nothing to justify the use of security operation to violate the rights of urban based refugees. There was no evidence to show that the best way to protect and promote the welfare of refugees was through a blanket policy of relocation and encampment.

The Refugees Act provided adequate policy space to deal with the refugees consistent with the Constitution. The implementation of policy had to take into account the special circumstances of urban refugees. The cost and burdens associated with deepening constitutional values did not lessen the obligation of the State to observe, respect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. The Government Directive could not be justified in terms of article 24 of the Constitution.

There were fears that the effect of the judgment would be an influx of a large number of refugees/asylum seekers in urban areas which would in turn pose administrative challenges to the Department of Refugee Affairs thereby impacting on the wellbeing of the country as a whole. This could be alleviated if the State came up with a system of registration of refugees that was consistent with the principles and values of the Constitution.

In a country that had been reeling from the effects of several years of poor governance, and widespread lack of confidence in the arms of government, especially the judiciary, this was a welcome reprieve, at least to refugees, in the push towards reforms.
Introduction:

Chapter Eight of the Constitution of Kenya, 2010 at Article 93(1) establishes a bi-cameral Parliament of Kenya to consist of the National Assembly and the Senate. The Role of Parliament is stipulated in Article 94(1), to exercise the legislative authority of the Republic of Kenya at the national level. The following is a synopsis of legislation enacted between January, 2013 and July, 2013.

Constituencies Development Fund Act (No.30 of 2013):
This Act repeals and replaces the Constituencies Development Fund Act, No.10 of 2003. Its object and purpose is to ensure that a specific portion of the national annual budget is devoted to the constituencies for purposes of infrastructural development, wealth creation and in the fight against poverty at that level.

The Constituencies Development Fund Board is established in section 4 and will be a successor to the Constituencies Development Fund established by the Constituencies Development Fund Act, 2003. It shall be a national fund consisting of moneys of an amount of not less than 2.5% (two and half per centum) of all the national government ordinary revenue collected in every financial year and any moneys accruing to or received by the Constituencies Development Fund Board from any other source. This fund will be additional revenue to the county governments under Article 202 (2) of the Constitution.

It is the principle function of the Constituencies Development Fund Board to ensure timely and efficient disbursement of funds to every constituency and efficient management of the Fund.

Division of Revenue Act (No.31 of 2013):
The Constitution of Kenya, 2010 creates a decentralized system of government with the primary objective of devolving power, resources and representation to the 47 counties. To this end, Parliament has enacted legislation to facilitate the transition to and implementation of this system of government.

This Act provides for the equitable division of revenue raised nationally between the national and county governments in 2013/14 financial year. Its objects and purpose is to give effect to Article 203(2) of the constitution on the equitable division of revenue raised nationally between the national and county levels of government, provide for the drawing of unconditional and conditional grants from the share of revenue of the National Government and the financing and continuation of on-going services in accordance with Articles 187(2) and 203(1) (d) of the Constitution.

Transition County Allocation of Revenue Act (No.6 of 2013):
This Act provides for allocation of wages and administration costs for the county executive and county assemblies for the period March to June, 2013 and the responsibilities of national and county governments in relation thereto. The object and purpose of this Act is to provide for the sharing of revenue raised nationally among the county governments to facilitate the transfer of county allocations from the Consolidated Fund to the relevant County Revenue Fund, for the period commencing March to June, 2013.

Kenya Agricultural and Livestock Research Act (No.17 of 2013):
This Act provides for the establishment and functions of the Kenya Agricultural and Livestock Research Organization. The object and function of this organization is to promote, streamline, co-ordinate and regulate research in crops, livestock, marine and fisheries, genetic resources and biotechnology in Kenya.

Pyrethrum Act(No.22 of 2013):
This Act repeals and re-enacts the Pyrethrum Act and
establishes the Pyrethrum Regulatory Authority to facilitate the development, regulation and promotion of the pyrethrum industry.

**International Interests in Aircraft Equipment Act**(No. 27 of 2013):  
This Act gives effect and the force of law to the provisions of the Convention on International Interests in Mobile Equipment and the Protocol on the Convention to International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment.

**Nairobi Centre for International Arbitration Act**(No. 26 of 2013):  
This Act provides for the establishment of the Nairobi Centre for International Arbitration to facilitate international commercial arbitration and in collaboration with other lead agencies and non-State actors, coordinate the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation.  
An Arbitral Court is established under section 22 with exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with this Act or any other written law. A decision of the Court in respect of a matter referred to it shall be final. The Arbitration Rules of the United Nations Commission on International Trade Law, with necessary modifications, shall apply to matters before this court by virtue of section 23.

**Statutory Instruments Act**(No. 23 of 2013):  
The main objective of this Act is to provide a comprehensive regime for the making, scrutiny, publication and operation of statutory instruments.

**Science, Technology and Innovation Act**(No. 28 of 2013):  
This Act seeks to facilitate the promotion, co-ordination and regulation of the progress of science, technology and innovation of the country. It provides for the establishment of a National Commission for Science, Technology and Innovation with the principal objective to regulate and assure quality in the science, technology and innovation sector and advise the Government on matters related thereto.  
It establishes the Kenya National Innovation Agency to entrench science, technology and innovation into the national production system and ensure that the relevant Government institutions assign priority to the development of science, technology and innovation.

**Technical and Vocational Education and Training Act**(No.29 of 2013):  
This Act provides for the governance and management of institutions offering technical and vocational education and training. Its main objectives are: to institute a mechanism that promotes access and equity in training and maintain standards, quality and relevance.  
It establishes two institutions for this purpose. The Technical and Vocational Education and Training Authority with the core functions of regulating, coordinating and accrediting technical and vocational education and training programmes. The Technical and Vocational Education and Training Curriculum Development, Assessment and Certification Council to provide for coordinated assessment, examination and certification. It further creates a Technical and Vocation Education Fund, to provide funds to be used for financing technical and vocation education institutions.

**Social Assistance Act**(No.24 of 2013):  
This Act gives effect to Article 43 (1) (e) of the Constitution. It provides for the establishment, functions and management of the National Social Assistance Authority. The key function of this Authority is to facilitate provision of social assistance to persons in need, notably, orphans and vulnerable children, poor elderly persons, widows and widowers, persons with disabilities, persons disabled by acute chronic illnesses and unemployed persons within the provisions of the Act.

**Sports Act**(no.25 of 2013):  
This Act of Parliament seeks to establish a legal framework to govern the sports sector in the country. It provides for the establishment of sports institutions namely, Sports Kenya, National Sports Fund, Kenya Academy of Sports and national sports organizations to: harness sports for development, promote drug-free sports and recreation, administer and manage the sports sector. It also establishes the Sports Disputes Tribunal to hear and determine appeals from national sports organizations and sports-related disputes. This Act will come into operation on such date as the Cabinet Secretary may appoint by notice in the Kenya Gazette.

By Moses Wanjala,
Laws of Kenya Department.

Judicial Review is a central feature of administrative public Law. It represents the judiciary seizing the constitutional responsibility of curbing abuse of executive power. It is the means by which the High Court scrutinizes public law functions intervening as a matter of discretion to quash, prevent, require or clarify not because they disagree with the judgment, but so as to right a recognizable ‘public law wrong’ which could be unreasonableness, unlawfulness or unfairness.2

There are five methods by which Judicial Review of the acts or omissions of public authorities may be obtained (i.e. the prerogative orders of certiorari, Prohibition and mandamus) and the actions for Declaration or an Injunction with each having its characteristic procedural advantages and disadvantages from the standpoint of a litigant.

In the case of Council of Civil Service Union v. Minister for the Civil Service, [1985] AC 374 at 408 by Lord Diplock. The application of judicial Review is the process by which prerogative orders are sought. The orders were created in order to ensure public bodies lawfully carried out their duties and kept within their jurisdiction. Mandamus secures the performance of a public duty whereas Prohibition prevents a public body from acting illegally or in excess of jurisdiction. Certiorari on the other hand quashes the decisions which are contrary to law. See Republic v. Kenya Sugar Board & 2 others ex-parte Krish Commodities Ltd, eKLR. Judicial Review is supervisory jurisdiction of the High Court.

The Civil Procedure Act, Cap. 21 of the Laws of Kenya under Order 53 make provisions for the application of the above prerogative orders.

In Rita Biwott v The Council of Legal Education the court was called upon to decide the applicant’s fate on her admission to the Kenya School of Law. The applicant after obtaining a Bachelor of Arts degree from McGill University, Montreal, Quebec in Canada, was admitted for a degree of Bachelor of Laws at the University of Edinburgh. She was exempted from one year of study in recognition of the course and examination passed by her in her first degree. The course for the Bachelor of Laws Degree therefore took two years. The applicant’s application to be admitted to the Kenya School of Law was rejected on the ground that the Council did not approve her two year degree at the University of Edinburgh under section 13(1) of the Advocates Act. In finding for the applicant, the

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1 It is a feature of the English conception of the separation of powers that Parliament, the Executive and the Courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks fit. The Executive carries on the administration of the country in accordance with the powers conferred on it by law. The Courts interpret the laws, and see that they are obeyed. This requires the courts on occasion to step into the territory which belongs to the executive, to verify not only that the powers asserted accord with the substantive law created by parliament but also that the manner in which they are exercised conforms to the standards of fairness which Parliament must have intended. See also Michael Fordham, Judicial Review Handbook2nd ed. John Wiley and Sons Limited, Chichester, 1997.

2) The Council of Legal Education may exempt any person from any or all of the requirements.
High Court ruled that she had not been given a hearing before her application was rejected and thus there was a breach of the rules of natural justice. The decision of the Council was quashed and the Principal of the Kenya School of Law ordered to admit her into the School.

It is therefore imperative to note that the doctrine of Judicial Review applies in relation to public authorities and/or public officers or anyone performing public functions. Should judicial review then extend to private entities exercising public functions?

This article therefore grapples with the question of the judicial review of this contractual private order. The Public Private Partnership Act defines Privatizations as a transaction or transactions that result in a transfer, other than to a public entity, of the assets of a public entity including the shares in a state corporation. Privatization however should not be confused with the public-private partnerships.

The Act provides in its preamble, “An Act of Parliament to provide for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects of the Government through Concession or other contractual arrangements....”

The Act also provides the following; Concession means a contractual licence formalized by a project agreement which may be linked to a separate interest or right over real property, entitling a person who is granted licence to make use of the specified infrastructure or undertake a project and to charge user fees, receive availability payments or both such fees and payments during the term of the concession.

Contracting Authority means a state department, agency, state corporation, or county government which intends to have a function undertaken by it performed by a private party.

Public private partnerships means an arrangement between a contracting authority and a private party under which a private party-

a) Undertakes to perform a public function or provide a service on behalf of the contracting authority;

b) Receives a benefit for performing a public function by way of-

i) Compensation from a public fund

ii) Charges or fees collected by the private party from users or consumers of a service provided to them; or

iii) A combination of such compensation and such charges or fees; and

c) is generally liable for risks arising from the performance of the function in accordance with the terms of the project agreement.

It is true that public Private Partnerships will result into improved service delivery to the citizens but then the challenge of privatization to public law is the transfer of what is termed as ‘public functions’ such as the provision of water and sanitation and healthcare to private entities. Public law in countries whose legal regimes are based on the English Legal system is only designed to regulate the exercise of “public power” – that is the power of government as opposed to “private power.”

What then happens where government transfers its functions (and the accompanying power) to private entities through privatization? Should it then be assumed that the power wielded by the private entities is benign?

The danger of making such assumptions is that where, for example, the government chooses to deliver a given public service by way of contractual arrangements with private entities, performance will be deemed to a private matter between the contracting parties with the result that there will be no framework for public scrutiny and accountability. What therefore is required is a review of the premises of public law so that it can extend its regulatory mechanisms to the exercise of private power which in many cases poses a threat to individual liberties and livelihoods as a result of privatization initiatives.

In Republic v Kenya Cricket Association, eKLR popularly known as the Maurice Odumbe case, Odumbe was found guilty in an investigation authorized by the International Cricket Council (ICC), and conducted

prescribed for the purposes of paragraph I or paragraph ii of subsection (1) upon such conditions, if any, as the Council may propose.

5 Prof. Migai Akech, Privatization and Democracy in East Africa

6 Prof. Migai Akech, Privatization and Democracy in East Africa
by the Kenya Cricket Association (KCA) of having ‘inappropriate conduct’ with a bookmaker and banned from the game for five years (Ebrahim, 2004). In an attempt to overturn this career ban, Odumbe applied for judicial Review. The High Court of Kenya declined to entertain his application, reasoning that it would not issue judicial review orders against ICC and KCA since they are not public bodies or persons performing public function.

From this case therefore, judicial review applies to anyone exercising public functions be it public or private. Judicial Review also applies to private entities though not exercising public functions but wields considerable power likely to threaten the liberties and livelihoods of individuals.

Public-Private Partnerships (PPPs)
Public-private partnerships aim at financing, designing, implementing and operating public sector facilities and services. The key characteristics of PPPs include:-

a) Long-term (sometimes upto 30 years) service provisions;

b) The transfer of risk to the private sector; and

c) Different forms of long-term contracts drawn up between legal entities and public authorities.

These are innovative methods used by the public sector to contract with the private sector, who bring their capital and their ability to deliver projects on time and to budget, while the public sector retains the responsibility to provide these services to the public in a way that benefits the public and delivers economic development and an improvement in the quality of life.

Concession agreement or concession as provided in the Act will entail arrangement in which non-government entity obtains, from the government or a government agency, the right to either:-

a) Provide a particular infrastructure service; or

b) Control access to (whether linked to obligations to develop, construct, renovate, operate or maintain effectively on an exclusive or dominant basis).

Public participation would therefore be of immense relevance first at the stage of structuring concession agreements. Secondly, at the stage of identifying the private entity with whom the concession agreement would be entered into, and lastly during the implementation of the concession agreement.

A well structured concession agreement seeks to prevent; unfair or discriminatory conditions on which services are provided, unfair or discriminatory determination or revision of price and the use of dominant position obtained under a concession agreement to enter into or protect its or related entity’s position in another relevant market.

PPPs however present as well a severe organizational and institutional challenge for the public sector. They are complex in nature, requiring different types of skills and new enabling institutions and they lead to changes in the status of public sector jobs. It is therefore imperative to note that for them to work well, they require well-functioning institutions, transparent, efficient, competent and accountable procurement procedures.

Governments are increasingly turning to the private sector for the financing, design, construction and operation of infrastructure projects. PPPs have emerged as an important tool for improving economic competitiveness and infrastructure services. They are increasingly being considered as a mechanism to fill an infrastructure ‘deficit’ in many countries.

Public Private Partnerships in the delivery of public services have become a phenomenon with many countries now embracing this concept whose overall answer is that PPPs avoid the often negative effects of either exclusive public ownership and delivery of services, on the one hand, or the outright privatization, on the other. PPPs combine the best of both worlds: the private sector with its resources, management skills and technology; and the public sector with its regulatory actions and protection of the public interest. This balanced approach is superb in the delivery of public services which touch on every citizen’s basic needs.

The Regulatory mechanisms coupled with the public interest protection aspect offered by the public sector embraces the judicial review measures to ensure delivery of quality services and the protection of liberties and livelihoods of citizens.

With the proper and effective implementation of the

In conclusion, PPPs through concessions have become the most established form of financing by bringing private sector management, private funding and private sector knowhow into the public sector and therefore the enactment of the Public Private Partnerships Act, 2013 by the Kenyan Parliament ushers in a new era in the delivery of services by the government to the citizens.

A deaf ear is followed by death and an ear that listens is followed by blessings. ~ Samburu Proverb
Bills Legislative Updates

By Collins Limo, Julie Mbijiwe
Laws of Kenya Department.

Law-making is regarded as one of the most significant tasks of Parliament. The process of government by which bills are considered and laws enacted is commonly referred to as legislative process. Kenya has three legislative organs, namely; National Assembly, Senate and the County Assemblies. This write-up recaps bills from the National Assembly.


The principal objective of this Bill is to amend Articles 260 of the Constitution of Kenya, 2010 in order to remove the office of Members of Parliament, Members of County Assemblies, Judges and Magistrates from the list of designated State offices. This Bill is informed by the need to uphold the doctrine of separation of powers between the various arms of government. The Constitution through various provisions establishes the Judiciary the Executive and the Legislature level. By including all the officers of these three arms of government under the definition of State office, it compromises their independence.

This Bill also seeks to strengthen the governance of public institutions by ensuring that there is an efficient, system of checks and balances between the different arms of government.


This Bill seeks to amend the Microfinance Act, 2006. Its objective is to provide a framework that would enable deposit taking microfinance institutions to subcontract to suitable agents thus enable other specialized entities undertake the identification, selection and acquiring of suitable agents for the institutions.


This legislation proposes to amend the Kenya Deposit Insurance Act, 2012 (No. 10 of 2012). Its objective is to strengthen the regulatory framework of the Kenya Deposit Insurance Corporation and aims at enhancing the protection of depositors’ savings by conferring on the corporation, the appropriate mandate and ensuring its good corporate governance.

4. Insurance (Amendment) Bill, 2013

This Bill seeks to amend various sections of the Insurance Act (Cap. 487). The objective of the Bill is to clarify the objectives of the insurance supervision and the mandate and responsibilities of the supervisor as set out under the Act. It also seeks to facilitate the implementation of the EAC Common Market Protocol.


This legislation seeks to amend the Insurance (Motor Vehicle Third Party Risks) Act (Cap. 405). It seeks to introduce a Schedule of structured payments of compensation payable in respect of death or of bodily injury to any person caused by or arising out of the use of vehicles on road.


This Bill makes provision for the establishment of a Tribunal which will hear appeals filed against any tax decision made by the Commissioner.
appointed under the Kenya Revenue Authority Act (Cap. 469).

7. Value Added Tax Bill, 2013

The objective of this Bill is to repeal and replace the existing Value Added Tax Act (Cap 476). It aims at addressing the challenges faced in the administration of the existing law by simplifying the law and thereby enabling taxpayers to comply with ease. Further, it provides for the adoption of information technology in the administration of the tax regime and the advancements that have been made in the business environment while taking into account international best practices.


The main object of this Bill is to cater for matrimonial property disputes in Kenya. The Bill provides for the rights and responsibilities of spouses in relation to matrimonial property.

The Bill states general principles to be applied in matrimonial matters, defines matrimonial property and sets out laws and procedures applicable. The Bill also provides to separate property during the subsistence of a marriage and for matters relating to jurisdiction and procedure in matrimonial matters.

The Bill also proposes the cessation of application of Married Women Property Act.


The objective of this Bill is to amend and consolidate the various laws relating to marriage and divorce into a single Act. Among other things it defines marriage and sets out the various kinds of marriage that may be contracted or celebrated in Kenya.


This Bill seeks to provide for the regulation, management, expenditure and accountability of election campaign funds during election and referendum campaigns.


This legislation seeks to amend the Kenya Information and Communication Act, 1998 (No. 2 of 1998).


This is a Bill introduced to parliament to provide for the regulation, management, expenditure and accountability of election campaign funds during election and referendum campaigns. The Bill proposes the Independent Electoral and Boundaries Commission to be responsible for the regulation and administration of campaign financing. If the Bill is passed, political parties will be required to; at least three months before the nomination of its candidates submit its party campaign expenditure rules to the Commission. For effective regulation, the Bill proposes the establishment of the following four committees; Party Candidate Expenditure Committee, Party Expenditure Committee, Independent Candidate Expenditure Committee and Referendum Campaign Expenditure Committee. These committees are required to disclose the amount and source of contributions received for campaigns.

Offences are captured under Part VI of the Bill. The various offences provided for under this Bill are punishable by either imprisonment, fines or both imprisonment and fine.

13. Agriculture, Fisheries and Food (Amendment) Bill, 2013

The object of the Bill is to amend the Agriculture Fisheries and Food Act (No. 13 of 2013) so as to extend the commencement period of the Act by a further six months in order to allow for the carrying out of administrative action, including promulgation of regulations, that is necessary to operationalize the Act.


The object of this Bill is to clarify the role and responsibilities of the Inspector-General and the role and responsibilities of the National Police Service Commission.
Police Service Commission.

The Bill provides for recognition of the Inspector-General and both the Deputy Inspectors-General as substantive members of the National police Service Commission. The Bill provides for consultation of the Inspector-General and the Cabinet Secretary by the Commission while dealing with the human resource functions. The Bill provides for the limits of the Commission while undertaking its functions and it provides that the Commission shall not undertake investigations on criminal matters.

15. Media Council Bill, 2013

This is a legislative proposal to provide part of the framework for the realization of the right of freedom of the media as provided for under Article 34 of the Constitution. The Bill seeks to provide for a body that is free of control by government, political or commercial interests that will set media standards, and regulate and monitor compliance with those standards.

Part IV provides for the establishment of the Complaints Commission, the membership, appointment, independence of, functions, powers of the Complaints Commission. It further provides for the procedures on complaints including procedure on hearings, records and appeals. Part VII of the Bill contains provisions on the repeal of the Media Act (Cap 411B) and for the transition of the Council, the Complaints Commission, staff, rights, liabilities, proceedings including awards.


The principal purpose of this Bill is to provide a legislative framework for the protection, conservation, sustainable use and management of wildlife in within, around and throughout the Republic of Kenya. Under Part II, the Bill provides for the establishment and functions of the Kenya Wildlife Service. The Bill at Part IV provides for the establishment of the Wildlife Regulatory Council. This part also provides for the establishment of county Committees for the purpose of wildlife conservation. Part V provides for the establishment of the Wildlife Endowment Fund and the Wildlife Compensation Fund. The latter shall be used to compensate persons who suffer loss or damage occasioned by wildlife. Part X prescribes offences and penalties. The Bill contains provisions on the repeal of The Wildlife (Conservation and Management) Act (Cap 376).

17. Truth Justice and Reconciliation Amendment Bill, 2013

The objective of this Bill is to amend Truth, Justice and Reconciliation Act (No. 6 of 2008), to make provisions on the consideration of report of the Commission by the National Assembly.


The Bill purports to amend the National Flag, Emblems and Names Act (Cap. 99) to reserve the flying of the national flag on motor vehicles to designated State officers who include the President, Deputy-President, the Chief Justice, the Speaker of the National Assembly and the Speaker of the Senate.

The objective of this legislation is to remove the matter of flying of the national flag from the ambit of the subsidiary legislation and entrench it in the substantive law, and also widen the scope of officers allowed to fly the national flag taking cognizance of new offices established under the Constitution.

19. County Governments (Amendment) Bill, 2013

The objective of this Bill is to amend the County Governments Act (No. 17 of 2012) so as to include in the Act; a Schedule setting out the seat or the physical location of each of the county governments.
Digest of Recent Legal Supplements on Matters of General Public Importance

Compiled by Ochiel I Dudley, Legal Researcher
Laws of Kenya Department.

This Article presents a brief summation of Legislative Supplements, published in the Kenya Gazette, on matters of general public importance. The outline covers the period between 15th March, 2013 and 26th July, 2013.

On their part, the Supplements cover diverse legal subjects – assumption of gubernatorial offices, devolution of procurement entities, as well as reservations and preferences for SMEs owned by youth, women and persons with disabilities.

New County and Parliamentary Rules were issued in L.N. 54/2013 to replace the initial rules on election petitions. The benefit, and perhaps necessity of the new rules, is that they contain a Part VII on appeals to the High Court and Court of Appeal respectively. That was a glaring omission from the initial rules. No matter - the legislative gap is now filled.

Other matters covered include the LAPSSET Corridor, anti-money laundering, aviation, load limits and weighbridges, in addition to money remittance. On matters health, nurses are now required to train at accredited nurse training institutions and thereafter take out practicing certificates and adhere to professional standards set by the Nursing Council.

At the same time, the Commission on Administrative Justice has issued rules on the procedure for filing, investigation, hearing and determination of complaints before the Commission.

Similarly, the Chief Justice has issued new practice directions to determine the dates for sittings and vacations of the Court. Under the rules, the offices of the High Court including registries will be open to the public from 8.00 a.m to 5.00 p.m - Monday to Friday.

The longer opening hours will ensure that citizens have more time to access the Courts.

At the same time, members of the Bench, who have been busy hearing Election Petitions, may be interested in the earliest possible vacation date under the rules.

Of most importance however, are the practice and procedure rules issued by the Chief Justice, under and that, apply to all Article 22 proceedings. The overriding objective of the rules is to ensure access to justice under Article 48.

Christened the “Mutunga” Rules¹, these rules have succeeded the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 widely known as the “Gicheru Rules.

Stay informed!

¹ See the Court of Appeal decision in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR
<table>
<thead>
<tr>
<th>Date of Publication</th>
<th>Legislative Supplement Number</th>
<th>Citation</th>
<th>Preface</th>
</tr>
</thead>
<tbody>
<tr>
<td>15th March, 2013</td>
<td>17</td>
<td>High Court Practice and Procedure (Amendment) Rules, 2013 (L.N. 53/2013)</td>
<td>These rules were issued by the Chief Justice under section 10 of the Judicature Act to determine the time and dates for sittings, as well as vacations, of the Court.</td>
</tr>
<tr>
<td>15th March, 2013</td>
<td>17</td>
<td>Elections (Parliamentary and County Election) Petition Rules, 2013 (L.N. 54/2013)</td>
<td>These rules revoked the earlier Election Petition Rules (L.N. 44/2013). The difference is that these latter rules included a Part VII that provides for appeals to the High Court and Court of Appeal respectively.</td>
</tr>
<tr>
<td>22nd March, 2013</td>
<td>20</td>
<td>LAPSSET Corridor Development Authority Order, 2013 (L.N. 58/2013)</td>
<td>The retired President issued this Order under section 3(1) of the State Corporations Act, Cap 446. The order establishes the Authority as a body corporate with perpetual succession, common seal and powers to sue and be sued. The central role of the Authority is to plan, co-ordinate and sequence Lamu Port–South Sudan–Ethiopia Transport Corridor projects.</td>
</tr>
<tr>
<td>5th April, 2013</td>
<td>22</td>
<td>Public Procurement and Disposal (County Governments) Regulations, 2013 (L.N. 60/2013)</td>
<td>These Regulations were put prescribed under the section 140 of the Public Procurement and Disposal Act, 2005, by the Minister for Finance to regulate procurement and disposals by County public entities.</td>
</tr>
<tr>
<td>Date</td>
<td>No.</td>
<td>Regulations</td>
<td>Details</td>
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<tr>
<td>12th April</td>
<td>24</td>
<td>Parliamentary Service (Offices of Members of Parliament) Regulations, 2013</td>
<td>These Regulations were issued under section 36 of the Parliamentary Service Act, to provide Members of Parliament with office spaces.</td>
</tr>
<tr>
<td>19th April</td>
<td>25</td>
<td>Central Bank Money Remittance Regulations, 2013</td>
<td>The Central Bank issued these regulations under section 57 of the Central Bank of Kenya Act, Cap 491. The regulations govern money remittance businesses including Western Union and mobile money transfer services.</td>
</tr>
<tr>
<td>19th April</td>
<td>28</td>
<td>Nurses (Accreditation of Training Courses) Regulations, 2013</td>
<td>These regulations were issued under section 26 of the Nurses Act, by the Nursing Council of Kenya. They outline procedures for inspection, evaluation and accreditation of nurse training institutions.</td>
</tr>
<tr>
<td>19th April</td>
<td>28</td>
<td>Nurses (Private Practice) Regulations, 2013</td>
<td>The Nursing Council of Kenya issued these regulations under section 26 of the Nurses Act. The regulations prescribe professional matters including a Code of Ethics and practicing certificates for nurses.</td>
</tr>
<tr>
<td>19th April</td>
<td>29</td>
<td>Civil Aviation Citation (Security) Regulations, 2013</td>
<td>The purpose of these regulations is to safeguard aviation security as well as regulate the conduct of persons at airports and on board aircraft. The regulations were issued under section 82 of the Civil Aviation Act, 2013.</td>
</tr>
<tr>
<td>19th April</td>
<td>31</td>
<td>Civil Aviation (Operation of Aircraft) Regulations, 2013</td>
<td>The Minister for Transport issued the Regulations under section 82 of the Civil Aviation Act, 2013. The Regulations prescribe rules on the registration, maintenance, and operation of aircrafts. They also outline rules for passenger safety and flight crew requirements.</td>
</tr>
<tr>
<td>26th April</td>
<td>34</td>
<td>Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2013</td>
<td>The regulations outline stringent rules on the painting on aircrafts nationality and registration marks. The regulations arise out of section 82 of the Civil Aviation Act, 2013.</td>
</tr>
<tr>
<td>18th June</td>
<td>41</td>
<td>Kenya Roads (Kenya National Highways Authority) Regulations, 2013</td>
<td>These regulations, issued by the Authority under section 22 (2) (d) and 46 of the Kenya Roads Act, set out the law on load limits, weighbridges and use of road reserves.</td>
</tr>
<tr>
<td>Date</td>
<td>No.</td>
<td>Description</td>
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<tr>
<td>18th June, 2013</td>
<td>45</td>
<td>Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013 (L.N. 114/2013)</td>
<td>These regulations require public procuring entities to allocate at least thirty percent of its procurement spend to goods, works and services from SMEs owned by youth, women and persons with disability. The regulations are given under section 140 of the Public Procurement and Disposal Act, 2005.</td>
</tr>
<tr>
<td>18th June, 2013</td>
<td>46</td>
<td>Capital Markets (Real Estate Investment Trusts)/Collective Investment Scheme) Regulations, 2013 (L.N. 116/2013)</td>
<td>Persons intending to invest in real estate trusts ought to familiarize themselves with these regulations. They are issued under section 12 of the Capital Markets Authority Act, Cap 485A.</td>
</tr>
</tbody>
</table>

If you see a man in a gown eating with a man in rags, the food belongs to the latter.
~ Fulani Proverb
National Council of Law Reporting Communications and Marketing Department
hosted an internal launch event for members of staff and invited guests July 19, 2013 at the Milimani Law Courts Ceremonial Hall. The internal Launch was to usher in the Councils new brand name “Kenya Law”

All members of staff participated in the pomp and flair of the event having all been organized in groups which

had prepared entertainment for the event. The entertainment revolved around the message “the Kenya law I want”. In this, teams were required to come up with a presentation which outlined the Kenya Law that members of staff wanted as well as that which the public wanted. In coming up with these, members of staff were required to come up with solutions on how to arrive at the Kenya law we all wanted in a two hundred and fifty word script as a swag line that best captured the essence of the new Kenya Law. The best team performance and best swag line were recognize and rewarded on the same, as judged by a panel of

Human Recourses and Administration Department Report

By Mutindi Musuva and Eric Odiwor.
The HR Department.
All teams performed well and the overall best team as judged by the guest judges was Team Oasis and Team Ipad for the best swag line.

**New Team Players**

Kenya Law welcomed new members of staff namely Ms. Jacinta Moraa, Assistant Accounts Officer in Finance Department in May, 2013, Mr. McDonald Shiundu Mumia, Intern attached to the Finance Department in June, 2013 Mr. Charles Kitavi who joined the Human Resource and Administration as a Clerk of Works in June, 2013 to supervise the partitioning and furnishing on the proposed Kenya Law Offices at Bishops Annex Plaza (Fifth Floor) Ngong Avenue and Mr. Anthony Kamau – Intern in Research and Development Department in July 2013.

**Proposed new offices**

Partitioning and works on the proposed new office premises at Bishops Annex Plaza (Fifth Floor) Ngong Avenue, ON L.R NO. 209/8342/, 5th floor have commenced.

The Drawings of the proposed offices for Kenya Law on Bishops Annex Plaza (Fifth Floor)-1st Ngong Avenue Upper hill were submitted on June 19, 2013 to the City Council of Nairobi online portal for approval by Architect Miseda - Ministry of Public Works.

Blue Print Drawings of the proposed offices for Kenya Law was presented to the City Council for stamping on July 19, 2013 and returned on July 22, 2013 with amendments. Once these were made City Council of Nairobi approved the drawings on July 26, 2013.

Performance bond was given by the main contractor.
Harrikasons Building Construction and presented to the Ministry of Public Works on July 25, 2013 and returned with comments on its format. Upon revision of the same, the Ministry of Public Works approved the performance bond.

The Site handing over Meeting was held on August 08, 2013, at Milimani Law Courts Ceremonial Hall. See attached the minutes in Appendix VIII.

The updated and revised work plan was approved on August 7, 2013. It provided timelines for all activities at the site. The first works would be the tiling and the construction of the hollow brick partitions for the wet areas which are ongoing.

Mr. Michael Murungi, the CEO/Editor of Kenya Law giving his speech.
Pictorial: Internal Launch of the Kenya Law Brand

1. Members of the Council for Law Reporting toasting to the new brand, from left is Christine Agimba, Lady Justice Lydia Achode and Michael Murungi, the CEO/Editor of Kenya Law

2. Team Oasis members Mr. Patrick Wahome and Ms. Jenipher Ogada dressed to the nines

3. Kenya Law Staff Jubilate th New Brand

4. A member of the entertaining band doing his thing

5. Linda Awuor, Team Leader, Research and Development and a member of the Morans Team offering a vote of thanks.
The Internal Launch of the Kenya Law Brand

By Carolyne Wairimu
Marketing & Communications Department.

When a new brand identity is ready for the world to see for any Organization, it is important to carry out an internal launch first for employees. If employees don’t buy into your new brand identity, why then should your customers and stakeholders? In other words, every organization that has a new brand identity needs to turn employees on to their brand. Make them believe in it, feel passionate about it and become emotionally connected to it.

As we embraced our new Kenya Law identity and colors, we felt that it was important that these changes are reflected in the way we are; our way of engaging one another, our way of doing business and most importantly in our way of engaging the citizens of Kenya. It is for this reason as an organization that we divided ourselves into five teams prior to the internal launch to discuss the Kenya Law through our individual contributions and guided by our mission, vision and values as indicated in our strategic plan.

Deliverables for each of the five teams were outlined by our CEO and Editor, Mr. Michael Murungi as follows;
1. Identify a Team name
2. Nominate a leader within the team who will guide the team through this exercise and for future exercises.

3. Generate discussion on the Kenya Law we want (As team members of Kenya Law and as citizens of Kenya) guided by our mission, vision and values and how we can individually contribute to it.

4. Prepare a 10 slide presentation on the new Kenya Law. This presentation will explain what the new Kenya Law means to us and the people of Kenya.

5. Prepare a 250 word script on the presentation in number 4 above.

6. Come up with a “swag line” and catchy acronym which captures the essence and spirit of Kenya Law. Something original and catchy that we will be using in-house that captures the essence of the new Kenya Law.

7. Get a good understanding on the functions of all departments in Kenya Law.

8. The team that was to come up the catchiest swag line and acronym and overall best presentation as nominated by our guest judges was eligible for an exciting team reward which was to be revealed on the day of our internal launch.

The Big Day

The big day finally dawned on July 19th 2013. A lot of time had been put in by every team to ensure that their presentation stood out from the rest. Everyone was anxious to see what each team had in store. The event kicked off from 6pm at the Milimani Law Courts ceremonial hall. It was a black tie event, all ladies and gentlemen dressed up for the occasion with glamorous outfits that expressed their will to transform and be the best they could be.

The master of ceremony was Felix Odiwuor, commonly known as Jalang’o, a man touted to be the most hilarious in Kenya today. Winnie Mbiori opened the event with a word of prayer. The CEO and Editor Mr. Murungi gave his welcoming remarks and Team Moran set the ball rolling with their captivating presentation. The second team was team IPAD whose swag line “Janjarka kisheria na Kenya Law” left everyone in awe. The Goal Diggers with the spade as their symbol were third on stage and had a couple of goals set up for the new identity. Team four called themselves the Eagle, ready to fly and take Kenya law to the highest level in terms of disseminating legal information to the Public. The last team to showcase their talent was team Oasis; they were all in fashionable brown hats and their short skit on stage carried the day. Team work, hard work and unity were evident in all the presentations.

The Chief Guest, the Honorable Chief Justice & President of the Supreme Court Dr. Willy Mutunga who is also the Chairman of the board could not make to the event. Lady Justice Lydia Achode High Court Judge and Council Member represented him. In her speech, Justice Achode said that she was really impressed by the team spirit which was evident in all the presentations. She added that all the members of the National Council for Law reporting went out of their way to
express their thoughts on the Kenya Law they want. The transformation would ensure that Kenya law as it is, strives to enlighten the society and informs the whole world about legal information. Ms. Christine Agimba who is a member of the Board of the National Council For Law Reporting was also present and was particularly impressed by how innovative, daring, enthusiastic and pro-active all the staff members of Kenya Law were. “You guys are on top of the game”, she said. Also in attendance was Mr. Tumising Rono who represented the Office of the Attorney General. Other guests present were Ms. Milkah Ondiek and some former employees of the National Council.
After remarks from the invited guests, Ms. Milka Ondiek who was in the judging panel went on stage to give the judges’ verdict. The best team name went to Team Moran and the best script award was shared by three teams namely; Team Moran, Team Oasis and the Eagles. The best swag line was “Janjaruka Kisheria na Kenya Law” by Team IPAD. The best overall position went to Team Oasis who according to the judges had the Kenya Law Mission and Vision excellently captured in their presentation, they were original and creative. The moment finally came; The CEO and Editor Mr. Michael Murungi requested the invited guests to join him at the podium for the unveiling of the new logo and brand identity. The unveiling was spectacular and everyone waited with bated breath for the new logo that would henceforth be the new brand identity for the National Council for Law Reporting. The new logo appeared on the mega screen in an amazing motion and the air in the Ceremonial hall was filled with confetti and smoke amid jubilation. Everyone welcomed the new brand and danced with joy. It was a mark of transformation and a promise of quality and reliable service to the people of Kenya. The Pillars symbolized strength, resilience and independence. The National Council for Law reporting got a new brand name, Kenya Law which continues to be the light of the Society as far as Legal information is concerned.

The Kenya Law staff celebrates the new brand
Kenya Law Mobile App. – Coming Soon.

By Martin Mbui
ICT Department

E ver the techno savvy an Organization Kenya Law is, coupled with passion and an unwavering zeal to be at our best, the Kenya Law fraternity embarked on a journey of enabling dispensation of legal information into more platforms accessible by most youth in Kenya by partnering with Strathmore University to create the Kenya Law App.

A mobile App, standing for Mobile Application (or mobile app) is a software application designed to run on smartphones, tablet computers and other mobile devices. They are usually available through application distribution platforms, which are typically operated by the owner of the mobile operating system, such as the Apple App Store, Google Play, Windows Phone Store, and BlackBerry App World. Some apps are free, while others must be bought. Usually, they are downloaded from the platform to a target device, such as an iPhone, BlackBerry, Android phone or Windows Phone, but sometimes they can be downloaded to laptops or desktops. For apps with a price, generally a percentage, 20-30%, goes to the distribution provider (such as iTunes), and the rest goes to the producer of the app.

Mobile apps were originally offered for general productivity and information retrieval, including email, calendar, contacts, and stock market and weather information. However, public demand and the availability of developer tools drove rapid expansion into other categories, such as mobile games, factory automation, Global Position System (GPS) and location-based services, banking, order-tracking, and ticket purchases. The explosion in number and variety of apps made discovery a challenge, which in turn led to the creation of a wide range of review, recommendation, and curation sources, including blogs, magazines, and dedicated online app-discovery services.

With a population of about 30 Million Kenyans using mobile devices and about 7 million using smart enabled devices, Kenya Law saw a niche for dispensing legal information in a trendy but accurate manner.

The Mobile App will be initially for access of basic Kenya Law functions and will be released in Versions as more content is added.

Contents of the initial version will include:

1. Selected States
2. The Cause List
3. Bills
4. Caselaw
5. Constitution.

Subsequent versions will contain all content on Version 1 and:

1. Kenya Gazette
2. Laws of Kenya
3. Legal notices.

Kenya Law is also sourcing for development of the same Application (App.) in the IOS platform which is basically for access by Apple based equipments (Apple - Macintosh).
The Android Mobile devices that can run the App will be required to be running Android version 3 and above. The App. Will be easily accessible for the Android platforms from the Google App Store.

Kenya Law and Strathmore sign the Memorandum of Understanding in the presence of the officials of Samsung, the sponsor.
The National Council for Law Reporting is a service state corporation in the Judiciary charged with the mandate of publishing the Kenya Law Reports, which contain the Judicial Opinions of the Superior Courts 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) the Laws of Kenya and other types of public legal information. The Council recently upgraded its Case Law database that runs on its main website www.kenyalaw.org which contains cases collated from the different courts all over Kenya.

Previously, the Case Law records were uploaded into a document management system after which editors then had to check the new judgements, edit them and then approve them for posting to the website. This process
took a long time, had many redundancies and used different systems which did not properly interface with each other therefore requiring manual intervention at many stages of the workflow.

Faced with these challenges, the Council engaged a consultant to implement a new database that meets the highest standards of database design and quality. The new system aimed at making the case search content open, technology neutral and inter-operable and collapse the workflow processes for the collection, inventorying, editing and online publishing of judicial opinions into a stable, robust, user-friendly and secure interface.

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.

This new database will collapse the workflow processes for the collection, inventorying, editing and online publishing of judicial opinions into a stable, robust, user-friendly and secure 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 that 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 and provide a mode through which back-end users can generate reports.

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 a variety of searches such as full-text search, Boolean search, and be able restrict search to metadata or the content of the document. It will also be possible to export content in to a variety of formats, such as XML, current and previous versions of MS Word and PDF.

Finally, this new 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 takes a whole village to raise a child.

~ Nigerian proverb
The New Kenya Law Website

By Martin Andago
ICT Department

Change is here!
Kenyalaw.org is the official website of the National Council for Law Reporting. In order to ensure that our users enjoy The Kenya Law website has been revamped and optimized in order to guarantee the most enjoyable and at the same time informative browsing experience. Some of the salient new features include:

1. Drop-down Menus
The use of dropdown menus allows us to organize all our content into smaller sub-categories that are easy to navigate. By placing content into sub-categories under a larger main category, we have been able to break down pages in a way that it is easy for our visitors to find exactly what they are looking for. This ensures that our visitors have a better experience when visiting the website.

2. Universal Accessibility
Kenya Law recognizes the importance of providing a website that is accessible to the largest possible audience. As such we have made every effort to ensure that our site can be easily used by all users, including those with disabilities.
We are committed to maintaining compliance with the appropriate accessibility guidelines and will continue to monitor future releases of our website in this regard.
We have introduced the following features to ensure the best use of our site by all of our users.

  ✓ HTML Heading Tags

HTML heading tags are used to convey document structure. H1 tags are used for main titles, H2 tags for subtitles etc. Navigation menus in the site are marked up as HTML lists to ensure that the number of links in the list is read out at the start and it can be skipped easily.

  ✓ Images

All images used in the website include descriptive ALT tag attributes. ALT tags are invisible descriptions of images which are read aloud to visually impaired users on a screen reader. Where an image has no use other than being decorative the ALT tag is set to null to allow easy reading of the site by all users.

  ✓ Font size

The font sizes used are in line with universal accessibility standards and are sizable. You can change the font size to make it either larger or smaller via a button available on the top right of every page.

  ✓ Style-sheets

Kenyalaw.org uses cascading style sheets for all visual layout. If your browser or browsing device does not support style-sheets at all, the use of structured semantic mark-up ensures that the content of each page is still readable and clearly structured.

  ✓ JavaScript

The use of Java script has been kept to an absolute minimum. Where it is used then all pages and process are still accessible should JavaScript be turned off.

3. Image Slider
The image slider appears on the Home Page and stands out as one of the brand new features. Here, we display the latest news that Kenya Law has to offer.

4. Responsive Design
The purpose of responsive design is to have one site, but with different elements that respond differently when viewed on devices of different sizes.
Responsive web design offers you the best quality browsing experience with easy reading and navigation minimizing the need for resizing, panning and scrolling. A website design with responsive architecture displays itself effectively on desktop browsers, tablets and...
mobile devices. With responsive design, the website automatically adjusts based on the device the viewer sees it in.

The old woman looks after the child to grow its teeth and the young one in turn looks after the old woman when she loses her teeth.

~ Akan (Ghana, Ivory Coast) proverb
The road to financial freedom begins not with gaining more money but with your head. Everything you do starting with your thoughts (Rhonda Byrne, Author of The Secret) and thinking outside the box.

Gaining financial freedom is every person’s dream. To have financial freedom does not mean you should be paid more to be able to spend or acquire everything you want but it always comes down to spending well what you got at the moment or finding new ways to make extra money to supplement what you earn.

Most employed persons depend solely on salaries and wages for their financial uses. That doesn’t mean one cannot create wealth nor have extra ways to earn money so that he can have more to spend.

We have read and seen thousands of materials and infomercials on becoming millionaires overnight and with each try, most people get disappointed and do not even make an extra cent from this information but rather end up spending more than they anticipated through attending money making seminars and workshops, buying books that tell them what they already know or one just ends up losing more than what they put in this ventures.

Yes this concepts work but how are they going to work if you have not set goals or implemented them. Nothing happens overnight, it takes time to become wealthy or gain financial freedom, and one has to be disciplined before they reap the benefits of acquiring more money. It’s not about getting and spending but also looking for options to save you an extra cent than you would have spent on the first instance you get the money.

Here are my 2 cents to financial freedom and if you are looking to achieve financial freedom, practice makes perfect and after a period of time, you recognize the benefits of taking a minute to account for what you have gotten and you will see, Financial Freedom is in your reach and you can achieve it if you want to.

a) Budgeting and Spending

Do you have a personal or family Budget? Most of us don’t, we work with what we are used to, I have a need, I then have to buy. That’s why most of us end up spending more than we earn. We buy impulsively even when we know we don’t need that item or products. We feel guilty for not having something but depending on your needs is it necessary for you to have it? That’s why we need to budget, one can draw up or download a simple budget (www.Google.com) in different formats to suit ones needs.

You can only save if you are budgeting for what to buy, that helps you know exactly what you need and how much you are spending and then you can even browse around from different suppliers on costs and quality. Therefore you end up saving money and comparing previous month’s budgets and expenditure throughout the year.

b) Creating Savings Through:

i) Sacco- Sheria Sacco is an example of a saving and borrowing tool. You can save and borrow three times as much as your savings through Sacco’s at low interest rates in Sacco’s. Borrowing doesn’t need any collateral and through borrowing, you can accomplish so many goals. Sacco’s also are a way of acquiring property such as land, housing that you would otherwise not been able to acquire through your salary pad at the end of each month.

ii) Chama’s and group savings. Chama’s/ Merry Go rounds like Sacco’s are also a way of getting more funds at a
particular period at no or even lower interest rates. Nowadays Chama’s are not only merry go rounds where you get money when its your turn, but chama groups save money in banks or Sacco’s and you can borrow funds when you need to as long as you are a member of a chama and this now comes with so many benefits.

iii) Banks trough fixed account savings, periodical savings accounts. These saving tools and accounts enable you contribute a given amount of money for a period of time without using it and after a given agreed period, you can withdraw the funds and use it for a budgeted need, start a business, or purchase of property which you would otherwise have not afforded or managed to acquire

iv) Insurance savings through Life insurance, Endowment funds, Educational plans. Life Assurance is a risk management mechanism through which a sum of money is paid to designated beneficiaries, usually your nominated family members, in the event of your untimely death, disability and terminal or critical illness. It is also a financial planning tool.

Endowment Plans are wealth creation plans which give you, the policyholder, the dual benefit of protection along with the potentially higher returns in the form of bonuses. Endowment products, therefore, combine protection and savings.

Education Policy-This plan is specially designed as a savings and protection tool to provide the money your child needs and ensures that money is made available at crucial junctures in a child’s schooling years.

c) Loans – This are taken mostly from banks. Individuals both in the formal and informal sector can take loans from banks, Sacco’s or Chama’s as a way to promote themselves to acquire property or buy items which they wouldn’t afford at a particular period of time. Loans although come with varying interest rates, if well managed and payments made, gains are long term products and those taking loans can supplement to have money now than wait till they manage to save up to get what one will want to buy.

d) Entrepreneurship: Side Businesses and ventures.

Entrepreneurship is the art of starting a business that will eventually be profitable or sustainable. Both formal and Informal sector entrepreneurship help employees to make extra money when they are in full time employment. The entrepreneurial spirit like leadership is made within an individual.

We are all born to be entrepreneurs, we are only afraid of taking the steps and risks to this ventures that can be profitable and increase our wealth. A lot of information on entrepreneurs, entrepreneurship and entrepreneurial ventures is available all over the internet, in books, newspapers, magazines and one has to have an interest and be willing to start. It doesn’t take money, it takes spirit to work.

Such ventures locally one can start small such as opening a kiosk in your neighborhood, open a shop in a bigger town, sell items in your extra time such as weekends, run online shops and blogs that reap benefits from advertisers etc.

Stocks and shares- Under Stocks and shares you put money into different types of investments, such as unit trusts, open-ended investment companies (similar to unit trusts) and investment trusts mainly for Listed companies in the stock exchange, as well as government bonds and corporate bonds. Although there are benefits from Stocks and shares, investors have to be patient and give their investments time because stock and share investment can go down as well as up. One has to seek professional investor advice and read information about the companies they want to invest in before they commit their funds. At times, Stocks and shares has created millionaires overnight but that doesn’t guarantee it will do the same for you, the investors have to be willing to withstand through the fluctuating markets to reap the benefits too.
type of financial wealth is manly considered a long term investment.

e) Windfall gains this can be done through competitions such as Bonyeza Ushinde na Safaricom, raffle ticket (Kenya Charity Sweepstakes) or participating in online radio shows that reward listeners for listening (Maina Kageni’s Count my Cash and Keep it). Although many of us try this games, it’s advisable to join them with caution and beware of the information about them i.e the thin line before you participate to avoid being cheated or falling victim to fraudsters.

This windfall games can be beneficial and disadvantageous at times, you just have to understand the game and avoid being conned. One can try competitions that reward listeners and this can give you gifts or cash or vouchers you had not planned for which can be a source of money too.

All these don’t come easily; it takes time, discipline and willingness to two cents for financial freedom.

A lion can run faster than we can, but we can run farther. ~ Maasai Proverb
Stores and stock control has become a core competency, a strategic weapon that most organizations are now turning to for enhancement of their competitive position. Stores and stock control excellence is however becoming harder to achieve due to several challenges that those responsible for the operation of the storehouse face. These includes demands for higher customer service levels with reduced levels of inventory, demands for reduced storehouse operating costs and increased operating efficiency and increased preference for a “pull” as opposed to a “push” ordering system.

The function of the store is to receive, store and issue material. Store networks are incredibly complex and therein lies the opportunity of improvement. Stores function as an element of materials department, has an interface with many user departments in its daily operations. The basic purpose served by store is the provision of uninterrupted service to manufacturing divisions.

Store act as a cushion between purchasing and manufacturing on one hand and manufacturing and marketing on the other. The inherent limitations of forecasts make the stores function a necessity. Stores function is an inseparable part of all business and non-business concerns, whether they are industrial or service oriented public or private, small or large.

The task of store keeping relates to safe custody and stocking of materials, their receipts, issues, and accounting with the objective of efficiently and economically providing the right material at the time whenever required in the right condition to all user departments.

One must always remember that even though store keeping doesn’t add any value to the product in the normal sense, it is an essential function and just cannot be wished away. At a time store may add time utility or value by preserving scares material that may be required in future.

**Stores are normally divided into various sections such as:**

- Receiving section
- Tool stores
- General store
- Raw materials store
- Finished parts store etc.

By Sylvester Obunde
Finance Department
proper preservation and storage, the store department avoids any depreciation in the value of inventory. The financial view considers stores as an overhead i.e. a cost with no return.

One must always remember that efficiency in the stores operations cannot be built overnight but has to be thought of right from the initial planning stage. Stores must be visualized as an integral part of the purchasing-manufacturing-marketing link. Unfortunately, store management is looked down upon by many as an operational clerical function and fails to attract appropriate talent because of its underdog nature.

One has to bear in mind that the store’s manager heads the single largest group of current assets and his performance is the key to smooth production and subsequent marketing. Many decision related to stores have a dramatic impact on the operational efficiency of the production department and profitability of the entire organization. Management of today’s store and stock control function requires much more professional approach, than previously adapted. It is critical that today’s stores practitioners adapt and adhere to a professional approach.

One must appreciate the role of store in maintaining optimum inventory and highlighting cases through building up proper MIS by maintaining accurate records.
The Beauty of Change: Team Oasis Soaks in Glory

By Emma Kinya, Victor Andande & Ochiel J Dudley

Change ambassadors, Team Oasis delivered the most captivating and representative overall presentation during the Kenya Law Internal Launch (see separate story). The team’s presentation captured the spirit of the new Kenya Law.

The presentation was judged the best on the basis of creativity, swag, focus on the citizen and focus on Kenya Law’s values.

The team had it all - featuring a video and a skit in the entertaining presentation which involved all the Oasis team members.

The audience, comprising rival teams and the panel of guest judges seemed impressed as Oasis presented a well-rehearsed act. One could hear a pin drop as Oasis held the audience captive.

In the skit Wanjiku, written and directed by Ochiel Dudley, Team Oasis presented an old lady who was so enlightened by Kenya Law’s products that she not only represented herself in court but also told off a sly youth who tried to lie to her about her rights.

Jennifer Ogada who played the old lady Wanjiku pulled off such a tight act that everyone present was left awed. “Some of us should consider a career shift. We
might be in the wrong jobs”, CEO Michael Murungi remarked afterwards, leaving the audience in stitches.

The video was a documentary directed by Emma Kinya and Wambui Kamau was shot by team members at the informal *Bunge la Wananchi* that gathers outside Nakumatt City Hall. Other scenes were captured at the Ruiru Municipal Market featuring market women who were excited to receive free copies of the Constitution of Kenya, 2010. The last bit was dedicated to a Patrick Wahome, Victor Andande and Leone W played a major role in editing the film. The result was a spectacular world-class documentary.

The gist of Team Oasis’ presentation, put together by Mutindi Musuva, Patricia Nasumba and Carolyne Wairimu, was the new spirit of Kenya Law where every staff member is proactive and goes out of their way to do their ultimate best.

The presentation also focused on the duty of Kenya Law to innovate products that are high quality, accessible and affordable. Members said they desired a Kenya Law that would be a one-stop shop for all legal information.

Accessibility, according to Team Oasis means the availability of laws in formats accessible to persons with disabilities including braille, audio, and large print.

An integral part of the presentation was expressed in the desire for a Kenya Law that uses flexible approaches to copyright, including Creative Commons Licences.

Part of the presentation was inspired by a visit to Thika High School for the Blind. Team members had a moving session with the virtually impaired students who informed them of the challenges they face in accessing information. They challenged Kenya Law to create products that meet their needs too.

Additionally, Oasis also underscored the essence of an enjoyable workplace. They reasoned that since we spend a third of the days of our lives at the office, it would better be a pleasant experience.

Besides, members of Team Oasis argued for a Kenya Law where everyone is a brand ambassador; knowledgeable of Kenya Law’s products and services and empowered to market them.

Another facet of the presentation visualized a Kenya Law that team members would be proud to be associated with.

As a result, Oasis not only gets recognition in this Bench Bulletin, but will also feature in a documentary to be aired widely, as well as retreat to a reclusive location in Malindi for three nights and days.

Additionally, each Oasis team member will get the cool Samsung Galaxy I-Tabs, obtained at a subsidized price from Samsung.

Now Team Oasis members, Victor, Emma and Dudley show and tell how they did it. Enjoy!
Team Oasis Pictorial

Charting the course – Oasis Team Leader Ivy gets her troops ready at the Windsor Golf course.

Tis food that make us happy! Team Oasis' Lady Battalion takes time off for a bite during the preparation at...windsor.

This is it! Team Player Emma, introduces team Oasis.

Order in the court! – Judge (Steve) performs the Oasis skit.

Lead actress Jennifer Ogada plays Wanjiku in the Oasis skit.
1. Who got swag like us
2. Tuvute pamoja - creating a team spirit
3. Dudley of Tewam Oasis translates “celebrations” in Kenya Sign Language
We won it! Team Oasis breaks into a rapturous celebration

Job well done – Team Oasis stands back as the credits roll

Muchoki of Team I-pad (r) congratulates Steve of Team Oasis (l)

We won it! Team Oasis breaks into a rapturous celebration
Organizational transformation
The power of teams in facilitating change - Team iPAD

By Evelyn Anyokorit Emaase,
Copy Editor, Laws of Kenya Department

Contributors-Team iPAD

Kenya Law was in the process of transformation. Organizational transformation is depicted in its culture through employees, products and services. For organizational transformation to be evident and successful, all employees need to be involved in the process, by so doing employees develop the sense of acceptance and value for the organization. Kenya Law’s management in its efforts to embrace change strategically teamed up five groups internally in realization of the transformation exercise. The teams were given guidelines on what they were expected to do. The final products for the teams were to be presented on the day scheduled for the internal launch.

Team iPAD

Team iPAD was team two of the five teams formed for this function. The team comprised of 16 members drawn from the various departments of the organization.

Why the Name “iPAD”

When the members of this team met for the first time, it was agreed that the choice of name would influence the presentation the group would come up with. The foundation for the team was therefore laid with the team name. After various significant deliberations the team resolved to adopt the name iPAD as team name. As the name suggests, team iPAD is an acronym of a well-chosen word to represent the team’s values which is the transformed Kenya Law or the Kenya Law we want.

The acronym iPAD therefore stands for:

I-nnovative
We embrace creativity and the use of Information Communication Technology (ICT) to enhance access to information.

P-rofessional
Recruiting, retaining and nurturing the best in their fields

A-countable
Accountable to the people of Kenya

D-ynamism
We change with the times, we advance with technology and we adapt to the needs of our stakeholders.

The acronym iPAD simply tells us that at Kenya Law we are technology driven and Mwananchi oriented.

How we packaged the Presentation

Among the things to be presented by each team included: A two hundred and fifty word write-up on “the Kenya Law we want” and a 10 slide presentation. In order to generate the two hundred and fifty word presentation, we started by brainstorming on the Kenya Law we want. Views and ideas were gathered from each member of the team which saw the team
Kenya Law Groups

garner 700 words which was then later deliberated on and reduced to the required total of two hundred and fifty words.

On the 10 slide presentation the teams worked on the strong points from the two hundred and fifty word presentation of the Kenya Law we want which among others included:

- Kenya Law recognizes the aspirations of Kenyans for a Government that is based on the essential values of access to information.
- The Paradigm Shift-We are Agents of the People
- Credible, comprehensible and timely legal information that is open and accessible to all.
- Legally informed, empowered and participative citizenry.
- Accessibility of Legal Information
- Leading Legal Resource Frontier
- Promoting and guaranteeing equal opportunity to its current and potential employees
- Implementing the Constitution by responding to the needs & rights of the Mwananchi.

The slides were packaged with graphics for friendlier and easy to understand presentation.
Other activities in our presentation
The presentation would not have been stimulating without the exciting accompaniments. The team had talented members that sensibly came up with a variety of activities including a poem entitled “Change”, a song “Change is here” cartoons with live audio informing Mwananchi of Kenya Law and an introduction translated in sign language for universal access of information.

Team iPAD wins – “Best Swag line” category
“Janjaruka Kisheria na Kenya law” was team iPAD’s swag line. Knowing that the team that comes up with the best swag line would receive an exciting reward, team iPAD fought hard to win in this category, but how? The answer is simple; by being relevant, simple and unique. Thus “Janjaruka Kisheria na Kenya law” which means be legally informed with Kenya Law. This was not an easy task for the team but the creative minds and the diversity within the teams was a source of strength. We started by listing potential swag lines and then later eliminating them one by one which was not an easy task either since we had listed other exciting and remarkable Swag lines among them; ‘Kuwa Gwijji Wa Kisheria Na Kenya Law, “Kuchanua wadhii Kisheria ni Pozeo Letu Swipe www.kenyalaw.org” Ujichekie” all said and done we eventually agreed on the one the “Janjaruka Kisheria na Kenya law” that carried the day.

Team iPAD’s swag line stood out from the rest, because of its uniqueness, simplicity and relevance. The art of telling it in one word also made team iPAD’s presentation even juicy. Source credibility was another factor in team iPADs presentation. The Presenter was influential as he was able to engage with the audience, was socially attractive as he made the audience yearn for more from the team.

Realization
Even though team iPAD had the best swag line and will receive an exciting reward, the bottom-line for the team is the great achievement of not just winning in the competition and the reward at the end of the day but the concept of being part of the change we want at Kenya Law. As the saying of Ayn Rand goes “Competition is a by-product of productive work, to its goal. A creative man is motivated by the desire to achieve, not by the desire to beat others”.

Going by Stephen R. Covey’s conviction that one person is a change catalyst, a transformer in any situation in any organization, it is paramount that organizations
going through change or transformation bring all members of staff on board to internalize the aspect of change because employees are the ambassadors of the organization and that puts them in a better position to facilitate the change that the organization wants. Covey equates an individual to yeast that can leaven an entire loaf. He says it requires vision, initiative, patience, respect, persistence, courage, and faith to be a transforming leader.
Surviving and thriving in the ever changing world’s one of the most difficult tasks a young person has in his/her plate to be able to accomplish their goals and to be recognized both in the social, career or business world.

As difficult as it may be it doesn’t mean that young people cannot spot the opportunities that come across them to be able to acquire success in what they intend to achieve.

Even with these, young people have to understand when and how opportunities for success come by without having these placed in front of them or delivered to them on a silver plate. As hard as it maybe, hard work reaps the best for individuals both at and outside the workplace to be able to accomplish goals.

It may come as a surprise to many who forgo opportunities to accomplish anything successfully by ignoring simple ways to get ahead forgetting that one has to stand out and at the same time put much effort and dig into the strategies for surviving and thriving to be able to accomplish his/her goals.

There are several forms and ways one can spot opportunities in and out of the workplace. From this, listed are some of the five ways to help you spot new opportunities for success:

1. Look for gaps

The life structure is typically a set of nicely arranged boxes. Every box represents a part of our lives that we live. The boxes are connected so that the life flows between these different stages. Between these boxes are the “golden” gaps. In other words, between the stages of life is some more opportunity that’s important but nobody currently “owns” that opportunity. This is your chance to take ownership of that challenge and fill the gap or seize the opportunity.

2. Look for more responsibility

At work, careers demand taking responsibility in what we do or making decisions to be able to stand out. Taking more responsibility will generally involve more work but it’s also more about being accountable for bigger results. Just like the rich people get richer, the people who produce bigger results are given more opportunities to produce even bigger results. This means you are automatically put in an advantage point to spot new opportunities.

3. Look for bigger problems

The general tendency among the young people i.e the Generation X is staying away from problems and stay far away from even bigger problems. Problems don’t mean real problems but more about challenges at work and in life. However, if you are not solving a big enough problem, chances are that you may not be doing anything important. If you are not doing anything important, then chances are that you may not find any new opportunities. When many people stay away from a big problem, you need to grab that chance and go after it.

Look around and see what the “big problem” around you is. Try to find a way to get engaged to lead or
be in the team for solving this problem. Solving a bigger problem typically would mean seizing a bigger opportunity.

4. Look for knowledge

Knowledge in simple terms, it is a process of applying information from one field in another field to be able to succeed at the same time to improve the power of what each of us has gained academically and career wise. Go beyond your company, industry and/or trade. Learn something new each time, look elsewhere in an unrelated field and see what's working.

5. Look to Listen

Yes, it seems simple but most people don't listen. We live in a generation where we simply “We don’t listen but want to speak at every opportunity we get”.

When then we don’t listen, we lose the chances and opportunities that are before us i.e a chance that someone may say something beneficial or important to improve or lives or careers.

When you actively listen with an open mind, you will start spotting opportunities sooner than later.
Caseback

By Emma Mwobobia Senior Law Reporter

Law Reporting Department

Feedback For Caseback Service

Good afternoon,
Thank you for the decision herein. I find it crucial.
With regards,

S.M.MOKUA

Dear Kenyalaw,
Thank you for this feedback. It has been most useful especially since the subject case raised many legal questions that the High Court has firmly settled.
Keep up this great work.
Most kind regards,

Hon. Lorot

Thank you so much for this service. It has given me lots of insight on what is expected of me as a judicial officer. May I know how far back I can get my decision challenged in appeal.

Most kind regards,

Hon. L.Mesa

I am grateful for the information. I have learnt alot from the decisions of the Higher Court. I endeavor to build on the jurisprudence. Please keep updating me more and more on other decisions.
Thanks

Hon. Vincent Kiptoon
Thank you for this excellent service. Much appreciated

RICHARD MWONGO,
PRINCIPAL JUDGE,
HIGH COURT OF KENYA

On Our Notice Board ............

To all NCLR staff

You are my key allies.
I like the following in order of priority:
1) Uploaded cases on eKLR.
2) Caseback service.

Sincerely,
G.K. Kimondo Judge

Kenya Law (KLR) is a national achievement.
Many, many thanks.

[Signature]
26-7-2013

Hon. Justice Richard Mwongo,
Court upholds its earlier ruling on unconstitutionality of section 14 of the Supreme Court Act which conferred ‘special jurisdiction’ on the Supreme Court

JASBIR SINGH RAI & 3 Others v TARLOCHAN SINGH RAI & 4 Others [2013] eKLR

Petition 4 of 2013
Supreme Court of Kenya

August 20, 2013

Reported by Njeri Githang’a Kama & Victor L Andande

Upon the promulgation of the Constitution of Kenya, 2010 and the enactment of the Supreme Court Act, 2011 (No. 7 of 2011), the petitioners moved the newly-established Supreme Court, seeking redress, by invoking the Supreme Court’s ‘special jurisdiction’ under Section 14 of the Supreme Court Act, by way of petition.

While the petition was pending, the Supreme Court delivered pertinent ruling in another matter, Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & two Others, Supreme Court Application No. 2 of 2011 (Macharia Case). The burden of that Ruling, in relation to the present case, was the declaration of Section 14 of the Supreme Court Act to be unconstitutional, insofar as it purported to give the Supreme Court a ‘special jurisdiction’.

Soon after the Ruling in the Macharia Case, and as the petition herein was pending before the Supreme Court, the respondents raised a preliminary objection to the petitioners’ case. They contended that the Court lacked jurisdiction to entertain the matter.

In response to the preliminary objection on jurisdiction, as lodged, the petitioners applied to the Court for a review of the Macharia ruling, on the basis that the declaration of section 14 of the Supreme Court Act, 2011 as unconstitutional was “wrong”, and ought to be reversed.

**Issues**

i) Whether the Supreme Court could depart from its earlier decision and if so under what circumstances?

ii) Whether the Supreme Court’s declaration that section 14 of the Supreme Court Act was unconstitutional could be reversed.

iii) Whether the Supreme Court could deal with matters on violation of fundamental rights.

iv) What is the distinction between an obiter dictum and per incuram decision?

**Constitutional law** – constitutionality of a statutory provision – constitutionality of section 14 of the Supreme Court Act – where the Supreme Court had declared the section unconstitutional – whether the Supreme Court rightly declared section 14 unconstitutional.

**Jurisdiction** – Supreme Court – Jurisdiction of the Supreme Court – scope of jurisdiction of the Supreme Court – where the Supreme Court Act conferred special jurisdiction upon the Supreme Court – whether in the circumstances the Supreme Court could exercise special jurisdiction – Supreme Court Act, section 14, Constitution of Kenya 2010, article 163.

**Precedent** – stare decisis – distinction between obiter dictum and per incuriam decision – where the petitioners requested the Supreme Court to depart from its earlier decision – whether the decision could be said to have been per incuriam – what were the circumstances under which the Supreme Court could depart from its earlier decisions – Constitution of Kenya, 2010, article 163(7).

Article 163(7) of the Constitution of Kenya 2010 provided that:

“All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.”

**Held**

1. As a matter of consistent practice, the decisions of the higher Courts were to be maintained as precedent; and the foundation laid by such Courts was to be sustained in principle. This left an opening for the special circumstances which would occasionally dictate a departure from previous decisions.

2. Whether or not the apex court could adhere to its
precedent, or depart therefrom, was dependent on that
court’s perception of the claims of justice and equity, or
of the fundamental constitutional or related principles
coming to bear upon the issues raised.

3. The immediate pragmatic purpose of such an
orientation of the judicial process was to ensure
predictability, certainty, uniformity and stability in the
application of law. Such institutionalization of the play
of the law gave scope for regularity in the governance of
commercial and contractual transactions in particular,
though the same scheme marked also other spheres of
social and economic relations.

4. The Supreme Court, as an apex Court, could indeed
depart from its previous decision, for good cause,
and after taking into account legal considerations of
significant weight. Such a latitude for departure from
precedent existed not only in principle, and from well-
recorded common law experience, but also by virtue
of the express provision of the Constitution.

5. The following factors had to be considered, where
the Supreme Court was called upon to overturn its past
decision:

(i) whether the precedent set had become impracticable
or intolerable;

(ii) whether overturning the precedent would occasion
hardship, or inequities to those who had already relied
on the authority of the precedent;

(iii) whether, since the setting of the precedent, related
principles had evolved to such an extent that it was
fair to conclude that the society’s conditions and
expectations had taken new dimensions;

(iv) whether the facts had significantly changed, or
were currently viewed so differently, that the design of
the precedent had become irrelevant, or unjustifiable.

6. The Supreme Court, if it was to “develop the
law”, had to have the liberty to depart from previous
decisions such as could stand as a constraint to the
growth of the law.

7. An obiter dictum statement was one made on an
issue that did not strictly and ordinarily, call for a
decision: and so it was not vital to the outcome set out
in the final decision of the case. On the other hand,
a decision per incuriam was mistaken, as it was not
founded on the valid and governing pillars of law.

8. Comparative judicial experience showed that the
decision of a superior Court was not to be perceived as
having been arrived at per incuriam, merely because it
was thought to be contrary to some broad principle, or
to be out of step with some broad trend in the judicial
process; the test of per incuriam was a strict one, the
relevant decision having not taken into account some
specific applicable instrument, rule or authority.

9. The decisions of Kenya’s Supreme Court, which
ought always to be arrived at only after the most
conscientious and detailed consideration, were to
stand as the binding reference-point in the norms
governing the judicial process. Such a position was vital
for the maintenance of the certainty, predictability, and
jurisprudential standards that sustained the principles
of the Constitution, and the rights and duties flowing
from the legal set-up, and which provided sanctity for
the legitimate actions of the people.

10. Subject to the broad principle, the following
directions had to be considered by the court when
dealing with precedents:

(i) where there were conflicting past decisions of the
court, it could opt to sustain and to apply one of them;

(ii) the court could disregard a previous decision if it
was shown that such decision was given per incuriam;

(iii) a previous decision would not be disregarded
merely because some or all of the members of the
Bench that decided it would presently arrive at a
different conclusion;

(iv) the court would not depart from its earlier decision
on grounds of mere doubts as to its correctness.

11. The decision of the Supreme Court on the issue
of the constitutionality of Section 14 of the Supreme
Court Act was to be considered an element in the ratio
decidendi of the Macharia Case in which the issue was
handled, rather than an obiter dictum.

12. If it would be thought that any error was entailed
in the Court’s perception of jurisdiction, such an
apprehension by itself, could not justify the reversal of
the ruling declaring section 14 unconstitutional. That
decision established itself as a mark of certainty and
predictability in the law, and on the basis of which
numbers of people would have figured out their rights
and expectations. In these circumstances, public policy
where legal information is public knowledge

A quarterly publication by Kenya Law

102

Supreme Court Cases

was unconstitutional, insofar as it purported to give the Supreme Court a ‘special jurisdiction’. The Supreme Court, as an iconic court in the land, should however have approached the issue of the constitutionality, or lack thereof, of section 14 of the Supreme Court Act, in a more comprehensive manner, and strived to explain its background and context extensively, or even painstakingly, so that the people of Kenya, and the litigants (present or prospective), could fully grasp the reasons behind its refusal to exercise jurisdiction as purportedly provided under Section 14 of the Supreme Court Act.

Per Ibrahim SCJ Dissenting:

1. The Court was to take into account the following principles, in addition to those already stated when considering whether to depart from its precedents:

   (i) A decision that was manifestly wrong on the face of it would occasion a departure by the Court. What was manifestly wrong would depend on a conscientious determination by the Court, and would vary from case to case.

   (ii) Whether a decision was erroneous, and severely affected the lives of people, and impacted negatively on the general welfare of the public.

   (iii) Upon consideration of such elements, the Court would be ready and willing to depart from an erroneous decision, where the decision was a recent one and the decision had not as yet created property rights around which individuals’ interests had vested.

2. A question of jurisdiction when raised, occasionally by way of a preliminary objection, did not necessarily address the issue of the constitutionality of a piece of legislation. It would be questioning the applicability of that law to the issues forming the subject-matter under consideration.

3. The issue of jurisdiction in the Macharia Case was framed not on the question of the constitutionality of Section 14 of the Supreme Court Act, but on whether the case as presented by the Applicant had met the procedural requirement of moving the Court by way of petition, provided for by the rules, had been followed; and if not, whether that was fatal to the application before the Court. The issue of the
stakeholders on board. This would enhance fidelity to the doctrine of separation of powers, and contributed to respect for all constitutional organs, and for their mandates. This way, the principle of checks and balances would be seen to be truly operational, within the constitutional framework, in the terms of article 2 of the Constitution.

8. Until the contrary was proved, a legislation was presumed to be constitutional. The onus was upon those who challenged the constitutionality of the legislation to rebut the presumption.

9. An issue touching on a procedure challenging the constitutionality of statutory law was not a matter of procedural technicality. It was a matter of procedural substance. The procedure towards the declaration of Section 14 of the Supreme Court Act as unconstitutional was a substantive procedure that went to the core of the constitutionality of a legislative activity. Thus, the declaration of Section 14 as being unconstitutional lacked the procedural substantive requirement, and it ought not to be left to stand as a precedent.

10. The declaration of Section 14 as being unconstitutional was made when the instant matter was pending before the Court. Therefore, the premature declaration in proceedings which did not call for such a determination, prejudiced litigants who were properly before the Court, given that the prima facie threshold requirement under Section 14 had been attained as the particular judge at the centre of the instant case retired as a consequence of the allegations made against him.

Application disallowed but an order as to costs to be made in the cause.

Criteria in determining matters of public interest warranting the exercise of the Supreme Court appellate jurisdiction

SAJ v AOG & 2 Others
Supreme Court of Kenya
Petition No 1 of 2013
W Mutunga CJ, P K Tunoi, M K Ibrahim, J B Ojwang, S Wanjalla & N S Ndungu SCJ
August 1, 2013
Reported by Andrew Halonyere & Cynthia Liavule

Following the issuance of certificate of leave by the Court of Appeal, to appeal to the Supreme Court, the applicant filed a petition seeking the Supreme Court’s consideration of the law of international child abduction in Kenya and more specifically;

(i) The conduct of proceedings on international child abduction cases in Kenya.
(ii) The nature of relief in international child abduction cases in Kenya.
Appeal to the Supreme Court
(a) as of right in any case involving the interpretation or application of this Constitution; and
(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

Article 165(3) - Subject to clause (5), the High Court shall have
(a) unlimited original jurisdiction in criminal and civil matters;

Held

1. A matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that its impacts and consequences were substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest were not closed, the burden fell on the intending appellant to demonstrate that the matter in question carried specific elements of real public interest and concern.

2. The applicable criteria in determining whether a matter would merit certification as one of general public importance were:
   (i) the intending appellant had to satisfy the Court that the issue to be canvassed on appeal was one the determination of which transcended the circumstances of the particular case, and had a significant bearing on the public interest;
   (ii) where the matter in respect of which certification was sought raised a point of law, the intending appellant had to demonstrate that such a point was a substantial one, the determination of which would have a significant bearing on the public interest.
   (iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination.
   (iv) where the application for certification had been occasioned by a state of

The 1st respondent on his part raised a preliminary objection on grounds inter – alia that the issues raised in the petition were not canvassed in the High Court or the Court of Appeal and that they were not matters of general public importance and therefore that the notice of appeal petition and record of appeal should be struck out.

Issues

I. Whether the Supreme Court has jurisdiction to determine issues raised in an appeal that were not canvassed in the High Court or the Court of Appeal.

II. What is the criteria in determining matters of public interest warranting the exercise of the Supreme Court appellate jurisdiction

III. Whether the appeal or intended appeal involved a matter of general public importance under article 163 (4) of the Constitution of Kenya 2010 with particular reference to child abduction.

IV. Whether the law is uncertain in the area of international abduction of a child.

Jurisdiction – appellate jurisdiction – Supreme Court appellate jurisdiction – duty of the Court of Appeal to certify whether a matter is of public importance – where issues raised were not canvassed in the High Court or Court of Appeal - applicable criteria in determining whether a matter would merit certification as one of general public importance – whether the Supreme Court had jurisdiction to determine the matter - whether in the circumstances the appeal had merit

Jurisdiction – jurisdiction of the Supreme Court to determine question of law of international child abduction in Kenya – whether the law on international child abduction in Kenya was uncertain - Constitution of Kenya, 2010 article 163 (4)

Constitution of Kenya, 2010

Article 163(4) - Appeals shall lie from the Court of

abduction cases in Kenya;

(iii) The role of international law instruments relating to international child abduction in Kenya.

(iv) The future of legal responses to international child abduction in Kenya.
uncertainty in the law, arising from contradictory precedents, the Supreme Court could either resolve the uncertainty, as it could determine, or refer the matter to the Court of Appeal for its determination.

v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, was not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, had to still fall within the terms of article 163 (4)(b) of the Constitution.

vi) the intending applicant had an obligation to identify and concisely set out the specific elements of ‘general public importance’ which he or she attributed to the matter for which certification was sought.

vii) determinations of fact in contests between parties were not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

3. The matters raised for determination in the case potentially transcended the circumstances of the instant case and would have a significant bearing on the public interest.

4. The Court of Appeal was better placed to certify whether a matter of public importance was involved since it had all along been seized of the matter on appeal before it and had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, the Court of Appeal should have ideally been afforded the first opportunity to express an opinion as to whether an appeal could lie to the Supreme Court or not.

5. The issues cited by the appellant as placing the matter on the platform of general public importance, were exhaustively outlined in the petition which was still pending in the High Court. The petition was yet to be determined and the parties had not exhausted the forum accorded to them by the law. The Court of Appeal ought to have referred the matter back to the High Court for the determination of the questions it flagged as matters of general public importance.

6. If the Supreme Court were to consider the matters raised, it would not be providing further input, but merely undermining the role of the other Courts, and encroaching on the unlimited original jurisdiction of the High Court, which was provided for under article 165 (3)(a) of the Constitution of Kenya 2010.

7. The substantive matters in the appellant's petition remained unanswered, as they had not yet been canvassed in the proper forum. As a Court not furnished with facts, the Supreme Court ran the risk of perpetuating an injustice, as both parties should first have been heard in the appropriate Court, before preferring an appeal either to the Court of Appeal or to the Supreme Court. It was such initial hearing on fact that constituted the centerpiece of the right to be heard and to fair trial.

8. The Supreme Court, as the ultimate judicial agency, ought to exercise its powers strictly within the jurisdictional limits prescribed and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it would be perverse for the Court to assume a jurisdiction which by law was reposed in the Court of Appeal and which that Court had duly exercised and exhausted.

9. In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle was that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, had the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law and only cardinal issues of law or of jurisprudential moment would deserve the further input of the Supreme Court.
10. The assertion that the law on international abduction was uncertain was not categorical as the matter had not yet been determined by the High Court. Even if an uncertainty existed, it was not occasioned by contradictory precedent but rather by lack of precedent.

11. The Supreme Court was not inclined on an ordinary appellate cause, to pronounce itself on an issue that had not been canvassed and determined by the lower Courts or tribunals as provided by law. The High Court had not heard the petition before it on the matter and neither had the matter before the Children’s Court (on custody of the child) been determined. Those Courts ought to have an opportunity to hear the matters before them, and make a finding, before the stage was reached for an appeal to the Supreme Court, as contemplated under article 163 (4).

12. The intended appeal failed the test of certification of an appeal on matters of public interest established in Hermanus Steyn v Giovanni Gnechi – Rusconi, Supreme Court Application No 4 of 2012. The matters before the High Court and the Children’s Court remained undetermined. The issues raised by the appellant formed the basis of the petition pending in the High Court and the High Court was the proper trial forum; hence that Court was to be allowed the opportunity to hear and determine the matter.

Notice of appeal struck out, certificate of leave granted by the Court of Appeal quashed. Matter pending before the Children’s Court shall be set for hearing and determination.

Supreme Court’s power to extend time limited by the Supreme Court rules
Shabbir Ali Jusab v Anaar Osman Gamrai and another
Supreme Court Civil Appeal No 1 of 2013
Supreme Court at Nairobi
S C Wanjala & S N Ndungu, SCJJ
April 23, 2013
Reported By Njeri Githang’a Kamau

Facts:
The preliminary objection was filed by the 1st respondent seeking the dismissal of an appeal filed in the court on November 20, 2012 by the applicant/petitioner challenging the decision of the Court of Appeal in the matter. Leave to appeal to the Supreme Court had been granted on the basis that the intended appeal raised weighty issues of general public importance relating to the law of international child abduction. The appellant filed a Notice of Appeal before the Supreme Court on 20th November 2012 and a Petition of Appeal on the 5th February 2013 under Rules 9, 33 and 42 of the Supreme Court Rules and the inherent powers of the Court. The preliminary objection was raised on the grounds that the appeal was filed out of time; the matters raised in the petition were not matters of general public importance, and that; the Court did not have jurisdiction to entertain the matter.

Issues:

i. Whether the court could allow the preliminary objection considering that the matter at hand was one where the Court had been called upon to determine if the questions raised were of general public importance while the court was yet to pronounce itself on what constitutes a matter of general public importance under Article 163(4) (b) of the Constitution of Kenya, 2010.

ii. Whether the Supreme Court under Rule 53 of the Supreme Court Rules had power to extend the time limited by the rules.

iii. Whether the Court could disregard procedural technicalities in favour of substantive justice having regard to all relevant circumstances obtaining in the case.
Civil Practice and Procedure – notice of appeal – time within which to file – preliminary objection on the ground that the appeal was filed out of time and that the matters raised in the petition were not matters of general public importance – whether the Supreme Court under Rule 53 of the Supreme Court Rules had power to extend the time limited by the rules and the court could exercise the power and deem the Notice of Appeal and Record of Appeal to have been filed within time.

3. The Supreme Court under Rule 55 of the Supreme Court Rules had discretion to issue appropriate orders where the rules of procedure had not been followed.

4. No injustice would be occasioned to the applicant if the matter was allowed to proceed to its determination under Article 163 (4) (b) of the Constitution of Kenya, 2010.

5. Article 159 (2) (d) of the Constitution of Kenya, 2010 required the Court to administer justice without undue regard to procedural technicalities. The essence of that provision was that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. That principle of merit bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course. 

Raila Odinga v IEBC and 4 others, Petition (No. 5 of 2013).

6. The case before the court was one where the Court could disregard procedural technicalities in favour of substantive justice having regard to all relevant circumstances obtaining in the case.

7. (Dicta) “In arriving at this decision, this Court is guided by rules and regulations and urges all parties to follow the same since they guide the court and the parties in obtaining justice”

Preliminary objection dismissed, matter to proceed to full hearing

Supreme Court Rules
Rule 55 states:

These Rules and Practice Directions issued thereunder shall bind all parties in all proceedings before the Court provided that:

(a) where any provision in these Rules or any relevant practice direction is not complied with, the Court may give such directions as may be appropriate, having regard to the gravity of the non-compliance, and generally to the circumstances of the case.

(b) any direction given under this rule may include the dismissal of the petition, reference or application

Held:

1. The Court was yet to pronounce itself on what constitutes a matter of general public importance under Article 163(4) (b) of the Constitution of Kenya. The matter at hand was one where the Court had been called upon to determine if the questions raised were of general public importance. Allowing the preliminary objection would deny the Court an opportunity to determine the important question of law and examine the substantive issues raised by the appeal to enable it make a jurisprudential finding on whether issues of child custody were indeed matters of general public importance.

2. The Supreme Court under Rule 53 of the Supreme Court Rules had power to extend the time limited by the rules and the court could exercise the power and deem the Notice of Appeal and Record of Appeal to have been filed within time.
Test to be applied in an application for leave to institute a pauper brief

John Mbugua and another v Attorney General and 16 others

Petition No 3 of 2013
Supreme Court at Nairobi
L Njora, DRSC
March 20, 2013

Reported by Njeri Githang’a Kamau

Facts:
The applicants in the application sought to be allowed to file the petition challenging the swearing in of the President-elect as paupers.

Issue:
i. Matters which the registrar of the Supreme Court should consider in an application for leave to institute a pauper brief.

Civil Practice and Procedure – pauper briefs – application for leave to file petition as a pauper in the Supreme Court – matters which the registrar of the supreme court should consider in such an application – Supreme Court Rules, Rule 50

Supreme Court Rules
Proceedings in forma pauperis
50. (1) A party may apply in any proceedings in the court to proceed in forma pauperis.
(2) Where the Registrar of the court is satisfied in any proceedings that a party lacks the means to pay the required fees, the Registrar may by order direct that the matter be lodged
(a) Without prior payment of fees of Court, or on payment of any specified amount less than the required fees; and
(b) On condition that the applicant undertakes to pay the fees or the balance of the fees out of any money or property that may be recovered in or as a consequence of the proceedings.
(3) In considering an application under sub-rule (2), the Registrar shall consider—
(a) whether the person has the capacity to pay the costs;
(b) whether the suit in the court below was instituted in forma pauperis.
(c) the affidavit of means deponed by the party;
(d) the objective merit of the case; and
(e) any practice directions made by the Chief Justice.
(4) No fee shall be payable on the lodging of an application under sub-rule (1).
(5) Any expenses arising from waiver of fees under this

Rule shall be charged on the Judiciary Fund.

Held:
1. The threshold of proving that an applicant deserves the leave of the Court to be pronounced as one capable of filing in forma paupers is extremely high.
2. The prayers sought called for the exercise of the courts discretion which was in terms unfettered. But as in all cases where the court had to exercise its discretion, there must be some reasonable basis in fact or in law to warrant the orders made. The court’s discretion had to be exercised judiciously at all times under any given circumstances.
3. The applicants had failed to;
   a. Provide the Court with sufficient evidence to persuade the Court to find in their favour.
   b. meet the threshold of proving and providing full disclosure
   c. Provide an inventory of their assets and liabilities by merely stating that they have none.
4. The onus in pauper briefs lay squarely on the applicant to candidly and in extreme openness reveal all about his status to the Court. Failure to provide disclosure in its strict sense would knock out the matter and would render a matter as un creditworthy.
5. The court must be satisfied on the application of an applicant that he lacks the means to pay the required fees or to deposit the security for costs and that the matter is not without reasonable possibility of success. Court of Appeal Civil Application number 228 of 2004
6. A court was entitled to reject such an application where the court was satisfied that the applicant could not recover more than nominal damages, the court might well be justified in refusing permission because it would be unjust to the other party who would
have to incur substantial costs which might not be recoverable. *Ali Suleman Mandevia v Rongwe African Co-operative Union Ltd.* Application dismissed.

**Jurisdiction of the Court of Appeal to entertain an application under Rule 5(2)(b) of the Court of Appeal Rules**

*Equity Bank Limited v West Link Mbo Limited [2013] Eklr*

Civil Application 78 of 2011

Court of Appeal at Nairobi

E.M Githinji, D.K. Musinga, P.O. Kiage, K. M’Inoti & F. Sichale JJA

May 31, 2013

Reported By Andrew Halonyere, Njeri Kamau, Teddy Musiga, Lynette Jakakimba and Beryl Ikamari

**Case History**

(Application under Rule 5(2)(b) of the Court of Appeal Rules for stay of execution of the Ruling and Order of the High Court of Kenya at Nairobi (Muga Apondi, J) dated 4th February, 2010 in H.C.C.C. No. 142 of 2009)

**Brief Facts**

The applicant filed an application before the Court of Appeal for stay of execution of the High Court’s summary judgment and decree. The respondent on its part challenged the Court of Appeal’s jurisdiction under Rule 5(2)(b) through a preliminary objection and requested that a bench of five be empanelled to hear the objection. The panel was thereafter empanelled.

**Issues**

i. Whether the jurisdiction under rule 5(2)(b) of the Court of Appeal Rules was an original jurisdiction as opposed to exclusive appellate jurisdiction under article 164 (3).

ii. Whether article 164(3) of the Constitution of Kenya, 2010, gave litigants a direct, unfettered, and absolute right of appeal to the Court of Appeal and whether requirements pertaining to seeking leave to appeal, and conditions attached to the right to appeal, were unconstitutional and obsolete.

iii. Whether a notice of appeal was a mandatory requirement before invoking the powers of the Court of Appeal under Rule 5(2)(b) of the Appellate Jurisdiction Act (Cap 9).

iv. Whether section 3(1) and (2) of Appellate Jurisdiction Act which limits right of appeal to the Court of Appeal were unconstitutional.

v. Whether article 259 of the Constitution of Kenya, 2010 was the primary tool of interpretation of the Constitution.

vi. Whether article 164 (3) of the Constitution of Kenya, 2010 was a major departure from section 64(1) of the repealed Constitution and the jurisdiction of the Court of Appeal under the two provisions is different.

vii. Whether the Court of Appeal had inherent powers to grant interim orders pending hearing and determination of appeals.

**Civil Practice and Procedure** – jurisdiction - jurisdiction of the Court of Appeal to stay execution of a decree – whether under the Constitution the jurisdiction of the Court of Appeal to hear appeals extends to issuance of conservatory orders – whether a notice of appeal was a mandatory requirement before filing an appeal – rule 5(2)(b) of the Court of Appeal Rules.

**Civil Practice and Procedure** - appeals- Court of Appeal-circumstances under which the appellate jurisdiction is invoked-whether article 164(3) of the Constitution of Kenya, 2010, gave litigants a direct, unfettered, and absolute right of appeal to the Court of Appeal -whether requirements pertaining to seeking leave to appeal, and conditions attached to the right to appeal, were unconstitutional and obsolete

**Constitutional Law** – interpretation of the constitution – primary tool of interpretation of the Constitution - duty of the court to interpret the Constitution in a way that ensures promotion of the purpose, values and principles of the Constitution, advancement of the
rule of law, the Bill of Rights and contribute to good governance – Constitution of Kenya, 2010 article 259,164(3) - Appellate Jurisdiction Act (Cap 9) Rule 5(2)(b).

Constitutional Law - jurisdiction— inherent jurisdiction of the court of appeal - Court of Appeal jurisdiction to grant orders of stay - interpretation of section 3(1) and (2) of Appellate Jurisdiction Act- where the said sections limit right of appeal to the Court of appeal — whether section 3(1) and (2) of the Appellate Jurisdiction Act are unconstitutional– Appellate jurisdiction Act section 3(1) and (2)

Words and phrases
“Jurisdiction” means courts power to decide a case or issue a decree.”

“Inherent power” means the authority possessed by a court implicitly without it being derived from the constitution or any statute.

Constitution of Kenya, 2010:

Article 164

“There is established the Court of Appeal, which –
(a) shall consist of the number of judges, being not fewer than twelve, as may be prescribed by an Act of Parliament; and
(b) shall be organized and administered in the manner prescribed by an Act of Parliament.

(2) ……………………

(3) The Court of Appeal has jurisdiction to hear appeals from –
(a) the High Court; and
(b) any other court or tribunal as prescribed by an Act of Parliament.”

Article 259

“This Constitution shall be interpreted in a manner that-

(a) promotes its purposes, values and principles;
(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
(c) Contributes to good governance.”

Section 64(1) of the repealed Constitution which provided:-

“ There shall be a Court of Appeal which shall be a superior court of record and which shall have such jurisdiction and powers in relation to appeals from The High Court as may be conferred on it by law”

Appellate Jurisdiction Act, Section 3 provides that;

(1) “The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any rule.

(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.”

Court of Appeal Rules, Rule 5(2)(b) provides that;

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may –

(a) ………………………..

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

Held

1. The description that the Court of Appeal exercises “original jurisdiction” under Rule 5(2)(b) is what has brought confusion on the true nature of the powers under that rule. Taken at face value, it creates the false impression that the Court of Appeal has an original jurisdiction like the original jurisdiction of the High Court and that that jurisdiction exists and is exercisable independent of the jurisdiction conferred on the Court by the Constitution to hear appeals. The fact of the matter is that the Court of Appeal cannot assume or exercise jurisdiction in an application under rule 5(2) (b) unless a competent notice of appeal has been filed.

2. Article 164(3) of the Constitution, 2010 grants power to the Court of Appeal to “hear appeals” from the High Court and other tribunals as prescribed by an Act of Parliament. The constitution does not define what an “appeal” is. The Constitution merely provides a general framework and principles that prescribes the nature, functions and limits of government or other institutions. Acts of Parliament and subsidiary legislation contain the details regarding its operationalization. Therefore
3. Accordingly, the first step in instituting an appeal is the filing of a notice of appeal. Therefore as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence and a litigant could move the Court of Appeal for the grant of order of stay under Rule 5(2)(b) of the Court of Appeal Rules. In doing so, the Court of Appeal is said to be exercising special independent original jurisdiction because in considering whether to grant or refuse an application for stay it is not hearing an appeal from the High Court. It can grant orders of stay, irrespective of whether such an application had been made in the High Court.

4. An application under Rule 5(2)(b) is not an appeal as envisaged by Article 164(3). For purposes of judicial proceedings an appeal is a substantive proceeding instituted in accordance with the practice and procedure of the court by an aggrieved party against a decision of a court to a hierarchically superior court with appellate jurisdiction seeking a reconsideration and review of the decision in his favour.

5. As a general principle of law an appeal being a totally distinct proceeding from the original or appellate proceedings appealed from, the institution of an appeal does not operate as a bar to execution of a sentence in criminal matters or execution of decree, in civil matters unless otherwise expressly so provided. Order 42 Rule 6(1) Civil Procedure Rules restates that principle and proceeds to give the court appealed from jurisdiction to grant a stay of execution in case of an appeal.

6. Rule 5(2)(b) is the counterpart of Rule 6(1) of Order 42 of the Civil Procedure Rules. At the stage of determining an application under Rule 5(2)(b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5(2)(b) because the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal the Court of Appeal would have no business to meddle in the decision of the High Court. Indeed, by Rule 2, an appeal in relation to the Court includes an intended appeal.

7. Rule 5(2)(b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.

8. The procedure recognises that the Court has only jurisdiction to hear appeals but deems an intention to appeal as manifested by a Notice of Appeal as an appeal. Thus, the true nature of Rule 5(2)(b) applications is for all intents and purposes, an interlocutory application in the appeal.

9. Since Rule 4 of order 42 Civil Procedure Rules and Rule 2 of Court of Appeal Rules deem an appeal as filed upon filing of the Notice of Appeal, there is, no practical difference as in both cases the application is filed and heard within the appeal.

10. The Court of Appeal’s jurisdiction to hear appeals would be an impossibility and impracticality if it were not read to mean that the Court of Appeal had jurisdiction to determine all manner of applications that impact on or were incidental or related to the appeals. Therefore, rule 5(2)(b) of the Court of Appeal Rules, and section 3(2) of the Appellate Jurisdiction Act (Cap. 9) were not unconstitutional.

11. Pursuant to article 164(3)(b) of the Constitution of Kenya, 2010, the Court of Appeal had jurisdiction to hear all appeals from the High Court (unless expressly excluded) but the Court of Appeal would only hear appeals from other courts and tribunals as specified in the legislation contemplated by article 164(3)(b) of the Constitution.

12. It would not be possible for a litigant to appeal to the Court of Appeal at will and on any issue. The provisions of the Civil Procedure Act (Cap. 21) and the Criminal Procedure Code (Cap. 75) revealed that not every decision of the High Court (or any other court or tribunal) was appealable.

13. Limitations and conditions attached to an appeal under the Civil Procedure Act (Cap. 21) were expressed in sections 67(2), 72(1) and 75(1), which respectively provided for the non-appealability of consent judgments, the conditions attached to second appeals to the Court of Appeal, and orders for which an appeal lies as of right. Such limitations on the right to appeal...
14. In the Criminal Procedure Code (Cap. 75) limitations to the right of appeal were provided for under sections 379 and 361, which respectively indicated that minor convictions from the High Court were not appealable and that certain conditions were to apply as to the nature of appeals for which appellate jurisdiction would be exercised.

15. Clause 7(1) of the sixth schedule to the Constitution of Kenya, 2010 preserved all existing laws operational as at the time of the promulgation of the Constitution. Only that such laws were to be construed with such alterations, adaptations, qualifications and exceptions as are necessary to bring them to conformity with the constitution. The Appellate Jurisdiction Act is one such law that was preserved under the Transitional clauses hence section 3(1) and (2) were not unconstitutional.

16. The words used under article 259 were not the only primary tools of interpretation of the Constitution. They were the starting point and most often they would ensure promotion of the purpose, values and principles of the Constitution, advancement of the rule of law, the Bill of Rights and contribute to good governance. The drafters of the Constitution were also acutely aware that words used in a provision might admit to a meaning that did not, or that least promoted the ends set out in article 259.

17. There were at least two major differences between section 64(1) of the repealed Constitution and article 164(1) and 164(3) of Constitution of Kenya, 2010.

a. Section 64(1) of the repealed Constitution merely established the Court of Appeal without jurisdiction and left it to parliament to enact a legislation to confer jurisdiction to the Court. The Appellate Jurisdiction Act [Section 3(1)] is such legislation. In contrast, article 164 both establishes the Court of Appeal and confers jurisdiction to it.

b. Section 64(1) of the repealed Constitution gives jurisdiction to the Court to hear appeals from the High Court whereas article 164 of the Constitution of Kenya, 2010 gives jurisdiction to hear appeals from the High Court and also from any other court or tribunal as prescribed by an Act of Parliament. While conferring jurisdiction to the Court of Appeal section 3(1) of the Appellate Jurisdiction Act restricts such appeal “to cases in which an appeal lies to the Court of Appeal under any law”, meaning that a right of appeal has in turn to be conferred by a statute.

18. The fact that the appellate jurisdiction is now conferred by the Constitution instead of by statute does not in itself amount to a major departure as long as the jurisdiction conferred is appellate and not otherwise. Both the repealed Constitution and the Constitution of Kenya, 2010 give the Court purely appellate jurisdiction and to that extent, the character of the Court remains the same, namely, to hear appeals.

19. Inherent power is the authority possessed by a court implicitly without it being derived from the Constitution or statute. Such power enables the Judiciary to deliver on their constitutional mandate. Inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion. Even if Rule 5(2)(b) of the Court of Appeal Rules was not in existence, in appropriate circumstances, the Court of Appeal would perfectly be entitled to exercise its inherent power to order stay of execution pending appeal so that an appeal is not rendered nugatory. No appeal can be filed, served, heard and determined in a day. If the Court of Appeal did not have power to grant interim relief in the intervening period, great injustice would be occasioned to litigants. In M. Mwenesi v Shirley Luckhurst & Anor No. 170 of 2000, it was held that a court of law is under a duty to exercise its inherent power to prevent injustice.

20. (Dicta per K. M’Inoti, JA) “The Court is called upon, if it is to be absolutely true to article 164(3), to introspect and review how it has treated appeals vis-à-vis conservatory applications. It must in those appeals where it considers it necessary to issue conservatory orders, demand that the beneficiary moves expeditiously and files and prosecutes the appeal without delay. Time limits within which such action must be taken could be set. It is only then that we shall be able to assert that appellate justice is administered without undue delay and without being too costly. The Constitution of Kenya, 2010 which demands we comprehensively review our legislation, rules and practices to ensure that they truly accord with all the principles and values of the Constitution offer a great opportunity to address these shortcomings.”

21. (Dicta per D. K. Musinga, JA) “In my view, the Rules Committee should urgently consider an amendment to rule 5(2)(b) of this Court’s Rules to limit the time such orders, once issued, can remain in force. With the recent increase in the number of judges of this Court, the Court is now empowered to dispose of appeals much faster than was the case when there were only
about ten judges in the Court. In instances where an order under rule 5 (2)(b) has been granted, the appeals should be heard on priority basis and disposed of expeditiously, say within six months from the date of filing the notice of appeal. “

Preliminary objection dismissed.

Law reform issues

1. To avoid abuse of the orders of stay granted by the Court of Appeal, the Rules committee should urgently consider an amendment to Rule 5 (2) (b) of the Court of Appeal Rules to limit the time such orders, once issued, can remain in force.

To harmonize all legislation, rules and practices to ensure that they truly accord with all the principles and values of the Constitution offers a great opportunity to address these shortcomings.

Court of Appeal Reinstates Mumo Matemu as Chairperson of Ethics and Anti-Corruption Commission

Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others [2013] eKLR

Civil Appeal 290 of 2012

Court of Appeal at Nairobi

P. KIHARA KARIUKI - PCA, W. OUKO, P. O. KIAGE, S. GATEMBU KAIRU & A. K. MURGOR

Fri 26, July, 2013

Reported by C. Lupao, N. Tunoi & M. Ombima

Brief facts:

This was an appeal against the decision of the High Court which had upheld a petition questioning the constitutionality of the appointment of the appellant, one Mumo Matemu, by the President as the Chairperson of the Ethics and Anti-Corruption Commission.

The appellant's appointment had followed clearance by the National Assembly even though Parliament's Departmental Committee on Justice and Legal Affairs had advised against such appointment allegedly due to the fact that he, the appellant, as well as other nominees to the commission apparently “lacked the passion, initiative and the drive to lead the fight against corruption”. The said report had, despite recommending against the appellant as well as the other nominees being appointed, made no recommendations relating to the unfitness or unsuitability of the appellant or the other nominees.

Following the appointment, the High Court was moved by the 1st respondent, Trusted Society of Human Rights Alliance, a non-governmental organization, to issue a declaration that among other things, the process and manner in which the appellant had been appointed was unconstitutional. The High Court subsequently ruled in favor of the Trusted Society by setting aside the appointment leading to this appeal.

Issues for determination:

i) Whether the Trusted Society of Human Rights Alliance, an NGO, had the locus standi (capacity) to file the petition at the High Court?
ii) Whether the High Court had jurisdiction or power to review and set aside the appointment of Mumo Matemu as Chairperson of the Ethics and Anti-Corruption Commission?
iii) Whether the High Court properly applied the principle in the Anarita Karimi Njeru case requiring that constitutional petitions be pleaded with reasonable precision?
iv) Whether the High Court in exercising the rationality test misapplied the doctrine of Separation of Powers thereby usurping the powers and functions of other branches of Government?
v) Whether the appointment of Mumo Matemu as Chairperson of Ethics and Anti-Corruption Commission was undertaken in accordance with the Constitution and the law?

Jurisdiction - High Court’s power of review - appeal against High Court’s decision to review and set aside the appointment of persons appointed to Public Office - where the High Court had set aside the appointment of the appellant as the Chairperson of the Ethics and Anti-Corruption Commission - grounds of appeal, inter
alia, that the High Court misapplied the “rationality test” in determining the outcome of the petition - whether the High Court in its rationality test misapplied the doctrine of separation of powers by usurping the powers and functions of other arms of Government - whether the appointment of the appellant was done in accordance with the law - whether the appeal had merit - Constitution of Kenya, 2010, articles 3, 10, 22, 48, 163, 250, & 258; Ethics and Anti-Corruption Commission Act, 2011, sections 6 & 40.

**Constitutional Law** - locus standi - scope of locus standi in constitutional petitions - constitutional provisions on factors to consider in establishing locus standi in proceedings - whether the 1st respondent (petitioner) had locus standi to file the petition challenging the appointment of the appellant as Chairperson of the Ethics and Anti-Corruption Commission - principle requiring that petitioners pleaded their case with reasonable precision - whether the principle in Anarita Karimi Njeru case requiring that constitutional petitions be pleaded with reasonable precision was properly applied - Constitution of Kenya, 2010, articles 1, 2, 3, 4, 10, 19, 20, 22, 73, 159, 258; Civil Practice and Procedure (cap 21) sections 3A & 3B.

**Held:**

1. By dint of articles 22 and 258 of the Constitution of Kenya, 2010, any person could institute proceedings under the Bill of Rights, on behalf of another person who could not act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. The petition filed before the High Court was by Trusted Society of Human Rights Alliance, an NGO (1st respondent), whose mandate included the pursuit of constitutionalism hence in the absence of a showing of bad faith as claimed by Mumo Matemu (the appellant), without more, the 1st respondent had the locus standi to file the petition.

2. The High Court had the jurisdiction to review and set aside the appointment of the appellant since the petition before it was not instituted as a removal procedure or as a complaint against the appellant in his capacity as a State Officer, but a challenge to the constitutionality of the process and manner of the appellant’s appointment. The High Court had jurisdiction to hear any question respecting the interpretation of the Constitution, including the determination of a question regarding whether an appointment by any organ of the Government is inconsistent with, or in contravention of the Constitution.

3. The petition before the High Court referred to articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title but provided little or no particulars as to the allegations and the manner of the alleged infringements hence did not meet the principle in Anarita Karimi Njeru case requiring that constitutional petitions be pleaded with reasonable precision. [Anarita Karimi Njeru v. Republic (1976-1980) KLR 1272]

4. The standard of judicial review of appointments to State or Public Office should be generally deferential, although courts will not hesitate to be searching where the circumstances of the case demand a heightened scrutiny provided that the courts do not purport to sit in appeal over the opinion of the other branches of Government.

5. The High Court is entitled to conduct a review of appointments to State or Public Office to determine the procedural soundness as well as the appointment decision itself to determine if it meets the constitutional threshold. The rationality test is a judicial review standard fashioned specifically to accommodate the doctrine of separation of powers, and its application must generally reflect that understanding. Such review by the court is however not an appeal over the opinion nor does it amount to a “merit review” of the decision of the appointing body. Thus, the High Court misapplied the rationality test in adopting a standard of review antithetic to the doctrine of separation of powers.

6. In view of the nature of the principles contained under article 73 of the Constitution of Kenya, 2010, a fact-dependent objective test provides a less burdensome standard of review of constitutionality of appointments on grounds of integrity. In fashioning this judicial test, the court does not exile the rationality test which is equally controlling in the examination of constitutional validity, if properly applied in terms of the means-ends analysis and the separation of powers framework. The fact that an objective test provides judicial manageability by focusing the analysis of the constitutionality of appointments to factual ascertainment of the means and purpose as opposed to the subjective standard of a reasonable or rational person. This latter path, if untamed, amounts to transforming the courts into appellate forums on the opinion of the other branches for which they may not be equipped.
7. Whereas the centrality of the Ethics and Anti-Corruption Commission as a vessel for enforcement of provisions on leadership and integrity under Chapter 6 of the Constitution warranted the heightened scrutiny of the legality of appointments thereto, that was neither a license for a court to constitute itself into a vetting body nor an ordination to substitute the Legislature’s decision for its own choice. To do so would undermine the principle of separation of powers. It would also strain judicial competence and authority. Similarly, although the courts are expositors of what the law is, they cannot prescribe for the other branches of the government the manner of enforcement of Chapter 6 of the Constitution, where the function is vested elsewhere under the constitutional design.

8. On review of the evidence placed before the Court of Appeal, the High Court’s conclusion of procedural impropriety on the part of the appointing organs and unsuitability on the part of the appellant could not be upheld.

9. Leadership and integrity are broad and majestic normative ideas. They are the genius of our constitutional fabric. However, their open-textured nature reveals that they were purposefully left to accrue meaning from concrete experience. Whereas these concepts germinate from the ground of normativity, they grow in the milieu of the facticity of real experience. Their life blood will therefore be our experience, not merely the abstract philosophy or ideology that may underlie them.

10. (Obiter) “Much of the emerging jurisprudence on integrity is still in its infancy. To advance the frontiers of that jurisprudence is the function of the courts, other organs of the government, and the people. In particular, this Court notes that the public aspiration towards “cleaning up our politics and governance structures” as noted by the court below remains compelling. However, we would be hesitant to do so in a manner that visits violence to the underlying fundamentals of due process, justice and fairness in our constitutional system. Should we do so, public opinion or popular rhetoric will not soften that violence. Principle, in the form of due process will. It is for that reason that the Constitution envisages the enactment of laws to provide a process for realizing the constitutional aspirations enshrined in Chapter 6 and embedded throughout the charter. The courts may have the highest intentions to hasten this process, but we must remember that the Constitution also protects us from our best intentions: by providing safeguards for due process, justice and fairness. That, extravagant as it appears, is the price of constitutional maintenance.”

Appeal allowed. Being public interest litigation, parties to bear own costs.

Never mind if your nose is ugly as long as you can breathe through it. ~ Zaire Proverb
A woman granted her claim for adverse possession over ancestral land
Eunice Karimi Kibunja v Mwirigi M’Ringera Kibunja
Civil appeal No 89 of 2009
Court of Appeal at Nyeri
A Visram, M K Koome, J O Odek JJA
May 29, 2013
Reported by Njeri Githang’a Kamau & Victor L Andande

Facts:
The appellant's father had two wives; the appellant's mother who had no male children and the respondent's grandmother who had sons. The appellant having been divorced from her husband lived on the suit land throughout her life. During land consolidation, the appellant caused the suit land to be registered in the name of the respondent who was her nephew. This was because under the Meru customs clan land could not be registered in the names of a woman and the appellant's mother did not have sons. However, during the time of the said registration the respondent was a minor aged 5 years. Despite the registration of the land in the respondent's name the appellant continued in occupation and developed a portion of the suit land. Upon the appellant becoming desirous of acquiring her title to the land she occupied, she called clan elders who apportioned to her five acres representing the portion for her mother's house. The parties thus occupied their respective portions until the respondent refused to give the appellant title to her land thus the suit. The High Court held inter alia that the applicant was neither in adverse possession nor a licensee or tenant at will, thus the appeal.

Issues
i. Whether a daughter who had been divorced from her husband could rely on the doctrine of adverse possession in a claim over her father's land (ancestral land.)
ii. Whether the appellant after registering the land in the names of the respondent who was her nephew while he was still a minor could later rightfully claim over the land.
iii. Whether a divorced daughter could be in the same status as a widow under the law of succession in regard to her right over the ancestral land.
iv. Whether the appellant could be regarded as a licensee over the ancestral land, having lived there from the time she was divorced.

Land Law – adverse possession – claim to title to land by adverse possession - where the appellant had lived on the ancestral land throughout her life – claim by the respondent that the appellant could not plead adverse possession on the ancestral land since she was a member of the family – whether in the circumstances a daughter could rely on the doctrine of adverse possession over her father's land.

Held:
1. The appellant could not be regarded as a licensee because she was a child of the original owners of the land. She thus occupied the land as a child but later on the land changed hands whereby she participated actively in securing the land by registering it in the name of the respondent.
2. The suit land had ceased to belong to the appellant's father and she continued to occupy it as of right. She thus did not require permission from the registered owner.
3. There was no basis for the trial judge to exclude the appellant's claim from the category of claims under adverse possession. The judge had clearly misapprehended the fact that land changed ownership from the appellant's father to her step brother's son.
4. The Law of Succession Act did not make any distinction between a male and female child or even their marital status. A child was described as such, their gender or marital status notwithstanding.
5. The trial judge could not rightly rely on the provision in the Law of Succession Act regarding distribution of the estate of a deceased to his widow. This was because the appellant was
c) In yester years, customary practices did not favour women in regard to registration of land. Thus, it was necessary to examine the circumstances under which the appellant caused the title to be registered in the respondent’s name.

7. The trial judge ought to have discerned that the intention of the appellant in registering the land in the names of the respondent was for him to hold the title in trust for the appellant.

Appeal allowed.

Appointment of County Commissioners was done in accordance with the law

Minister for Internal Security & Provincial Administration v Centre for Rights Education & Awareness (CREAW) & 8 others

Court of Appeal at Nairobi
Civil Appeal No 218 of 2012
M K Koome, A Makhandia, S Gatembu, JJA
June 14, 2013
Reported by Teddy Musiga

Issues:

i. Whether a state organ could seek legal representation from a private law firm despite the Constitution vesting that power upon the Attorney General.

ii. Whether an appellant to the Court of Appeal requires filing a Notice of change of Advocates where they are represented by a new advocate from the one previously on record at the High Court.

iii. Whether the President violated the Constitution in appointments/ deployments of County Commissioners.

iv. Whether there is an interface between the former and the new Constitution (Constitution of Kenya, 2010) as regards the exercise of executive powers.

v. Whether the President had an obligation to consult the Prime Minister on the appointments/ deployments of County Commissioners.

vi. Whether the appointments of the County Commissioners violated the principles of gender representations.

vii. Whether the President is subject to civil litigation in the event of violations of the

Constitution of Kenya, 2010
Section 2(c) of the sixth schedule:

“Article 129 to 155 of Chapter Nine except that the provisions of the Chapter relating to the election of the President shall apply to the first general elections under this Constitution.”
Court of Appeal Cases

Constitution of Kenya, repealed Section 23

(1) The executive authority of the Government of Kenya shall vest in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him.

(2) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the President.

24. Subject to this Constitution and any other law, the powers of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating any such appointment, shall vest in the President.

Held:

1. Article 50 of the Constitution of Kenya, 2010 guarantees a fair hearing. The fundamental right to fair hearing has no limitations or qualifications. The right of appeal vests upon an aggrieved party. That right overrides every other statute that makes provisions on legal representation. The appellant (Minister/Ministry for Internal Security) was sued alongside the Attorney General. However, the appellant was aggrieved by the judgment and intended to exercise that right to a fair hearing by challenging the decision of the High Court while the Attorney General elected not to appeal the decision.

2. As to whether the appellant was justified to seek legal representation from a private law firm despite the provisions of Constitution vesting powers upon the Attorney General, the court noted the Respondent’s arguments that the Attorney General was the principal legal advisor to the government and was mandated to represent the national government in court or in any other proceedings to which the national government was a party. However, the court stated that it would have considered the respondent’s argument favorably only if the Attorney General was candid and placed material before the court by way of affidavit giving reasons why he advised the appellant (if he did it) against filing the appeal. The court was informed that the Attorney General only made a public announcement that he was not going to appeal but no reasons were given. In the absence of the written reasons left the court with many questions as to why the Attorney General failed to file his affidavit stating his position regarding his advice to the appellant on the appeal. Had he given the reasons why he was not appealing as a party and advising the Minister too not to appeal; if such a disposition was availed in the appeal then its fate would have been sealed.

3. Rule 74 of the Court of Appeal Rules provided that “any person” affected by the decision of the High Court may appeal. However, the court cautioned that in a situation where the Attorney General had given written advice and given reasons against a particular Ministry from pursuing litigation, in that case, the Minister or officers pursuing litigation in their personal capacities, were to meet the costs arising therefrom and such costs were not to be paid from state coffers but be born personally.

4. The fact that the appellant failed to file a Notice of change of advocates was not fatal because the provisions of Order 9 Rule 5 of the Civil Procedure Rules were not particularly imported under the provisions of Order 53 and also the Rules of the implementation of fundamental rights. Further, parties filing appeals from the superior courts do not need to file a Notice of Change of advocates from the lawyers who were previously on record for the appellant. Such appeals were entirely new proceedings.

5. Articles 129 to 155 of Chapter 9 of the Constitution of Kenya, 2010 were all suspended until the 1st general elections after the constitution. The executive powers and authority of the President were retained under Section 23 and 24 of the former constitution. The suspension of the executive powers of the executive meant that the President was exercising the executive powers under section 23 and 24 of the former Constitution that gave him the authority to establish offices in the Republic of Kenya and to appoint officers thereto.

6. The court observed that Section 29(2) of the 6th Schedule of the Constitution of Kenya, 2010 provided that only new appointments by the President that needed approval of the National Assembly required consultation with the
Prime Minister under the National Accord and Reconciliation Act. The alleged “appointments of county commissioners” were not new appointments but rather were redeployments of existing officers, and more importantly, they did not require the approval of the National Assembly, and in that regard, consultation with the Prime Minister was not a statutory requirement.

7. Consultation with the Prime Minister as had become the practice in key public offices would have given the process more credibility and perhaps it would have assuaged the public, especially because those were times of transition but the president did not deem it necessary to consult as he was not obliged by law.

8. Since the impugned appointments happened within the transitional period when the new constitution was not the one fully operational, the President did not violate the provisions of the Constitution as it was done pursuant to the executive powers vested in the President under the old constitutional clauses that were saved in the new constitution.

9. As to the immunity of the President in respect of civil and criminal litigation, the court observed that if the President violated the law, he or she could only be subjected to the process of impeachment; however the former constitution never had provisions for impeachment.

Appeal allowed, judgment and decree of the High Court dated 29th June, 2012 is hereby set aside. As to the Appellant’s prayer to uphold Gazette Notice No. 6937 of 23rd May, 2012, the court was reluctant to do so in light of the provisions of section 15 of the National Co-ordination Act of 2013 that provides for the appointment of County Commissioners.

Contracts can be created by a series of correspondence entered between parties

Tetu Housing Co-Operative Society Limited v Peter Njoroge Ngahu
Civil Appeal No 242 of 2008
Court of Appeal at Nyeri
A Visram, M Koome & J Otieno-Odek, JJA
June 6, 2013
Reported by Lynette A. Jakakimba

Facts:
Tetu Housing Co-Operative Society (the appellant) conceived a project to put up a twelve storey building in Nyeri. In order to implement and deliver the project, the appellant engaged the services of various consultants including Peter Njoroge Ngahu t/a Ngahu Associates (the respondent) who was appointed as the quantity surveyor for the project. Pursuant to the appointment, the respondent rendered professional services on the project and submitted a fee note which the appellant declined to pay on the basis that the respondent could not and was not to commence any work without specific instructions, approvals and authority of the appellant regarding the design and other project details.

Issues:

i. Whether the respondent having been appointed as quantity surveyor by the appellant Society had authority to prepare a bill of quantity for the proposed construction works.

ii. Whether the fee to be paid to the respondent was to be based on the Fourth or Fifth Schedule of the Architects and Quantity Surveyors Act.

Contract Law – formation of a contract – whether a contract can be created by a series of correspondence – whether a contract was created by the series of correspondence entered between the appellant Society and the respondent

Contract Law – terms of contract – express and implied terms of contracts - implied terms through conduct of parties – terms of the contract on the fees payable to the respondent quantity surveyor for professional services rendered – whether the fee to be paid to the respondent was to be based on Fourth or Fifth Schedule of the Architects and Quantity Surveyors Act – Architects and Quantity Surveyors Act, fourth and
fifth schedule

Words and phrases - “Bill of quantity” meant an itemised trade list, including a description and quantity, of each of the components or items required for a construction project.

Architects and Quantity Surveyors Act
Fifth Schedule
B.1. “The following shall be the charges to be made by a quantity surveyor in connexion with:–

(a) Taking out and preparing bills of quantities:–
   (i) Basic scale – 2½ per cent upon the estimated cost of the work.
   ii. Works of alteration—the charges in subparagraph (i) shall be increased by not less than ½ per cent in respect of works of alteration according to the nature of the work.
   (iii) Generally – fees shall be calculated on the basis of the accepted tender for the whole of the work and shall be paid upon the signing of the contract but in the event of no tender being received, the fees shall be calculated upon a reasonable valuation of the work, based upon the original bills of quantities and if no tender is accepted or contract entered into the fees shall be paid within three months of the completion of the bills of quantities.”

Held:

1. The appointment of the respondent as a quantity surveyor was not based on an oral or implied agreement but on a written agreement embodied in the various correspondences whose terms were unequivocal.

2. The respondent received a letter from the appointed architect instructing him to “go ahead” and prepare the bill of quantity, which letter was also copied to the appellant. At no time did the appellant repudiate the letter addressed to it from the architect nor raise an issue with the authority given to “go ahead” and prepare the bill of quantity. From this conduct, the appellant was estopped from denying the contents of the letter from the architects, was bound by it and the respondent was thereby effectively instructed to prepare estimates for the cost of the works.

3. The agreement between the parties provided the basis for calculating the fee due and it also identified the Architects and Quantity Surveyors Act as providing the conditions of service. Paragraph 39 of the By-laws to the Act stated that the fifth schedule was to apply to the scale of professional charges for quantity surveyors.

4. Paragraph B.1 of the fifth schedule to the Architects and Quantity Surveyors Act stated that the charges that were to be made by a quantity surveyor in connection with taking out and preparing bills of quantity were to be a basic scale of 2½ % upon the estimated cost of the work. Paragraph B.1 (iii) stated that generally, fees were to be calculated on the basis of the accepted tender for the whole work and were to be paid upon the signing of the contract but in the event no tender being received, the fee was to be calculated upon a reasonable valuation of the work, based upon the original bills of quantity. In the case of works being abandoned, stopped or delayed during the preparations of the bills of quantity, the quantity surveyor was to be entitled to the foregoing fee in full or part in proportion to the amount of work done by the quantity surveyor. There was therefore no error on the part of the learned trial judge in relying on paragraph B. 1 of the Act in calculating the fee due to the respondent.

Appeal dismissed.
The nature of nominations by political parties that would meet special interest representation in the legislature

Commission for the Implementation of the Constitution v Attorney General & Another

Civil Appeal No 351 of 2012
Court of Appeal at Nairobi
F Azangalala, P O Kiage & J Mohammed, JJA
June 14, 2013
Reported by Beryl A Ikamari

Facts:
The Attorney General, exercising powers provided in the Revision of Laws Act (Cap. 2) published Legal Notice No. 142 of 2011, the Laws of Kenya (Rectification) Order, 2011, which deleted the word “not” found in section 34(9) of the Elections Act No. 24 of 2011. Section 34(9) initially provided that party lists, for nomination of members to the National Assembly, Senate and County Assembly, for purposes of special interest representation, may not contain the name of any Presidential or Deputy Presidential candidate. Thereafter, a petition was lodged to challenge the constitutionality of the amendment to section 34(9) of the Elections Act No. 24 of 2011. It was claimed that the new provision went against various constitutional provisions meant to safeguard the position of various special interest groups such as women, the youth, persons living with disabilities, workers, minorities, the marginalized and the disadvantaged. It was also contended that the amendment would defeat non-discrimination and affirmative action aims pursued within the Constitution.

At the High Court trial, Justice D. Majanja entered judgment entailing a finding that section 34(9) of the Elections Act No. 24 of 2011 was not unconstitutional, and that party lists made pursuant to that section could include Presidential and Deputy Presidential candidates. An appeal was lodged at the Court of Appeal against the judgment and the Court of Appeal made its findings on the issue of the constitutionality of section 34(9) of the Elections Act, No. 24 of 2011.

Issue:
I. Whether the amendment made to section 34(9) of the Elections Act, No. 24 of 2011, was inconsistent with constitutional provisions as it effectively made the nomination of persons who were Presidential candidates and Deputy Presidential candidates, as special interest representatives, possible.

Constitutional Law – interpretation of constitutional provisions – nomination of special interest representatives as members to the National Assembly, Senate and County Assembly by political parties – the nature of nominations that could be deemed to entail special interest representation – whether the nomination of Presidential candidates and Deputy Presidential candidates would embody special interest representation – Constitution of Kenya, 2010; articles 10, 90, 97(1)(c), 98(1)(b), 98(1)(c), 98(1)(d) and 177(1)(c) and Elections Act No. 24 of 2011; section 34(9).

Electoral Law – nomination of members to the National Assembly, Senate and County Assembly – the exercise of discretion by political parties in making nominations – whether the political parties’ discretion in making nominations of members to the National Assembly, Senate and County Assembly was absolute and unquestionable – Constitution of Kenya, 2010; articles 10, 90, 97(1)(c), 98(1)(b), 98(1)(c), 98(1)(d) and 177(1)(c) and Elections Act No. 24 of 2011; section 34(9).

Statutes – statutory interpretation – the constitutionality of section 34(9) of the Elections Act, No. 24 of 2011 – Constitution of Kenya, 2010; articles 10, 90, 97(1)(c), 98(1)(b), 98(1)(c), 98(1)(d) and 177(1)(c) and Elections Act No. 24 of 2011; section 34(9).

The Elections Act Section 34(9)

“The party list may contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.”

Held:
1. The legal framework for the nomination of candidates to the Senate, National Assembly and County Assembly was intended to inject equity, rationality, objectivity and inclusivity into the nomination processes. It was created to weigh against absolute and unquestionable discretion within political parties as relates to such nominations.
2. Pursuant to article 10 of the Constitution of Kenya, 2010, the national values and principles
of governance were applicable to all persons, inclusive of all state organs and political parties, whenever any of them applied or interpreted the Constitution, or enacted any law or made or implemented public policy considerations. Article 10 (2)(b) of the Constitution of Kenya, 2010, included values such as human dignity, equity, social justice, inclusiveness, equality, non-discrimination and the protection of the marginalized.

3. The discretion exercised by political parties in nomination processes was to be in accord with constitutional provisions and the spirit of the Constitution. The amendment made to section 34(9) of the Elections Act No. 24 of 2011, seemed to suggest that it was within the discretion of political parties to nominate Presidential candidates and their deputies who did not ascend to office, to the National Assembly, Senate or County Assembly, as special interest representatives.

4. The political parties’ discretion with regard to nomination of candidates to the National Assembly, Senate and County Assembly was to be carried on in accordance with constitutional provisions. That discretion entailed the following nominations:

(a) The twelve members of the National Assembly, nominated by political parties to represent special interests including the youth, persons with disabilities and workers, pursuant to article 97(1)(c) of the Constitution of Kenya, 2010.

(b) The sixteen women members of the Senate nominated by political parties to the Senate, pursuant to article 98(1)(b) of the Constitution of Kenya, 2010.

(c) Two members of the Senate, being one man and one woman, nominated to represent the youth, pursuant to article 98(1)(c) of the Constitution of Kenya, 2010.

(d) Two members of the Senate, being one man and one woman, nominated to represent persons with disabilities, pursuant to article 98(1)(d) of the Constitution of Kenya, 2010.

(e) The nomination of members to the County Assembly to represent marginalized groups, including persons with disabilities and the youth, pursuant to article 177(1)(c) of the Constitution of Kenya, 2010.

5. As concerns the nomination of members to the National Assembly, Senate and County Assembly, the exercise of discretion by political parties was required to promote gender equity and also regional and ethnic diversity, in accordance with the provisions of article 90 of the Constitution of Kenya, 2010. Additionally, such nominations were intended to protect the interests of women, and to give special representation to the youth and persons with disabilities.

6. The reference to the representation of special interests under Article 97(1)(c) of the Constitution of Kenya, 2010, invited the application of the *ejusdem generis* rule. Special interests representation would therefore include the representation of the youth, persons with disability, workers and also the disadvantaged and the vulnerable. It would include those interests which had not been catered for in the electoral process and which were vital to the effectiveness of the democratic process in ensuring adequate representation for all.

7. It was vital to the flourishing of democracy that representation for minority groups in the legislative assembly be availed and the instrumentality of nominations under the category of special interests was meant to facilitate such representation.

8. While the list of special interests was fluid, Presidential candidates and Deputy Presidential candidates could not possibly have been intended to be representatives of special interests.

9. In the interests of constitutionalism and in exercise of the judiciary’s role in interpreting the Constitution, the Court of Appeal in an appeal from the High Court could determine the constitutionality of legislative enactments. Testing the constitutionality of legislative provisions was especially vital in preserving special safeguards provided for in the Constitution in order to protect persons or groups that were vulnerable or disadvantaged.

*Appeal allowed. (Section 34(9) of the Elections Act, No. 24 of 2011, declared void and invalid.)*
Registration of land under statutory law does not extinguish right to land under customary law

Henry Mukora Mwangi v Charles Gichina Mwangi

Civil Appeal No 245 of 2004
Court of Appeal at Nairobi
W Karanja, P O Kiage & K M’Inoti JJ A
June 21, 2013

Reported by Report by Andrew Halonyere & Cynthia Liavule

Case History
(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Khamoni and Ransley, JJ) dated 27th June 2003.

Brief Facts
The appellant and the respondent in the appeal are brothers. Following the demise of their father, the respondent inherited 195 acres of land in trust of other heirs. The land was distributed between three wives/three house. The house of the parties to the suit got 75 acres since their mother was the eldest and the other two houses got 60 acres each. That distribution was agreed upon by all the parties. Out of the 75 acres that were allocated to the first house, the respondent transferred 30 acres to his younger brother the appellant and retained 45 acres. The 45 acres were registered in the name of the respondent. The bone of contention was the 15 acres that the respondent ended up with more than the appellant.

In a suit brought before the Resident Magistrate’s court by the appellant, the court found that the appellant had proved that he was entitled to half of the 15 acres comprised in the suit property. The respondent was aggrieved by the decision and brought an appeal before the High Court. The High Court overruled the Magistrate’s Court decision by holding that the appellant had not proved the existence of a trust in respect of the 15 acres of land and further held that their mother held the 15 acres under a life interest which was extinguished upon her death. That decision led to this appeal before the Court of Appeal.

Issues
I. Whether registration of land in the name of a proprietor under the Registered Land Act (Cap 300) (repealed), extinguished the right to ownership of land under Kikuyu customary law.

II. Whether a widow under Kikuyu customary law was entitled to remain on the piece of land given to her by the deceased on marriage and had full rights of use and cultivation over the land during her lifetime.

III. Whether a trustee (muramati) under Kikuyu customary law was entitled to an extra share of land, if so, under what circumstances?

Land law – right to ownership of land – competing rights to land under statutory law and customary law – whether land registered under statutory law could extinguish the right to ownership under customary law

Customary law – Kikuyu custom - whether a widow under kikuyu customs had a right to inherit land of her deceased husband – whether a trustee under kikuyu customs was entitled to extra share of land - Registered Land Act (Cap 300) (repealed) section 28

Held

1. The High Court as the first appellate court was entitled to re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion.

2. The widow was entitled to remain on the piece of land given to her by the deceased on marriage. She had full rights of use and cultivation over the land during her lifetime. On her death and in the absence of a will to the contrary, her portion was to be divided equally among the sons.

3. The respondent’s claim to the entire 15 acres was based more on the fact of his registration as proprietor of the suit property as well as his status as trustee (muramati). Although at all material time the respondent was the registered proprietor under the Registered Land Act, (Cap 300) (repealed), that fact alone did not negate the possibility that he held the land under a customary trust. The fact that he was previously registered as the proprietor of the entire 195
acres did not preclude the trust that led to distribution of that land to the three wives/houses of the original owner.

4. Under Kikuyu customary law the eldest son had a right to inherit land as a trustee (muramati) to hold it in trust for himself and the other heirs, a muramati was not entitled automatically to an extra share of land, he had a duty to distribute the shares to the heirs in accordance with the wishes of the deceased or in accordance with the rules of intestacy. He was not entitled to any remuneration for his services because his duty was a moral obligation. However in certain specific circumstances the muramati could get a slightly larger share if he proved in the eyes of the elders (muhiriga) that he had been a good muramati. The extra share was not a right but was given at the discretion of the elders.

5. There was absolutely no evidence that the 15 acres were given to the respondent as a trustee (muramati). Other than the respondent claiming and appropriating the land for himself, there was no evidence of any members of the muhiriga recommending an award of a larger share to the respondent. Besides, the evidence strongly suggested that the 15 acres in dispute were meant for the first wife and the mother to the parties to the appeal.

6. The respondent could not claim to have been a good trustee (muramati) when he had exhibited rapacity by encroaching on the land occupied by his late mother and cutting down her wattle trees to the point of compelling her to seek the intervention of the local chief. The respondent did not discharge his moral duty as a muramati to entitle himself to a larger share, let alone 15 acres.

7. The High Court misdirected itself regarding existence of a customary trust in favour of the first wife and the appellant.


Authorisation of construction works by Water Apportionment Board does not amount to an easement over a third party’s land
Brooke Bond (K) Limited v James Bii
Civil Appeal No 94 of 2007
Court of Appeal at Nakuru
W Karanja, P K Kiage & K M’Inoti, JJ A
July 5, 2013
Reported by Njeri Githang’a Kamau & Victor L Andande

Brief Facts:
The case concerned construction of a dam by the respondent on a river that passed between two parcels of land belonging to the appellant. The respondent had been granted construction permit by the Water Apportionment Board but did not obtain the appellant’s consent claiming that it was not necessary since the river belonged to the government. In order to construct his dam across the river, the respondent did some excavation works on the appellant’s said properties.

Issue

I. Whether it was lawful for the respondent to enter upon and do works on the appellant’s lands without the necessary permission from the appellant.

Land – easement – need for a valid easement to be endorsed on title to the land– claim by the appellant that the respondent’s acts amounted to trespass to its land - where the respondent claimed that he had been granted an easement by the Water Apportionment Board – whether there could be a valid easement in the circumstances - Registration of Titles Act, Cap 28, section 34, Water Act Cap 374, section 22.

Water Act, Cap 374, states as follows;

S.22 (1) The holder of a permit which authorizes the construction of works that would (or a
portion of which would), when constructed, be situated upon lands not held by the permit holder shall acquire an easement on, over or through the land on which the works would be situated and, unless the works have previously been lawfully constructed, shall not construct or use the works unless and until he has acquired such an easement.

Held

1. An easement amounted to a conveyance of an interest in land and had to be effected by way of a transfer within the meaning of the Registration of Titles Act, Cap 281 that was in operation at the material time.

2. The respondent’s contentions which seemed to suggest a creation of an easement in his favour by delay, default or mere implication had no foundation in law. An easement such as was contemplated by the Water Act was creatable only by the conscious act in writing of the parties, and at any rate the land owner of the servient tenement, and required to be noted in the certificate of title.

3. An easement was a convenience to be exercised by one land owner over the land of a neighbour without participation in the profit of that other land. Writing under hand or parol grant with or without valuable consideration created no legal estate or interest in land but only a mere licence to the licensor or licensee coupled with an interest or grant if it needed the latter to give effect to the common intention of the parties. (Kamau v Kamau KLR (E & I) 1 105).

4. It was not merely registration that did not occur, the easement itself never occurred and all due to the respondent’s inattention or outright disregard for both the law and the express wishes of the appellant who was the owner of what could have been the servient tenements.

5. At the heart of the dispute was never a fight between the appellant and the respondent over the use or utilization of the water of the stream. The bone of contention was the respondent’s unauthorized entry upon the appellant’s land in total disregard to the latter’s rights and in willful violation of the mandatory provisions of the Water Act designed to deal with the conflict.

6. The respondent’s entry and occupation of portions of the appellant’s parcels of land was unlawful and constituted a trespass. An injunction issued to restrain trespass with costs to the appellant.

Whether the High Court has jurisdiction to extend the time for filing and serving responses to an election petition

Mwamlome Tchappu Mbwana and another v Boy Juma Boy & 2 others

Election Petition No 5 of 2013
High Court at Mombasa
F A Ochieng, J
May 23, 2013
Reported by Beryl A Ikamari

Issues:

i. Whether responses filed out of time would be struck out despite the fact that the responses were filed after leave of court had been sought and granted.

ii. Whether the High Court had jurisdiction to extend the time for filing and serving responses.


Electoral Law – jurisdiction of the High Court – whether the High Court had jurisdiction to extend time for the filing of responses – Elections (Parliamentary and

**Held:**

1. Rule 20 of the Elections (Parliamentary and County Elections) Petition Rules, 2013, provided for the High Court’s jurisdiction to extend time for matters provided for in the rules. Matters pertaining to responses to an election petition were dealt with in the rules.
2. The time within which responses ought to be filed was not spelt out in the Constitution of Kenya, 2010. If such stipulations concerning responses had been provided for in the Constitution, the petitioners would have had a right to resist attempts to have time enlarged.
3. The High Court had acted within its jurisdiction when leave to file the responses was granted. If the petitioners were aggrieved by that decision, they ought to have appealed or applied for a review of the decision.
4. The petitioners would not suffer prejudice due to the extension of time but the respondents would be unable to effectively oppose the petition if their responses were struck out.
5. The extension of time, as granted, was in the interests of justice.

*Application dismissed.*

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**Deposit of security for costs is mandatory in electoral petitions**

**John Lokitare Lodinyo v Mark Lomunokol and 2 others**

Petition No 5 of 2013
High Court at Kitale
J R Karanja, J
May 22, 2013

*Reported by Teddy Musiga*

**Issues:**

i. Whether deposit of security of costs is a mandatory prerequisite before filing election petitions.
ii. Whether the obligation to deposit security of costs as contemplated under Section 78(1) of the Elections Act is a matter of law rather than technicality.
iii. Whether the failure to deposit security of costs is a bar to further proceedings before an election court.
iv. Whether the failure to deposit security of costs is a ground for striking out an election petition.
v. Whether an election court may extend time for a petitioner to deposit security of costs.

**Electoral Law – security of costs – deposit of security of costs – whether the deposit of security of costs is mandatory – whether the court may extend time for a petitioner to deposit security of costs – Elections Act, section 78.**

**Elections Act**

*Section 78 (1) – A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this part.*

**Held:**

1. The deposit of security of costs as envisaged under section 78 of the Elections Act was a mandatory requirement of the law and the failure to deposit the same questioned the validity and sustainability of an election petition.
2. The obligation created by section 78(1) of the Elections Act was more a matter of law rather than technicality. Parties expecting justice were first and foremost required to adhere to the law. Herein, the applicable law was the electoral law.
3. In terms of section 78(2)(b) of the Elections Act, a petitioner was required to deposit a sum of Ksh 500,000 within ten days after presentation of the petition.
4. Whereas the failure to deposit the full amount was a contravention with section 78(2) of the Elections Act, section 78(3) of the Elections Act presupposed that a petition would not be struck out for reason that the petitioner had failed to deposit the required security unless
an application to that effect was made by the respondent. In such a case where a respondent made an application then the failure to deposit security of costs would only halt further proceedings before an election court as regards the petition.

5. Under Rule 20 of the Elections Rules Act, an election court had the discretion to extend time to a petitioner where an injustice may be occasioned to the petitioner on account of failure to deposit security of costs within the 10 days period contemplated under section 78(2) (b) of the Elections Act.

Application allowed for the petitioner to deposit the full security of costs.

Power of the High Court to transfer election petition cases
Milkah Nanyokia Masungo v Robert Wekesa Mwembe and 2 others
High Court at Bungoma
Election Petition No 1 of 2013
F Gikonyo, J
May 17, 2013

Reported by Emma Kinya Mwobobia and Dorcas Onam Mac’Andere

Issues:

i. Whether the High Court had jurisdiction to determine an election petition challenging the election of a member of the County Assembly

ii. Whether the High Court had the jurisdiction to transfer an election petition that had been wrongly filed before the High Court to the appropriate court for hearing and determination

Jurisdiction – jurisdiction of High Court – transfer of cases – jurisdiction of High Court to transfer an election petition – where an election petition was erroneously filed at the High Court instead of the Magistrate’s Court – claim that the jurisdiction to transfer an election petition was a reserve of the Chief Justice - whether High Court had power to transfer the case to the appropriate court for hearing and determination – Constitution of Kenya 2010, article 163(3)(a)and (b)

Held:

1. The question of Jurisdiction was not a technicality but rather, a substantive issue and lack of it could not be cured by article 159(2) (d) of the Constitution.

2. Jurisdiction was everything. It was *sine qua non* the court’s authority to adjudicate a legal dispute. It was a principle that was elucidated on in the case of *The Owners Motor Vessel “Lilian S” v. Caltex Oil Kenya Ltd* (1989)] KLR).

3. In accordance with section 75 (1A) of the Elections Act and Rule 6(1) of the Elections(Parliamentary and County Elections) Petition Rules(Rules), 2013, the proper court to hear and determine a petition questioning the validity of the election of a member of a county assembly was a Resident Magistrate's Court designated by the Chief Justice. That jurisdiction was not disputed and the High Court did not intend to usurp jurisdiction.

4. Jurisdiction to transfer cases resided in a superior court which in the instant case would be the High Court. Unlike in purely private civil claims, the jurisdiction should be broadly exercised in public law remedy proceedings depending on the circumstances of each case. There was neither an express limitation of that jurisdiction in the Constitution or a statute or charter that Kenya had ratified nor had it been ousted expressly or by necessary implication by the Constitution, Election Act or the Rules.

5. The authority of the High Court to transfer cases should have been exercised in the interest of justice without unnecessary limitations. In transferring a case to the appropriate court for disposal, the High Court would not be deciding on a substantive issue in the case but simply exercising its power to transfer cases as a superior court. It was a constitutional power vested in the High Court and should not have been limited by a practice of by-gone years
which was out of tune with the Constitution.

6. The principal considerations in an application for transfer include:-

i. Constitutional principles i.e gives effect to the objects, values, principles and purposes of the Constitution on access to and dispensation of justice

ii. Balance of convenience

iii. Question of expense i.e does it cause any hardship to any of the parties

iv. Interest of justice

v. Nature of claim

vi. Is there a possibility of undue hardships?

vii. Is court in doubt on whether to grant a transfer?

7. Election disputes were not purely private disputes to be confined to strict rules which applied to private disputes but should have been viewed as public-election disputes falling under the league of *sui generis* proceedings. Such disputes carried remedies of a public character in all civilized legal systems and enjoyed a degree of liberal approach under the Constitution and the laws of the nation.

8. Election disputes raised questions on the integrity of the electoral process which was a public serving process. Public law disputes operated *erga omnes* and rarely stricted *inter partes* fairness in such disputes do justice to rights and obligations of a public character, least of all in public election disputes. Accordingly, electoral issues should not have been determined only as between the parties in the proceeding but with reference to the wider interest of the residents of the concerned electoral area to challenge the validity of the election of a person as their representative which was a right that was guaranteed under the Constitution. That was the justification for rules 23-29 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

9. If the court were to hold that the petition was incapable of being transferred, then the petitioner and the voters of that constituency who would have an interest in the petition would lose their right to challenge the validity of the election of the 1st Respondent to the County Assembly forever. However, the intention of the Constitution was mirrored in a court’s interpretation that gave effect to the spirit, objects, values and purposes of the Constitution.

10. Assurance of a fair trial was the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for the transfer was made which included something more substantial, more compelling and imperiling from the point of view of public justice and its attendant environment was necessitous if the court was to exercise its power of transfer.

11. The new constitutional order and the growing awareness that election disputes were public disputes should have led the courts and the National Assembly to develop new norms and standards to deal with applications such as the transfer of election petition cases.

12. The power of the High Court to transfer the election petition to the appropriate court was not a mere judicial practice but rather an exercise of a jurisdiction founded on the constitutional command that the court should not deny but promote the right of a party to access justice and should serve and promote substantial justice.

13. In a public election dispute and other matters of public law, courts should have adopted a purposive interpretation of the law in tandem with Article 259 of the Constitution as to promote the purposes, values of the Constitution, advance the rule of law and permit the development of the law.

14. The Chief Justice was the only person mandated under the Elections Act to constitute an election court. The High Court therefore, could not have constituted an election court for that purpose.
It would have been wrong thus, to equate an order for transfer of the petition by the High Court to constituting and election court in the sense of the Elections Act and Rules.

15. The order for transfer was a general order that was directed to the Resident Magistrate’s Court with the aim of placing the petition in the right court and registry. The relevant court registry would then employ the laid down administrative mechanisms to enable the chief Justice to constitute the election court for the particular petition. Invariably, all petitions were filed in the appropriate court registry before an election court was constituted.

16. (Dicta) "I would have failed if I did not express the desirability of providing for an express provision in the Elections Act on the power of the high Court to transfer an election petition that has been filed in the wrong court. Such legislative act would be in tandem with the Constitution and would obviate the kind of discourse the court has had to entertain on the subject.

Petition to be transferred to the Resident Magistrate’s Court, Bungoma Law Courts as shall be assigned by the Chief Justice.

Law Reform Issue:
“[I would have failed if I did not express the desirability of providing for an express provision in the Elections Act on the power of the high Court to transfer an election petition that has been filed in the wrong court. Such legislative act would be in tandem with the Constitution and would obviate the kind of discourse the court has had to entertain on the subject]."

Fundamental rights can only be limited to the extent that it is reasonable and justifiable in an open and democratic society, and the nature of that right must be taken into account

Philip Mukwe Wasike v James Lusweti Mukwe and 2 others
Petition No 5 of 2013
High Court at Bungoma
H A Omondi, J
May 17, 2013
Reported by Nelson K Tunoi

Brief facts:
The petitioner (applicant) had lodged an election petition against the 1st respondent (James Mukwe). Subsequently, the petitioner sought leave to file further affidavit to adduce further evidence in relation to voter bribery and witchcraft. The petitioner’s grounds were that the respondents had annexed documents to their affidavits that could only be challenged through filing of further affidavits; that there were crucial documents in the hands of third parties which could only be availed as evidence in the petition upon issuance of a court order for their production; that it was the petitioner’s constitutional right to access information (i.e. the exhibit evidence in police custody and data print-out from telecommunication service providers) and correction of deletion of untrue or misleading information; and that the 3rd respondent (Silas Rotich) had conceded that there were minor arithmetical errors that needed to be particularized.

The application was opposed by the respondents on grounds that the application was an attempt by the petitioner to amend the petition through the back door contrary to article 87(2) of the Constitution; and that the provisions of article 35 of the Constitution in relation to access to information was not absolute and as such could not be used by the petitioner to interfere with private affairs of persons who were not parties to the petition.

Issues:

i. Whether the orders sought by the petitioner (applicant) could be issued by court where such orders affected third parties who are neither parties to the application nor present in the application.

ii. Whether the petitioner had established a basis for granting leave to file further affidavit and other orders sought.
Election law – election petition – affidavit evidence – application for leave to file further affidavits – grounds that the respondents had annexed documents to their affidavits that could only be challenged through filing of further affidavits – whether the orders sought by the petitioner (applicant) could be issued by court where such orders affected third parties who are neither parties to the application nor present in the application – whether allowing the application for further affidavit would be introducing new evidence – whether the application had merit – Election Act, 2011 section 80(3); Elections (Parliamentary and County Elections) Petition Rules, 2013 rule 17(1)(2).

Constitutional law – fundamental rights and freedoms – right to access to information vis-à-vis right to privacy – whether the petitioner could be allowed unrestricted access to all information relating to third parties not parties to the application – where the petitioner had sought for orders for the production of crucial documents in the hands of third parties – Constitution of Kenya, 2010 articles 24, 31, & 35(1)(b), (2).

Held:

1. The orders sought were addressed to persons who were not parties to the suit. It was incumbent upon the petitioner to enjoin the third parties in the application to accord them a chance to be heard on the case levelled against them.

2. It was necessary for the petitioner to establish a basis for seeking an order against the third parties by at least leading evidence to show that he tried to obtain the said evidence from the persons and the plea was turned down or they failed to cooperate.

3. Rule 17(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 contemplates a situation where the court can allow parties to file further affidavits and introduce further evidence if a basis is established. In order to accord the petitioner a just opportunity to ventilate his case, he should be allowed to file a further affidavit to introduce the Occurrence Book (OB) containing the information sought. However, the affidavit must be deponed by either the Officer Commanding Station (OCS) or the Investigating Officer in the matter because this will make the deponent a compellable witness.

4. The reason why election petitions proceed by way of affidavit is because there is a presumption that the deponents are witnesses who can be called to testify and have their evidence tested on cross-examination.

5. Although the police are public servants who should avail information they hold upon request, the provision of article 35 of the Constitution, which is qualified by articles 24 and 31 of the Constitution, is not absolute. The right to privacy cannot be infringed and moreso article 31 of the Constitution guarantees the privacy of individuals unless they are first heard.

6. Unless a basis is established for intrusion on right to privacy, telecommunication service providers are private citizens and their customers are entitled to privacy. Article 35 of the Constitution can only be handled by the Constitutional Court and not an Election Court.

7. The petitioner cannot be allowed unrestricted access to all information contained on the mobile phones and sim-cards of the unnamed individuals, which information would only come from the telecommunication service providers and not the police. Presenting the sim-cards and phones in court without verification of their content and source would serve no purpose.

8. Article 35(1)(b) of the Constitution must be considered in light of article 24(1)(d) which provides that fundamental rights (including the right to privacy) can only be limited to the extent that it is reasonable and justifiable in an open and democratic society, and the nature of that right must be taken into account. However, in the instant case, the right to access the information by the petitioner would infringe on the privacy of persons who are not parties to the petition.

9. Allowing the application for further affidavit by the petitioner would not be introducing new evidence as alleged and would cause no prejudice to the respondents, so long as the affidavit was limited to deposing what the witnesses had alluded to.

10. Whereas it was true that the 3rd respondent had admitted that there were several minor arithmetical errors, there were no new factual or evidential issues raised in the said reply or affidavit to warrant leave being granted for filing
of particulars in respect of the admitted errors. Granting the orders as sought would amount to shifting the burden of proof of the allegations made in the petition from the petitioner to the 3rd respondent, which would be unlawful. Application to file further affidavit allowed.

**Issues:**

i. Whether the arrest and search of the petitioners (minors) in the absence and without knowledge of their parents was in violation of the Constitution of Kenya, 2010 and the Children Act.

ii. Whether there was a violation of the petitioners’ rights as a result of their being held in custody prior to being granted bail.

iii. Whether the material found pursuant to the search was admissible in the trial before the Children’s Court.

**Criminal practice and procedure – arrest – arrest of persons below the age of eighteen – requirement to be produced in the Children Court as soon as was practicable – whether the petitioners were brought before court within period stipulated under the Constitution and the Child Offender Rules – whether there was a statutory requirement for petitioners’ parents to be present during their arrest – Constitution of Kenya, 2010 article 49, Child offender Rules, rule 5, rule 4(1)**

**Criminal practice and procedure – search – whether there was a statutory prohibition for a search of a bag of an arrested person by an officer of the opposite sex – Criminal Procedure Code section 27, Narcotic Drugs and Psychotropic Substances Control Act section 76**

**Statutes – interpretation of statutes – right to parental care under section 6 of the Children Act – whether the section covered instances where a child had been arrested on suspicion of having committed a criminal offence – Children Act section 6**

**Child Offender Rules**

- **Rule 5** – Where a person apparently under the age of eighteen years is apprehended with or without warrant and cannot be brought forthwith before a court, the police or officer to whom such person is brought shall inquire into the case, and may in any case, and unless –
  (a) the charge is one of murder or manslaughter or other grave crime; or
  (b) it is necessary in the interests of such person to remove him or her from association with any undesirable person; or
  (c) such officer has reason to believe that the release of such person would defeat the ends of justice, release such person on a recognizance being entered into by his parent or guardian or other responsible person, with or without sureties, for such amount as will, in the opinion of such officer, secure the attendance of such person upon the hearing of the charge.

**Held:**

1. Section 6 of the Children Act when considered in the context of the entire Act, was intended to cover situations where a child, in his best interests, was taken away from his parents and placed, for instance, in foster care or an institution. It was not intended to cover a situation in which a child had been arrested on suspicion of having committed a criminal offence.

2. The petitioners were brought before court within the period stipulated by the Children Act and the Constitution; there could not have
been a basis for complaint about violation of their rights for failure to release them on bond or bail.

3. The wording of section 27 of the Criminal Procedure Code and section 76 of the Narcotic Drugs and Psychotropic Substances Control Act made it clear that the search contemplated related to a search of the person, not of bags or luggage. Therefore there was nothing in the law or reference by petitioners that would prohibit a search of the bag of an arrested person by an officer of the opposite sex.

4. The detention of the petitioners in custody after pre-arraignment in court was pursuant to a court order. It was therefore in compliance with the proviso to rule 4(1) that a minor could not be held in custody for longer than twenty four hours after his arrest without the leave of the court. Although the age assessment of the minors was done while they were in custody, it was, within the court's discretion, and was not unreasonable in the circumstances.

5. The Child Offenders Rules did not set out any requirement for the presence of a parent at the time of the arrest of a person below the age of eighteen years. Given the nature of and circumstances in which offences were committed, it would be a tall order to require that arrests only took place in the presence of parents. There was nothing in the law that imposed such an obligation on the respondent.

6. The law required that an interview by a police of a person under the age of eighteen years could not take place in the absence of his or her parents or guardian, an advocate appointed by his parents or guardian or a Children's Officer. The purpose was to ensure that a minor did not make any incriminating statements since minors were vulnerable and could be intimidated. However, if an interview took place in contravention of the law, what it ought to have led to was a rejection by the trial court of such statement as was obtained if it was sought to be relied on in the prosecution. It should not have been seen as entitling the child offender not to be tried.

7. The trial court was charged with the responsibility of weighing evidence presented to it, hearing witnesses and making a determination on whether or not such evidence was admissible.

The trials in criminal cases against the petitioners to proceed in accordance with the provisions of the Children Act relating to child offenders.

Employers can cap exit pay to a set number of years if the payment amounts to more than the statutory minimum

**Agnes Wachu Wamae and 104 others v Barclays Bank of Kenya**

Cause Number 806 of 2011
Industrial Court of Kenya
J N Abuodha, J
May 3, 2013
*Reported by Lynette A Jakakimba*

**Brief Facts:**
The claimants were employees of the respondent who were declared redundant as a result of a staff rationalization program that was being undertaken by the respondent. The claimants upon termination were offered an exit package that was based on one and a half month's pay for each year of completed service capped at 16 years. The claimants contended that the act of capping the exit pay to 16 years and not the minimum 15 days’ pay for each year of service prescribed by statute was in contravention of the Employment Act.

**Issues:**

i. Whether an employer who paid an employee who was declared redundant, more than the minimum fifteen days’ pay for each completed year of service prescribed under section 40(1) (a) of the Employment Act, was entitled to
put a ceiling on the number of years such compensation could be made.

ii. Whether the claimants having been paid their exit package and executed their release letter, had the right to sue the respondent.

**Employment Law** – termination of employment – redundancy – procedure of termination of employment via redundancy – severance pay for employee declared redundant – rate of payment of severance pay – whether an employer who paid an employee more than the minimum fifteen days’ pay for each completed year of service prescribed under statute was entitled to put a ceiling on the number of years such compensation could be made – whether an employee having been paid their exit package and executed their release letter had the right to sue their employer – Employment Act, section 40.

**Held:**

1. Section 40 of the Employment Act provided for the procedure to be observed in declaring employees redundant. Section 40(1)(g) provided that: “40 (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days’ pay for each completed year of service.”

2. The respondent offered the claimants one and a half months salary which was almost three times the statutory minimum of fifteen days however capped it to 16 years. As to whether the payment of one and a half times the statutory minimum subject to a ceiling amounted to a variation or a relinquishing of the minimum terms prescribed by the Act, that issue was factual and mathematical in the sense that one needed to determine if the enhanced minimum payment subject to a ceiling was less or more than the statutory minimum. If the answer to that issue was affirmative, the claimants would be unjustified in making the claim for payment of the enhanced amount for each year of completed service. In the present situation the use of one and a half months with a limit of sixteen years would yield a scenario that would have required the claimants to work for 48 years in order to be entitled to the exit package claimed from the respondent.

3. The claimants argument that once the respondent offered to pay one and a half times the compensation provided by statute it had no right to cap such compensation to a given number of years of service, was not only flawed but unreasonable. The Employment Act at section 3(6) stated that the provisions of the Act constituted the bare minimum below which parties could not contract out, vary or modify. To argue that once an employer offered a favourable term in one aspect it could not set the extent to which such favourable term could apply, was oppressive and would discourage any employer from making any offer that would have the effect of cushioning employees facing redundancy from the rough world of unemployment. The claimants’ contention was thereby disallowed.

4. Freedom of contract was a fundamental principle and the Courts would only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall. The claimants contended that they were misled into signing of the release letters in the belief that the exit package was to be 45 days salary for each completed year of service and not subject to any capping at all. However the exit package offered and paid to the claimants was over and above the statutory minimum, therefore there was neither unfairness nor anything unconscionable on the part of the respondent in making the release letters a condition precedent to paying the claimants their exit package. In any event the claimants had the opportunity to seek expert advice on the tenor and effect of the release letters prior to executing them.

Liability was thereby found not to lie against the respondent with regard to payment of any additional severance pay over and above what the respondent paid to each of the claimants as exit package. Further the release letters were neither tainted with unfairness nor unconscionable bargaining power hence could not be impugned by the Court.
Enforcement of Bill of Rights extends to citizens and foreigners alike

KAPI Limited and another v Pyrethrum Board of Kenya

Petition No 54 of 2012
High Court at Nakuru
R P V Wendo, J
April 26, 2013

Reported by Teddy Musiga

Issues:
i. Whether non-citizens can enforce their fundamental rights and freedoms under the Kenyan constitution, 2010.

ii. What is the mode of framing a constitutional question for determination before a constitutional court?

iii. Whether Section 16 and 17 of the Pyrethrum Act are unconstitutional.

iv. Whether private rights accruing out of contractual obligations can be canvassed in a constitutional petition.


Constitutional Law – constitutional question – modes of framing a constitutional question – how to move a constitutional court to enforce the constitution.

Statute – Pyrethrum Act – statute providing for orderly cultivation, marketing and processing of pyrethrum in Kenya – claim that the Pyrethrum Act was unconstitutional – Pyrethrum Act, section 16 and 17.

Constitution of Kenya, 2010

Article 22(1) – Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

Universal Declaration of Human Rights

Article 2 – Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Held:

1. Application and enforcement of bill of rights as provided under articles 20 and 22 of the Constitution of Kenya, 2010 respectively do not specifically exclude non-citizens of Kenya from enjoying their rights in Kenya. However, apart from the rights listed under article 25, all other rights have their limitations. As respects this case, the applicant’s right to hold land is provided for under article 65 of the Constitution. If his rights as respects the holding of land within the context of article 65 are violated, then he has a right under article 22 to move the court for enforcement of his rights.

2. Article 2(5) of the Constitution provides that the general rules of International law shall form part of the laws of Kenya. Article 2(6)
also adopts any treaty or convention ratified by Kenya as forming part of Kenyan law. As such, the Universal Declaration of Human Rights applies to Kenya by virtue of that article. Under article 2 thereof, everyone is entitled to all the freedoms set out in the declaration without distinction.

3. Article 8 of the Constitution of Kenya, 2010 also goes to confirm that anyone living in Kenya and subject to the law of Kenya is equally protected by the Kenyan law. Article 17 of the Universal Declaration of Human Rights, like Article 65 of the Constitution of Kenya, 2010 guarantees the right to property subject to the limitations set forth in the law of each country.

4. In Anarita Karimi Njeru v AG (1979) KLR 154, the threshold to be satisfied by an applicant seeking to move the court to determine whether or not his/her rights have been violated or are likely to be infringed are that he/she sets forth with reasonable degree of precision that of which they complain, the provision said to be infringed and the manner in which they are alleged to be infringed.

5. As to whether section 16 and 17 of the Pyrethrum Act are unconstitutional for restricting the applicant from selling his pyrethrum to any other person or body, the applicant failed to cite any provisions of the constitution that restricts the right of the state to regulate production, process and marketing of any commodity in Kenya. Section 16 and 17 of the Pyrethrum Act provided for the orderly cultivation, marketing and processing of pyrethrum in Kenya. The applicant failed to demonstrate the unconstitutionality of sections 16 and 17 of the Pyrethrum’s Act as per the dictates of Anarita Karimi Njeru case.

6. As to the applicant’s complaint of supplying pyrethrum to the respondent and the respondent failing to pay for them and the allegation of the respondent unlawfully terminating the lease between them are matters of private rights that could only be litigated at the civil courts under private law.

Preliminary objection raised by the respondent is upheld, the application and petition are dismissed with costs to the respondent.

Necessity of conservatory orders in public interest cases

Law Society of Kenya v National Assembly of the Republic of Kenya and 5 others
Petition No 281 of 2013
High Court at Nairobi
D S Majanja, J.
May 30, 2013

Reported by Emma Kinya Mwobobia

Brief facts:
The Law Society of Kenya (petitioner) moved the court through a notice of motion seeking conservatory orders to restrain the respondents (National Assembly) from enforcing a motion passed by the National Assembly and the subsequent issue of a certificate by the Clerk of the National Assembly that had the effect of nullifying the Gazette Notice been issued by the Salaries and Remuneration Commission to regulate state officers’ salaries.

Issues:

i. Whether the certificate of urgency sought by the petitioner raised fundamental constitutional issues pertaining to separation of powers, mandate of the National Assembly, independence of the Constitutional Commissions, the rule of law and constitutionalism

ii. Whether the issues raised by the petitioner justified the issue of conservatory orders in the circumstances

Constitutional Law – petition – conservatory orders – application seeking conservatory orders to restrain the respondents from enforcing a motion that was passed by the National Assembly nullifying a Gazette Notice – where the respondent had issued a certificate nullifying the Gazette Notice issued by the Salaries
and Remuneration Commission to regulate the salaries of the State Officers – whether a conservatory order could be issued under the circumstances.

**Held:**

1. There was likelihood that the certificate of nullification was likely to have had serious consequences. The effect of the nullification was to do away with all the salaries set for the State Officers even those whose salaries were not covered by the National Assembly Remuneration Act. It would also impair the ability of the Commission to conduct its mandate.

2. The conservatory orders were necessary to prevent loss to the public coffers of sums that would be paid out in the event that the ultimate decision of the court was that the cause taken by the National Assembly was unconstitutional.

3. A conservatory order was normally issued where there was real danger that the public would suffer substantial prejudice of violation of the Constitution by a state organ. It was intended to preserve the integrity of constitutional bodies and processes so as not to diminish or undermine the public confidence in them. On one hand, the State and public authorities should not be permitted to proceed and implement decisions that would violate the Constitution and on the other hand the mandate of the constitutional commissions should be protected from erosion by the legislature.

4. The balance was best maintained by the court stopping everything. It was the judiciary that had the ultimate authority to assert the supremacy of the Constitution. The High Court and the other superior courts had the final word on what the Constitution meant and it was only appropriate in those circumstances to permit the legal process commenced by the petition to take its course to settle the fundamental issues that had been raised in the petition.

Petition certified urgent. Conservatory orders issued.

The meaning of declaration of election results and the effect of failure to cite the full election results, in an election petition

*Caroline Mwelu Mwandiku v Patrick Mweu Musimba and 2 others*

Election Petition No 7 of 2013

High Court at Machakos

D S Majanja, J

May 28, 2013

_**Reported by Beryl A Ikamari**_

**Issues:**

i. Whether time, for purposes of filing an election petition in the High Court, began to run when the returning officer declared the results or when the Independent Electoral and Boundaries Commission published the results in the Kenya Gazette.

ii. Whether failure to state the full election results, which form the subject of an election petition, would be fatal to an election petition.

**Electoral Law** – election petition – filing of an election petition – time within which an election petition ought to be filed – whether time began to run at the time of the declaration of results by the returning officer or time began to run at the time that the Independent Electoral and Boundaries Commission published the results in the Kenya Gazette – Elections (General) Regulations, 2012 regulation 87(9) and 87(10), Elections Act, No. 24 of 2011 section 76 and Constitution of Kenya, 2010 article 87(2).

**Held:**

1. According to the canons of statutory interpretation, the provisions of a statute ought
to be read as a whole, in order to ascertain the intention the legislature intended to give them. Words used in a particular provision may be used to clarify the meaning of the words or phrases used in the same context in other provisions within a statute.

2. Parliament must have intended that the 28 day period would begin to run from the time the results were published in the Kenya Gazette as opposed to time of the announcement of the results by the returning officer.

3. The duty to declare the results was placed on the Independent Electoral and Boundaries Commission by article 87(2) of the Constitution of Kenya, 2010, and under section 76 of the Elections Act, No. 24 of 2011, the manner in which the Commission was to declare the results was through publication in the Kenya Gazette. The use of the term ‘declaration’ in the Elections (General) Regulations, 2012, with reference to returning officers could not oust the import of section 76 of the Elections Act, 2011 and article 87(2) of the Constitution of Kenya, 2010, as subsidiary legislation could not be used to oust statutory provisions and constitutional provisions.

4. The returning officer had a duty to sign the requisite forms and deliver to the Independent Electoral and Boundaries Commission the originals of Form 34 and Form 35 together with Form 36 and Form 37 as required. Regulation 87(9) and 87(10) of the Elections (General) Regulations, 2012, described the results submitted by the returning officers and the county returning officers as provisional results.

5. The legislature could not have intended that election petitions be filed based on provisional results as pronounced or as declared by the returning officers as opposed to the final results declared by the Independent Electoral and Boundaries Commission.

6. Accordingly, the present petition, having been filed within 28 days of the publication of the election results by the Independent Electoral and Boundaries Commission in the Kenya Gazette was filed within the time stipulated by the Constitution and the law.

7. Article 159(2)(d) of the Constitution of Kenya, 2010, placed a duty upon every court to dispense justice without undue regard to technicalities. The fact that elections constituted special disputes governed by special provisions did not exonerate the court from the prime obligation to do substantive justice.

8. There was no injustice occasioned by the petitioner’s failure to set out the results of the election forming the subject of the petition.

Application dismissed.

Whether in fixed term employment contracts, damages for unlawful termination equivalent to the remaining term of the contract were available.

**Alphonce Maghanga Mwachanya v Operation 680 Limited**

Cause No 146 of 2012  
Industrial Court at Mombasa  
S Radido, J  
May 24, 2013  
Reported by Beryl A Ikamari

**Issues:**

i. Whether in being allowed to make responses to queries from the employer’s auditors, an employee issued with a termination notice, had been afforded an opportunity to be heard and whether such responses could amount to an effective delegation of an employer’s duty to hear employees facing termination.

ii. Whether in fixed term employment contracts, damages for unlawful termination equivalent to the remaining term of the contract were available.

**Employment Law** – termination of employment – employer’s duty to afford an employee, issued with a termination notice of an opportunity to be heard – whether the employer’s duty to afford employees an opportunity to be heard during termination of
employment contracts could be delegated to auditors or other separate entities – whether allowing an employee to make responses to queries from auditors amounted to affording the employee an opportunity to be heard for purposes of the termination of an employment contract – Employment Act, 2007 section 41.

Employment Law – unlawful/unfair termination of employment – availability of damages for unlawful/unfair termination of an employment contract – whether damages for unlawful termination of employment in a fixed term contract would be different from the damages available in a permanent/indefinite employment contract – whether in a fixed term employment contract, damages for unlawful termination of employment would include damages equivalent to the pay that would have been earned by the employee in the remaining period of the contract – Employment Act, 2007 section 49(4)(f).

Held:
1. Section 41 of the Employment Act, 2007, did not contemplate the delegation of duties placed upon an employer, to hear an employee issued with a termination notice, to auditors or other separate entities. Explanations made to queries from auditors by an employee who was facing dismissal from employment, could not be relied on to demonstrate that such an employee was afforded an opportunity to be heard.
2. The premature termination of a fixed term employment contract would not be different from the termination of an indefinite contract of employment or even what would normally referred to as permanent employment.
3. Section 49(4)(f) of the Employment Act, 2007, did not open an avenue for the Industrial Court to grant damages equivalent to the remaining term of the contract for the unlawful termination of a fixed term employment contract. The Employment Act, 2007, allowed the Industrial Court to award compensation up to a maximum of 12 months gross pay for unfair termination of contract, whether definite, fixed term or indefinite. The only exception would be where the contract of employment provided for the payment of salary for the remaining part of the contract upon unfair termination.
4. Section 49(4)(f) of the Employment Act, 2007, could not be the legal basis for making an award of damages where a fixed term contract had been terminated prematurely or had not been renewed. Such damages would only be available where the employment contract itself provided for an award of damages equivalent to the remaining term of the fixed term contract in situations of unfair termination.

Memorandum of Claim allowed. (Compensation for unfair termination awarded in the following terms: - 1 month’s pay in lieu of notice; Kshs. 25,000/=, and 12 months’ pay as compensation for unfair termination; Kshs. 300,000/=.)

Constitutionality of sections 24(3), 25 and 90(a)(e) of the Children Act placing parental responsibility on a mother in the first Instance

ZAK and another v MA and another
Petition No 193 of 2011
High Court at Nairobi
M Ngugi, J
May 24, 2013
Reported by Cornelius Lupao and Mercy Ombima

Brief facts:
The first petitioner, a step-father to the children of the first respondent, instituted a petition alleging that sections 24(3), 25 and 90(a)(e) of the Children Act which placed parental responsibility on a mother in the first instance, had threatened his right to equal protection of the law as provided for in article 27 of the Constitution of Kenya 2010. The petitioner alleged that the threatened violation arose from the fact that he had been compelled to provide for children who were not his biological children whereas article 53 of the Constitution had provided that any person who sired a child would be responsible for that child.
Issues:

i. Whether section 24(3) of the Children Act that provided that parental responsibility would vest on a mother in the first instance then a father would subsequently acquire parental responsibility, was ultra vires article 53(1)(e) of the Constitution of Kenya 2010 which provided that both a mother and father of a child would have equal responsibility to a child, whether or not they were married to each other.

ii. Whether sections 90(a) and 90(e) of the Children Act that had the effect of placing parental responsibility of children born out of wed-lock on a mother only was ultra vires article 53(1)(e) of the Constitution of Kenya 2010 which provided for equal parental responsibility.

iii. Whether article 53(1)(e) of the Constitution of Kenya 2010 providing for equal parental responsibility created an open parental responsibility which was not pegged on whether the children were biological, adopted, fostered or otherwise.

Held:

1. Sections 24(3) and 25 of the Children Act, when read in light of article 53(1)(e) of the Constitution if Kenya 2010 were unconstitutional. Under article 53(1)(e) of the Constitution of Kenya, a person who was not the biological parent of a child could acquire parental responsibility in that a person who was or had been married to or had cohabited with the father or mother of a child of whom he or she was not the biological parent could acquire parental responsibility towards that child.

2. Section 94 of the Children Act already permitted courts to make orders for financial provision for a step child while having regard to the circumstances of each case. The section then set out factors that a court was to consider in making such an order.

3. The society of Kenya had evolved very rapidly from the traditional polygamous society to monogamous unions in which parties entered into marriage with children from previous unions. While the relationship between couples in a family where there were children from either of the parties’ previous relationships was working, the question of parental responsibility for such children did not usually arise. They were deemed and were to be treated as children of the family, entitled to maintenance and all that appertained to the duties of parents to children. It was when the relationship fell apart that the question of parental responsibility for the children of the other spouse was likely to arise.

4. Article 53(2) of the Constitution of Kenya required that the best interests of a child be of paramount consideration in any matter concerning a child. A step-parent would thus be held to have an obligation recognised in law to exercise parental responsibility as defined in section 23 of the Children Act over his or her step-child. It would be an affront to morality and the values of the Constitution of Kenya for a party who had had a relationship with a child akin to that of a father or mother, to disclaim all responsibility and duty to maintain the child when he or she fell out with the parent of the child. Such responsibility would however...
depend on the circumstances of each case, and the relationship shown to have existed between the person in question and the children in respect of whom he or she was sought to be charged with parental responsibility for.

5. While taking into account the best interest of a child, other jurisdictions had held that such a parent had an obligation to financially provide for a child even where the child had reached the age of eighteen years.

Petition dismissed

Outsourcing or transfer of business should be in conformity with fair labour practices

Elizabeth Washeke and 62 others v Airtel Networks (K) Ltd and another
Industrial Cause No 1972 of 2012
Industrial Court at Nairobi
M Mbaru, J
May 24, 2013
Reported by Lynette A Jakakimba and Emma Kinya Mwobobia

Brief Facts:
The claimants were employed by Airtel Networks (K) Ltd (1st respondent) as customer care service executives. A decision was made by Airtel Ltd to terminate their services and to transfer them to Spanco Ltd (2nd respondent) on terms comparable to those under which they were servicing Airtel Ltd. The claimants contended that the negotiations giving rise to their termination with Airtel Ltd were done without their consultation and that they never had a chance to seek legal advice to the letters of offer of employment with Spanco Ltd and that the transition was without notice as against their individual contracts of employment which contemplated a termination notice of two months or payment in lieu of notice.

The claimants contended that since moving to the employment of Spanco Ltd they had lost most of the benefits they enjoyed while working for Airtel Ltd. Further their attempts to go back and work for Airtel Ltd as per a window period of two years allegedly offered to return to work for Airtel Ltd following their dissatisfaction with the conditions of service at Spanco Ltd, had been met with hostility with Airtel Ltd declaring that their jobs were no longer available and that the claimants had become redundant.

Issues:

i. What was the applicable law and procedure in cases of outsourcing or transfer of business?

ii. Whether the procedure followed by Airtel Ltd in outsourcing services to Spanco Ltd was in contravention of article 41 of the Constitution which protected employees against unfair labour practices.

iii. Whether employees affected by outsourcing or transfer of business arrangements needed to give their consent or where unionised, with the representation of a trade union.

iv. Whether the outsourcing of the services carried by Airtel Ltd to Spanco Ltd amounted to termination of employment or redundancy of the claimant employees.

v. Whether there was mutual termination of employment between the claimant and Airtel Ltd and therefore the claimants were not entitled to claim against Airtel Ltd.

vi. Whether an employee who declined to have their employment transferred or outsourced was deemed to have resigned from their position and therefore not entitled to a claim under redundancy.

vii. Whether the issuance of Certificates of Service to the claimant employees by Airtel Ltd amounted to a notice of termination of employment.

Employment Law – outsourcing/transfer of business

procedure for outsourcing/transfer of business – applicable fair labour practices in outsourcing/transfer of business – transfer of benefits of employees in outsourcing/transfer of business – consent of employees affected by outsourcing/transfer of business – whether employees affected by outsourcing/transfer of business arrangements had to give their individual consent or where unionised, with the representation of a trade union – United Kingdom Transfer of Undertakings
(Protections of Employment) Regulations, 2006


**Employment Law** – termination of employment – termination of employment as a result of outsourcing/transfer of business – whether the outsourcing of the services carried by Airtel Ltd to the 2nd respondent amounted to termination of employment or redundancy of the claimants employees – Employment Act, 2011 section 45.

**Words and Phrases**

Meaning of “outsourcing” based on the United Kingdom Transfer of Undertakings (Protections of Employment) Regulations, 2006

Meaning of “transfer” based on the United Kingdom Transfer of Undertakings (Protections of Employment) Regulations, 2006

Employment Act, 2011

Section 45(1) – No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

Constitution of Kenya, 2010

Article 41(1) – Every person has the right to fair labour practices.

Held:

1. It was important to note that for a long time in Kenya, employees had not had the necessary legal protection and well laid down procedure that outlined the unique circumstances of labour relations until the enactment of the Employment Act, 2007 and the Labour Institutions Act. The Constitution of Kenya, 2010 had further provided for the protection of fair labour practices as a fundamental right and freedom under article 41.

2. The Industrial Court had handed down decisions dealing with virtually all aspects of the employment relationship ranging from unfair dismissals, employment opportunities, appointment and selective criteria to promotions. However the Act and the Court had not defined what “fairness” was. In the South African Case of Council of Mining Unions vs. Chamber of Mines of SA (1985) 6 ILJ 293 (IC) it was held that when Courts were faced with the issue of “unfair labour practice”, the courts had not defined precisely what was the concept of ‘fairness’. However what was stated was that fairness was something more than lawful. That meant that even though a conduct was lawful, it was not necessarily fair.
3. Whether a conduct was fair or not involved a degree of subjective judgement. However, this was not to suggest that the assessment of fairness was unfettered or a matter of whim. Any understanding of fairness had to involve weighing up the respective interests of the employer vis-à-vis the employee as well as the interests of the public.

4. Without a specific law in Kenya that outlined what should go into outsourcing in a business, the possibility for abuse and circumvention of the statutory protections by unscrupulous employers was easy to imagine. However, that was not the case since in the absence of a specific legislative provision, article 41 of the Constitution became applicable with the standard being the use of fair labour practices. In Aviation and Allied Workers Union v Kenya Airways Limited and 3 Others Industrial Cause No. 1616 of 2012, the Court that held that an employer in declaring employees redundant had to establish valid reasons for the termination and demonstrate that it followed fair procedure. Even where there were good reasons for an employee to terminate an employee, the employer had to demonstrate that it followed fair procedure. ‘Fairness’ was that which would have applied to both the employer and the employee based on the facts before court.

5. Outsourcing had been said to occur where the managers of a business preferred to concentrate on the core work of the business and to enter into a contract with another entity to perform services that were peripheral. The transfer had to therefore have a transfer of a business as a going concern and the transfer had to be by the old employer to the new employer. A “going concern” meant a business in operation and whether transfer had occurred was a factual matter to be determined objectively by reference to all relevant factors considered cumulatively, the list not being exhaustive and none of the factors individually decisive, as held in South African Airways (PTY) Limited versus Aviation Union of South Africa and Others, supreme Court of Appeal of South Africa, Case No. 123 of 2010.

6. Outsourcing did not mean the rights of employees in whichever entity abetted. Quite to the contrary, employees either moved as part of a going concern in the outsourcing or remained with the employer with their rights unaffected. On the other hand, if such employees wished to terminate their employment and get new employment with the new entity, that was equally regulated. The employee protection both ways was guaranteed.

7. A transfer on the other hand meant the transfer of a business by one employer (“the old employer”) to another employer (“the new employer”) as a going concern. Under United Kingdom law that Kenya heavily borrowed from with regard to the old labour laws regime, what was applicable was the United Kingdom Transfer of Undertakings (Protections of Employment) Regulations 2006 which referred to ‘transfer’ rather than ‘outsourcing’ and provided that relevant transfer meant the transfer or a service provision change to which those regulations applied in accordance with regulation 3, and ‘transferor’ and ‘transferee’ was to be construed accordingly and in the case of a service provision change falling within regulation 3(1) (b), the ‘transferor’ meant the person who carried out the activities prior to the service provision change and ‘transferee’ meant the person who carried out the activities as a result of the service provision change.

8. For outsourcing or transfer to take effect, the same had to involve one employer to another and the affected employees in any outsourcing agreement or a transfer had to give their individual consent or the representation of the Union, where they were unionised. That was unless the entire or any part of a business was being transferred as a going concern where the employee’s employment continued without interruption as if they had not stopped their employment relationship. The employer entity changed and not the employees’ terms and condition of service. These remain unchanged in such a scenario of outsourcing or transfer.

9. Similarly where a whole or a part of a business or trade was outsourced or transferred, unless there was a consent from the affected employees, all the rights and obligations between the old employer and each individual employee as at the time of the outsourcing or transfer continued in force as if they had
been rights and obligations between the new employer and each employee. Consequently anything done before the outsourcing or transfer by or in relation to the old employer was to be considered to have been done in relation to the new employer.

10. Outsourcing and transfer of business in whole or any part was between an old employer and a new employer who was the new business owner. Since there was no privity of contract between the two employers, any affected employee had to give their individual consent and continuity of their employment was not interrupted. The employee contract of employment remained protected in law and the same could not be altered at the instance of one party even if for the benefit of the other without their consent.

11. Equally, an employee who upon due process being followed moved with the whole or part of a business that had been outsourced or transferred also took the subsisting liabilities with him or her. Personal liabilities moved with the person. Any loans, money advanced or overdrafts moved with the employee to the new employer in the outsourced or transferred business in whole or in part.

12. Airtel Ltd’s concept of outsourcing was fundamentally different from the general practice in other jurisdictions and the terms of fair labour practices as under the Constitution and Part VI of the Employment Act. There was no consent of employees and the outsourcing arrangement was not a going concern, where the offer from the pre-agreements between the respondents was not negotiated to enable the claimants make choices and where these choices were not possible, the arrangement did not ensure that their rights were safeguarded in the change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor (Airtel Ltd). Further the claimants were not privy to the negotiations and deal between Airtel and Spanco Ltd.

13. Airtel Ltd had the option to give notice as outlined under the Employment Act to affected staff that they needed to outsource, terminate and let them engage with Spanco Ltd on a willing employee willing employer basis. The act of outsourcing without securing the claimant’s terms and conditions as agreed with Airtel Ltd was tantamount to a termination. The other alternative available to Airtel Ltd was to declare the claimants redundant, pay severance pay and let them engage with Spanco Ltd on new terms just like it happened under their new contracts on new terms and conditions less payment of their severance pay by Airtel Ltd. The procedure employed by Airtel Ltd was therefore based on unfair labour practice.

14. The respondents had decided on outsourcing, an agreement seemed to have been drawn between the respondents to the exclusion of the claimants and in utter disregard of the individual contracts between the claimants and Airtel Ltd. After which Airtel Ltd proceeded to issue the letters informing them of the outsourcing agreement and soon thereafter Spanco Ltd issued letters of offer of employment to the claimants. Airtel Ltd further issued Certificates of Service to the claimants which effectively severed the employment relationship, and the claimants thereafter could not take up the offer of returning to Airtel Ltd in case of dissatisfaction with Spanco Ltd.

15. The termination of the claimants was therefore procedurally flawed as the letter issued to the claimants was not an outsourcing or a transfer. It was a termination without taking into account the terminal dues of the claimants. Where an employee was not fairly treated and an employer undertook processes to defeat the ends of justice it amounted to a labour practice that was fundamentally an unfair labour practice in the meaning of article 41 of the Constitution and therefore unfair termination as under section 45 of the Employment Act. Airtel Ltd was thereby liable for the unfair termination of the claimants.

Judgment entered in favour of the claimants.
Declarations of election results through gazettement is inconsistent with the Constitution

Suleiman Said Shahbal v Independent Electoral Boundaries Commission and 3 others
High Court at Mombasa
Election Petition No 8 of 2013
F Ochieng, J
May 23, 2013
Reported by Willis Oluga, Andrew Halonyere and Cynthia Liavule

Brief facts:
The petitioner was a candidate for the Mombasa County gubernatorial seat in the March 4, 2013 elections. He filed a petition challenging the declaration of Hassan Ali Joho, the 3rd respondent and Hazel Ezabel Nyamoki Ogunde, the 4th respondent as Governor and Deputy Governor of Mombasa County respectively. The 3rd and 4th respondents, after filing their response to the petition, filed an application seeking a declaration that the petition was invalid on grounds of failure to file within the period stipulated by the Constitution. The 3rd and 4th respondents argued that the petition was filed beyond 28 days of declaration of election results as provided for in Article 87 (2) of the Constitution. They submitted that section 76 (1) of the Elections Act was in contravention of Article 87 (2) of the Constitution to the extent that it provided for the filing of election petition within 28 days of publication of election results in the Gazette and therefore ought to be declared unconstitutional.

Issues:

i. Whether the actions of a duly appointed returning officer of the Independent Electoral and Boundaries Commission (IEBC) could be deemed as actions of the IEBC.

ii. What amounted to an official declaration of election results under electoral law?

iii. Whether section 76 (a) of the Elections Act, 2011 that required the filing of an election petition within twenty eight days after publication of election results in the gazette was inconsistent with and contravened article 87(2) of the Constitution.

iv. Whether the petition had been filed within time as required by the Constitution and whether the same should be struck out.

Electoral Law – election petition – declaration of gubernatorial election results – what amounted to declaration of results – need for election petition to be filed within 28 days of declaration of election results – whether there was a constitutional requirement for publication of election results in the Kenya Gazette – whether declaration of election results by returning officers was declaration by the Independent Electoral and Boundaries Commission (IEBC) –whether the petition had been filed within the time prescribed in the Constitution – whether section 76 (a) of the Elections Act, was inconsistent with article 87(2) of the Constitution – Elections Act 2011 section 76(1) – regulation 4(1) of the Elections (General) Regulations, 2012.

Constitution of Kenya, 2010
Article 87(2) – Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

Elections Act, 2011
Section 76(1) A petition –
(a) to question the validity of an election shall be filed within twenty eight days after the date of the publication of the results of the election in the Gazette and served within fifteen days of presentation;
(b) to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or
(c) to seek a declaration that a seat in Parliament has become vacant may be presented at any time.

(2) A petition questioning a return or an election upon a ground of corrupt practice, and specifically alleging a payment of money or other act to have been made or done since
the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice, be filed at any time within twenty eight days after the publication of the election results in the Gazette.

(3) A petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by any agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice be filed at any time within twenty eight days after the publication of the election results in the Gazette;

(4) A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.

(5) A petition filed in respect of the matters set out in subsections (2) and (3) may, where a petition has already been presented on other grounds, be presented as a supplementary petition

Held:

1. The actions of a duly appointed returning officer were deemed to be the actions of the Commission unless such actions gave rise to personal criminal culpability on the part of such officer.

2. The Gazette Notice declaring the 3rd and 4th respondents Governor and Deputy Governor respectively did not constitute a declaration of the results of elections because it only declared the persons who were elected to the respective offices. The Gazette Notice fell short of constituting the declaration of results to the extent that it did not contain the particulars of other candidates, the rejected votes, the total votes cast and the total number of registered voters.

3. If a declaration had to be in a formal instrument, the forms that contained the results of elections at every level constituted such formal instruments. Once Forms 34, 35, 36, 37 and 38 were duly signed by the authorized returning officer, the requisite forms became an instrument which could not be challenged save through an election petition.

4. The Constitution had not imposed the requirement for gazettement but had only provided for declaration of the election results. When section 76 of the Elections Act imported the requirement of gazettement into the mechanism, it created for timely settling electoral disputes, however the said statute exceeded the authority bestowed upon it by the Constitution. By imposing a requirement for gazettement without specifying the period for it, section 76 of the Elections Act was putting forth an impracticable and unpredictable mechanism.

5. As at the time when the petitioner instituted the petition, section 76 of the Elections Act was an integral part of the law in force and was prima facie lawful. Therefore by striking out the petition at the time it was filed in court, the court would be purporting to impose such decision retroactively.

6. Until and unless an appellate court held otherwise, election petitions had to be filed within 28 days of the declaration of the results of the election in question and such declaration was the one made by the appropriate returning officer responsible for the electoral process in question.

7. *Dicta* “Before concluding this Ruling I feel obliged to mention that Section 77 (1) of the Elections Act expressly provides as follows: “A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission.” That is exactly what article 87 (2) of the Constitution stipulated. Perhaps if Section 76 (1) (a) of the Elections Act did not import the requirement for gazettement, there would have been no room for the arguments of unconstitutionality of such requirement. But that is perhaps being too optimistic, as the word “declaration” was not defined. I do therefore recommend that the requirement for gazettement be removed from.
Section 76 (1) (a) of the Elections Act, and that the wording in Section 77 (1) be used instead. The alternative would be to amend Article 87 (2) of the Constitution, by introducing therein the requirement for gazettement of results, as the mechanism for declaration. If publication of the results in the Gazette is made a requirement of the Constitution, it will be necessary to specify the period within which there must be compliance.”

Prayer to strike out petition declined. Each party to bear own costs.

Court rules on the constitutionality of section 76(1)(a) of the Elections Act 2011
Gideon Mwangangi Wambua v Independent Electoral and Boundaries Commission and 2 others
High Court at Mombasa
Election Petition Number 4 of 2013
G V Odunga, J
May 23, 2013

Reported by Phoebe Ida Ayaya and Derrick Nzioka

Issues:

i. Whether the court had jurisdiction to grant orders that section 76(1)(a) of the Elections Act, 2011 was inconsistent with article 87(2) of the Constitution of Kenya, 2010 and hence the petition was invalid.

ii. Whether section 76(1)(a) of the Elections Act, 2011 was inconsistent with article 87(2) of the Constitution of Kenya, 2010.

iii. Whether the court could extend time for filing responses to an election petition.

Constitutional Law – interpretation of the constitution – principles of interpretation – interpretation of the general principles of the constitution – interpretation of the principles in determining whether the provisions of section 76(1)(a) of the Election Act were inconsistent with the Constitution of Kenya, 2010 – interpretation of what constituted “declaration” in the absence of a clear picture emerging from both the Constitution and the Elections Act, 2011 with respect to the word – Constitution of Kenya, 2010, article 87(2)

Constitutional Law – conflict of laws – where a conflict existed between the Constitution of Kenya, 2010 and the Elections Act, 2011 – where section 76(1)(a) of the Elections Act provided that an election petition had to be filed within twenty eight days after the date of publication of the results of the election in the gazette whereas article 87(2) of the Constitution of Kenya, 2010

provided that petitions concerning an election were to be filed within twenty eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission – Elections Act, section 76(1)(a) – Constitution of Kenya, 2010 article 87(2)

Statutes – interpretation of statutes – interpretation of the Election Act – where section 76(1)(a) of the Elections Act was claimed to be inconsistent with article 87(2) of the Constitution of Kenya, 2010 – Elections Act, section 76(1)(a) – Constitution of Kenya, 2010 article 87(2).

Election Law – election petition – where the petitioner challenged the election of the 2nd respondent in respect of the declared results in Lunga Lunga Constituency – where the petitioners applied for extension of time to file responses and affidavits – whether the court could extend the time for filing documents in an election petition – Elections (National Assembly and County Election Petitions) Rules, 2013 rules 14, 20.


Elections Act, 2011
Section 76
(1) A petition – (a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of
Constitution of Kenya, 2010

Article 87(2) –

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

Words and phrases:

“Determination” was defined by 9th Edition of the Black’s Law Dictionary to mean “a final decision by a court or administrative agency.”

“Declaration” was defined in the same book as “a formal statement, proclamation or announcement especially one embodied in an instrument”

“Publication” was defined therein as “generally, the act of declaring or announcing to the public”.

Held:

1. There was no court established under article 165 of the Constitution of Kenya, 2010 known as “Election Court”. The term “Election Court” however appeared in section 2 of the Election Act under which it was defined to mean the Supreme Court in exercise of the jurisdiction conferred upon it by article 163(3)(a) of the Constitution of Kenya, 2010 or the High Court in exercise of the jurisdiction conferred upon it by article 165(3)(a) of the Constitution of Kenya, 2010.

2. Where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an act of parliament, that procedure had to be strictly followed A (Speaker of the National Assembly v Karume [2008] 1 KLR 426). Therefore where a party set out to challenge the constitutionality of an enactment and ignored the procedure set out from doing so, notwithstanding the fact that the court had jurisdiction to determine the matter, the court could have properly declined to grant the orders sought since to do so would have amounted to abetting abuse of the process of the court. However, where the issue of constitutionality of an enactment arose in the course of the proceedings, the court was properly entitled to hear and determine the issue.

3. Article 87(2) of the Constitution of Kenya, 2010 did not define what amounted to declaration of results and since the article dealt with electoral disputes, it followed that for the court to determine what amounted to declaration of the election results, it was enjoined to resort to the Elections Act, 2011.

4. Section 76(1)(a) of the Elections Act, 2011 provided that a petition to question the validity of an election had to be filed within twenty eight days after the date of publication of the results of the election in the gazette and served within fifteen days of presentation. Section 77(1) of the Act on the other hand simply reproduced the provisions of the article aforesaid, and was unhelpful to the court in determining how declaration of results was to be made.

5. In determining whether or not section 76(1)(a) of the Election’s Act was inconsistent with article 87(2) of the Constitution of Kenya, 2010 it was clear from the authorities (Waititu v IEBC and others Nairobi High Court Election Petition No 1 of 2013) and (Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkedienye & others Nairobi High Court Election Petition No 6 of 2013) that the court had to be guided by the principles that:

   i. There was a rebuttable presumption that legislation was constitutional and that the onus of rebutting the presumption rested on those who challenged that legislation’s status. It therefore followed that the starting point was that section 76(1)(a) of the Election’s Act was constitutional.

   ii. Fundamental rights provisions had to be interpreted in a broad and liberal manner. Article 38(2) of the Constitution of Kenya, 2010 which provided that every citizen had the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors was one such right.

   iii. In order to determine the constitutionality of a statute, the court had to consider the purpose and effect of
the impugned statute or section thereof and if the purpose was not to infringe a right guaranteed by the Constitution, the court had to go further and examine the effects of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional. Section 76(1)(a) of the Elections Act, 2011 did not infringe upon a right guaranteed by the constitution.

iv. In interpreting the Constitution, the constitutional interpretation principle of harmonization, which was to the effect that all the provisions of the Constitution concerning an issue had to be considered together, was to be applied.

v. In addition the widest construction possible, in their contexts, had to be given to the words used according to their ordinary meaning and each general word held to extend to all ancillary and subsidiary matters.

vi. Moreover, constitutional provisions were to be given a liberal construction unfettered by technicalities because though the language of the Constitution did not change, changing circumstances may have given rise to new and fuller import to the meaning of the words used.

6. Article 87(2) of the Constitution of Kenya, 2010 talked about “declaration”. However, the duty imposed on the returning officer under article 86(c) was to “openly and accurately collate and promptly announce” the results. The word “declare” was omitted. From the reading of articles 87(2) and 86(c) of the Constitution of Kenya, 2010, one could not therefore state with certainty that the returning officer was the one upon whom the duty to “declare” results was placed as opposed to announcement of the results. One had to therefore peruse the other instruments such as the Elections Act, 2011, the Elections (National Assembly and County Election Petitions) Rules, 2013 and the Elections (General) Regulations, 2012 to find out what exactly the role of the returning officer was with respect to declaration of results.

7. The Elections Act itself in so far as it had two provisions on the exact point in time from which the reckoning of time for presentation of the petition started to run could not be said to offer a solution to this lacuna. Reliance had been placed on section 39 of the Elections Act, 2011 which provided that:

(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling

(2) Before determining and declaring the final results of an election under subsection (1), the commission may announce the provisional results of an election.

(3) The commission shall announce the provisional and final results in the order in which the tallying of the results is completed.

8. The court was urged to make a determination on what encompassed the words “determine”, “declare” and “publish”, and from the definitions it was clear that publication was in effect a form of “declaration” and the definitions of both words seemed to narrow down to the act of announcement. “Determination” would refer to the decision without necessarily the act of announcement. However, the Election Act required these three activities to be carried out immediately at the close of polling.

9. Polling was normally undertaken at the polling station so that if the results were determined, declared and published immediately, those would only be the results of the polling station and could not constitute the results of the particular constituency. In fact regulation 73(1) of the Elections (General) Regulations, 2012 imposed the task of declaring the polling station closed on the presiding officer. Accordingly the declaration of results as contemplated in article
87(2) of the Constitution of Kenya, 2010 could not be equated to the determination, declaration and publication that took place at the close of the polling under section 39 of the Elections Act, 2011 since time for the presentation of the petition could not be expected to start running until after all the results from the polling stations in a constituency had been declared.

10. On the other hand if the declaration under article 87(2) of the Constitution of Kenya, 2010 was to be done by the returning officer immediately after tallying, that would defeat the apparent mandatory requirement on the Independent Electoral and Boundaries Commission to announce both the final and provisional results as provided in section 39(3) of the Elections Act. Instead of clarifying the meaning of the term “declaration” section 39 of the Elections Act, 2011 compounded and complicated matters even further.

11. In the absence of a clear picture emerging from both the Constitution and the Elections Act with respect to what constituted “declaration” the law was that the purpose of legislation had to be looked at to see whether or not it was unconstitutional. The insertion of “gazettement” in section 76(1)(a) of the Election Act was meant to give certainty to reckoning of time.

12. However if declaration was construed to mean the same thing as gazettement, since there was no timeline provided under the Elections Act for gazettement of the results, Independent Electoral and Boundaries Commission would not be bound to gazette the results immediately and could even take as long as two months a scenario which would lead to uncertainty and absurdity.

13. However, a statute or enactment worded in a language which was difficult to follow, or was ambiguous or contradictory or impossible to apply, was not necessarily thereby rendered unconstitutional since it only gave rise to questions of interpretation by the court and with regard to inconsistencies and repugnancy in parts of the Act. These were not things that necessarily rendered a statute unconstitutional since they were things which were resolved by the rules of statutory interpretation in real factual situations.

14. The court was enjoined to interpret the Constitution by giving its provisions a liberal construction unfettered by technicalities because changing circumstances may have given rise to new and fuller import to the meaning of the words used. Section 76(1)(a) of the Elections Act, 2011 introduced new circumstances based on the explicit words therein which circumstances had influenced parties in their decisions to challenge the results of the elections in the country.

15. The court was duty bound to interpret article 87(2) of the Constitution of Kenya, 2010, taking into account such changed circumstances in order to give new and fuller import to the meaning of the word “declaration” as used in the article. Section 76(1)(a) of the Elections Act, 2011 was a mechanism by which the Legislature was fulfilling its mandate as enjoined by article 87(1) of the Constitution of Kenya, 2010.

16. Neither the Constitution nor the Elections Act provided the timelines within which the responses to the petition were to be filed. The period for doing so was however provided under rule 14 of the Elections (National Assembly and County Election Petitions) Rules, 2013. Rule 20 of the said Elections (National Assembly and County Election Petitions) Rules, 2013 also provided that the court could extend time. The period which an applicant for extension of time was obliged to explain was the period of the delay subsequent to the last day when the step in the proceedings ought to have been taken.

17. The jurisdiction conferred upon the High Court by the Constitution to hear and determine election petitions was a special jurisdiction as the Elections Act, 2011 and the rules made thereunder formed a complete legal regime with its elaborate procedure concerning the filing, serving, hearing and determination of the election petitions and therefore the provisions of other law and the Civil Procedure Act and Rules made thereunder did not apply.
to election petitions save where expressly incorporated.

18. Under rule 20 of the Elections (National Assembly and County Election Petitions) Rules, 2013, the discretion to enlarge time was very wide and was only subject to ensuring that justice was done. In this case, all the parties appreciated the role of the Independent Electoral and Boundaries Commission in those proceedings. The delay in filing the response and affidavits was not inordinate and no prejudice had been alleged that would be occasioned to the respondents if the application was allowed. The applicants had applied for extension of time before the respondents took up the issue of the filing of the responses out of time.

19. (Obiter) “Section 76(1)(a) left as it is may be a source of mischief, uncertainty and absurdity and in order to uphold the values of the Constitution, the court would be perfectly entitled where an Act of Parliament exhibits certain deficiencies which make it uncertain and insufficient to properly realise the Constitutional aspirations to “read in” the omitted words so as to bring the Legislation in line with the Constitutional aspirations without the necessity of declaring the legislation unconstitutional. In the result, I hereby direct the Attorney General to initiate the process of legislative amendment to the Elections Act, 2011 with a view to providing a reasonable timeline within which the gazettlement of results and not just the names of the winners of the election under section 76(1)(a) of the Act is to be undertaken by the Independent Electoral and Boundaries Commission. If such amendment is not undertaken within the next 60 days the said section will be deemed to contain a requirement that the said commission is to gazette the results of the elections under section 76(1)(a) of the Elections Act, 2011 within 7 days of the announcement of the results by the Returning Officer.”

Chamber summons dismissed, notice of motion allowed, The Hon Attorney General directed to initiate the process of legislative amendment to the Elections Act, 2011 with a view to providing a reasonable timeline within which the gazettlement of results under section 76(1)(a) of the Act is to be undertaken by the Independent Electoral and Boundaries Commission. If such amendment was not undertaken within the next 60 days the said section would be deemed to contain a requirement that the said commission was to gazette the results of the elections under section 76(1)(a) of the Elections Act, 2011 within 7 days of the announcement of the results by the Returning Officer. The Ruling was to be served by the Deputy Registrar of the court on the Attorney General for implementation.

Court’s power in scrutiny of votes in electoral petitions
Philip Osore Ogutu v Michael Onyura Aringo and 2 others
Petition No 1 of 2013
High Court at Busia
F Tuiyott, J
May 23, 2013
Reported by Teddy Musiga

**Issues:**

i. What is the scope of an election court power in the exercise of scrutiny of votes?

ii. Whether a narrow margin of votes between a winner and runner up justifies an order for scrutiny of votes.

**Elections Act**

Section 82 (1) – An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.
Held:

1. An election court may order for scrutiny of votes *suo moto* or on an application by any party to the proceedings the order or application may be made at any stage of the proceedings. On the timing of the application, it would be upon a party seeking scrutiny of votes to choose when to approach the court. The application could be made prior to the hearing given that the Election Petition Rules required that the substance of the evidence to be relied on by the parties be set out in the affidavits accompanying the petition or the responses. Therefore any evidence that goes beyond pleadings must either be rejected outright or disregarded.

2. An order of scrutiny will not be granted as a matter of course. Rule 33 (2) of the Election Petition Rules provided that the court must be satisfied that there was sufficient reason to require an examination of the ballots. In Masinde v Bwire & Anor (2008) 1 KLR (EP) 547, scrutiny would only be ordered when a foundation or a basis had been laid.

3. The reasons why scrutiny should not be ordered as a usual course are:
   i. The need to guard against an abuse of the court process. Parties must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence or for purposes of chancing on new evidence. Scrutiny should not be looked upon as lottery.
   ii. Scrutiny is often arduous and laborious. A court making an order for scrutiny will define its own scope. Whatever that scope, it is invariably a painstaking exercise. That is not a route to be taken without a good course. Rule 33(4) of the Election Petition Rules outlined the possible scope of that task. Under that rule, scrutiny is an examination of any or all of the following:
      a) The written statements made by the presiding officers under the provisions of the Act;
      b) The copy of the register used during the elections;
      c) The copies of the results of each polling station in which the results of the election are in dispute;
      d) The written complaints of the candidates and their representatives;
      e) The packets of spoilt papers;
      f) The marked copy register;
      g) The packets of counterfoils of used ballot papers;
      h) The packets of counted ballot papers;
      i) The packets of rejected ballot papers; and
      j) The statements showing the number of rejected ballot papers.
   iii. Where a petitioner in his petition fails to include in his petition and the affidavit concise statements of the material facts upon which the claim of impropriety or illegality of the casting or counting of the ballots is made then an order of scrutiny ought not be granted. The Election Petition Rules required that affidavits of witnesses be filed alongside the petition or the response. The affidavits set out the substance of the evidence. If scrutiny is sought then the evidence must corroborate the argument.

4. As to whether a narrow margin of votes between the winner and the runner up justifies an order for scrutiny depends on the total number of votes cast. In Onamu v Maitsi Election Petition No. 2 of 1983 where the margin is very low, justice will be done and seen to be done if scrutiny and recount is ordered from the beginning. In those instances a scrutiny and recount could unearth errors (inadvertent or deliberate) that may wipe out the small margin.

Application for scrutiny of votes denied save for only one polling station where sufficient reason was provided.
Formal requirements in the making of a valid will

In Re GKK (Deceased)

High Court at Nairobi
Succession Cause No1298 of 2011
Isaac Lenaola, J
June 6, 2013

Reported by Phoebe Ida Ayaya and Derrick Nzioka

Brief facts:
The deceased, GKK died on 21st December, 2010 at a hospital in Sandton, Johannesburg, South Africa. He left behind three wives with seven, two and four children respectively. He allegedly died testate, leaving behind a will dated 10th September 2010 and another dated 20th July 2006 with a codicil dated 6th May 2008. For ease of reference, the former will drawn in London, was referred to as the “London Will”, while the latter drawn by the deceased’s advocate, was referred to as the “Kahari Will”.

Issues:
i. What Constitutes format requirements in making a will.

ii. Whether the Kahari will (and codicil) as well as the London will were vitiated by failure to comply with the formal requirements of making a will.

iii. What order the court could give for avoidance of depletion of the estate.

Succession Law – wills – validity of wills – where the wills were claimed to be invalid for failure to comply with the formal requirements of making a will – depletion of deceased’s estate – where the estate of the deceased was being depleted by prolonged failure to appoint administrators – what orders the court would give in the instances – Law of Succession Act, sections 5, 11 and 66.

Held:

1. Before a will could be declared lawful, it had to be proved as a valid testamentary disposition of the testator, and in proving so, a court had to examine whether the formal requirements in making a will had been complied with, such as; whether the testator had the legal capacity to make the will and whether it was made voluntarily without any duress, undue influence or mistake. It would also be important to consider whether the testator revoked the alleged will before his death.

2. The claim that the deceased did not have capacity to make the Kahari will could not stand because capacity related to understanding the nature of the will making process and it did not matter whether there was apparent bias in the final disposition made. The objectors of the Kahari will failed to lead evidence and prove the lack of testamentary capacity contemplated under section 5(3) of the Law of Succession Act, due to ill health of the deceased, at the time of making it.

3. In addition to having testamentary capacity, a testator had to know and approve the contents of his will. A testator would be deemed to have known the contents of his will if he was aware of its contents and understood the terms, while approval was seen from the execution of the will (John Kinuthia Githinji v Githua Kiarie & others, Civil Appeal No 99 of 1988).

4. It was not proved in evidence that at the time of making the Kahari will in 2006, the deceased was badly ill except for his diabetic condition which he had had for a long time anyway, and the court was unable to find sufficient evidence that at that time, the deceased was not of sound mind and was acting without independence.

5. However, with regard to the subsequent codicil and power of attorney, evidence was led to the effect that in 2008 the deceased’s health had deteriorated and he had been locked up in his Kitusuru residence by the beneficiary of both the codicil and power of attorney. Furthermore, video evidence shown in court captured the deceased speaking at Wellington Hospital, and denying any signatures he may have put on certain documents.

6. The totality of the evidence tendered led the
court to conclude that noting the deceased’s state of health and his condition he was not of such a mind as to have voluntarily executed the codicil and power of attorney, and in holding that the two documents were invalid agreed with the principle that undue influence occurred when a testator was coerced into making a will or some part of it that he did not want to make. It was proved if it could be shown that the testator was induced or coerced into making dispositions that he did not really intend to make.

7. On the allegation of suspicion of the Kahari will and codicil for it was witnessed by a secretary, a building caretaker and a bodyguard, the court held that under section 11(c) of the Law of Succession Act, any person could witness the execution of a will so long as they were capable of seeing the signature and understand what they are doing. A witness competent to attest a will was defined by section 3(1) of the Act as a person of sound mind and full age, and it did not matter what the social standing of the testator or the witness in the society may have been and their circumstances, and so the Kahari will and codicil could not fail on that ground alone.

8. However, under section 11(c) of the Act, to be present at signing meant that the witness had to be capable of seeing the testator sign the will and thereafter attest to that fact. In both the Kahari will and codicil, the witnesses allegedly saw the deceased sign one page of a document and they also signed one page of the same document, whereas the will and codicil presented in court bore the signature of the deceased on all the pages, and that of the witnesses on only one page, raising questions as to whether the witnesses indeed attested to the signature.

9. The witnessing was to the signature of the testator and could not be anything else (Re Colling (1972) 1 WLR 1440), and the court found that the deceased failed to make and execute the Kahari Will of 20th July 2006 and codicil of 6th May 2008 in accordance with the provisions of section 11 of the Law of Succession Act and they were therefore both invalid.

10. Turning to the London will, the court raised concern over issues surrounding its making, to wit it queried:

i. How the deceased being so ill while at Nairobi Hospital that he had to be transferred to London for special treatment, could get well so quickly that he was able to do all that a healthy person could do including a few days after arriving in London, decide to write a wholly fresh and new will?

ii. How he could be said to have been in control of his affairs when in fact he had been forcefully taken away from his last wife and her children to the daughter of his first wife and her sisters?

iii. How he was able, without influence, to read and understand the will and its contents, when he was blind in one eye and was 40% blind in the other, semi-literate, unaided and in sick health made serious amendments to the draft will?

iv. Whether his daughter by his first wife, who was the one who instructed the advocate who prepared the will, and paid both his and the doctor’s fees could have manipulated the making of the will?

v. Why he did not pay the advocates fees himself or arrange for payment from his many bank accounts including one in London, if he was in full control of his affairs?

vi. How the deceased allegedly revoked the power of attorney and denied his last wife while previously he had never denied her?

11. Section 5(1) of the Law of Succession Act embodied the principle of testamentary freedom by providing that any person was capable of disposing of his property by will so
long as he was of sound mind. Testamentary capacity was described as the testator’s ability to understand the nature of will making, and the test was set by Cockburn CJ in Banks v Goodfellow where he stated “he must have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them.”

12. As a starting point, section 5(3) of the Law of Succession Act created the presumption that the person who was making a will was of sound mind, and under section 5(4) of the Act, the burden of proving otherwise was on the person alleging that the testator was not of testamentary capacity or was of unsound mind at the time of making the will. From the evidence tendered, it was manifest that the London will – like the Kahari will and codicil - was made upon manipulation of the deceased’s mind by persons close to him, it could not be an expression of the deceased’s intentions and so the court invalidated it.

13. The intention of the Law of Succession Act was the eventual distribution of a deceased’s estate, and in the present case, invalidation of the wills did not enhance that cause as during the hearing, it became clear that the family was divided into two distinct camps neither of which was able to work together and jointly to manage the estate, necessitating the court to intervene so as to avoid depletion of the estate.

Both the Kahari will (and codicil), and the London will were declared invalid. Both the deceased’s daughter by his first wife, and the deceased’s last wife were to appoint someone to be co-administrator within 7 days following the ruling, failure of which the court would invoke section 66 of the law of Succession Act and appoint the co-administrators. The estate of the deceased was to be distributed under intestacy laws in accordance with the Law of Succession Act.

Whether the IEBC had an obligation to deliver ballot boxes to the registrar in every election petition filed in court

George AladwaOmwera v Benson MuturaKangara& 2 others
Election Petition No 4 of 2013
High Court at Nairobi
R M Mwongo, J
June 5, 2013
Reported by Beryl Aikamari

Issues

i. Whether rule 21 of the Elections (Parliamentary and County Elections) Petition Rules, 2013, required the Independent Electoral and Boundaries Commission (IEBC), in a mandatory and automatic manner, in every petition, to deliver ballot boxes for the election in dispute to the registrar.


The Elections (Parliamentary and County Elections) Petition Rules, 2013, rule 21;

“21. The Commission shall deliver to the Registrar—
(a) the ballot boxes in respect of that election not less than forty eight hours before the date fixed by the court for the trial; and
(b) the results of the relevant election within fourteen days of being served with the petition.”
Held:

1. In interpreting the meaning of rule 21 of the Elections (Parliamentary and County Elections) Petition Rules, 2013, the whole context of the rules and the Elections Act, No 24 of 2011, as the enabling statute would be read together. Such interpretation would avert a literalistic or narrow approach which may not be in accord with the purpose of the law.

2. Rule 21 of the Elections (Parliamentary and County Elections) Petition Rules, 2013, placed two obligations on the IEBC. First, it required the IEBC to deliver the results of the election in dispute within fourteen days of being served with the election petition. Secondly, it required the IEBC to deliver ballot boxes to the registrar before the commencement of the hearing. The first obligation accords with the legal requirement that the petitioner should state the results of the election in dispute within the body of the election petition. It also accords with the IEBC’s duty to determine and declare election results after closure of polling, as recognized in section 39 of the Elections Act, No. 24 of 2011.

3. It was not in every petition that there would be need for scrutiny. Therefore, ballot boxes need not necessarily be availed for every petition.

4. In terms of pragmatism, the court would consider the nature of the requirement connoted by rule 21 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

Delivery of ballot boxes to the registrar would pertain to the security of the voting materials, the maintenance of their integrity from the completion of voting and their sealing, the verification of their state from the date of voting up to the date upon which they are ordered up by the court, and the overall safety of the boxes for use in the scrutiny.

5. In receiving the ballot boxes the registrar was required to maintain records detailing information concerning the ballot boxes. Such information including the costs involved in security and transportation, were amongst the details which would have to be taken into account in ensuring proper delivery, irrespective of whether physical movement of the ballot boxes was involved or not. Given the nature of factors involved in delivering ballot boxes to the registrar, the delivery of ballot boxes could not have been envisaged as a simplistic matter which was to occur every time that a petition hearing was fixed.

6. The IEBC was not under a strict and automatic obligation to deliver ballot papers to the registrar. Accordingly, the delivery of ballot boxes would be carried on upon an application being made by a party or on the court’s motion, in appropriate circumstances.

Application dismissed.

Public participation in interviews conducted by the Public Service Commission does not mean physical presence of people

Consumer Federation of Kenya (COFEK) v Public Service Commission & another

High Court at Nairobi
Petition No 263 of 2013
I Lenaola J
June 4, 2013

Reported by Andrew Halonyere & Cynthia Liavule

Issues:

i. Whether the phrase “participation of the people” as enshrined in article 10 of the Constitution of Kenya 2010, meant that “the people” had to be present during interviews conducted by the Public Service Commission for the posts of Principal Secretary

ii. Whether failure by the Public Service Commission to consider letters from the Ethics and Anti-Corruption Commission (EACC) regarding on-going investigations on integrity of some applicants violated article 10 of the Constitution, 2010.

Constitutional law –interpretation of the Constitution-interpretation of the phrase “participation of the people” – whether the phrase “participation of the people” as enshrined in article 10 of the Constitution
should be read to mean that “the people” must be present during interviews – whether the Court was entitled to review the process of appointments to State to public offices

Constitutional law – public office – appointment to public office - failure by the Public Service Commission to consider letters from the Ethics and Anti-Corruption Commission regarding on-going investigations on integrity of some applicants – whether the court could condemn a party on the basis of suspicious generalities - Constitution of Kenya,2010 article 1(2), 10,155.

Constitution of Kenya, 2010
Article 1(2)All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

Article 10(2) The national values and principles of governance include—
(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

Article 155(3)The President shall—
(a) nominate a person for appointment as Principal Secretary from among persons recommended by the Public Service Commission; and
(b) with the approval of the National Assembly, appoint Principal Secretaries

Held:
1. Article 155 of the Constitution of Kenya 2010 merely required the Public Service Commission to recommend the appointment of persons to the office of Public Secretary. It neither appointed nor approved the appointments made as argued by the petitioners. The role of the Public Service Commission was important but was only one in a chain of events.
2. Article 10 of the Constitution enshrined one of the national values and principles of governance as “the rule of Law, democracy and participation of the people”. The petitioner had latched on to the phrase “participation of the people” in a selective and selfish manner. There was no express requirement that “participation of the people” should be read to mean that “the people” must be present during interviews.
3. The “people” were represented in the National Assembly and that was why Chapter Seven of the Constitution was titled, “Representation of the People.” Article 1(2) of the Constitution also had a deeper meaning, it provided that the people could exercise their sovereignty directly or through their democratically elected representatives. In the case before court, there was an opportunity for a second time for the people to participate indirectly in raising issues, good or bad, about the persons recommended for appointment because Parliament, before approving any applicant would scrutinise their suitability for the office of Principal Secretary.
4. Neither the Public Service Commission nor the High Court could seriously hold anything against any of the applicants on the basis of the vague letters from Ethics and Anti-Corruption Commission regarding investigations on integrity issues. A Court could not condemn a party on the basis of suspicious generalities which had not been carefully crafted to enable the party under attack respond comprehensively to the allegations of lack of integrity.
5. Courts were entitled to review the process of appointments to State or Public Offices for procedural infirmities as well as for legality. A proper review to ensure the procedural soundness of the appointment process included an examination of the process to determine if the appointing authority conducted a proper inquiry to ensure that the person appointed met the constitutional requirement. The absence of any evidence that such an inquiry was conducted, or, the availability of evidence that such an inquiry was, in fact, not conducted, led to the conclusion that the procedural aspect of this constitutional test had not been satisfied. Additionally, the Court had to review the appointment decision itself to determine if it met the constitutional threshold for appointment.

Petition dismissed
Written agreement between a client and advocate as to advocates fee is not subject to taxation.

R v Disciplinary Committee, Law Society of Kenya & another ex-parte Wanja G. Wambugu t/a Wambugu and Company Advocates

High Court at Nairobi

Miscellaneous Civil Application 698 of 2009

G V Odunga J

June 3, 2013

Reported by Andrew Halonyere & Cynthia Liavule

Issues:

i. Whether the Law Society of Kenya (LSK) Disciplinary Committee acted ultra vires its jurisdiction by re-taxing an advocate's bill of costs in disregard of an express written agreement between a client and advocate as to advocate's fee.

ii. Whether an appeal could lie against the LSK Disciplinary Committee under section 62 of the Advocates Act for an unlawful order.

iii. Whether judicial review orders could be issued against decisions of the Disciplinary Committee.

Civil practice and procedure – taxation of costs – taxation of advocate’s fees – where there was a written agreement between a client and advocate as to advocates fee – whether such fees was subject to taxation.

Judicial review – certiorari – application for orders of certiorari to quash the decision of the Law Society of Kenya Disciplinary Committee of re-taxing an advocate's bill of costs - whether the existence of an alternative procedure barred the remedy of certiorari - whether judicial review orders could be issued against the committee - Advocates Act (Cap 16), sections 45(2), 45(6), 62

Advocates Act, (Cap 16)

Section 45(2) - Agreements with respect to remuneration

(2) A client may, 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.

Section 45(6)

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.

Section 48 - Action for recovery of costs.

Section 60

(1) A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonorable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.

(2) Where a person makes a complaint under subsection (1), the complaint shall be by affidavit by himself setting out the allegations of professional misconduct which appear to arise on the complaint to the Tribunal, accompanied by such fee as may be prescribed by rules made under section 58 (6); and every such fee shall be paid to the Society and may be applied by the Society to all or any of the objects of the Society.

(3) Where a complaint is referred to the Tribunal under Part X or subsection (1) the Tribunal shall give the advocate against whom the complaint is made an opportunity to appear before it, and shall furnish him with a copy of
the complaint, and of any evidence in support thereof, and shall give him an opportunity not less than seven days before the date fixed for the hearing:

Provided that, where in the opinion of the Tribunal the complaint does not disclose any prima facie case of professional misconduct, the Tribunal may, at any stage of the proceedings, dismiss such complaint without requiring the advocate to whom the complaint relates to answer any allegations made against him and without hearing the complaint.

Section 62 - Appeal against order of committee

62. (1) Any advocate aggrieved by order of the Committee made under section 60 may, within fourteen days after the receipt by him of the notice to be given to him pursuant to section 61 (2), appeal against such order to the Court by giving notice of appeal to the Registrar, and shall file with the Registrar a memorandum setting out his grounds of appeal within thirty days after giving by him of such notice of appeal.

Held

1. Where there was an agreement between an advocate and the client with respect to remuneration, that agreement was not subject to taxation and where the agreement was sought to be set aside on the grounds that it was harsh and unconscionable, exorbitant or unreasonable the procedure provided under section 45(2) had to be followed.

2. Section 62 applied to situations where the Committee had exercised the powers conferred upon it by section 60 of the Act. In the case before the court, the powers purportedly exercised by the Committee was ultra vires its jurisdiction hence there was no lawful order to be appealed against.

3. Whereas the existence of an alternative procedure did not necessarily bar the remedy of certiorari, the fact that a remedy existed which had not been resorted to was a factor which the Court had to take into account in deciding whether or not to award the discretionary remedy of certiorari. However, that avenue had to be beneficial, convenient or effectual.

4. Judicial review orders were intended to correct a wrong or illegal performance or non-performance of the inferior tribunals or bodies or persons who could be judicial and quasi-judicial, it also included administrative bodies or persons. Judicial review orders if properly used were intended to bring out faster but more effective results. Therefore section 62 of the Advocates Act was not a bar to the reliefs sought in the application.

Orders of Certiorari, Prohibition and Mandamus granted as prayed for in the application

Scope of the State's obligation to provide housing as espoused under article 43(1)(b) of the Constitution of Kenya, 2010

Richard Were v Permanent Secretary Ministry of Health

Petition No 568 of 2012

High Court at Nairobi

DSMajanja, J

May 31, 2013

Reported by Nelson K Tunoi & Beatrice Manyal

Issues:

i. What is the scope of the State’s obligation to provide housing to its employees as espoused under article 43(1)(b) of the Constitution of Kenya, 2010.

ii. Whether the State violated the petitioners’ right of access to housing guaranteed under article 43(1)(b) of the Constitution of Kenya, 2010 by issuing the eviction notices.

Constitutional law - fundamental rights and freedoms - right to housing - scope of State’s obligation to provide housing to its employees - where the petitioners were provided with staff houses when they were employees of the Ministry of Health at Mathari Hospital - whether
the petitioners’ right to access to housing was violated by the respondents in issuing the eviction notices - where eviction notices were issued when the petitioners were transferred to another Ministry for employment - whether the intended eviction was unlawful – whether the petition had merit - Constitution of Kenya, 2010 articles 21, 27(1), 28, 43(1)(b)

Constitution of Kenya, 2010, article 43(1)(b) provides;

43(1) (b) Every person has the right to accessible and adequate housing, and to reasonable standards of sanitation.

Held:

1. The general principle that employment does not confer tenure to property was firmly established by the Court of Appeal in Eric V. J. Makokha & others v Lawrence Sagini & others [1994] eKLR. The employees’ right to occupy the employers’ premises was subject to the employment contract. In this case, the deployment of the petitioners to other ministries meant the benefit of housing that came with their association with the hospital came to an end.

2. The provision of housing relating to government employees was governed by the Code of Regulations (Revised 2006) which stated that the long term policy of the government was to gradually move away from the responsibility of housing civil servants with the aim of paying a consolidated wage. In this connection, the government paid civil servants house allowance pegged at market rates and charged market rates for its houses. In addition, the government was to sell all non-institutional houses to civil servants through a tenant-mortgage scheme. It would also provide mortgage to civil servants to acquire houses. However, the government would continue to provide institutional housing for staff working in essential institutions such as schools, hospitals and at remote stations.

3. The State’s obligation under article 43(1)(b) was not to give houses to specific applicants but to provide a framework under which citizens may have access to housing. In order to achieve the objective of ensuring that a class of employed person access housing the State through section 31 of the Employment Act imposed a mandate on the employer to provide housing or an allowance to the employee to obtain housing in the market.

4. The mandate imposed on every employer was consistent with the State’s obligations under article 43(1)(b) to provide access to housing. The government, as employer, had provision for either housing or payment of house allowance and in the circumstances of the case, it was clear that the respondents were not in contravention of the law.

5. The Code of Regulations (Revised 2006) clearly showed that there was no right to a government house as such and once the petitioners ceased to occupy government houses, their right to house allowance which was guaranteed by statute would not be affected.

6. The right to housing under article 43(1)(b) of the Constitution of Kenya, 2010 was framed in terms of access. Although the petitioners, just like other citizens had a right to accessible and adequate housing, in the specific instances especially where such right sprung from an employment contract with clear terms and benefits under the law, that right had to be realised within the framework of the existent regulations and laws which included the Government Housing Regulations and employment statutes.

7. The right to housing was not absolute; it had to take into account the rights of others and in this case, the continued occupation by the former employees of the premises obviously prejudiced the right of other incoming staff to secure the same right asserted by the petitioners.

8. The mandate imposed by the State on every employer fulfilled and promoted the right to access. Payment of a sum in the form of housing allowance enabled the employee to secure accommodation in the open market. Therefore, the petitioner’s rights under article 43(1)(b) were not violated as alleged by the petitioners.

Petition dismissed with no order as to costs. The petitioners shall vacate the Staff houses at Mathari Hospital by 31st July 2013.
Lawful computation of a redundancy package
Fredrick Ngari Muchira, Howard Kipkoech Korir and 98 others v Pyrethrum Board of Kenya
Industrial Court at Nakuru
Cause No 16 of 2013
B Ongaya, J
May, 31 2013
Reported by Phoebe Ida Ayaya and Derrick Nzioka

Issues:

i. Whether computation of redundancy package was to be on the basis of the basic salary or the gross monthly pay.

ii. Whether staff above 50 years were to be paid on the basis of the period pending attainment of the age of 60 years or on the basis of period already served.

iii. Whether the criteria set for redundancy package in the Government letter was lawful.

iv. Whether the termination by way of redundancy was unfair.

Employment Law – termination of employment – redundancy – severance pay for employees declared redundant – where termination was done pursuant to a redundancy arrangement – where the redundancy package was set out by a letter from the government – where the provisions of the redundancy package were said to be contrary to the provisions of the collective bargaining agreement (CBA) and the Employment Act, 2007 – whether the termination of employment in this case amounted to unlawful termination – whether an employee having been paid a redundancy package and signed it had recourse against the employer – Employment Act, 2007 section 40.

Employment Act, 2007 section 40(1) – an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

(2) Subsection (1) shall not apply where an employee’s services are terminated on account of insolvency as defined in Part IX in which case that Part shall be applicable.

(3) The minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written
law or by any firm underwriting insurance business to be approved by the Minister.

Held:

1. The Collective Bargaining Agreement (CBA) was clear that for the claimants being employees in the union, the basic pay or salary was to apply in computing dues.

2. The provisions of the Employment Act, 2007 on redundancy were the basic statutory binding provisions, and section 40(1)(f) was clear that the payment of dues was on the basis of at least one month’s wage, where “wage” as used in the section meant the net price the employer paid for labour as a factor of production and whose traditional measure was the amount of time worked or the output of production attributable to the individual employee.

3. In view of the relevant provisions in the Employment Act and the CBA, the computation of redundancy package was to be on the basis of the basic salary or the wage and the claimants were not entitled to a computation on the basis of remuneration or gross salary as claimed.

4. However, the statutory principle that the computation was on the basis of the wage or basic salary was a minimal standard and parties were at liberty to agree upon criteria more advantageous to the employees but which was not agreed upon in this case.

5. Section 40(1)(g) of the Employment Act, was clear that one of the conditions in redundancy was that the employer had to pay to an employee declared redundant severance pay at the rate of not less than fifteen days’ pay for each completed year of service, therefore for the claimants who had attained the age of fifty years or above, the respondent acted in contravention of the clear statutory provision and so they were entitled to be paid on the basis of the period already served and not the period pending attainment of the mandatory retirement age of sixty years.

6. The letter by the Government providing that the respondent would pay the claimants who had attained the age of fifty years or above for years pending attainment of the mandatory retirement age of sixty years, was in contravention of the clear statutory provision requiring that they be paid on the basis of the period already served and to that extent, the letter was unlawful.

7. The provisions of section 40 of the Employment Act, 2007, governed termination of employment on account of redundancy and the section enumerated the conditions an employer had to cumulatively satisfy failing which, the redundancy would be unlawful and the ensuing termination therefore unfair. Considering the evidence, pleadings, and submissions, the redundancy as undertaken by the respondent did not comply with some critical provisions of the section including:

- notifying the labour officer and the management employees personally in writing of the looming redundancy;

- complying with the statutory criteria of identifying and selecting employees to be declared redundant taking into account the statutory criteria of seniority in time; and skill, ability and reliability of individual employees in the particular class of employees;

- not placing an employee at a disadvantage for being or not being a member of the trade union – the management staff were disadvantaged compared to employees in the union because based on the years served the union staff were paid 3 to 7 months salaries for notice while those in management were paid only 3 months; and

- failing to pay the due leave of the employees declared redundant.

8. Compensation was in view of service and there had to be parity of treatment for the employees involved because the statute clearly stated that an employee should not be disadvantaged by reason of being or not being a member of the union.
9. The selection of staff for redundancy had to be based on the objective statutory criteria and the redundancy payment had to be such that it was commensurate to the level and length of service of the affected employees, and so the employees, who had served longer and at higher grades, had to be entitled to higher redundancy package compared to those with shorter period of service and at lower grades of service. Thus the redundancy as implemented by the respondent in this case was unfair for breaching the cited statutory provisions.

10. Parties in an employment relationship are entitled to enter into any valid agreement provided the agreement is lawful, and so the undertaking signed by every claimant upon receiving the redundancy package was binding as far as the package was within the statutory provisions.

11. However, the undertaking could not oust express provisions of the statute and it was only valid to the extent that it could only cover matters that the parties had power to contract.

12. Any statutory provision that was not within the parties’ the undertaking could not cover authority or power to vary, and in particular, the undertaking signed by the claimants could not validly vary the mandatory provisions of section 40 of the Employment Act, 2007.

Judgment entered for the claimants against the respondent for a declaration that the redundancy of the claimants was unfair.

Police Owe a Constitutional Duty to a Victim of Crime to Conduct Prompt, Effective, Proper, Corruption-Free and Professional Investigations

C K (a Child) through Ripples International as her Guardian and Next Friend) & 11 others v Commissioner of Police/Inspector General & 4 others

High Court at Meru
Petition No 8 of 2012
J A Makau, J
May 27, 2013

Reported by Mercy Ombima

Brief facts:
Ripples International, the 12th petitioner, a non-governmental organization, brought this petition on behalf of the rest of the petitioners who were allegedly victims of defilement and other forms of sexual violence and child abuse. The victims alleged to have made various reports on the said violence against them in various police stations within Meru County. The police officers at the said stations however neglected, omitted, refused and or otherwise failed to conduct prompt, effective, proper and professional investigation into the petitioners’ complaints or record the petitioners’ complaints, visit the crime scenes, interview the witnesses or collect and preserve evidence, take any other steps or put in motion such other processes of the law as would have brought the perpetrators of the violence to book.

The petitioners hence moved the court arguing that due to the neglect, commission, refusal and/or failure on the part of the police to act on their complaints, they (the petitioners) suffered grave, unspeakable and immeasurable physical and physiological trauma and that the perpetrators of the aforesaid unlawful acts still roamed large and free hence threatening the physical and psychological wellbeing of the petitioners.

They thus sought, among other orders, a declaration to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into their complaints violated the their fundamental rights and freedoms under:

(a) The Constitution of Kenya 2010,
(b) Articles 1 to 8(inclusive) and 10 of the Universal Declaration of Human Rights,
(c) Articles 2, 4, 19, 34 and 39 of the United Nations Convention on the rights of the child;
(d) Articles 1, 3, 4, 16 and 27 of the African Charter on the Rights and welfare of the child,
and
(e) Articles 2 to 7 (inclusive) and 18 of the African Charter on Human and people's rights.

Issue:

i. Whether shoddy investigations by the police in alleged criminal acts amounts to infringement of the victim’s fundamental rights and freedoms under all or any of articles 21(1),(3), 27, 28, 29, 48, 50(1) and 53(1), (d) of the Constitution of Kenya, 2010, and other international legal instruments.

Constitutional Law - fundamental rights and freedoms
- right to special protection as members of vulnerable groups - human dignity - access to justice - protection from abuse – neglect - all forms of violence - inhuman treatment and right to equal protection and benefit of the law - breach of fundamental rights and freedoms through police inaction to complaints of victims of defilement - where police failed to conduct prompt, effective, proper, corruption free and professional investigations to the complaints - effect of the police inaction - Constitution of Kenya 2010, Articles 2(5); 2(6); 21(1)(3); 27; 28; 29; 48; 50(1) and 53(1) (d); African Charter on the Rights and welfare of the child, Articles 1, 3, 4, 16 and 27; the Universal Declaration of Human Rights, Articles 1 to 8 (inclusive) and 10; the African Charter on Human and people’s rights, Articles 2 to 7 (inclusive) and 18.

Held:

1. The police's failure to conduct prompt, effective, proper and professional investigations when the victims reported complaints of defilement and other forms of abuses against them caused grave harm to the victims and also created a climate of impunity for defilement as perpetrators were let free. This infringed the victim's fundamental rights and freedoms under inter alia articles 21(1); (3), 27, 28, 29, 48, 50(1) and 53(1) (d) of the Constitution of Kenya 2010, and the general rules of international law, including any treaty or convention ratified by Kenya, which form part of the law of Kenya as per Article 2(5) and 2(6) of the Constitution.

2. The police owed a constitutional duty to protect the petitioners' rights and that duty was breached by their neglect, omission, refusal and/or failure to conduct prompt, effective, proper and professional investigations and as such they violated the petitioners’ fundamental rights and freedoms as entrusted in the Constitution.

3. The Respondents in the petition failed to implement the victims' rights and fundamental freedoms as enshrined under article 21 of the Constitution of Kenya 2010. They also failed in their fundamental duties as stated under article 21 of the Constitution in failing to observe, respect, protect, promote and fulfill the petitioners’ fundamental rights and freedoms in particular the rights and freedoms relating to special protection as members of vulnerable group (article 21(3), equality and freedom from non-discrimination (article 27) humanity dignity (article 29), access to justice (article 48 and 50) and protection from abuse, neglect, all forms of violence and inhuman treatment (article 53(1), (d) under the Constitution of Kenya.

4. The police's failure to conduct prompt, effective, proper, corruption free, and a professional investigation into petitioners complaints of defilement and other form of sexual violence amounted to discrimination contrary to the express and implied provisions of articles 27 and 244 of the Constitution of Kenya.

5. The Police failure to effectively enforce section 8 of the Sexual Offences Act, 2006 infringed upon the petitioners right to equal protection and benefit of the law contrary to article 27(1) of the Constitution of Kenya 2010 and further by failing to enforce existing defilement laws the police contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity.

6. The police played a critical role in protecting and preserving fundamental rights and its abdication from that role inevitably deprived the claimants’ access to courts and led to miscarriage of justice or denied them justice altogether. Their demand for payments as preconditions for assistance, whether for fuel or P3 forms or whatever the case might have been violated the petitioners right to access to
justice and right to have disputes that could be resolved by the application of law decided in a fair and in public hearing before a court of law in accordance with article 50(1) of the Constitution of Kenya.

7. The police failure to act on the petitioners’ complaints of defilement violated their rights under article 53 of the Constitution of Kenya, 2010. The Constitutional requirement to protect the best interests of the child required not only the establishment of relevant laws but also required their proper enforcement by state agencies and any failure to implement laws aimed at protecting children amounted to infringement and/or violation of their constitutional rights.

Orders of the Court;

1. A declaration issued to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the petitioners’ (victim’s) complaints of defilement violated the petitioner’s fundamental rights and freedoms-

(a) [To] special protection as members of a vulnerable group,

(b) [To] equal protection and benefit of the law;

(c) [Not] to be discriminated against,

(d) [To] inherent dignity and the right to have the dignity protected;

(e) [To] security of the person,

(f) [Not] to be subjected to any form of violence either from public or private sources or torture or cruel or degrading treatment; and

(g) [To] access to justice as respectively set out in Articles 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1) (c) of the Constitution of Kenya.

2. A declaration made to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the petitioners’ respective complaints violated the petitioners’ fundamental rights and freedoms under-

(a) Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights,

(b) Articles 2, 4, 19, 34 and 39 of the United Nations Convention on the rights of the child;

(c) Articles 1, 3, 4, 16 and 27 of the African Charter on the Rights and welfare of the child, and

(d) Articles 2 to 7 (inclusive) and 18 of the African Charter on Human and people’s rights.

3. An order of mandamus made directing the 1st respondent (Commissioner of Police/Inspector General) together with his agents, delegates and/or subordinates to conduct prompt, effective, proper and professional investigations into the petitioners’ respective complaints of defilement and other forms of sexual violence.

4. An order of mandamus made directing the 1st respondent together with his agents, delegates and/or subordinates to implement article 244 of the Constitution in as far as it is relevant to the matters raised in this Petition.
Denial of the National Police Service to form a Trade Union is Unconstitutional

Nicky Njuguna & 3 others v Registrar of Trade Unions & another

Appeal No 1 of 2007
Industrial Court at Nairobi
O Makau, J
June 14, 2013

Reported by Emma Kinya Mwobobia

Facts:
The applicant filed an appeal challenging the denial by the Respondent (Registrar of Trade Unions) to register the Kenya Police Union and therefore a denial of the rights to form, join or participate in the activities and programs of a trade union as provided under article 41(2)(c) of the Constitution. It was noted that the motion did not challenge the denial of the right to go on strike. However, while the appeal was pending in court all the laws to which the appeal related to were repealed. The repealed laws included the Trade Unions Act (Cap 233), The Trade Disputes Act (Cap 234), The Police Act (Cap 84) and the Constitution of Kenya. The laws were replaced by the Labour Relations Act (2007), the Constitution of Kenya (2010) and the National Police Service Act (2011). According to the applicants, the new laws presented a serious obstacle on whether to proceed with the appeal or not.

Issues:
i. Whether the applicants had locus standi to seek the constitutional relief on violation of the Bill of Rights on the right to form, join or participate in the activities and programs of a trade union as provided under article 41(2)(c) of the Constitution

ii. Whether the Notice of Motion was procedurally competent before the court according to the rules and procedure to be followed

iii. Whether section 3(b) of the labour Relations Act (LRA) 2007 and section 47(3)(e) of the National Police Service Act (NPSA) were inconsistent with article 41,24,27 and 10 of the Constitution of Kenya, 2010 which generally dealt with equality and freedom from discrimination

iv. Whether the construction of article 24 of the Constitution envisaged a complete denial of any right on the Bill of Rights to labour relations for persons

v. Whether members of the Police Service were entitled to form, join or participate in a Trade Union and to carry out such other things as may be ancillary or incidental, to further their employment interest, social welfare and economic well being

vi. Whether the purpose of section 47 of the NPSA which was to guarantee national security and security to the officers themselves could have been achieved by less restrictive means as contemplated under article 24 of the Constitution

Constitutional law – fundamental rights and freedoms
– right to form, join or participate in the activities and programs of a trade union – provision by the Constitution for the limitation of the rights to labour relations for persons serving in the National Police Service – where the police officers of Kenya had been denied the right to form, join or participate in the activities of the trade union – provision by the National Police Service Act for the limitation of the right to fair labour relations to the extent of prohibiting officers of the National Police Force Service from joining and participating in the activities of the trade union – whether the National Police Service Act was inconsistent with the provisions of the Constitution – Constitution of Kenya, 2010 article 24(2)(b); National Police Service Act section 47(3)(e)


Held:

1. According to article 22(2) of the Constitution, in addition to a person acting in their own interest, court proceedings under article 22(1) may have been instituted by:
   a) person acting on behalf of another
person who could not act in their own name
b) a person acting as a member of or in the interest of a group or class of persons
c) a person acting in public interest
d) an association acting in the interest of one or more of its members

Article 22(3)(a) had further provided that the Chief justice would make rules providing for the court proceedings referred to under article 22 which would among other things facilitate the standing provided under clause 2. However, those rules had not yet been made and neither the Industrial Court Act nor the Industrial court Procedure Rules 2010 had provided for a clear procedure on standing.

2. The applicants had locus standi to institute the motion before court because:
   a) They were acting on behalf of thousands of the police officers who under the law had been outlawed from engaging in trade Union Activities and as such could not sue in their name.
   b) Some of the applicants although not police officers, formerly served in the force and they know the interests of the serving police officers on whose behalf they had sued.
   c) The claimants were acting in the public interest because they saw a police officer as a vehicle for delivery of good service to the public.

3. Article 22(3)(b),(d) and (4) had provided that formalities relating to commencement of proceedings under article 22 would be kept to the minimum and that the court could entertain proceedings on the basis of the informal documentation. It further provided that the rules that were to be made by the Chief justice would ensure that the court was not unreasonably restricted by procedural technicalities and would not limit the right of any person to commence court proceedings under article 22 of the Constitution.

4. The Constitution had encouraged the court to allow informal documents thereby limiting the requirement of strict procedure in favour of substantive justice. In addition, article 159(1)(d) of the Constitution provided that Courts would administer justice without undue regard to procedural technicalities.

5. There was no strict procedure to guide the Court and the litigants on the procedure to be followed. Even if the procedure was in place, a special court had been established to deal with workers’ rights where worldwide the rules of strict procedure and rules of evidence were kept at the minimum or excluded. Therefore, the Notice of Motion was competently before the Court.

6. Article 24(5) of the Constitution had allowed a legislation to limit the rights to labour relations for persons serving in the National Police Service. The limitation would not however have been allowed unless to the extent that it was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

7. The Court’s interpretation of article 24(2)(b) of the Constitution was that there were certain requirements which must have been satisfied before limitation could become valid. The requirements were not complied with by the drafters of section 3(b) of the LRA who completely took away the right to good labour relations as guaranteed under article 41 of the Constitution.

8. The Court took judicial notice that section 3 of the LRA was enacted before the promulgation of the Constitution. However, nothing had been shown by the state or anyone else as to why the inconsistency had not been remedied.

9. Whereas the intention of the legislature was to limit the right to joining and participating in a trade union activities and strike, Section 47(3)(e) of the LRA was a complete denial of the right to all cadre of officers and was therefore inconsistent with article 41(2)(c) and Article 24 of the Constitution. The denial of the right to form, join or participate in the activities and programs of a trade union was unreasonable and unjustifiable in an open and democratic society.

10. The Court relied on CCT 27 of 1998 South
African Defence Union v Minister of Defence and Chief of the South African National Defence Force where the Constitutional Court of South Africa declared unconstitutional provisions of the South African labour laws similar to the labour laws of Kenya in relation to officers of the Defence Forces. The South African Court was of the view that members of the National Defence were also citizens who would render better services if their rights as other citizens were accorded.

11. The same purpose envisaged under section 47 of the NPSA could have been achieved by less restrictive means. The complete denial of the right to form and join trade union for purposes of collective bargaining for better terms and conditions of service was not justifiable in an open and democratic society.

12. It was public knowledge that the police officers in Kenya were faced with serious challenges in their conditions of service which could only have been properly handled collectively through representation by a trade union.

Orders:

i. Section 3(b) of the Labour Relations Act No. 14 of 2007 was declared unconstitutional, null and void for being inconsistent with article 41 and 24 of the Constitution to the extent that it entirely took away the right of all the members of the National Police Service to form, join and participate in all the activities of a trade union.

ii. Section 47(e) of the National Police Service Act, No. 11A of 2011 was declared unconstitutional, null and void for being inconsistent with article 41 and 24 of the Constitution to the extent that it entirely took away the right of all the members of the National Police Service, to form, join and participate in all the activities of a trade union.

iii. The police officers remained prohibited from calling or participating in any strike as per Section 47(3) (g) of the NPSA No. 11 of 2011 or any other Law.

iv. There would be a stay of order (a) and (b) above for four months from the date of the Ruling to allow the state to amend the aforesaid statutory, provisions and to lay down a legislative framework to guide and facilitate the new phenomenon of Police Unions. The new legislations should strictly comply with Article 24 of the Constitution.

v. The ruling and order to be served on all the parties, Attorney General and Inspector General of Police within 10 days from the date of the Ruling.

Compensation payable for admitted violations of fundamental rights and freedoms

Gitobu Imanyara & 2 others v Attorney General
Petition Number 78, 80 & 81 of 2010 (consolidated)
High Court at Nairobi
I Lenaola, J
June 14, 2013
Reported by Lynette A Jakakimba

Facts:
The petitions were as a result of the breach of fundamental rights and freedoms of the Hon. Gitobu Imanyara(1st petitioner), Njehu Gatabaki(2nd petitioner) and Bedan Mbugua(3rd petitioner) by the Government of Kenya. The petitioners were at various dates and times unlawfully detained and tortured by state agents at bequest of the Government due to their involvement in agitation for democratic and constitutional reforms in Kenya. The respondent expressly admitted liability and the issue for determination was the compensation payable to the petitioners.

Issues:

i. What were the damages payable to the petitioners for the admitted violations of their fundamental rights and freedoms as provided for under article 23(3) of the Constitution of
ii. Whether exemplary and aggravated damages were payable to the petitioners for the admitted violations of their fundamental rights and freedoms as provided for under article 23(3) of the Constitution of Kenya, 2010.

iii. What was the liability of the respondents in instances where the petitioners were taken to Court, tried, sentenced and later released either on appeal or upon an executive order.

iv. Whether the court could make an order on the liabilities incurred by petitioners as a result of or during their unlawful detention.

Constitutional Law – fundamental rights and freedoms – breach of fundamental rights and freedoms – claim for breach of fundamental rights and freedoms – claim for unfair detention and torture – claims by Nyayo House torture victims for unfair detention and torture – repealed Constitution sections 72(1),(2),(3) and (5),74(1), 75(1), 76(1), 77(1) and (2), 79(1), 80(1) and 81(1) – Constitution of Kenya, 2010 articles 28, 29, 31, 33(1), 34(1) and (2), 37, 39 and 40(1)

Constitution Law – fundamental rights and freedoms – compensation for breach of fundamental rights and freedoms – compensation payable for the admitted violations of fundamental rights and freedoms as provided for under article 23(3) of the Constitution of Kenya, 2010

Constitution of Kenya (Repealed)

Section 72(1)

(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases

(a) in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted;

(b) in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal;

(c) in execution of the order of a court made to secure the fulfilment of an obligation imposed on him by law;

(d) for the purpose of bringing him before a court in execution of the order of a court;

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya;

(f) …

(g) …

(h) …

(i) …

(j) …

(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

(3) A person who is arrested or detained –

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

(4) Where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connexion with those proceedings or that offence save upon the order of a court.

(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon
reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”

Constitution of Kenya, 2010
Article 23 (3)
“In any proceedings brought under Article 22, a court may grant appropriate relief, including—
(a) a declaration of rights;
(b) an injunction;
(c) a conservatory order;
(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
(e) an order for compensation; and
(f) an order of judicial review.”

Article 28
“Every person has inherent dignity and the right to have that dignity respected and protected.”

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;
(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;
(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 40(1)
“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
(a) of any description; and
(b) in any part of Kenya.”

Held:
1. Awarding exemplary and aggravated damages in cases where an unconstitutional action had been challenged would be inappropriate. Exemplary damages are sought not for compensation of the victim but to punish and serve as an example to the wrongdoer and ultimately act as a deterrent. Exemplary damages would not be an effective deterrent because the same would be paid from public funds and not be obtained from the perpetrator directly thus placing a heavy burden on the innocent tax payer. Further notice had to be taken of improved political environment in Kenya, and the attempts at dealing with human rights violation. The Kenyan Government had learnt from its past and the deterrent effect was alive and obvious. (Benedict Munene Kariuki & 14 Others vs. The Attorney General Petition Number 722 of 2009 (2011) eKLR, Wachira Waihere vs. the Attorney General HC Misc. App.No.1184 of 2003)

2. Section 72(1) of the Repealed Constitution while protecting the freedom to personal liberty also provided that such liberty was not protected in cases involving the execution of the sentence or order of a Court in respect of a Criminal Case of which a person had been convicted and with respect to the execution of the order of the High Court or the Court of Appeal punishing for contempt of that Court or tribunal. The petitioners in many instances were incarcerated upon being charged with some criminal offence and in the case of the 3rd petitioner, having been cited by the Court of Appeal for contempt the present court could not declare those convictions to be unconstitutional as it was admitted by the petitioners that in some instances, the criminal convictions and sentences were actually overturned (wholly or partly) on appeal.

3. In respect of the economic liabilities incurred by Hon. Imanyara’s that arose as result of or during his unlawful detention. The petitioner should have shown how the liabilities were incurred and the nexus between the present proceedings and those liabilities. The court could there not make an order as to those liabilities however the petitioner could use the judgment herein to create that nexus in the proceedings, if any, where the liabilities were directly and materially in focus.

4. In awarding general damages, monetary compensation had to be reasonable and fair taking into account all the circumstances of each case. A global sum was awarded to the petitioners for breach of their fundamental rights as each of the petitioners suffered the breach of their fundamental rights.
rights and freedoms for differing periods and in differing circumstances. 

Judgment entered in favour of the Petitioners and against the Respondent in the following terms;

i. The 1st petitioner awarded general damages of Kshs.15 Million, the costs of the Petition and interest at Court rates on damages from the date of this judgment until payment in full.

ii. The 2nd petitioner awarded general damages of Kshs.10 Million, the costs of the Petition and interest at Court rates on damages from the date of this judgment until payment in full.

iii. The 3rd petitioner awarded general damages of Kshs.7 Million, the costs of the Petition and interest at Court rates on damages from the date of this judgment until payment in full.

Court declines to quash certain recommendations in the report of the Truth, Justice and Reconciliation Commission.

Kiriro wa Ngugithe and 6 others v Truth, Justice and Reconciliation Commission and 6 others

Miscellaneous Civil Case No 192 of 2013

High Court at Nairobi

I Lenaola, J

June 11, 2013

Reported by Emma Kinya Mwobobia & Obura Paul Michael

Issues:

i. Whether the petitioner was entitled to leave, to institute judicial review proceedings in the nature of orders of certiorari and prohibition to quash certain recommendations in the report of the Truth, Justice and Reconciliation Commission (TJRC).

ii. Whether upon grant of leave, it could operate as a stay to bar the 2nd to 7th respondents from tabling or receiving the report.

Held:

1. Leave could only be granted to an applicant to commence judicial review proceedings only upon that party proving that prima facie, it had an arguable case that was not frivolous.

2. The applicant had raised a number of issues relating to the Truth Justice and Reconciliation Commission’s (TJRC) Report, however, the court was not obligated to look at the merits or otherwise of those issues and whether in fact the actions complained of, should have attracted the orders of certiorari and prohibition. The findings and recommendations of the TJRC report were so serious that to shut out a party from seeking judicial scrutiny of that report, would itself amount to an injustice.

3. According to the preamble to the Truth Justice and Reconciliation Act, 2008 (TJRC Act), the Act was enacted with a desire to give the people of Kenya a fresh start where justice was accorded to victims of injustice and past transgressions adequately addressed. That desire could only have been achieved if any Kenyan with any complaints against the report was accorded the opportunity to express those complaints within the confines of the law by instituting proceedings in Court to challenge any aspect of the report that was so painstakingly crafted.

Judicial review – certiorari and prohibition – application for orders of certiorari and prohibition to quash certain recommendations in the TJRC report – where it was alleged that the report was not accurate – whether judicial review orders could be issued against the commission

Judicial review – requirement for application for judicial review where the findings contained in the TJRC report were deemed inaccurate – whether an application for leave to apply for orders for judicial review was competent in the circumstances

Civil Practice and Procedure – stay – application for orders of stay – application for orders of stay to bar the 2nd – 7th respondents from tabling or receiving the TJRC report – where it was claimed that the report contained inaccurate findings on historical injustices – whether the findings warranted the granting of such stay – Truth Justice and Reconciliation Act 2008, sections 48(4), 50
after the participation of many other Kenyans.

4. There was no reason to deny the leave sought as no prejudice was to be suffered by the Respondents where leave was granted in the circumstances.

5. Section 48(4) of the TJRC Act had instructed the Minister to table the report in Parliament within twenty one days after its publication. By so doing he was merely performing messengerial services. He neither sought the adoption of the report nor any specific action by Parliament. Similarly, all other respondents had no specific role as regards the contents of the report.

6. Under Section 50 of the Act, the role of the National Assembly was limited to receiving periodic reports of the implementation of the report and ensuring that any lack of implementation was also reported to it with reasons. Therefore it was held that there would be no harm with the tabling of the report and that Parliament would not be stopped from performing its statutory function.

7. It was unclear why the other respondents, save the 1st respondent, had been enjoined in the proceedings when the real issue in contest was the report of the 1st respondent in which the other respondents played no role in crafting.

8. Judicial review was concerned with the process as opposed to the merits of a decision. In the present case, not one act of commission or omission had been alleged against the 2nd – 7th respondents and even later in the judicial review proceedings, it was not certain that they were to be faulted for any actions leading to the finalization of the report under attack. Therefore the court was not satisfied that the order of stay was warranted.

9. The Constitution was specific in creating boundaries between the organs of Government. The Judiciary ought to have been alert of that fact and further be careful not to usurp the role of Parliament even as it checked the excesses of the executive by use of judicial review (Trusted Society of Human Rights Alliance V.s. Attorney General [2012])

Leave was granted in terms of prayers 2(a), (b), (c), (d) and (e) of the Chamber Summons dated 7th June 2013. Prayer 3 of that Chamber Summons seeking orders of stay was dismissed. The substantive Notice of Motion seeking judicial review orders shall be filed within 7 days of that day's date. Costs shall abide the outcome of the judicial review proceedings.

An election petition filed by more than one petitioner does not impose upon each of the petitioners the obligation to separately deposit security

Charles Maywa Chedotum and another v Independent Electoral and Boundaries Commission and 2 others

Election Petition No 11 of 2013
High Court of Kenya at Kitale
J R Karanja, J
June 4, 2013

Reported by Phoebe Ida Ayaya and Derrick Nzioaka

Issues:

i. Whether an election petition filed by more than one petitioner imposes upon each of the petitioners the obligation to separately deposit security in terms of section 78(2)(b) of the Elections Act as read together with Rule 11(1) of the Election Petitions (Parliamentary and County Elections) Rules.

ii. Whether a deposit made by petitioners outside the prescribed period of ten (10) days rendered the petition incompetent and incurably defective.

Electoral Law – election petition – deposit of security for costs for election petition – where the petition was brought by two petitioners who paid the deposit amount jointly – where it was claimed that each of the petitioners ought to have paid the amount separately – whether the deposit amount contemplated by the Elections Act related to the amount paid for the petition itself or the amount payable by the individual petitioners – Elections Act, section 78(1)(2); Election
High Court Cases

Deaths of a respondent does not abate an Election petition

Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others
Petition No 6 of 2013
High Court at Machakos
L N Mutende, J
May 29, 2013

Reported by Teddy Musiga

Facts:
The first respondent died subsequent to the filing of the petition. The petitioner therefore filed an application pursuant to Article 101, 103 and 105 of the Constitution, sections 3A of the Civil Procedure Act, Section 80(3) of the Elections Act, Rule 29 of Election (Parliamentary and County) Petition Rules 2013 and Order 51 of the Civil Procedure Rules.

He sought prayers that Rule 29(1) of the Election Petition Rules were in conflict with Article 103(1)(a) of the Constitution. And that following the death of the 1st respondent the Senate seat for Makueni County became vacant thereby the Petition stood abated inter alia.

Issues:

1. Parliament in enacting section 78(1)(b) and 78(2) of the Elections Act did not intend to block any person from accessing justice by the requirement that a petitioner deposited a sum of Kshs 500,000/= in an election petition.
2. The court was inclined to interpret the words “a petitioner” and the word “a person” as appeared in section 78(1) and section 78(2) of the Elections Act to mean “a petitioner” or “a person” in plural rather than singular terms as it would be too restrictive to apply the said provisions in singular terms as doing so would have the repercussion of blocking persons who had a common cause to jointly approach the courts with a view to minimizing costs.
3. The deposit required under section 78(2)(b) of the Act related more to the petition rather than the person or persons filing the same in court.
4. Under section 78(1) of the Elections Act, the payment of deposit was mandatory and therefore a matter of law and not a mere technicality.
5. Related payment of deposit may have been regarded as non-payment of deposit unless the position was regularized by way of an application for extension of time, and rule 20 of the Election Petitions (Parliamentary and County Elections) Rules gave the court discretion to extend time for anything which was to be done under the rules and by extension the Elections Act under which the rules are made.
6. The petitioners were yet to move the court for extension of time but to save precious judicial time and so that justice may be done by the hearing of the petition on the merits, the court on its own motion extended the time within which security was to be deposited.
7. The failure by the petitioners to deposit the security within the prescribed time did not render the petition incompetent and/or incurably defective.

The words “a petitioner” and “a person” as used in section 78(1) and (2) of the Elections Act were interpretable in plural terms, and consequently, the sum of Kshs 500,000/= deposited as security for costs by the petitioners was sufficient. The time for deposit of security was extended and the security already deposited was deemed to have been properly and lawfully deposited.
i. Whether Civil Procedure Rules were applicable in Election Petitions.

ii. Whether Rule 29(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 is in conflict with Article 103(1)(a) of the Constitution.

iii. Whether an election petition can abate and whether the court can terminate an election petition whenever a vacancy occurs as contemplated under Article 103(1)(a) of the Constitution of Kenya, 2010

iv. Whether death of an elected person makes the suit abate.

v. Whether the security for costs ought to be refunded in the event a petitioner withdraws a petition.


Constitution of Kenya, 2010

Article 103 (1)(a):

*The office of a member of Parliament becomes vacant if the member dies.*

Election Petition Rules, 2013

Rule 29(1)(a)

*If before the trial of an Election Petition, the person whose election is being contested dies... the Petition shall not abate but shall continue whether or not any person applies to be admitted as a Respondent in the manner provided in this Rule.*

Held:

1. An election petition is a special litigation which is neither criminal nor civil nature. They are disputes which are of great importance to the public. The Civil Procedure Act and Rules made thereunder do not apply to election petitions unless it was expressly stipulated. Section 3A of the Civil Procedure Act gave the court inherent power to make orders sought to ensure justice is done. The relevant provision in respect of Election Petitions was Rule 4(1) of Elections (Parliamentary and County Elections) Petition Rules, 2013. Therefore, citing the Civil Procedure Act did not conform to legality.

2. The marginal note to Rule 29 was in respect to death, resignation or notice not to oppose by elected person. The occurrence of any of the stated events did not result into abatement of the petition. The petition continued.

3. Rule 9 provided that the Independent Electoral and Boundaries Commission must be a respondent to all election petitions. Therefore, looking at the purpose of Rule 29(1) of the Election Petition Rules, it was intended to ensure the continuation of the Petition in order for the court to determine the issues raised by the petitioner. There were other instances where the seat would be left vacant other than the death of the respondent. Rule 29(1) therefore catered for all other eventualities surrounding the filling of a vacant seat other than by way of death. Accordingly, Rule 29(1) of the Election Petition Rules was not inconsistent with Article 103 of the Constitution of Kenya, 2010.

4. Death of the person elected does not make an election petition suit abate. Since the 1\textsuperscript{st} respondent was not the sole respondent in the petition as there were two other respondents, the petitioners must proceed notwithstanding publication of vacancy by the speaker.

5. Since the 2\textsuperscript{nd} and 3\textsuperscript{rd} respondents opposed the application, the court observed that it had no power to terminate the petition against them. The petition could only be terminated through a withdrawal under Rule 23 of the Election Petition Rules. Further, hearing of the petition could also not be dismissed as mere academic exercise because the court had a legal mandate of inquiring into allegations set out in the petition.

6. As to the petitioner’s contention that the failure of the 2\textsuperscript{nd} and 3\textsuperscript{rd} Respondents to provide the petitioners with documents and information requested for as enumerated in the petition was unconstitutional, highly handed and violated the petitioner’s rights under Article 35 of the Constitution of Kenya, 2010; the court observed that the parties therein were the 2\textsuperscript{nd} petitioner and the 2\textsuperscript{nd} and 3\textsuperscript{rd} respondents respectively. The 1\textsuperscript{st} petitioner and 1\textsuperscript{st} respondent were not parties therein. Therefore, making such prayers in the current application was either mischievous or a misconception of the law.
7. The general rule was that costs follow the event. However the court had discretion to make any other order depending on the circumstances of the case. Whether or not the court was to depart from that general rule was left to be determined on a later date.

Application dismissed.

Police officers should be held personally liable for breach of human rights
Margaret Wairimu Njuguna v Commissioner of Police & 2 others
Petition No 74 of 2012
High Court at Nairobi
M Ngugi, J
May, 8 2013
 Reported by Nelson K Tunoi & Beatrice Manyal

Issues:

i. Whether the alleged assault on the petitioner by an administration police officer, non-refund of the bail money and the failure of police to record her statement on the assault incident violated the petitioner's fundamental rights.

ii. Whether the police officers should be held personally liable for breach of the petitioner's fundamental rights and freedoms under the Constitution.

Constitutional law – fundamental rights and freedoms
– right to freedom and security of person – right to fair administrative action – right to human dignity – rights of arrested persons – whether there was violation of the petitioner's constitutional rights – where the petitioner was allegedly assaulted by an administration police officer, arrested and kept in custody for hours before being released on cash bail – where the cash bail was not refunded to her – where the police had declined to record her statement on the incident – whether the police officers should be held personally liable for breach of the petitioner's fundamental rights and freedoms under the Constitution – Constitution of Kenya, 2010 articles 28, 29 (a) (c), (d) and (f), 47 and 49.

Held:

1. The High Court could not make a definitive finding as to the violation of the petitioner's rights under articles 28 and 29 as the evidence brought before the court was conflicting. It was difficult for the court in the matter to make a determination on the circumstances under which the petitioner received the injuries on her ankles if it was as a result of an assault or in the cause of resisting arrest. It was however important to balance the interests of the petitioner and the interests of the respondents in maintaining law and order.

2. The petitioner was released on cash bail on the day of her arrest and was directed to attend court. This was in accord with the provisions of article 49(h) of the Constitution of Kenya, 2010.

3. There was little before the High Court on the basis of which to make a proper finding on the alleged violation of the petitioner's constitutional rights. The petitioner refused to name the officer who assaulted her though she knew him. There was also no further affidavit from either her husband or the driver of the motor vehicle in which she was employed as a conductor. This would have helped to shed more light on the incident.

4. This was the kind of matter that merited inquiry by the institutions that had now been established to oversee the manner in which police deal with citizens in the course of maintaining law and order. Section 87(2) of the National Police Service Act established the Internal Affairs Unit whose functions were to receive and investigate complaints against the police. The Independent Policing Oversight Authority also had power, under Section 7 of the Independent Policing Oversight Authority Act, No. 35 of 2011, to investigate the conduct of police officers, and under section 7(ix), to recommend to the Director of Public Prosecutions the prosecution of any person.
5. The respondents had failed to carry out their functions to establish whether or not there was an assault on the petitioner by the alleged administration police officer(s). If there was such an assault, then the said officer(s) should have faced disciplinary action to deter such conduct.

6. (Obiter) “While in appropriate cases those whose rights have been violated will be entitled to compensation from the state, liability for any unlawful conduct on the part of police officers in the course of their duties but done in breach of the constitution and their statutory mandate under the National Police Service Act must begin to be placed on the officers concerned, otherwise there will be no end to acts of misconduct by police officers”

A copy of the judgment should be availed to the Internal Affairs Unit of the National Police Service and to the Independent Policing Oversight Authority for their appropriate action; petitioner’s cash bail to be released; each party to bear its own costs of this petition.

Court rules on issuance of statutory notice in cases where it was already issued before the coming into effect of the new land laws

St Elizabeth Academy- Karen Limited v Housing Finance Company of Kenya Limited

High Court at Nairobi
Civil Suit No 747 of 2012
J Kamau, J
March, 7 2013

Reported by Phoebe Ida Ayaya and Derrick Nzioka

Issues:

i. Whether the mortgage instrument was defective on the ground that it was not witnessed in accordance with the provisions of I.T.P.A. (repealed)

ii. Whether the mortgage instrument was defective for the reason that it did not have a fixed rate of interest over a fixed repayment period as provided under Section 100 A of the I.T.P.A. (repealed)

iii. Whether the purported increase of interest without seeking approval from the Minister for Finance amounted to an illegality.

iv. Whether the plaintiff was entitled to any injunctive orders.

v. Whether the defendant ought to have issued a fresh statutory notice so as to comply with the new law

Land Law – statutory notice – issuance of statutory notice – where the issuance of statutory notice was done under the I.T.P.A. (repealed) but was not realized until the Land Act came into force – whether there was a requirement for issuance of a new statutory notice in line with the provisions of the Land Act – Land Act, section 162.

Civil Practice and Procedure – injunction – where the plaintiff sought an injunction against the defendant exercising its statutory power of sale – where it was contended that the injunction was merited on grounds that the statutory notice was to be issued afresh in accordance with the new applicable land laws – whether the application was merited – Land Registration Act; Land Act section 162

Land Act
Section 162:

1. Unless otherwise is specifically provided 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 prior to the commencement of this Act.”

2. ….

3. ….

4. If a lessor or lender had initiated steps to forfeit a lease or to foreclose a charge, as the case
may be, a court on the application of the lessee or the chargor may issue an injunction to the lessor or, to the lender to stop the continuation of any step.

5. If a court had issued an injunction under subsection (4), the lessor or lender to whom the injunction has been issued may commence any action under this Act to terminate the lease or bring that charge to an end.”

Held:

1. Failure to witness a mortgage instrument in accordance with the provisions of I.T.P.A (repealed) went to the very root of whether there was a valid and binding contract.

2. The mortgage Instrument herein was duly executed by the mortgager and witnessed by two persons in line with Section 59 of the I.T.P.A (repealed) and the failure to adduce any evidence to show that the said instrument was executed by mistake, under duress, misrepresentation or coercion which would in itself have vitiatted the contract, satisfied the court that the said mortgage instrument complied with the mandatory provisions of the I.T.P.A (repealed) as far as the execution of the same was concerned.

3. It was clear from the documentation before the court that the rate of interest the parties had contracted to had a variation of interest, and the decision to vary the interest could not be questioned whatsoever.

4. Section 44 of the Banking Act Cap 488 (laws of Kenya) provided that no institution could increase its rate of banking or other charges except with the prior approval of the Minister, the key words in the section being “rate of banking or other charges” with no specific mention of “interest”.

5. Section 52 of the Banking Act further provided that no contravention of the provisions of the act could affect or invalidate any contractual obligation in any way between an institution and any other person, and in that regard, there was no contravention of the Banking Act when the interest rates were varied without approval from the minister.

6. Moreover, the minister could not interfere with the contractual obligations between the parties when the mortgage instrument clearly spelt out the effects of variation of interest by providing that “…the decision of the mortgagee in this regard shall not be questioned on any account whatsoever.”

7. The plaintiff, aware of the variation of the interest rates and having received notices from the defendant, was clearly aware that it was in arrears and even admitted to being indebted to the defendant, to the extent of approaching it with an offer that it be given time to sell the suit premises by way of private treaty to offset the mortgage account, however, breached its contractual obligations and the defendant was right when it issued the plaintiff with the statutory notice on 21st December 2011 under Section 69 (1) of the I.T.P.A.(repealed).

8. The plaintiff however made subsequent payments, the last one being on 14th September 2012, under the belief that the payments would estope the defendant from exercising its statutory power of sale.

9. The defendant did not realize its security after the expiry of the notice, and there was on record a forty five days’ notice dated 21st September 2012 from the auctioneers and a newspaper notice advertising the sale of the subject property on 27th December 2012. This was after the enactment of the Land Act, 2012 whose commencement date was 2nd May 2012, and in this regard, the plaintiff submitted that the defendant had to re-issue a fresh statutory notice in accordance with the new law.

10. However, the statutory notice issued on 21st December 2011 was still in force and it could not be extinguished, as a lender was under no obligation to decline a payment made by a borrower who was in default, and the defendant was therefore under no obligation to issue a fresh statutory notice after it received monies for payment of the loan from the plaintiff.

11. The plaintiff withheld information to the effect that it had admitted to owing the defendant the outstanding loan, it had sought the defendant’s indulgence for it to dispose of the suit premises
by private treaty, that the mortgage instrument had been duly executed and attested as required by the law, that the mortgage instrument provided for variation of interest and that it had received notices informing it of the variation of the interest rates.

12. The issue of non-disclosure of material facts went to the root of court's discretionary powers to grant injunctive orders as this was an equitable relief and whereas a party was not obliged to disclose any information that would prejudice its case, it risked not enjoying equitable reliefs if the opposing party disclosed such information to its detriment.

13. The defendant's right to foreclosure commenced in 2011 when it issued and served its statutory notice although the plaintiff contended that the defendant could only proceed to realise the security according to the Land Act 2012 and Land Registration Act 2012.

14. The statutory power of sale that accrued to the defendant as envisaged in section 162 of the Land Act 2012 was one that would continue being governed by the law applicable before the commencement of the Land Act 2012. However, procedures had to be followed in cases where properties were to be sold pursuant to the Land Act 2012, and since the defendant did not proceed with the sale of the property before the commencement of the Land Act 2012, the plaintiff could enjoy the benefit of the law as other persons whose properties were being sold after the commencement of the said act.

Although the plaintiff had not made out a case for a grant of a temporary injunction pending the hearing and determination of the suit, it was an injunction as provided for in Section 162 (4) of the Land Act, and the defendant directed to commence action to realize its security as stipulated under Section 162(5) of the Land Act, 2012.

Stripping & searching of persons in public by the police is unconstitutional

A N N v Attorney General
Petition No 240 of 2012
High Court at Nairobi
M Ngugi, J
June 14, 2013
Reported by Lynette A Jakakimba

Facts:
The petitioner filed the petition alleging violation of his constitutional rights to dignity, privacy and freedom from torture and degrading treatment. The petitioner alleged that while he was held at Makongeni police station, he was undressed by male and female officers in public and in the full glare of the media whom he alleged had been summoned by the police and the public. The petition further stated that the police acted as they did allegedly in order to establish his gender as at the time of his arrest he was dressed as a woman, which he averred they could not do as only a medical doctor was capable of gender assessment.

Issues:
I. Whether the petitioner who suffered from Gender Identity Disorder, had the mental capacity to file the petition without a guardian.
II. Whether the police violated the petitioner’s fundamental rights and freedoms by stripping him in the view of male and female police officers, employees of media houses and the public thereby subjecting him to inhuman, degrading and cruel treatment in violation of article 29(f) and article 28 of the Constitution.
III. Whether the police violated the petitioner’s right to privacy under article 31(a) and the right to human dignity as provided by article 28 of the Constitution by subjecting him to a search by female police officers.
IV. Whether the broadcasting and publishing of the petitioner’s private affairs and personal life was in violation of his right to privacy provided by article 31(c) of the Constitution.
**Constitutional Law** – fundamental rights and freedoms – right to dignity and privacy – freedom from inhuman, degrading and cruel treatment – petition where the petitioner was stripped and searched in public – whether the police violated the petitioner’s fundamental rights and freedom by stripping him in the view of male and female police officers, employees of media houses and the public thereby subjecting him to inhuman, degrading and cruel treatment in violation of article 29(f) and article 28 of the Constitution – Constitution of Kenya, 2010 articles 28, 29 and 31

**Criminal Practice and Procedure** – searches – searches on accused persons by police officers – personal searches by police officers to be done with regard to decency and respect for human dignity – personal search on a male suspect by female officer – whether the police violated the petitioner’s right to privacy under article 31(a) and the right to human dignity as provided by article 28 of the constitution by subjecting him to a search by female police officers – Criminal Procedure Code section 25, 27 – Constitution of Kenya, 2010 article 24 and 28.

**Parties to a suit** – institution of suit – capacity to institute suits – suit instituted by a person with a Gender Identity Disorder – whether the petitioner who suffered from Gender Identity Disorder, had the mental capacity to file the petition without a guardian.

Criminal Procedure Code
Section 25

“Whenever a person is arrested -
(a) by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail; or
(b) without warrant, or by a private person under a warrant, and the person arrested cannot legally be admitted to bail or is unable to furnish bail, the police officer making the arrest, or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search that person and place in safe custody all articles, other than necessary wearing apparel, found upon him.”

Section 27

“Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman with strict regard to decency.”

Constitution of Kenya, 2010

**Article 28**

“Every person has inherent dignity and the right to have that dignity respected and protected.”

**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;
(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;
(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 31**

“Every person has the right to privacy, which includes the right not to have—
(a) their person, home or property searched;
(b) their possessions seized;
(c) information relating to their family or private affairs unnecessarily required or revealed; or
(d) the privacy of their communications infringed.”

**Held:**

1. The petitioner suffered from Gender Identity Disorder (GID) which affected a person’s perception of self in terms of gender such that the petitioner perceived himself as a woman and acted accordingly. There was no material before the court that indicated that GID affected one’s mental capacity so as to bar him or her from bringing a matter before the court without the aid of a guardian, the petition was therefore properly before the court.

2. Human dignity was the foundation for recognition and protection of human rights; it belonged to each individual regardless of one’s status or position, or mental or physical condition. Consequently, doing certain things or acts in relation to a human being, which had the effect of humiliating him or her, or
subjecting him or her to ridicule was a violation of the right to dignity protected under article 28 of the Constitution.

3. As a human being, the petitioner was entitled to have his dignity respected and protected. Whatever his choices or his conduct in relation to his mode of dress, regardless of the fact that he perceived himself as a woman, though a man, he still retained the inherent worth and dignity to which all humans were entitled, and which the Constitution guaranteed to everyone, and he was still entitled to his privacy.

4. The police, if they were in doubt of the petitioner’s gender should have referred him to a hospital for gender assessment. However by subjecting the petitioner to a search in front of members of the public and of the media, the police appeared to have had the intention of humiliating him in a manner to suggest that their actions were directed at him specifically because he was dressed as a woman while they had reason to believe that he was male. The respondent therefore violated the petitioner’s right to human dignity and privacy as contained in articles 28 and 31 of the Constitution.

5. It was wrong and unlawful when officers of the state, members of the public and of the media, found it fitting to humiliate and degrade a person because of his mode of dress or a mental condition that he could have no control over by subjecting him to a personal, humiliating, public search. The petitioner had he chosen to, could have enjoined the media houses that broadcast the incident as respondents in the petition.

6. The right to privacy could be limited by law as provided under article 24 of the Constitution, which permitted searches of persons and property, similarly the provision as to searches could be found in various penal statutes including the Criminal Procedure Code.

7. Section 27 of the Criminal Procedure Code made specific provision with regard to the search of a woman by providing that whenever it was necessary to cause a woman to be searched, the search should be made by another woman with strict regard to decency. However, even though no specific provision was made with regard to searches of male persons, whatever the gender or apparent gender of an arrested person, the operative words with regard to personal searches by police officers, were regard to decency and respect for the dignity of the arrested person. No one should be subjected to a search that was intended or has the effect of humiliating the suspect. In this case, given the fact that the petitioner was dressed as a woman, it was, in the circumstances, reasonable for the search to be conducted by a woman.

Petition allowed. Petitioner awarded Kshs 200,000.00.

An election petition cannot be withdrawn verbally

Moses Saisi v Independent Electoral & Boundaries Commission & 2 others

Election Petition No 10 of 2013
High Court at Kakamega
George Dulu, J
June 13, 2013

Reported by Njeri Githang’a Kamau & Victor L Andande

Issues:
I. Whether an election petition could be lawfully withdrawn through a verbal application.

II. Whether a respondent who had not been served with an election petition could rightfully apply for its dismissal and the costs thereto.

Electoral law – election petition – application for withdrawal of an election petition – procedure for withdrawal of an election petition – where the petitioner had made a verbal application for withdrawal of the petition -whether such application could be made verbally – Elections Act No 24 of 2011, section 78, Election (Parliamentary & County Election) Petition

Held:

1. Under Rule 23 and 24 of the Election Petition Rules 2013, there was a legal requirement that a request for withdrawal of an election petition ought to be made in writing, and that such application for withdrawal had to be served on the respondents. There could thus be no verbal withdrawal of an election petition.

2. The High Court had set down requirements for withdrawal of an election petition in the case of Martin Sarakwe Wechuli v IEBC & 2 others HC Election Petition 7 of 2013. The requirements therefore had to be complied with since the rules were worded in mandatory terms. Such notice of withdrawal had to be published in the Gazette.

3. By the time the petitioner’s counsel requested to withdraw the petition, all the three respondents had already filed formal applications challenging the validity of the petition, and also requested for costs. This could thus be seen as an attempt to compromise the pending applications for dismissal of the petition. However, in judicial proceedings parties have a right to make compromises in the proceedings, and the court could not interfere with such compromise.

4. The law did not state that only respondents who had been served could make applications for dismissal of an election petition and ask for costs thereto. Such respondents were thus entitled to such prayers and the costs of the proceedings.

5. The law under section 78(3) of the Elections Act was clear that once the deposit for costs had not been made, no further proceedings could be heard on the petition and the respondents were entitled to apply for dismissal of the petition and for payment of costs.

Petition dismissed with costs.

Limitation of time under section 9 of the Law Reform Act should be amended to provide for extension of time

Jitesh Shah & another v Nairobi District Lands Registrar

Miscellaneous Application JR No 294 of 2011
High Court at Nairobi
June 12, 2013
G V Odunga, J

Reported by Nelson K Tunoi & Beatrice Manyal

Facts:

Jitesh Shah & Highland Textiles Limited (ex parte applicants) was the registered proprietors of the suit parcels of land. A restriction was registered in respect of the suit properties by Nairobi District Lands Registrar (respondents). In view of the restrictions the ex parte applicants brought the present application for judicial review orders. The application was, however, filed more than a year after the registration of the said restrictions in contravention of section 9(3) of the Law Reform Act.

Issue:

I. Whether the High Court could grant judicial review orders of certiorari, mandamus and prohibition where the application was filed after lapse of the 6 months period prescribed under section 9 of the Law Reform Act.

Judicial review – limitation of time – whether the court could grant judicial review orders of certiorari, mandamus and prohibition where the limitation period for seeking such orders had lapsed – Law Reform Act (cap 26) section 9(3)

Law Reform Act
Section 9(3)

“In the case of an application for an order of certiorari, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order,
decree, conviction or other proceeding or such shorter period as may be prescribed under any written law.”

**Held:**
1. Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. The present application was, however, filed more than a year after the registration of the said restrictions.
2. Judicial review remedies being exceptional in nature could not be made available to indolent persons who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes.
3. An order of mandamus could not be sought in order to quash a decision or to compel the exercise of discretion in a certain manner. Where a decision had already been made, unless that decision was quashed mandamus would not be an efficacious remedy.
4. The remedy of prohibition could only prevent the making of a contemplated decision. Here the decision had already been taken and there was nothing left to be enforced. Accordingly, prohibition would not be efficacious in the circumstances.
5. Whereas the applicants contend that the registration of the restriction was not brought within their attention, the court could not simply ignore the provisions of section 9(3) of the Law Reform Act with respect to the time bar for making applications seeking to quash the impugned decisions.
6. In order to uphold the values of the Constitution, the court would be perfectly entitled where an Act of Parliament exhibited certain deficiencies which made it insufficient to properly realize the Constitutional aspirations to “read in” the omitted words so as to bring the Legislation in line with the Constitutional aspirations without the necessity of declaring the Legislation unconstitutional.
7. *Obiter:* “It is high time the provisions of section 9 of the Law Reform Act were amended to provide for extension of time in cases where a strict adherence to the limitations manifests a miscarriage of justice for example where a decision is made and for some reasons the same is not made public with the result that the persons affected thereby are not aware of the decision until after the expiry of the said limitation period:”

Application dismissed with no order as to costs.

**Law Reform:**
“It is high time the provisions of section 9 of the Law Reform Act were amended to provide for extension of time in cases where a strict adherence to the limitations manifests a miscarriage of justice for example where a decision is made and for some reasons the same is not made public with the result that the persons affected thereby are not aware of the decision until after the expiry of the said limitation period.”

The legal effect of failure to seal and properly mark annexures to an affidavit

**Musikari Nazi Kombo v Moses Masika Wetangula & 2 others**

Election Petition No 3 of 2013
High Court at Bungoma
F Gikonyo, J
June 10, 2013
Reported by Beryl A Ikamari

**Facts:**
The petitioner filed a petitioner’s further affidavit to which various annexures including an expert witness’s affidavit, marked MNK-5a, were attached. The documents annexed to the affidavit, starting from page 62 to the last page, were not sealed or marked with serial letters. Those unmarked documents included a document titled, “Principal Register of Voters (PRV).” The annexures to the petitioner’s further affidavit also included an analysis on the electoral process for the senatorial elections for Bungoma County prepared as a study by an expert witness. The respondent raised an objection on grounds that the expert witness’s affidavit did not have annexures, in
that, the expert witness’s affidavit was also an annexure and that the expert witness, in giving oral evidence, could not rely on an annexure found in a different deponent’s affidavit.

**Issues:**

1. The legal effect of an alleged failure to securely seal, and properly mark, the annexures to a petitioner’s further affidavit with serial letters of identification as required in law.

2. Whether an expert witness could give evidence as concerns a document annexed to a different deponent’s affidavit, where such a document entailed a study allegedly carried on by the expert witness.

**Electoral Law – affidavits – annexures to affidavits – the sealing and marking of annexures to affidavits, with serial letters of identification, as required in law – the effect of failure to seal and mark annexures to affidavits, with serial letters of identification – circumstances in which documents constituting annexures to affidavits would be disallowed – Constitution of Kenya, 2010; article 159, Oaths and Statutory Declaration Act, (Cap. 15); section 6, Oaths and Statutory Declarations Rules; rule 9 and rule 10 and Elections (Parliamentary and County Elections) Petition Rules, 2013; rule 12(1)(c).

**Evidence Law – admissibility of evidence – affidavits – annexures to affidavits – the sealing and marking of annexures to affidavits, with serial letters of identification, as required in law – the effect of failure to seal and mark annexures to affidavits, with serial letters of identification – Constitution of Kenya, 2010; article 159, Oaths and Statutory Declaration Act, (Cap 15); section 6, Oaths and Statutory Declarations Rules; rule 9 and rule 10 and Elections (Parliamentary and County Elections) Petition Rules, 2013; rule 12(1)(c).

**Evidence Law – admissibility of evidence – expert witness – evidence based on an expert witness’s knowledge and belief – whether an expert witness could rely on a document annexed to a different deponent’s affidavit to expound on his opinion and analysis, where such a document was allegedly generated by the expert witness.

**Held:**

1. The legal requirement relating to securely sealing and marking all exhibits in an affidavit entailed a substantive legal act, within the context of the production of evidence and the admissibility of evidence, and it was not a legal technicality. The requirement would serve to ensure that only proper documents were placed before court and admitted in evidence.

2. Allowing documents brought in an improper and inappropriate manner to form part of the court’s record would prejudice the administration of justice and it would also go against the law of evidence as it would defeat the aims of safeguarding the fairness of the trial process.

3. The document titled, “Principal Register of Voters (PRV)” and annexed to the petitioner’s further affidavit was not securely sealed and marked with serial letters of identification as required by law. As there was no basis laid in the further affidavit for its introduction as an annexure and its sources were unknown, the document was inadmissible.

4. It was necessary for the expert witness to allude to his CV and to lay out his qualifications, academic credentials, work experience and general standing in the area of expertise he professed. There was sufficient identification and basis for the two CVs, immediately following the expert witness’s affidavit, which appeared as an annexure to the petitioner’s further affidavit. It would serve the interests of substantive justice to allow the CV annexures to remain as part of the record and to allow the expert witness to allude to them in his oral evidence.

5. While giving his oral testimony, the expert witness referred to his expert analysis detailing a study on the electoral process for the senatorial elections for Bungoma County, which formed part of the annexures to the petitioner’s further affidavit. The testimony would be allowed to remain on record, as it had a proper basis in the expert witness’s affidavit, which also formed part of the annexures to the petitioner’s further affidavit.

6. As a matter of law, a deponent in an affidavit would speak on the facts which he could prove based on his own knowledge. However, a deponent would be allowed to depose to information from other sources on the subject matter, as long as the sources were disclosed and the deponent affirmed that he had believed the information to be true. Therefore, an expert
witness could refer to documents annexed to a petitioner’s affidavit.

7. Neither the petitioner nor expert witness could claim exclusive ownership of the analysis, on the electoral process, as the analysis was worked on in the company of a team. The expert witness could claim co-ownership of the analysis and may give evidence concerning the analysis and all the documents used to generate the analysis.

Application allowed in part. (The annexure to the petitioner’s further affidavit titled, “Principal Voters Register (PVR)” was found to be improperly on record as it was not securely sealed, was not marked with letters of identification and did not bear a certification as to its source.)

High Court’s jurisdiction to hear and determine an election petition filed before the gazettement of results
Thuo Mathenge v Nderitu Gachagua & 2 others
Election Petition No 1 of 2013
High Court at Nyeri
J Wakiaga, J
June 10, 2013
Reported by Nelson K Tunoi & Beatrice Manyal

Facts:
The petitioner (Thuo Mathenge) had filed a petition challenging the election of the 1st respondent (Nderitu Gachagua) as the Governor of Nyeri County. The petition was filed before the gazettement of the final results.
The 2nd and 3rd respondents challenged the petition through a preliminary objection application as to the jurisdiction of the High Court to handle election petitions prior to gazettement of the official results.

Issues:
I. Whether section 76(1) of the Elections Act, 2011 was inconsistent with article 87(2) of the Constitution of Kenya, 2010.
II. When are the election results declared? Is it when they are announced at the tallying center or when they are gazetted?
III. When did time start to run in respect of 28 days within which petitions were filed?
IV. Whether the petition was filed prematurely and if so what was its effect.
V. Whether the High Court lacked jurisdiction to hear and determine an election petition challenging the validity of ungazetted election.

Electoral Law – election petition – filing of an election petition – time within which an election petition ought to be filed – whether time began to run at the time of the declaration of results by the returning officer or at the time of publication of results in the Kenya Gazette by the Independent Electoral and Boundaries Commission (IEBC) – whether section 76(1) of the Elections Act, 2011 was inconsistent with article 87(2) of the Constitution –Constitution of Kenya, 2010, articles 87(2), 138(3)(c); Elections Act, 2011, section 76, 77 & 78

Jurisdiction – jurisdiction of the High Court – preliminary objection application challenging the High Court’s jurisdiction – whether the High Court lacked jurisdiction to hear and determine an election petition challenging the validity of ungazetted election – where the petition was filed before the elections results were gazetted – Constitution of Kenya 2010 articles 87(2), 88(4)(e); Election Act, 2011, sections 76, 77

Constitution of Kenya, 2010
Article 87(2)
“Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.”

Elections Act
Section 39
“The IEBC is mandated to determine, declare and publish the results immediately after close of polling and announce the provisional results of an election.”
Section 76(1)
“A petition to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the elections in the gazette and served within fifteen days of presentation.”

Held:

1. There was no inconsistency or contradiction between article 87(1) of the Constitution and section 76(1)(a) and 77 of the Election Act as regards the period within which petitions were to be filed as those provisions of the Act gave effect to the Constitutional aspirations. The declaration which the legislators intended was a declaration by publication of the results through the gazette.

2. The commencement date in computing the 28 days within which to file a petition was the date when the elections results were gazetted by the Independent Electoral and Boundaries Commission. This therefore answered the question that the petition herein was prematurely filed.

3. It was the Legislature’s intent to put the publication of the election result in the gazette as the starting point and as the mode of declaration. Court would not therefore interpret the said provision in such away which would frustrate Legislature intent. If only declaration by the returning officer was intended as submitted by the petition the purpose of gazette would have been reduced to futility and therefore the word immediately under section 39(1) of the Election Act should be given broader interpretation.

4. Article 87(2) of the Constitution required the election results be declared before the High Court could have jurisdiction to hear a petition challenging the election results and that before the declaration of election results the jurisdiction to settle any electoral dispute was vested solely with the Independent Electoral and Boundaries Commission under article 88(4)(e) of the Constitution of Kenya, 2010 and section 74 of the Elections Act which was given jurisdiction in the settlement of electoral disputes including disputes relating to or arising from nomination but excluding election petitions and disputes subsequent to the declaration of election results .

5. There was need to establish what the Elections Act meant by the word “election” as the extent of that jurisdiction was dependent on the meaning of the word “election” in order to confirm when the jurisdiction of the IEBC ended for the purposes of the said provision of the law.

6. Upon its proper construction, the word “election” is not to be restricted to the declaration of the poll, but is apt to extend to each and every step in the election process from the issue of the writs to the various returning officers up to and including the declaration of the poll. (Powell J. in McDonald v. Keats [1981] 2NSWLR 268 at 274).

7. It follows that the petition filed before the timelines set out by the Constitution and the Act was therefore filed in the wrong forum. Where there was a clear procedure for redress of any particular governance prescribed by the Constitution or an Act of parliament, that procedure should be strictly followed.

8. To the extent that the legislature gave jurisdiction to the IEBC to handle disputes before declaration then it followed that the High Court did not have jurisdiction to determine the petition as at the time when it was filed.

9. Both the Constitution and the Elections Act did not take away the inherent and supplementary powers of the court which view was supported by Halsbury’s law of England 4th Edition vol.10 paragraph 713 thus: “Prima facie no matter is deemed to be beyond the jurisdiction of the Superior Court unless it is expressly shown to be so while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court. Therefore where a statute was silent and judicial intervention was required courts strived to redress grievance according to what was perceived to be principles of justice equity and good conscience.
10. Under Article 159(2)(d) of the Constitution the court was enjoined to do substantial justice to the disputants expeditiously and without undue regard to technicalities and the right of the parties to fair trial under Article 50 of the Constitution need also to be taken into account.

11. The petition could not be struck out at that stage as to do so would therefore mean that one could not invoke the judicial intervention to file petitions before the declaration of elections even where the same was merited if something happened during election which would provide good grounds for election being set aside so as to preserve the purity of election process through the means of depriving the returned candidate the success secured by him by resorting to means and methods falling foul of the law and the body charged with responsibility fails or refuses to exercise jurisdiction to right the same.

12. The law seemed to be against those who had moved the court out of the stipulated period of time taking into account the fact that petitions had to be determined within six months from the date of filing. To punish the petitioner for coming too earlier and based on misinterpretation of the law and the Constitution which we now herein do would be a miscarriage of justice as equity ought to come to the aid of the vigilant and not the indolent.

Preliminary objection upheld in part with costs to the respondents; petition not struck out.

Admissibility of video evidence in Election Petitions

**William Odhiambo Oduol v Independent Electoral & Boundaries Commission & 2 others**

Election Petition No 2 of 2013  
High Court at Kisumu  
A O Muchelule, J  
June 5, 2013  
Reported by Lynette A Jakakimba

**Facts:**
The petitioner sought to produce as part of evidence a video which had been developed into a Compact Disc (CD). The petitioner’s chief campaign manager had used his cellphone to take a video of ballot papers which one of the IEBC clerks at Ujwan’ga polling station in Rarieda Constituency had allegedly attempted to stuff in the ballot boxes at the station.

**Issues:**
I. Whether video evidence was admissible in election petition proceedings.
II. Whether the requirement that electronic evidence be accompanied with a certificate in terms of section 106B (4) of the Evidence Act could be substituted with the submission of a verifying affidavit.
III. Whether lack of disclosure of the particulars of the device used to develop electronic evidence as required by section 106B of the Evidence Act rendered the evidence inadmissible.

**Evidence Law** – electronic evidence – admissibility of electronic evidence in election petition proceedings – lack of disclosure of the particulars of the device used to develop electronic evidence – whether the requirement that electronic evidence be accompanied with a certificate in terms of section 106B(4) of the Evidence Act could be substituted with the submission of a verifying affidavit – Evidence Act section 106 B

**Evidence Act**
Section 106 B:
“(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible
in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following:

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub-section (2) was regularly performed by computers, whether:

(a) by a combination of computers operating in succession over that period; or
(b) by different computers operating in succession over that period; or
(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following:

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;
(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and
(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

**Held:**

1. Ordinary documentary evidence and electronic evidence was to be distinguished.
While alterations on physical documents were often immediately visible on the face of the document, this was not the case with electronic material. An electronic document could be modified in the process of collecting it as evidence, compared to physical or other forms of exhibit evidence. Electronic evidence was relatively more difficult to detect and trace the signs of tampering. Further, computer equipment ran on artificial intelligence which received, interpreted, and applied human commands; this artificial intelligence was known to go awry. Finally, the capturing, preserving, and presenting of evidence in electronic form required a measure of technical knowledge in the operation of the electronic equipment.

2. Section 106B(4) of the Evidence Act provided that for electronic evidence to be deemed admissible, it had to be accompanied with a certificate that was signed by the person in control of the device that produced the electronic evidence, and the particulars of the device used had to be given.

3. A verifying affidavit was not a certificate, if it were to be taken as such, the petitioner had to show that it met the conditions set in section 106B(4) of the Evidence Act.

4. The reason why the particulars of the computers used in the production of the CD tendered by the petitioner had to be given was so that, if it became necessary, one could trace the devices for audit purposes. Without such information, it could not be ascertained that the computers used in the production of the CD tendered by the petitioner were operating properly and therefore that its content was accurate. In the present petition, there was no evidence adduced to show who owned, operated, and managed the computer, and the particulars of the computer used to produce the CD with the video evidence were not given.

Application dismissed. The CD sought to be produced was not admissible.

A Senator can engage in gainful employment so long as it does not conflict with his role as a member of the Senate

John Okelo Nagafwa v Independent Electoral and Boundaries Commission
Election Petition No 3 of 2013
High Court at Busia
F Tuiyott, J
June 5, 2013

Reported by Andrew Halonyere & Cynthia Liavule

Issues:

I. Whether a member of the senate was a full-time state officer who was barred by article 77(1) of the Constitution from participating in any other gainful employment.

II. Whether failure by the deponent to state his place of abode was a substantive omission that rendered his Affidavit fatally defective.

III. Whether section 23 of the Leadership and Integrity Act applied to elected State Officers.


Constitutional Law – leadership and integrity – restriction on activities of State officers – whether a senator could sign pleadings and act as counsel in an election petition – whether such conduct was in contravention of Article 77(1) of the Constitution and section 23 of the Leadership and Integrity Act – Constitution of Kenya, Article 77(1), Leadership and Integrity Act, section 23.

Statutes – interpretation of statutes – whether section 23 of the Leadership and Integrity Act applied to elected State officers – whether a senator’s political neutrality would be compromised by giving legal representation in an election petition.
Constitution of Kenya, 2010
Article 77
“(1) A full-time State officer shall not participate in any other gainful employment.
(2) Any appointed State officer shall not hold office in a political party.
(3) A retired State officer who is receiving a pension from public funds shall not hold more than two concurrent remunerative positions as chairperson, director or employee of—
   (a) a company owned or controlled by the State; or
   (b) a State organ.
(4) A retired State officer shall not receive remuneration from public funds other than as contemplated in clause (3)”

Leadership and Integrity Act 2012
Section 23-
“(1) An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties -
   (a) act as an agent for, or further the interests of a political party or candidate in an election; or
   (b) manifest support for or opposition to any political party or candidate in an election.
(2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.
(3) Without prejudice to the generality of subsection (2), a public officer shall not
   (a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;
   (b) publicly indicate support for or opposition against any political party or candidate participating in an election.”

Section 26
“(1) Subject to subsection (2), a State officer who is serving on a full time basis shall not participate in any other gainful employment.
(2) In this section, “gainful employment” means work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the State office or which results in the impairment of the judgment of the State officer in the execution of the functions of the State office or results in a conflict of interest in terms of section 16.”

Election Petition Rules
Rules 12(6)
“The provisions of Order 19 of the Civil Procedure Rules, 2010 and the Oaths and Statutory Declarations Act shall apply to affidavits under this rule.”

Civil Procedure Rules 2010
Order 19 rule (4)
“Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age.”

Held:
1. A deponent in an election petition had to disclose his true physical aboard and failure to do so rendered his affidavit fatally defective. This was more so in situation where the issue of personal service was of paramount importance since the deponent could deliberately want to cover up his place of residence in a bid to show that he was not personally served.
2. The petitioner had not shown what prejudice he would suffer by the defective affidavit. The Court was not willing to strike out the entire response merely because of an omission in the Affidavit that was not material to the controversy at hand. That would not have been a just way of resolving the public interest dispute.
3. Nowhere else in the Constitution, apart from Article 77 was the term “full time state officer” used. Article 250(5) provided that members of Commissions created by Article 248 could serve on a part-time basis and that obviously was the opposite of full time basis. Members of those Commissions were also State officers within the meaning assigned to them above. The import of those provisions was that not all the persons defined as State officers were expected to work on a full-time basis.
4. The following issues were pertinent in determining whether Members of Parliament
and County Assembly were also in the category “expected to work on a full time basis.”

i. What was the role, duty and responsibility of a Member of Parliament?

ii. How much time would a Member of Parliament be engaged in the Parliamentary and non-Parliamentary functions of the office?

iii. The nature of remuneration, allowances and benefits of a Member.

iv. The experiences of other jurisdictions with similar systems of Government.

In the instant case neither did the parties place sufficient material nor did they articulate these issues in any particular depth and therefore the Court could not determine the question whether or not a Senator was a full-time State officer.

5. Article 77(1) was silent as to the meaning of the term “gainful employment” but it was defined in section 26 of the Leadership and Integrity Act. There being no suggestion that the meaning assigned to the term by the Act was inconsistent with the Constitution, the provisions of Article 77(1) of the Constitution and section 26 of the Act were to be read together.

6. Even if a Member of Senate was to be involved in other business of the House such as Committees, Parliamentary business could not engage a Member fully from Monday to Friday; 8.00a.m to 5.00p.m. In respect to non-Parliamentary business, there was no regulation governing work hours.

7. The petitioner had not persuaded the court that the Senator had used up public time in preparing for and participating in the Election Petition. No evidence had been shown to the court to demonstrate that the senator’s conduct was inherently incompatible or fundamentally in conflict with his role as a Member of the Senate.

8. Section 23 of The Leadership and Integrity Act was a provision on political neutrality expected of appointed state officers. The senator held an elective position. Elected Members of Senate were politicians. The provisions of section 23 did not apply to them. Even if it was to be assumed that by representing the 3rd Respondent the senator was pursuing a political agenda that would not be inimical to his office as a Member of Senate.

Application dismissed with costs.

Retirement in public interest must be based on valid reasons and adherence to fair termination procedure under the Employment Act

D K Njagi Marete v Teachers Service Commission

Cause Number 379 [N] of 2009

Industrial Court at Nairobi
James Rika, J
June 28, 2013

Reported by Nelson K Tunoi & Beatrice Manyal

Brief Facts:
D. K. Njagi Marete (claimant) is a Judge of the Industrial Court of Kenya. He had filed this Claim in 2009 before he was made judge against his former Employer the Teachers Service Commission (respondent) where he had served as the Senior Legal Principal Officer. TSC is a body corporate established under the Teachers Service Commission Act, Cap 212 the Laws of Kenya, whose role is to regulate Public School Teachers. The claimant received a letter from the Chief Executive Officer of the respondent, Mr. Lengoiboni, purporting to retire him on the ground of public interest. There was no warning or notice. The claimant argued that the decision by the employer was malicious, unwarranted, against natural justice and in breach of employment law.

Issues:
1. Whether retirement in public interest was outside the purview of termination under the
High Court Cases


II. Whether the retirement of the claimant was unlawful and if so whether he was entitled to general damages for breach of contract, punitive damages, exemplary damages, and aggravated damages, or in the alternative compensation for unfair termination.

III. Whether the plaintiff was entitled to the salaries and allowances he would have earned between the age of 49 years and 60 years, a period of 11 years, and to the other claims particularized under the claim, totaling Kshs. 26,337,665.

Employment law - termination of employment contract – termination in public interest - whether retirement in public interest was outside the purview of termination law under the Employment Act 2007 - where the claimant was a legal officer of the Teachers Service Commission - where he was terminated through a letter purportedly in public interest – where no notice was given –whether the retirement was unlawful and unfair – whether the claimant was entitled to damages- Employment Act 2007 sections 41, 42 &43.

Held:

1. Termination of employment as a general term, meant, the coming to an end of the contract of employment. The end could come voluntarily, involuntarily or consensually. It came voluntarily when for instance, the employee resigned; involuntarily when the employee was dismissed or had his position declared redundant; or consensually when a fixed term employment contract lapsed. Retirement in public interest was an involuntary termination, instigated by the employer. As a decision based in public interest resulted in termination of employment, it would fall within the requirements of section 43 of the Employment Act 2007.

2. The respondent had the onus to show objective and demonstrable grounds warranting the retirement of the claimant. When a public employer justified the premature termination of a contract of employment, on the grounds of public interest, such an employer had to show its decision was driven by public policy objective, and that the decision taken was legitimate and justifiable. It was not enough to merely write a letter to the employee and inform him that a decision to retire him on public interest had been made. There had to be shown valid reasons amounting to public interest, to justify termination.

3. The respondent did not justify retirement of the claimant in public interest. It was not shown that there was a complaint against the claimant, initiated by a member of the public or by the respondent; that this complaint was investigated; the claimant given a chance to answer the complaint; and a decision made to retire him based on valid grounds.

4. If public employers were allowed to merely invoke public interest in retiring employees, without giving elaboration of the circumstances giving rise to the infringement of public interest, the employment protections given under the Employment Act 2007 would be meaningless to public servants.

5. The Public Officer Ethics Act 2003 and the Codes of Conduct applicable to various Commissions did not contemplate retirement of employees on the bare allusion to public interest. The Codes, like the Employment Act, demanded that administrative and disciplinary decisions against public servants be fair, legitimate and justifiable.

6. Under section 43 of the Employment Act where the employer failed to prove the reason or reasons for termination, the termination would be deemed to be unfair within the meaning of section 45 of the Employment Act 2007. Thus the termination of the Claimant’s contract of employment through premature retirement was unfair under section 43 as read with section 45, of the Employment Act 2007.

7. In examining what remedies were suitable in unfair employment termination, the court had a duty to observe the principle of a fair go all round. A grant of anticipatory salaries and allowances for a period of 11 years left to the
expected mandatory retirement age of 60 years
would not be a fair and reasonable remedy.

8. The Industrial Court would not facilitate
double remuneration of the claimant from public
funds as he was no longer rendering any legal
services to the TSC. The claimant had moved on
after the unfortunate and capricious decision
of the TSC. He had secured an appointment
as a judge of a superior court in the Kenyan
Judiciary, about three years after the retirement
from the TSC.

9. General damages for breach of contract,
punitive, exemplary, and aggravated damages,
did not apply in the instant case. Section 49
of the Employment Act however afforded the
claimant fair, adequate and reasonable remedy
of compensatory award as prayed in the
alternative to other damages.

Claimant awarded a total sum of Kshs. 1,913,293, to
be paid within 30 days of the delivery of this Award
with no order on the costs and interest.

**Workers misconduct should not attract collective punishment**

*Kenya Plantation & Agricultural Workers v Roseto Flowers*

**Cause No 44 of 2013**

**Industrial Court at Nakuru**

**B Ongaya, J**

**June 28, 2013**

*Reported by Andrew Halonyere & Cynthia Liavule*

**Brief facts**

The claimant brought an application before the
Industrial Court seeking *inter-alia* a declaration that
the lock–out, dismissal and termination of over 100
employees collectively through an ultimatum process
was wrongful and unfair.

**Issues**

I. Whether it was proper for employees to engage
   in a strike before seeking conciliation.

II. Whether collective workers misconduct
    attracts collective punishment through an
    ultimatum process addressed to the employees
    collectively as opposed to the rules of natural
    justice.

III. What is the effect and scope of section 80
    of the Labour Relations Act 2007 in event of a
    prohibited strike?

IV. Whether issues of law would require to be
    verified by an affidavit.

**Labour law – dismissal and termination from
employment – where over one hundred (100)
employees who took part in an industrial strike were
summarily dismissed collectively through an ultimatum
process – whether collective workers misconduct
attracts collective punishment – whether it was proper
for the employer to summarily dismiss the employees
without following the rules of natural justice.

Civil practice and procedure – where the law required
that a memorandum of claim is to be accompanied
by a verifying affidavit - whether issues of law would
require to be verified by an affidavit – Labour Relations
Constitution of Kenya, 2010 article 47 - Industrial
Court Procedure Rules 2010 rule 5 (1)

Labour Relations Act section 80

‘80. (1) An employee who takes part in, calls, instigates
or incites others to take part in a strike that is not in
compliance with this Act is deemed to have breached
the employee’s contract and?
1. is liable to disciplinary action; and
2. is not entitled to any payment or any other benefit
under the Employment Act during the period the
employee participated in the strike.

(2) A person who refuses to take part or to continue
to take part in any strike or lock-out that is not in
compliance with this Act may not be?
(a) expelled from any trade union, employers
organisation or other body or deprived of any right or
benefit as a result of that refusal; or
(b) placed under any disability or disadvantaged,
compared to other members or the trade union, employers’ organisation or other body as a result of that refusal.

(3) Any issue concerning whether any strike or lock-out or threatened strike or lock-out complies with the provisions of this Act may be referred to the Industrial Court.’

Held

1. The strike took place without the process of the trade dispute being resolved in reconciliation process under the Labour Relations Act, 2007 or the conciliation as may have been agreed between the parties in the collective agreement. To that extent, the strike was unlawful.

2. The step of engaging in conciliation before any strike was at the core of industrial stability and amicable settlement of trade disputes. The conciliatory step constituted the harmonious and peaceful attempt to bargain before invoking the strike process as the ultimate bargaining mechanism and which invariably would disrupt the flow of work in the ensuing industrial unrest.

3. The number of employees who went on strike was about one hundred and three (103). It was not practical to subject each of the employees to appear for a hearing in a disciplinary process. The employees were not issued with individual dismissal letters. There was no evidence that the terminal dues were deposited with the District Labour Office.

4. Collective ownership, collective responsibility and people-participation are at the core of good governance as a basis of the other principles such as accountability, transparency, affirmative action, meritocracy and constitutionalism. In that perspective, the notions of collective ownership and responsibility yield desirable outcomes. However, when applied in misconduct and punishment, the notions of collective ownership and responsibility as invoked in the ultimatum principle can very easily yield into absurd and unjust outcomes. It can very easily lead to imposing punishment against innocent persons who were not aware of the ultimatum or who were not involved in the dispute at hand or who had individual explanations in self-exculpation.

5. Under Kenya’s constitutional and statutory regime in employment and labour relations law, the string that flows throughout was that employers had to uphold due process in a fair procedure in terminating employment on account of poor performance, misconduct and even ill-health. The constitutional and statutory law did not provide for the ultimatum principle as in South Africa and in the absence of legislation on ultimatum principle, the court could not coin an interpretation as to apply it in cases of strikes in Kenya’s employment and labour relations.

6. The ultimatum principle did not apply in event of an unlawful strike and the employer was required to apply rules of natural justice as provided for in the provisions of the Constitution and the legislation as well as the lawful provisions on disciplinary process as may be agreed between the parties. It was not open for the employer to invent the ultimatum principle as the path of terminating the employees’ employment in oblivion of the clear provisions of section 80 of the Labour Relations Act, 2007 and the provisions of the Employment Act.

7. A punishment including the dismissal on account of an employee’s involvement in a strike that did not comply with provisions of the Labour Relations Act, 2007 could only be imposed by the employer through a fair process that affords the employee an opportunity to know the allegations leveled and a chance for the hearing. The Labour Relations Act, 2007 did not prescribe the procedure for the disciplinary action, such procedure was provided for in the principles of due process of justice set out in the Constitution such as Articles 47 and 50(1), the provisions of the Employment Act, 2007 and the lawful provisions of the agreement between the parties.

8. under section 80 of the Act, the primary punishment to be imposed by the employer was to deny payment to the concerned employee for the period of the strike, the imposition of that primary punishment could only take
place after the employee had been accorded due process to establish that the employee was indeed involved in the strike that did not comply with the statutory provisions. The primary punishment could not be imposed sweepingly like by invoking the ultimatum principle which was devoid of the statutory and constitutional fair process, as innocent employees could easily be unfairly punished.

9. The drastic punishment of dismissal could be imposed in appropriate cases under due process, however the primary punishment was preferable so as to foster collective bargaining, recognizing that employees usually do not go on lawful or unprotected strikes with the evil design to injure the employer and end the relationship, lawful strike was a bargaining chip invoked as a last option to strike amicable balance, the storm before the tranquility.

10. Rule 5 (1) of the Industrial Court Procedure Rules 2010 requires a memorandum of claim be accompanied by a verifying affidavit. The contest before the court was not on issues of facts but of law. Issues of law would not require to be verified by an affidavit. It is not always the case that where a rule is expressed in mandatory terms the Courts blindly enforce such rules, regardless of the broader issues of substantive justice. to strike out and dismiss the claim for lack of a verifying affidavit would be manifestly unjust, and would not serve the intended purpose of the Labour Institutions Act and the Employment Act.

Orders

I. Summary dismissal of over 100 employees was wrongful and unfair.

II. Each of the employees affected to be paid full terminal benefits including one month pay in lieu of notice; days worked if any; overtime worked if any; annual leave due; and 6 months gross monthly wages as at termination.

III. The respondent to deliver to each of the affected employees the respective certificate of service.

IV. The respondent to pay costs of the case.

Circumstances when employers are bound to deduct and remit Union fees

Kenya Long Distance Truck Drivers & Allied Workers Union v Ms Kyoga Hauliers Ltd

Cause No 61 of 2013

Industrial Court at Mombasa

S Radido, J

June 28, 2013

Reported by Emma Kinya Mwobobia and Obura Paul Michael

Issues:

I. Whether the employer was legally bound to deduct and remit its employee’s union dues to the Union.

II. Whether the Union was entitled to a recognition agreement by the employer.

Notice No. 9371

Held:

1. The deduction and remitting of union dues from employees who had acknowledged union membership was based on the Minister for Labour making an appropriate order. It did not require a recognition agreement between a union and an employer. The Minister had made an appropriate order through the Kenya Gazette.

2. There was no legal reason for the employer to decline to deduct and remit the union dues since the Union had submitted to the employer the names and identity card numbers of the employees through the check-off forms.
3. The employer was duty bound to deduct and remit the union dues to the account named in the Gazette Notice.

4. A union needed to establish that it had complied with section 54 of the Labour Relations Act in order to be entitled to a recognition agreement. It represented more than a simple majority of the unionisable employees of the employer.

5. The conciliator’s report contained evidence to the effect that the Union had recruited 61.38% of the Unionisable employees of the employer and further that there was no rival Union. The Union was therefore the relevant Union for employees.

6. The court was satisfied that the Union had complied with the requirements of section 54 of the Labour Relations Act and was thus entitled to recognition by the employer.

7. Victimization because of union membership was a grave matter which struck at the heart of the constitutional right to freedom of association, right to organize and participate in the activities of a Union and was an unfair labour practice. However, the Union had not placed before court, the names of the employees who had been harassed or intimidated because of Union membership.

Respondent to commence deducting and remitting to the Union its dues.

**Scope for review of a court decree or order**

**Michael Mungai v Ford Kenya Elections & Nominations Board Others & 2 Others**

JR Misc Application No 53 of 2013

High Court at Nairobi

I Lenaola, Mumbi Ngugi, P Nyamweya, D S Majanja, W K Korir, JJ

June 27, 2013

*Reported by Andrew Halonyere & Cynthia Liavule*

**Brief Facts**

The applicant brought an application before the high court seeking orders for review of an earlier high court decision composed of three judges. The Chief Justice specifically empanelled a bench of five to hear the application.

The gist of the applicant's application was that the High Court’s ruling had errors, mistakes and omissions and that it did not address the applicants complaint namely that the respondents and their agents were careless and negligent by allowing the interested party to conduct a political party meeting without following the Constitution, statute, rules, regulations and proper procedures.

**Issues**

I. Whether the scope for review of a decree or order was limited to discovery of new and important evidence and a mistake or error apparent on the face of the record or for any other sufficient reason

II. Whether in an application for review the court could deal with new prayers which were not part of the applicant's original application.

**Civil practice and procedure** - review — application for review – scope for review of a decree or order - Whether in an application for review the court could deal with new prayers which were not part of the applicant’s original application - whether the applicant had met all or any of the grounds for allowing a review of an order – Civil Procedure Rules order 45 rule 1(1).

Civil Procedure Rules, 2010

Order 45 rule 1(1)

“Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the
record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

Held

1. The High Court was not sitting on appeal over its earlier ruling. The court's mandate was to only determine if the applicant had established grounds for the review of its earlier decision.

2. The applicant's prayer for compensation was not in his original motion, therefore the High Court could not deal with new prayers since they did not form part of the decision which the applicant was asking it to review.

3. The scope for review of a decree or order was limited to a situation where an applicant had discovered new and important evidence which was not available at the time the decree was passed or where there was a mistake or error apparent on the face of the record or for any other sufficient reason.

4. The applicant had not argued that he had discovered new and important evidence which was not available to him at the time he had filed his initial application. He had not placed before court anything to support a review of the decision on that ground.

5. An error apparent on the face of the record could not be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it had to be left to be determined judicially on the facts of each case.

6. There was a real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stared one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there could conceivably be two opinions could hardly be said to be an error apparent on the face of the record.

7. For one to succeed in having an order reviewed for mistake or error apparent on the record, he had to demonstrate that the order contained a mistake that was there for the whole world to see. It was not enough for an applicant to say that he was dissatisfied with the decision or that the same was wrong, such opinions ought to be subjected to an appeal.

8. The applicant had not established that there was an error or mistake in the decision that he had asked the High Court to review. He had not even pointed out what in his opinion was the error or mistake in that decision, he had just told the court to review its earlier decision. That was not good enough.

9. A decree or order could also be reviewed for any sufficient reason. Sufficient reason could only be deduced from the facts and circumstances of a particular case before the court. For example, in the case of Ngororo v Ndutha & another (1994) KLR 402 the Court of Appeal held that any person though not party to the suit whose direct interest was affected by a judgment was entitled to apply for review. Such a reason could be “sufficient reason” for the purposes of order 45 rule 1(1) for reviewing a decree or an order. An applicant had to place convincing evidence before a court for the court to be satisfied that there was sufficient reason to review its decision. The applicant in the case had not given any reason to warrant the review of the impugned decision on the ground of “sufficient reason”.

Application dismissed, no order as to costs

Cases referred to

Jurisdiction of the Environment & Land Court in a claim including both land issues and also company law issues

Tasmac Limited v Shalin Chitranjan Gor
Miscellaneous Application No 5 of 2013
High Court of Kenya at Malindi
Environment & Land Court
O A Angote, J
June 27, 2013
Reported by Beryl A Ikamari

Issue
i. Whether the Environment & Land Court had jurisdiction to determine a suit, brought by a shareholder, in which the appointment of an inspector to look into the affairs of a company, which owned land from which proceeds were being generated by a hospitality business, was sought.

Jurisdiction
jurisdiction of the Environment & Land Court
jurisdiction in a claim that concerned proceeds from the use of land and company law matters such as directorship and shareholding—whether the Environment & Land Court would have jurisdiction in a claim dealing with a mixture of issues which extended beyond land and environment matters.

Held:
1. The jurisdiction of the Environment and Land Court concerned the determination of disputes relating to the environment and the use, occupation and ownership of land.

2. The subject matter of the dispute disclosed civil or commercial matters, touching on company law and delving into the directorship and shareholding of a company, but it also concerned the issue of the ownership of land by a company and the management of the proceeds obtained from activities carried on in the land.

3. Where a dispute raised matters which fell within the jurisdiction of both the High Court and the Environment and Land Court, any of the two courts would be able to adjudicate upon it and make a determination.

4. A suit could not be “dismembered” by a party so that one limb would get heard by the Environment and Land Court and another limb by the High Court. That would amount to an absurdity and miscarriage of justice and was not intended by the Constitution.

Jurisdiction assumed by the Environment and Land Court.

Police investigative findings concerning an employee are binding upon an employer in disciplinary cases

John Kirui Torongei v National Cereals & Produce Board
Cause No 6 of 2013
Industrial Court at Nairobi
B Ongaya, J
June 21, 2013
Reported by Emma Kinya Mwobobia and Obura Paul Michael

Brief facts:
The claimant was initially employed by the respondent as an Assistant Silo Manager and later promoted to the position of a Silo Manager. He was suspended from employment via a letter dated 06/10/2009 following allegations that he had falsified documents to conceal physical shortage of fertilizer prior to their annual stock taking exercise which was communicated via a circular dated 05/09/2009. The stock taking took place and every bag of fertilizer tallied with the number
recorded in the books. While serving his suspension, police investigations into the allegations was launched after which he was found innocent of any wrong doing. Termination followed via a letter dated 15/07/2010 which forms the basis of this suit.

Issues:
I. Whether the claimant was unfairly terminated from employment on grounds of gross misconduct despite being declared innocent of any criminal doings by police from their investigations.

II. Whether the employer’s advisory committee exceeded its jurisdiction by disregarding the police investigation report and forming new grounds for dismissal without inviting the claimant to defend himself.

III. Whether an employer could introduce new grounds of dismissal at the hearing stage whilst deviating from the original grounds that it had used to summon the employee

IV. Whether the claimant was entitled to any other remedies.

Employment law - unfair termination - unfair termination of employment on grounds of gross misconduct - employee accused of criminal acts and was under investigations with the police - employee later declared innocent following conclusive police investigations - where the respondent(employer) introduced new grounds and deviated from the original grounds of termination disregarding the police investigations - whether the employee’s termination of employment was unfair in the circumstances - Employment Act 2007, Sections 41, 43

Held:
1. In disciplinary cases in the employment relationship, where in the opinion of the employer there existed a criminal element, the court had set out the guiding applicable principles applied in Mathew Kipchumba Koskei – Versus – Baringo Teachers SACCO, Industrial Cause No. 37 of 2013 as follows:
   a) Where in the opinion of the employer the employee’s misconduct amounted to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rested with the employer’s decision without involving the relevant criminal justice agency.
   b) If the employer decided not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer was generally bound with the outcome of the criminal process and if at the end of the criminal process the employee was exculpated or found innocent, the employer was bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee had been exculpated or found innocent in the criminal process.
   c) If the employer had initiated and concluded the disciplinary proceedings on account of a misconduct which also had substantially been subject of a criminal process for which the employee was exculpated or found innocent, the employee was thereby entitled to setting aside of the employer’s administrative punitive decision either by the employer or lawful authority and the employee was entitled to relevant legal remedies as may be found to apply and to be just.
   d) To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee’s misconduct amounted to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it was open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process.
2. The employer decided not to conclude the administrative disciplinary case and made
A criminal complaint to the police. The respondent was generally bound with the outcome of the criminal process and at the end of the criminal process, the claimant was exculpated or found innocent and the employer was bound and could not initiate, continue and impose a punishment on account of the grounds similar to or substantially similar to those the claimant had been exculpated or found innocent in the criminal investigation process as carried out by the police. The court found that the police investigative findings were conclusive in exculpating the claimant of the allegations in the suspension letter.

3. The claimant was neither served with the notice of the allegations nor invited to defend himself towards self-exculpation. The claimant would invariably have availed himself channels of defence such as whether the circular was ever conveyed to his attention, whether indeed he contravened the circular, whether the officers he assigned duty were inexperienced as alleged and many such other issues that would remain unresolved because the claimant was never invited to give his account by way of notice and a hearing as envisaged in section 41 of the Employment Act, 2007 (the Act).

4. While considering a disciplinary case, the employer was not at liberty at the hearing stage to deviate from the allegations of misconduct. The staff advisory committee had wandered away in a drift from the legitimate inquiry as it had been commenced in the suspension letter and the committee had disregarded the objective findings of the police investigations and created its own fresh line of considerations and findings which were never put to the claimant at the initial stage. Therefore the committee had exceeded its jurisdiction.

5. The police investigative findings that were binding upon the employer conclusively exculpated the employee so that the allegations did not constitute genuine reasons for termination as envisaged in section 43 of the Employment Act, 2007. Therefore due process of notice and hearing was not invoked as provided for in section 41 of the Act. Accordingly, the termination was unfair as the initial reasons were not valid and the subsequent reasons were not subjected to the due process of justice.

6. The claimant was entitled to the sum that was withheld pay for the ten months since the termination flowing from the suspension was unfair.

The respondent to pay the claimant a sum of Kshs.1,024,880. Interest payable from the date of the judgment till full payment. The respondent to pay costs.

Non-inclusion of a deputy governor in an election petition challenging the election of a governor not a fatal omission

M’nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 Others
Election Petition No 4 Of 2013
High Court at Meru
J Lesiit, J
June 24, 2013
Reported by Lynette A Jakakimba

Issues

i. What was the meaning of the word ‘declaration’ in reference to declaration of election results as used in article 87 (2) of the Constitution.

ii. Whether the petition having been filed 28 days after the publication of the results in the Kenya Gazette and not 28 days after announcement of results by the Returning Officer was filed within the time allowed by law.

iii. Whether affidavits filed in support of an election petition could be struck out at the preliminary stage of the proceedings.

iv. Whether the failure to enjoin the Deputy Governor in an election petition challenging the
A declaration contained in the Kenya Gazette was to the whole world and had the force of law, whilst the announcement by a County Returning Officer of an election result and the publication thereof in Form 35 was but information to the persons in the tallying hall and declaration of the results of a polling station to the IEBC by its officer. ‘Declaration’ as set out in article 87 (2) of the Constitution therefore meant ‘publication in the gazette’.

1. A declaration contained in the Kenya Gazette was to the whole world and had the force of law, whilst the announcement by a County Returning Officer of an election result and the publication thereof in Form 35 was but information to the persons in the tallying hall and declaration of the results of a polling station to the IEBC by its officer. ‘Declaration’ as set out in article 87 (2) of the Constitution therefore meant ‘publication in the gazette’.

2. Section 76(1)(a) of the Elections Act provided that a petition was to be filed within 28 days of publication of the results in the Kenya Gazette therefore the present petition, having been filed within 28 days of publication of the Gazette Notice was properly within the Constitutional timelines set out in Article 87 (2).

3. The respondents contended that the affidavits filed by the petitioner ought to have been struck out as they had in law for being false. The veracity of the contents of the affidavits could only be tested when the witnesses of either side took the stand. This made the application to strike out the petitioner’s affidavits, whether in part or the whole; unsuitable for determination at the preliminary stage as the court had not had an opportunity to hear the witness evidence. The various affidavits sworn in support of the petition were not self-reliant but were subject to cross examination and re-examination by virtue.
4. The non-inclusion of the Deputy Governor who was the running mate to the 1st respondent was not fatal to the petition as the court had the power under section 80(1)(b) to compel the attendance of any person as a witness who appeared to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy. Whether the failure to include the Deputy Governor in the petition was fatal would be considered fully at a later stage in the petition.

Application dismissed with costs.

**Holders of allotment letters could not enforce the right to property over land**

**John Mukora Wachihi v Minister for Lands & 6 others**

Petition No 82 of 2010

As consolidated with Petition No 83, 84, 85, 86, 87, 88, 89, 90 & 92 of 2010

High Court of Kenya at Nairobi

Mumbi Ngugi, J

June 21 2013

*Reported by Beryl A Ikamari*

**Issues**

i. Whether the respondents’ revocation of the petitioners’ title to land, without affording them a hearing, was a violation of the petitioners’ right to fair administrative action and the petitioners’ right to property.

ii. Whether the right to property could only be enforced by registered proprietors of land and not holders of allotment letters who had not registered their interest in land.

iii. Whether allegations of unlawful acquisition of land could allow for revocation of titles to land without hearing the persons who claimed ownership to the land.

iv. Circumstances in which damages would be available for the alleged breach of the petitioners’ rights to fair administrative action and rights to property.

**Constitutional Law** - the right to property and the right to fair administrative action-revocation of title to land by the state - revocation of title to property without affording the holder of the property a right to be heard - effect of allegations of unlawful acquisition of land on the right to property and the process of revocation of title to property - Constitution of Kenya, 2010; article 40 & 47.

**Constitutional Law** - the right to property - enforcement of the right to property by unregistered holders of allotment letters - whether the right to property in land could be claimed by persons who were not registered proprietors of land.

**Constitutional Law** - the right to property and the right to fair administrative action - claim for damages for violations of the right to property and the right to fair administrative action - whether damages would be available in situations where no evidence on the nature of damage suffered was tendered.

**Held:**

1. The right to property as recognized in the article 40 of the Constitution of Kenya, 2010, and section 75 of the repealed Constitution of Kenya, as concerns rights to land, could only be enjoyed by registered proprietors of land. The petitioners in Petition No. 83, 85, 86, 88 and 89 of 2010, only held allotment letters and were not the registered owners of the land that they claimed to own and could therefore not enforce the right to property.

2. The petitioners who held allotment letters, as concerns the suit land, had certain interests in the land whose extent and validity could be determined in a different forum. Therefore, they could not have such interests taken away from them without being afforded a hearing. The respondents’ purported revocation of those petitioners’ title to land without affording them a hearing, was a violation of their rights to fair
administrative action.

3. With respect to the properties where the petitioners held certificates of lease, issued under the provisions of the Registered Land Act (Cap. 63) (repealed), namely Petition Nos. 82, 84, 87, 90 and 92 of 2010, allegations of unlawful acquisition of the land could not allow for the revocation of the titles to the land without affording the title holders a hearing, in accordance with the rules of natural justice.

4. The issue on whether the petitioners’ land was lawfully or unlawfully acquired constituted a matter that would require determination through a process and in a forum that would allow all the parties to present their respective cases on their merits. Without such a determination, the petitioners’ property was protected by virtue of the right to property under article 40 of the Constitution of Kenya, 2010. Those petitioners, as registered proprietors of land, were entitled to be heard and the absence of a hearing, before the purported revocation of their title to land, was a violation of their rights to fair administrative action under article 47 of the Constitution of Kenya, 2010.

5. The petitioners’ prayer for monetary compensation for the violation of their rights would not be granted as the petitioners were still in possession of their property and no evidence was tendered to establish that damage had been suffered as a result of the purported revocation of their title to land.

Petition allowed in part. (The court found that all the petitioners’ right to fair administrative action had been violated and that the petitioners, who were registered proprietors of the suit land, also had their right to property violated but that the petitioners with allotment letters only could not enforce the right to property over land. No damages were awarded.)

The scope of “without prejudice” communications
Millicent Wambui v Nairobi Botanica Gardening Limited
Cause No 2512 of 2012
The Industrial Court at Nairobi
Nzioki wa Makau, J
July 5, 2013
Reported By Njeri Githanga Kamau & Victor Andande

Issue:
I. Whether communications marked as “without prejudice” could be adduced as evidence in court where the parties had not reached a compromise.

Evidence – admission – doctrine of without prejudice – ambits and rationale of the doctrine – where the applicant sought to have the suit marked as compromised – claim by the respondent that no compromise had been reached – whether admissions which parties did not intend to be adduced in subsequent cases would be admissible

Held:
1. The words “without prejudice” imposed upon the communication an exclusion of use against the party making the statement in subsequent court proceedings. It was a well-established rule that admissions, concessions or statements made by parties in the process of trying to resolve a dispute could not be used against that party if the dispute was not resolved thus resulting in litigation.

2. The term “without prejudice” was used by parties as a means to enable offers and counter offers to be made to settle disputes or claims without fear that the said letters would later be used by the opposite party as an admission of liability in the ensuing lawsuit.

3. A party makes a “without prejudice” offer on the basis that they reserve the right to assert their original position, if the offer was rejected and litigation ensued.

4. For correspondence between parties to be
protected it had to be made in a genuine attempt to settle a dispute between the parties. The protection afforded by that phrase being limited to negotiations for compromise.

5. The rule which excluded documents marked “without prejudice” had no application unless some person was in dispute or negotiation with another, and terms were offered for the settlement of the dispute or negotiation. The judge was entitled to look at the document in order to determine whether the conditions, under which the rule applied, existed. The rule was adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there was a dispute or negotiations and an offer the rule had no application. (Re Daintrey ex Holt [1893] 2 QB 116).

6. The “without prejudice” material could be admissible if the issue was whether or not the negotiations resulted in an agreed settlement. The judge would be permitted to look into the letters exchanged to ascertain the character of the negotiations and whether there was indeed an agreement which would take the matter out of the purview of the protection afforded by the “without prejudice” tag. (Walker v Wilsher (1889) 23 QBD 335)

7. The letters exchanged between the parties were in the class of communication to which the principles on “without prejudice” apply. This was because the letters were seeking to settle the dispute amicably.

Application dismissed with costs.

Seven days’ notice must be provided before commencing an industrial strike.

Teachers Service Commission v Kenya National Union of Teachers & another

Petition No 23 of 2013
Industrial Court at Nairobi
L Ndolo, J
July 1, 2013

Reported by Teddy Musiga

Brief facts:
The recognizable dispute between the parties was as a result of the rationalization of remuneration due to the respondent’s members under Legal Notice No. 534 of 1997 and Legal Notice No. 16 of 2003. The petitioners contended that the strike infringed on the rights of the child to basic and compulsory education inter alia. The respondents failed to respond to the petition.

Issues:
I. Whether a balance could be struck between the rights of the teachers and those of the children to free and compulsory basic education.

II. Whether the strike was legal.

III. Whether teaching services are essential services thereby not amenable to a right to strike or lock-out – whether parties calling for a strike need to provide notice before doing so – section 76, Labour Relations Act

Labour Relations Act
Section 76
A person may participate in a strike or lock-out if-
(a) the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;
(b) the trade dispute is unresolved after conciliation
   (i) under this Act or
   (ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and
(c) seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorized representative

IV. Whether teaching services are essential services thereby not amenable to a right

Labour Law – employer & employee relationship –
of

(i) the trade union in the case of a strike;
(ii) the employer, group of employers or employers’ organization in the case of a lock-out.”

Held:

1. There was need to balance between the right of the child to free and compulsory basic education as envisaged under Article 53 of the Constitution of Kenya, 2010 and the rights of the teachers. The employer of the teachers and by extension the Government of Kenya had to secure and protect the rights of the teachers in order to safeguard the rights of the children.

2. Section 78 set out categories of what constituted a prohibited strike or lock-out. One of the instances where a strike or lock-out was prohibited was where the employer and the employee were engaged in an essential service.

3. Section 81(1) of the Labour Relations Act defined essential services as those services the interruption of which would probably endanger the life of a person or health of the population or any part of the population. Moreover, the fourth schedule thereof categorized only six services as essential services and they did not include teaching services. Therefore, there was no legal basis for the contention that teachers would not go on strike as they were not engaged in essential services.

4. The respondent failed to issue the seven days’ notice as provided by law.

Orders:
The parties were directed to proceed for negotiations to be convened by the Cabinet Secretary for Labour. Parties directed to report back to work by 8am on Tuesday, 2nd July, 2013. Any strike beyond that time would be considered unprotected and illegal.

In order to preserve industrial peace, parties were restrained from commenting on that matter outside the confines of the negotiations.

DPP’s discretion in instituting and undertaking criminal proceedings is not subject to court directives

R v Director of Public Prosecutions & 5 others exparte Victory Welding Works
JR Misc Civil Application No 249 of 2012
High Court at Nairobi
GV Odunga J
June 28, 2013

Reported by Andrew Halonyere & Cynthia Liavule

Issues:
I. Whether there was a duty imposed on the Director of Public Prosecutions to prefer charges in all instances where a complaint was lodged with his office.

II. Whether the court could by way of mandamus compel the Director of Public Prosecutions (DPP) to institute and undertake criminal proceedings or amend a charge sheet.

Constitutional Law – powers of the Director of Public Prosecutions to institute and undertake criminal proceedings – whether the court by way of mandamus could compel the Director of Public Prosecutions to institute and undertake criminal proceedings and amend a charge sheet -Constitution of Kenya, 2010 article 157(6)

Constitution of Kenya, 2010

Article 157
6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by
another person or authority, with the permission of the person or authority; and
(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

Held:

1. An applicant for judicial review had to show that the decision or act complained of was tainted with illegality, irrationality and procedural impropriety.

2. The court could not usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings were in all likelihood bound to fail was not a ground for interfering with those proceedings by way of judicial review since judicial review proceedings were not concerned with the merits but with the decision making process.

3. The court had power and duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guided their instigation.

4. The office of the DPP was an independent constitutional office which was not subjected to the control, directions and influence by any other person and only subject to control by the court based on the principles of illegality, irrationality and procedural impropriety.

5. The decision whether or not to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed by the DPP was purely discretionary. Where in the opinion of the DPP no offence was disclosed, the DPP could not be compelled to institute and undertake criminal proceedings since a decision whether or not to prosecute was arrived at after assessing the merits of the case based on the evidence presented to the office. This was however not to say that the Director could decide not to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General had to comply with any such direction where credible allegations were made.

6. The DPP’s powers to direct the conduct of investigations were to be exercised in good faith and where the office due to some ulterior motives decided not to carry out any warranted investigations; the court could issue appropriate orders for the same to be carried out. However once the same were conducted and a decision arrived at the court could not by way of mandamus compel the DPP to undertake and institute criminal proceedings contrary to the decision made by the Director.

7. Where the DPP Prosecutions decided to undertake and institute criminal proceedings, since the decision to do so was an exercise of discretion, the Court could not by way of mandamus compel the DPP to undertake and institute criminal proceedings contrary to the decision made by the Director.

8. The purpose of judicial review was not to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court was observed, the court would, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.

Application dismissed with costs
Scope of a notice of termination in an employment relationship

James Chutha Gathere v Nation Media Group Limited
Industrial Cause No 1346 of 2010
Industrial Court at Nairobi
M Mbaru, J
June 13, 2013
Reported by Cornelius Lupao & Mercy Ombima

Issues:

I. What was the scope and meaning of resignation?

II. What was the effect of a notice of termination to an employment relationship?

III. What were the termination procedures that follow a notice of termination?

IV. Whether an employer was duty bound to explain termination procedures to an employee, even where the notice to terminate an employment relationship was issued by the employee.

Employment Law – termination – notice of termination – terminal processes of an employment relationship – duties of an employer and an employee to each other during termination processes – whether an employment relationship continues to subsist after issuance of a notice to terminate – duty to explain the termination processes where the employee, and not the employer gives the notice to terminate – Employment Act sections 35 (3); (4); 36, 38

Employment Act
Section 36
Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.”

Held:

1. The Employment Act did not mention the word ‘resign’ or ‘resignation’ but looking at the provisions of the term ‘termination’ the word had the same effect and wider meaning.

2. An employee who was under a contract of employment and wished to terminate his employment relationship with his employer could give notice as agreed between the parties. That notice was important as it set in motion other termination processes noting that where the terminating party opted to serve for the duration of their notice, this other party ought to put into perspective any leave days due, days worked over and above the notice period or below the notice period and other workplace best practices like handing over report or property that belongs to the other party.

3. The notice period was equally important as the party serving under such notice had a duty to continue work up and until the last day of the notice. The work relationship did not end and the employee was bound to give their best labour, effort and due diligence to the employer until their last day of work.

4. On the other hand, the receiving party of the notice also had a duty to notify the departing party of any procedures that were to be adhered to and where the departing party opted not to serve their notice period, to ensure that they paid in lieu of notice.

5. Where the notice related to an employee who gave a notice, the employer was expected to acknowledge the notice and commence termination processes with the employee by ensuring that proper handover was done and that the employee continued to give service and good performance as under their contract. A party could also give notice but opt not to serve the term and hence section 36 of the act became operative. The termination notice could also be negotiated by the parties as was envisioned under section 38 of the Employment act.

6. A termination notice became very important because based on that notice, other termination
processes were to commence, for example:-

i. Acceptance of the notice where an employee ought to serve the term of notice,

ii. Acceptance of the notice and payment in lieu of serving the term of notice or

iii. Acceptance of the notice and a waiver of the term of notice period or

iv. A waiver under terms as agreed between the parties.

ev. A notice can also be rejected by an employer on good reason.

7. The duty to explain the termination procedures rested with the employer, even where the employee gave the notice to terminate an employment contract. These explanations were to be done with certainty and without any ambiguity. Failure on the part of the employer to do so would put the employee in a situation of conflict because due to lack of proper instructions, the employer was deemed to be in fault as was outlined under section 35 (3) and (4) of the Employment act.

Claim Succeeds

Vicarious liability depends not on ownership but on the delegation of tasks

Jane Wairimu Turanta v Githae John Vickery & another

Civil Suit No 483 of 2012
High Court at Nairobi
R Ougo, J
May 16, 2013

Reported by Andrew Halonyere & Cynthia Liavule

Issues:

I. Whether joint ownership of a motor vehicle logbook by a financier and a borrower could create vicarious liability for the negligence of anyone that was driving the vehicle at the time of a traffic accident.

II. Exercise of extreme caution by courts before striking out a suit.

Civil practice and procedure – striking out – application to strike out suit on the grounds that no reasonable cause of action was disclosed – duty of the court to exercise caution before striking out a suit – whether in the circumstances it was proper for the High Court to strike out the suit.

Tort – vicarious liability – where there was joint ownership of a motor vehicle logbook by a financier and a borrower – whether ownership by way of logbook was sufficient to create vicarious liability for the negligence of anyone who happened to drive the vehicle at the time of the accident - Traffic Act (Cap 403) section 8 – Civil Procedure Act (Cap 21) sections 3A – Civil Procedure Rules – order 1 rule 10(2.)

Held:

1. Striking out a suit was a summary remedy that was to be granted in the clearest case with extreme caution since a court of justice had to aim at sustaining a suit rather than terminating it by summarily dismissing it.

2. The applicant had proved on a balance of probability that it was not the owner of the suit motor vehicle as at the time of the accident.

3. To establish agency relationship it was necessary to show that the driver was using the car at the owners request express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner. The fact that the applicant was the owner of the vehicle by way of the logbook being in its name, such ownership was not sufficient to create vicarious liability for the negligence of anyone who happened to drive the vehicle at the time of the accident.

4. The borrower was not the servant of the applicant (financier) within the normally accepted meaning of vicarious liability. Vicarious liability depended not on ownership but on the delegation of tasks or duty.

Application granted.
Right to Information – Doctor Patient Confidentiality

Peter Mule Muthungu (Suing as administrator and personal representative of thereafter estate of Jane Mueningui v Kenyatta National Hospital)

High Court at Nairobi
Civil Suit No 364 of 2007
R Ougo, J
May 13, 2013

Reported by Phoebe Ida Ayaya & Derrick Nzioka

Issue:
1. Whether the court could order for production of hospital records relating to the deceased’s treatment and management from the defendant.

Evidence law – privileged information – the rule of doctor patient confidentiality – where the applicant acting as an administrator made a request for release of the deceased’s medical records for use in prosecuting a claim of medical negligence – where the defendant claimed that the records amounted to privileged information protected under the rule of doctor patient confidentiality – whether the defendant could be compelled to produce the medical records – whether the right to information under the constitution could trump the rule of doctor patient confidentiality – Constitution of Kenya, 2010 article 35(1)(b).

Held:
1. Medical documents were governed in the doctor patient confidentiality rule. A duty of care arose once a doctor or health care professional agreed to diagnose or treat a patient. The plaintiff through its pleadings tried to show the court that the defendant owed him a duty of care and that the duty of care was breached.

2. Having seen some of the medical documents that were produced by the defendant, the applicant felt that for him to advance his case he needed the documents held by the defendant, as indeed medical documents provided vital evidence of what went wrong.

3. It was imperative of the defendant to disclose to the plaintiff any document that related to the plaintiffs claim as under article 35(1)(b) of the Constitution of Kenya, 2010, every citizen had the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom.

Application allowed.

Termination on account of redundancy

Thomas De La Rue (K) Ltd v David Opondo Omutelema

Civil Appeal No 65 of 2012
Court of Appeal at Nairobi
W Karanja, P O Kiage &K M’Inoti, JJ A
July 5, 2013

Reported by Nelson K Tunoi & Beatrice Manyal

Brief Facts:
Thomas De La Rue (K) Ltd (appellant) is one of the subsidiaries of De La Rue, PLC, based in the United Kingdom. It specializes in secure printing of currencies, passports and other security documents. At all material times Thomas De La Rue (K) Ltd operated two passport production lines at its printing plant on Noordin Road, Ruaraka, in Nairobi.

David Opondo Omutelema (respondent) was employed by the appellant as a senior Kugler operator. David Opondo Omutelema was also a member of the Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers (KUPRIPUPA), a trade union recognized by the appellant and which had entered into a Collective Bargaining Agreement with the appellant.
Thomas De La Rue (K) Ltd closed down one of the passport production lines in Nairobi. The net effect of the closure was to render 35 workers, among them the respondent, redundant. Aggrieved he lodged a claim at the Industrial Court, contending that the redundancy was unlawful, irregular, and premature and without notice or justification and the court found that the respondent faced a genuine redundancy situation but it did not follow the procedure prescribed in the Employment Act and the Collective Bargaining Agreement and therefore the termination of the respondent's employment was an unfair termination. The Court awarded the respondent compensation of KShs.529,720.00/= being 10 months’ gross salary. Aggrieved by that award, the appellant lodged this appeal

**Issues:**

i. Whether there were two types of notifications contemplated on redundancy under section 40 of the Employment Act.

ii. Whether the appellant's declaration of the respondent redundant was in accordance with section 40 of the Employment Act No 11 of 2007.

iii. Whether the Industrial Court abrogated the principle of freedom of contract by holding that the redundancy clearance form was of no effect.

iv. Whether the Industrial Court erred in law and acted contrary to the principles of natural justice by pronouncing on issues that were not raised by the parties.

**Employment law - termination of employment - redundancy notice - whether there were two types of notifications contemplated on redundancy under the Employment Act - whether the appellant's declaration of the respondent redundant was in accordance with the Employment Act - whether the Industrial Court abrogated the principle of freedom of contract by holding that the redundancy clearance form was of no effect Employment Act No 11 of 2007 section 40**

**Statute - interpretation of statute - Employment Act - termination of employment - whether the one month's redundancy notice was applicable to non-unionized members - Employment Act No 11 of 2007 section 40.**

**Employment Act No 11 of 2007 section 40 set out seven conditions which the employer must comply with before declaring an employee redundant. These are:**

a) *if the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;*

b) *if the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer;*

c) *in determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;*

d) *where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;*

e) *the employer must pay the employee any leave due in cash;*

f) *the employer must pay the employee at least one month’s notice or one month’s wages in lieu of notice; and*

g) *the employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service.*

**Held:**

1. Sections 40 (a) and 40 (b) provided for two different kinds of redundancy notifications depending on whether the employee was or was not a member of a trade union. Where the employee was a member of a union, the notification was to the union and the local labour officer at least one month before the effective redundancy date. Where the employee was not a member of the union, the notification had to be in writing and to the employee and the local labour officer. A purposive reading and interpretation of the Employment Act meant that a one month notice was required notwithstanding whether the employee was or was not a member of a trade union. There was no rational reason why the employee who was not a member of a union wasentitled to a shorter notice.

2. Where an employee was a member of a
trade union, the law contemplated that the employer would deal with the employee through the union. It was only in cases where the employee was not a member of the union that the employer had to deal directly with the employee.

3. Although, in respect of unionisable employees section 40 (a) required at least one month’s notice before the effective date of the redundancy, the Act allowed parties, in a collective agreement, to agree on more favourable terms and such terms apply and take precedence. In consequence thereof, Clause 25 (ii) of the collective agreement provided for a two months redundancy notice.

4. Contrary to the letter and spirit of section 40 (a) and 40(b) of the Employment Act, the Industrial Court imposed upon the appellant obligations that could only have arisen if the respondent was not a member of a trade union. Had the Court considered and appreciated the rationale behind the provisions of section 40 relating to employees who are members of a union and those who are not, it would not have imposed upon the appellant the obligations it purported to impose. Having given the two months’ notice required under the collective bargaining agreement to the Union the appellant was not obliged to give another notice to the respondent personally under section 40 (b) because these notices were alternatives.

5. All the Kugler operators were evaluated on a wide range of criteria and not performance on a single occasion or single factor or skill. On the whole, virtually all those who were retained had better scores than the respondent. There was nothing on record to suggest that in selecting the respondent, the appellant was actuated by any malice, ill-will or ulterior motives.

6. The suggestion that the Industrial Court treats all cases involving discharge vouchers as absolving an employer from statutory obligation was a bit alarming. The industrial court was a court of law and in each case where the validity of a discharge voucher was in issue, evidence had to be led to support or disprove its validity. The court could not abdicate its responsibility by adopting a general presumption and applying it rigidly in each and every case without considering whether the presumption has been rebutted or not. That could suggest a firm and closed mind-set which a court of law could not afford to have.

7. The payment to the respondent of two months leave had not been pleaded as a particular of malice or bad faith. In addition the appellant had explained its basis and the fact that the respondent had been paid for those two months. It was not open therefore to the court to find malice, ill-will or bad faith on the basis of facts that were not pleaded.

Appeal allowed; each party to bear its own costs for both costs in the High Court and in the Court of Appeal.

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Enforcement of consumer rights as tortious claims & also human rights claims

Stephen Saitoti Kapaiku v Cocacola Sabco Nairobi Bottlers Limited & another

Petition No 338 of 2012
High Court of Kenya at Nairobi
Mumbi Ngugi, J
June 21, 2013
Reported by Beryl A Ikamari

**Issues**

I. Whether a claim for general damages and special damages concerning bodily injuries suffered after consuming a soft drink constituted a claim that could properly be instituted as a constitutional petition for the enforcement of consumer rights.

II. Whether fundamental rights and freedoms recognized in the Constitution of Kenya, 2010, could be enforced by a private individual against another private individual.
Constitutional Law - fundamental rights and freedoms
- enforcement of fundamental rights and freedoms
- whether constitutional rights could be enforced by private persons against other private persons.

Tort – negligence - defective product - soft drink with physical impurities - whether a claim for general damages and special damages for injuries suffered after consuming an allegedly contaminated soft drink was a claim for the breach of consumer rights under the Constitution or a claim for negligence in tort - Constitution of Kenya, 2010, article 46.

Constitutional Law - fundamental rights and freedoms-
consumer rights - defective product - soft drink with physical impurities - whether a claim for general damages and special damages for injuries suffered after consuming an allegedly contaminated soft drink was a claim for the breach of consumer rights under the Constitution or a claim for negligence in tort - Constitution of Kenya, 2010, article 46.

Held:
1. In appropriate cases, a claim for a violation of a constitutional right could be brought against a private individual. However, whether or not a claim could be made against an individual person or company by another individual, rather than against the state, would depend on the nature of the right.

2. The petitioner’s claim concerns allegations that he suffered harm after consuming a soft drink which had visible physical impurities in it. The claim appeared to be a tortious claim in which a secondary issue concerning whether consumer rights as recognized in the Constitution were violated, could also arise.

3. It would serve the ends of justice to have the suit transferred to the appropriate civil division of the High Court for hearing and determination in accordance with the provisions of the Civil Procedure Rules, 2010.

Suit transferred to the civil division of the High Court.

Rights of an employee whose employer is placed under receivership
Joseph Mburu Kahiga & anor v KENATCO Taxis Limited &Anor
Petition No. 39 of 2012
Industrial Court at Nairobi
M Mbaru, J
May 27, 2013
Reported by Teddy Musiga

Brief Facts
The matter commenced at the High Court Human Rights Division as Petition No. 150 of 2012 and was later transferred to the Industrial Court. It concerned the rights of employees whose services were terminated without payment of their benefits. They alleged that the successive receivers failed to wind up or to declare profits to be able to pay the petitioners as former employees thus infringing on their fundamental rights and freedoms as workers. Accordingly, and upon transfer to the Industrial Court, they filed Industrial Cause No. 1524 of 2011 claiming for compensation and loss of terminal benefits by the Minister on account of Insolvency as provided under the Employment Act. The matter was heard before the establishment of the Industrial Court. (The judges of the Industrial court were gazetted on July 12, 2012) But they later withdrew the matter after disagreeing with their advocates on record. Thereafter, they filed this petition at the Industrial Court seeking to be paid their retirement and all due payments and a declaration that the harassment and termination of the employees was unlawful inter alia.

Issues
I. What are the procedures to be followed under the Employment Act by employees whose services are terminated by an employer who is Insolvent?

II. Whether the Industrial Court has the jurisdiction to entertain matters that arose before the commencement of the Industrial Court Act, 2011

III. Whether the High Court Human Rights Division had jurisdiction to hear industrial causes before the establishment of the Industrial Court.
IV. Whether Companies under receivership have the capacity to sue or be sued in their own name.

V. What rights exist to an employee whose employer has been placed under receivership? And whether they have remedies, if any?

Employment Law – Employment Relationship – filing of employment disputes at the Industrial Court – whether the industrial court has jurisdiction to hear matters that arose before its establishment – rights of an employee whose employer has been put under receivership – Employment Act, Section 67.

Held

1. The Industrial Court as constituted under the Industrial Court Act, 2011 was competent to interpret the Constitution and to enforce fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act, 2011.

2. The petition was properly filed before the High Court Human Rights Division and the action to transfer the petition for hearing to the Industrial Court once operationalized was also proper.

3. As at the time of termination, the petitioner was no longer a “temporary” staff as by operation of the law he was an employee employed under permanent terms. Therefore, such a claim for violation of fair labour practices was proper within the rights of an employee under the Employment Act as well as the allegations of harassment of employees by the employer was unlawful under the ambit of the Employment Act.

4. Where a company (like the 1st respondent herein) has been placed under receivership, such a company lacks the legal competence to institute suits or be sued on its own name and can only sue or be sued through the receiver or manager as that is the person/body in law that has taken over the affairs of that entity under receivership. However, if in the court’s opinion based on the proceeding before it finds that the claims directly touch on the property, assets, actions complained of subject of the receiver’s powers or where the receiver’s position would be prejudiced by the court decision then a court can direct that proceedings be made jointly with that other entity. The case herein was one such peculiar case with the claim interrelated and one could not exist without the other and therefore both parties as respondents were properly sued.

5. Section 67 and the whole part VIII of the Employment Act outlined conditions to be satisfied before instituting proceedings by employees whose employers had come under receivership through insolvency as follows;
   a) There had to be a valid claim;
   b) There had to be insolvency of the employer;
   c) An application had to be done to the Minister that an employer was insolvent and an employee had been terminated;
   d) On the insolvency date, the employee was entitled to payment; and
   e) Then the Minister had to pay from the Insolvency Fund.

6. After the respondents terminated the services of the petitioners for gross misconduct after a lock-out, the petitioners reported to the Minister for Labour who placed it for reconciliatory but the same broke down or was abandoned and the petitioners filed Industrial Cause No. 1524 of 2011 which they later withdrew after disagreeing with their advocates.

7. By inviting the Minister to arbitrate, a large part of the preconditions of the Employment Act had been met. As such the parties assumed that insolvency had occurred and there was a valid claim. Accordingly, the employee was entitled to payment of wages and the Minister had to establish an Insolvency Fund from where such a claim was to be paid from.

8. The reasons for termination being gross misconduct after a lock-out were issues for determination by the Industrial Court as well as whether the termination was fair or unfair and whether the terminal dues and retirement benefits were paid were also specific claims that ought to have been outlined in a claim for the court or labour officer to establish from
the circumstances of the termination as had been alleged to be unlawful. Section 90 of the Employment Act required that such claims had to be lodged within 3 years of the termination of services.

9. The claim herein as at the time of being referred to the Minister was within the outlined requirements of the Employment Act on Insolvency procedures. With the parties failing to agree before the Minister and by filling the same at Industrial Court, the Court was properly seized of the matter to arbitrate on the terminal benefits owing, the retirement benefits and the circumstances of the termination as being fair or unfair.

10. The act of the petitioners withdrawing from that claim and by filing this petition even where the court had jurisdiction amounted to a case of duplicity. The court had a duty to put into context other pending suits or claims against similar parties over the same subject matter or cause of action.

11. The Petitioner should have pursued their claim before the court as filed in Cause No. 1524 of 2011. By withdrawing that cause, they threw their rights away and could not redeem the damage by filing the present petition either by calling it a petition or a Plaint and not calling it a cause or a claim.

Petition dismissed.

Diversity in making appointments to the county offices does not connote a seat for each ethnic group

Mathew Lempurkel v Joshua Wakahora Iruungu & 2 others

Petition No 279 of 2013
High Court of Kenya at Nairobi
D S Majanja J
July 15, 2013

Reported by Njeri Githang’a Kamau & Victor Anande

Issues

I. Whether appointments to the county assembly had to ensure allocation of a seat to each ethnic group.

II. Whether the court could make a decision on a person’s ethnic identity where such a person was not a party to the proceedings.

Constitutional Law – appointments to the county assembly – appointment of county executive – procedure for making such appointments under the Constitution – where the petitioners alleged that the list did not consider regional balance and ethnicity – whether in the circumstances the constitutional requirements of inclusiveness and diversity were breached – the constitution of Kenya, 2010, articles 10 & 232, County Government Act (Act No. 17 of 2012), section 35(1)

Held

1. The governor had the ultimate responsibility to make appointments through a transparent process. Interrogation of integrity and technical competence of the individual was just but a facet on the duty of the governor and the County Assembly. They had to direct their minds to inclusiveness and diversity and the process had to lend itself to meeting this outcome.

2. However hard the task of making appointments, the constitutional obligation remained. This involved adopting a process that was rationally connected to meet the outcome of the diversity. Such a process did not demand a seat for each community nor did it require the use of mathematical precision to allocate seats. What was required was a process that showed that all these factors were taken into account and that the end product was rational in light of the constitutional objectives.
3. It was also important to recognize that the process of nomination, appointment and vetting was intended to ensure that constitutional objectives were met. Each body along the process was thus supposed to consider the factors necessary to meet the constitutional threshold for appointment. All these bodies had a margin of discretion in exercising their authority (Community Advocacy Awareness Trust and Others v Attorney General Nairobi Petition No. 243 of 2011 [2012] eKLR).

4. A person’s ethnicity was a fundamental issue of identity and in making a decision about such identity, the person ought to have been given an opportunity to be heard and to assert her own identity. The appointee to the Executive Council was not joined as a party and to proceed to inquire into her ethnic identity without her participation in the proceedings would constitute a fundamental breach of her right to be heard (Pashito Holdings & another v Ndung’u & 2 others KLR [E &L] 1, 295).

Petition dismissed with no order as to costs.

Original jurisdiction of subordinate courts as relates to marriages contracted under the African Christian Marriage and Divorce Act (Cap. 151)

E W M v DR. P M
Divorce Cause No. 37 of 2012
High Court of Kenya at Milimani
W. M. Musyoka, J
June 27, 2013
Reported by Beryl A. Ikamari

Issues

I. Whether the High Court had jurisdiction to hear and determine petitions which concerned marriages contracted under the African Christian Marriage and Divorce Act (Cap. 151).

II. Whether a subordinate court, pursuant to the provisions of the African Christian Marriage and Divorce Act (Cap. 151) and the Matrimonial Causes Act (Cap. 152), had jurisdiction to grant reliefs relating to co-ownership of matrimonial property.

III. Whether pecuniary considerations could oust the jurisdiction of a subordinate court to hear and determine petitions which concerned marriages contracted under the African Christian Marriage and Divorce Act (Cap. 151).

Family Law-jurisdiction-jurisdiction of the High Court-separation-petition for separation for a marriage contracted under the African Christian Marriage and Divorce Act—whether the High Court had original jurisdiction to grant orders of separation in relation to a marriage contracted under the African Christian Marriage and Divorce Act-African Christian Marriage

and Divorce Act (Cap. 151); section 14, and the Matrimonial Causes Act (Cap. 152); section 3.

Family Law-jurisdiction-jurisdiction of subordinate courts-petition for separation-petition for separation for a marriage contracted under the African Christian Marriage and Divorce Act—whether pecuniary limits, based on the value of matrimonial property, could oust the jurisdiction of a subordinate court to hear and determine a suit for separation with respect to a marriage contracted under the African Christian Marriage and Divorce Act—Civil Procedure Act (Cap. 21); section 11.

Family Law-jurisdiction-jurisdiction of subordinate courts-matrimonial property-division of matrimonial property-prayer for the remedy of joint ownership of property—whether a subordinate court could grant relief entailing joint ownership of matrimonial property with respect to the dissolution of a marriage contracted under the African Christian Marriage and Divorce Act—Matrimonial Causes Act (Cap. 152); section 27 & 28, and Married Women’s Property Act, 1882; section 17.

Held:

1. Pursuant to section 14 of the African Christian
Marriage and Divorce Act (Cap. 151) as read with section 3 of the Matrimonial Causes Act (Cap. 152), jurisdiction as concerned petitions for marriages contracted under the African Christian Marriage and Divorce Act (Cap. 151) was vested in the subordinate court of the first class.

2. The High Court had appellate jurisdiction over petitions related to marriages contracted under the African Christian Marriage and Divorce Act (Cap. 151) but it did not have original jurisdiction to hear such petitions.

3. Sections 27 and 28 of the Matrimonial Causes Act (Cap. 152) did not provide for the grant of reliefs relating the co-ownership of matrimonial property by a subordinate court.

For such purposes, proceedings under section 17 of the Married Women’s Property Act, 1882 would have to be brought.

4. Pecuniary limits, based on the value of the subject matter, would not apply where a suit took the form of a matrimonial cause as opposed to a civil suit. Matrimonial causes were governed by the provisions of special legislation and therefore, the Civil Procedure Act (Cap. 21) and the Civil Procedure Rules, 2010, and particularly section 11 of the Civil Procedure Act (Cap. 21), would not apply to such causes.

Preliminary objection upheld; petition struck out.

Scope and Procedure of Enhancing a Sentence in Criminal proceedings

JW v R
Criminal Appeal No. 11 of 2011
Court of Appeal at Kisumu
J W Onyango Otieno, F Azangalala & S Kantai, JJ.A
July 12, 2013
Reported by Mercy Ombima

Brief Facts
The Appellant and another person had been charged in the trial court with the offence of murder but they were found to be guilty of manslaughter and were sentenced to serve imprisonment of a term of seven (7) years. The Appellant, dissatisfied with both the conviction and sentence, appealed to the High Court but the High Court enhanced the sentence of the Appellant to ten (10) years imprisonment despite the fact that the State had neither filed a cross-appeal nor had it sought enhancement of the sentence during the hearing of the appeal. The court also did not warn the Appellant that the sentence of seven (7) years would be enhanced. The Appellant made a second appeal to the Court of Appeal for reinstatement of the term ordered by the trial court by alleging that the High Court did not have jurisdiction to enhance a sentence where a cross appeal had not been filed and where the Appellant had not been warned.

Issues
I. What constitutes a Notice of Appeal?
II. Whether appellate courts had jurisdiction to entertain memoranda and submissions challenging convictions in the appeals against sentence.

III. What is the procedure for enhancing a sentence in criminal cases?

IV. Whether it was proper for an appellate court to enhance a sentence which had not been appealed against.

Criminal Procedure - sentencing - enhancement of sentence - circumstances in which an appeal court can enhance a sentence – second appeal against enhancement of sentence of the appellate High Court – where the high Court enhanced the sentence on the first appeal - where the High Court did not inform the Appellant of the possibility of his sentence being enhanced – where the State had not sought enhancement of sentence during the hearing of the appeal - whether enhancement of the sentence was proper – Constitution of Kenya Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 rule 59 (2), Criminal Procedure Code Cap
4. The court in enhancing a sentence already awarded was required to be aware that its action in so doing was likely to have serious effects on an appellant. Because of such a situation, it was a requirement that the Appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence was likely to be enhanced. Oftentimes that information was conveyed by the prosecution filing a cross appeal in which it would seek enhancement of the sentence and that cross appeal was served upon the Appellant in good time to enable him prepare for that eventuality.

5. The second way of conveying that information was by the court warning the Appellant or informing the Appellant that if his appeal did not succeed on conviction, the sentence was likely to be enhanced or if the appeal was on sentence only, by warning him that he risked an enhanced sentence at the end of the hearing of his appeal.

6. The prosecution had not urged enhancement of sentence and did not file cross appeal to that effect. The court did not warn the Appellant of that possibility or in any case there was no record of such a warning if any was issued; yet all of a sudden, in the judgment, the learned judge enhanced the sentence from seven years to ten (10) years. The need for prior information to be given to the Appellant in such a situation was to enable him to prepare and argue his side of the case as regards such intended enhancement.

7. The enhancement of the Appellant’s sentence to ten (10) years was done without affording him opportunity of persuading the court against such a proposal. Save for a small part in passing, the Appellant did not specifically appeal against sentence in that court and hence the need to inform him of the possibility of enhancing the sentence. The enhanced sentence was therefore unlawful.

Appeal Allowed
Scope of taxing master in calculating instruction fees

Grace Wangui Ngenye V Wilfred Kiboro & another
HCCC No. 847 of 2005
(As consolidated with)
Grace Wangui Ngenye V Wilfred Kiboro & another HCCC No. 1008 of 2005
High Court of Kenya at Nairobi
R E Ougo, J
May 22, 2013
Reported by Mercy Ombima

Brief Facts
The Plaintiff had filed two separate bills for taxation after a joint judgment for the sum of Ksh. 3,500,000/= had been entered, in relation to two defamation suits that had been consolidated into one suit by consent of parties to the dispute. The taxing master had gone ahead and awarded instruction fees in both cases. The Applicant (the Defendant) sought court orders to set aside the award on the ground that it had been erroneously assessed. The Applicant also disputed the taxing master’s reasons for enhancing instruction fees whereby the taxing master had considered issues such as the importance of the plaintiff and the threat of the Defendant’s publications to the Plaintiff’s career and livelihood.

Taxation of costs - advocate and client costs - application to set aside the tax master’s award of costs - where the taxing master assessed the advocates fees based on two separate suits that had been consolidated into one suit – claim that each suit should not have attracted distinct advocate’s instructions - whether the taxing master exercised his mandate appropriately - Advocates Remuneration Order 2009 Rule 11(2)

Issues
I. What was the proper procedure of assessing advocates fees for consolidated suits?
II. What was the scope of a taxing master’s mandate to award getting up fees?

Held

1. Costs of consolidated suits were to be apportioned when it came to instruction fees. The taxing master had awarded instruction fees on the basis of the award of Kshs 3,500,000/= on each suit which in essence amounted to Kshs 7,000,000/= and in so doing, he had paid the plaintiff twice the award given by the judge. That amounted to unjust enrichment bearing in mind that the suits had been consolidated.

2. On getting up fees, since counsel had prepared for the hearing for one suit after the consolidation, the item was to be taxed once. The taxing master had gone out of his way in considering extraneous matters in awarding instruction fees. What he had considered were views that should have been expressed during the trial.

3. The Advocate’s Remuneration Order allowed the taxing master, when considering instruction fees to consider the nature or importance of the matter, the amount or value of the subject matter involved; the interest of the parties, complexity of the matter and all circumstances of the case. In that matter the court had given gave an award of Kshs 3,500,000/= which was the amount to be considered when taxing those bills of costs. The taxing master had therefore misdirected himself in considering the status of the plaintiff to the extent that he did, yet the same had been extensively considered in the judgment.

Application allowed
Scope of the applicability of the Evidence Act on cross-examination of witnesses in election petitions

M’NkiriaPetkayShenMiriti vRangwa Samuel Mbae& 2 Others
Election Petition No.4 of 2013
J. LESIIT, J
July 15, 2013
Reported by Lynette A. Jakakimba

Brief facts
The petitioner’s counsel sought to cross examine the respondent’s witness on polling stations not specifically mentioned in the petition and petitioner’s affidavit in support of the petition. The respondents opposed the attempt by the petitioner’s counsel to cross examine on the polling stations not mentioned, as it would prejudice the respondents who had filed their responses on the basis of filed petition and affidavits in support therein.

Issues
i. Whether a petitioner could be allowed to introduce new evidence which was not specifically raised in the pleadings, through cross examination.

ii. What was the scope of the applicability of section 153 of the Evidence Act on cross examination of witnesses, in election petitions.

Election Law – election petition – additional evidence – introduction of additional evidence through cross examination – applicability of section 153 of the Evidence Act on cross examination of witnesses, in election petitions — where a petitioner’s counsel sought to cross examine the respondents witness on a polling Station not mentioned in the petition — Evidence Act section153 – Elections (Parliamentary And County Elections) Petition Rules rule 17

Elections (Parliamentary and County Elections) Petition Rules

Rule 17
(1) Within seven days after the receipt of the last response to a Petition, the court shall schedule a pre-trial conference with the parties in which it shall—
(a)
(b)
(c)
(d)
(e)
(f)
(g)

(i) give directions as to the filing and serving of any further affidavits or the giving of additional evidence

Section 153 of the Evidence Act provided that:
A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict a witness by a previous written statement, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Held
1. Section 153 of the Evidence Act related to cross examination of witnesses on statements made by them in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict a witness by a previous written statement, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

2. The scope of the applicability of the Evidence Act in election petitions was confined to the extent dictated by the provisions of the Elections Act and subsidiary legislation made thereunder.

3. The Elections Act and Rules, specifically removed the discretion of the court to allow solicitation of issues outside those raised in the pleadings and or issues for determination themselves. A party who wished to introduce new issues other than those pleaded had to be guided by the Election Rules. Applications to file additional evidence outside the period provided under the Election Rules was not allowed, unless the application was made and the court was minded to extend the period of introducing the evidence.

4. A party could not be allowed to introduce new evidence which were not specifically raised in the pleadings, through cross examination contests. The reason being Election Petitions were limited in
5. The petitioner could not have a free hand to cross examine on polling stations outside those specified in the petitioner’s pleadings. He could not argue that those polling stations were implied in his pleadings, given the general language used in the pleadings. What was implied in the pleadings was not specified as required in the Election laws and could not be considered by the court, as the court had no jurisdiction to do so.

The Petitioner was free to cross examine the witnesses presented but he could not be allowed to introduce new contests in polling stations outside those specified in the pleadings.

Officers of the National Assembly cannot be enjoined in proceedings to challenge the TJRC report.

**Njenga Mwangi & another V. Truth, Justice and Reconciliation Commission & 4 others**

Petition No. 286 of 2013
High Court of Kenya at Nairobi
July 16, 2013
Isaac Lenaola, J

*Reported by Nelson K. Tunoi & Beatrice Manyal*

**Brief Facts:**

The Petitioners commenced these proceedings by a petition wherein they sought inter-alia various declarations claiming that their constitutional rights had been violated. They also sought orders restraining the 3rd, 4th and 5th respondents from tabling or admitting into the National Assembly, the Report of the Truth Justice and Reconciliation Commission (TJRC)(1st respondent) until all the recommendations contained in the 1st respondent’s draft were expunged; and also for an order to prohibit the 2nd respondent from operationalizing the implementation mechanisms recommended by the 1st respondent and for an order prohibiting the 2nd, 3rd, 4th and 5th respondents from reporting to the National Assembly as to the implementation of the Report.

**Issues:**

i. Whether the Officers of the National Assembly were properly enjoined in the proceedings owing to the issue of Parliamentary privilege

ii. Whether the High Court lacked jurisdiction to hear the application filed against the Officers of the National Assembly in respect of acts of their respective offices in exercise of the powers conferred and vested in them by the Constitution of Kenya, the National Assembly Powers and Privileges Act and the Standing Orders.

iii. Whether the petitioners had other available avenues to ventilate their concerns regarding the Truth Justice and Reconciliation Report application thus rendering the application premature.

**Constitutional law**—whether the Officers of the National Assembly were properly enjoined in the proceedings owing to the issue of Parliamentary privilege—whether the High Court lacked jurisdiction to hear the application—where the application was filed against the Speaker of the National Assembly, the Clerk of the National Assembly and the leader of the Majority Party in respect of acts of their respective offices in exercise of the powers conferred and vested in them by the Constitution of Kenya, the National Assembly Powers and Privileges Act and the Standing Orders—whether the application was premature—where the applicants claimed that the petitioners had not exhausted all available avenues to ventilate their concerns regarding the Truth Justice and Reconciliation Report—Constitution of Kenya, 2010 article 165(3) (d); National Assembly (Powers and Privileges Act) (Cap.6), section 29.

**Held:**

1. Under section 29 of the National Assembly Powers and Privileges Act (Cap.6), courts could not exercise jurisdiction in respect of acts of the Speaker and other Officers of the National Assembly. However, under article 165(3) (d) of the Constitution, the High Court could enquire into any unconstitutional
actions on their part.

2. The role of the National Assembly with regard to the tabling of the report was clear. Section 48(1)(4) of the Truth Justice and Reconciliation Act provided that upon the TJRC compiling its report, it had to hand over the same to the President and there after the Minister was required to table the report to Parliament within twenty one days after its publication.

3. The petitioners did not demonstrate that the Officers of the National Assembly had anything to do with the tabling, operationalizing and final implementation of the report. The role of the Officers of the National Assembly was limited to receiving the report; they had no interest in the report per se or in its implementation thereof. They were thus wrongly enjoined.

4. The Minister in tabling the report in Parliament was merely performing messengerial services. He was not seeking the adoption of the Report nor any specific action by Parliament. Similarly, all other respondents had no specific role as regards the contents of the Report. In fact, in section 50 of the Act, the role of the National Assembly was limited to receiving periodic reports of the implementation of the Report and ensuring that any non-implementation was also reported to it, with reasons thereof. The tabling of the Report would cause no harm to the applicants. In any event; there was no reason why the other respondents were enjoined in these proceedings save for the 1st respondent.

5. There was no other avenue that the petitioners could use in having a determination as to whether their rights had been violated or at all save by proceedings filed in the High Court.

6. Article 22(1) enabled every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been violated. The jurisdiction of the High Court to determine the proceedings so instituted was found in article 23(1) of the Constitution. This Article provided that the High Court had the jurisdiction to hear and determine applications for redress of a denial, violation, or infringement of a right in the Bill of Rights. The same Article has provided for reliefs available to a person whose rights had been infringed. The jurisdiction to hear and determine the violation of fundamental rights as contained in the Bill of Rights was further provided for under article 165(1)(b) of the Constitution. This jurisdiction had not been disputed and the petition in so far as it alleged a violation of the fundamental rights and freedom was properly court.

Preliminary Objection upheld on one issue of law only and the 3rd, 4th and 5th Respondents struck out of the proceedings. ; Each party should bear its own costs.

EACJ dismisses case seeking to block the EAC secretariat from carrying out activities geared towards the realization of the East African Political Federation

Timothy Alvin Kahoho v Secretary General of the East African Community
Reference No 1 of 2012
East African Court of Justice, at Arusha
(First Instance Division)
Johnston Busingye, PJ, Mary Stella Arach- Amoko Deputy PJ, John Mkwawa,
Jean Bosco Butasi, Isaac Lenaola, JJ
May 17, 2013
Reported by Linda Awuor

Background:
On 30th November 2011, the Summit of the East African Community issued a Communiqué after meeting in Bujumbura, Burundi, where it stated that it approved the Protocol on Immunities and Privileges for the East African Community, its organs and Institutions for conclusion and that it considered and adopted the Report of the Team of Experts on fears, concerns and challenges on the Political Federation.
In an application filed on January 20, 2010, the applicant Mr. Timothy Alvin Kahoho, a citizen of the United Republic of Tanzania sought to challenge the
Summit’s directives. Among the directives in question, was one to propose an action plan on and a draft model of the structure of the East African Political Federation, one on the conclusion of the protocol on immunities and privileges for the East African Community, its Organs and Institutions, one on producing a roadmap for establishment and strengthening of institutions identified by a team of experts as critical for the functioning of the Customs Union, Common Market and Monetary Union and one on formulation of an action plan for the purpose of operationalising the other recommendations in a report of a team of experts. In the Applicant’s view, these directives were an infringement of Article 11 (5) of the EAC Treaty, which provides that while the EAC’s supreme Organ may delegate the exercise of any of its functions to one of its own, the Council of Ministers or to the Secretary General, there is no provision for the Summit to give directives to the Secretariat.

Mr. Kahoho argued that it was only the Council of Ministers and Partner States that could spearhead the process of establishment of the Political Federation and not the Secretariat as was directed by the 13th Summit. He further told the Court, that his application was in the interest of all citizens of East Africa, who he asserted stand to benefit from adherence to Treaty provisions by the Summit, the Council and the Partner States.

**Issues:**

i. Whether the 13th Summit decisions as set out in paragraph 6 of its Communiqué issued on 30th November 2011 in the Republic of Burundi approving the Protocol on Immunities and Privileges contravened Articles 73, 138 and 151 of the Treaty providing for immunity of persons employed in the East African Community;

ii. Whether the 13th Summit of the Heads of States’ decision to mandate the Secretariat to undertake Protocol on Immunities and Privileges for the East African Community, its organs and Institutions for conclusion was in contravention – treaty for the establishment of the East African Community articles 6, 7 and 123(6).

International Law – Interpretation of Treaty – role of the Secretariat in the East African Community− whether the Secretariat can contribute towards the establishment of a Political Federation of the Partner States – whether the 13th Summit of the Heads of States’ decision to mandate the secretariat to undertake Protocol on Immunities and Privileges for the East African Community, its organs and Institutions for conclusion was in contravention – treaty for the establishment of the East African Community articles 6, 7 and 123(6).

iii. Whether the process towards the establishment of a Political Federation of the Partner States is an exclusive preserve of the Council to which the Secretariat cannot contribute.

iv. Whether the conclusion of Protocols is only permissible where the Treaty specifically provides for areas of co-operation.

v. Whether the Applicant was entitled to the prayers sought

International law – treaty for the establishment of the East African Community –whether fast-tracking the Political Federation without finalizing the Customs Union, Common Market and Monetary Union and without consulting citizens of the partner states would be a violation of the treaty – Treaty for the establishment of the East African Community, articles 6, 7 and 123 (6).

International law – interpretation of treaty – areas of co-operation – what amounts to areas of cooperation under the treaty – proposed protocol on Immunities and Privileges for the East African Community – whether privileges and immunities amount to areas of co-operation under article 138 of the treaty – treaty for the establishment of the East African Community articles 73, 138 and 151.

International Law – Interpretation of Treaty – role of the Secretariat in the East African Community– whether the Secretariat can contribute towards the establishment of a Political Federation of the Partner States – whether the 13th Summit of the Heads of States’ decision to mandate the secretariat to undertake Protocol on Immunities and Privileges for the East African Community, its organs and Institutions for conclusion was in contravention – treaty for the establishment of the East African Community articles 6, 7 and 123(6).

**Treaty for the establishment of the East African Community**

**Article 73 – (1) Persons employed in the service of the Community:**

(a) Shall be immune from civil process with respect to omissions or acts performed by them in their official capacity; and

(b) Shall be accorded immunities from immigration restrictions and alien registration.

(2) Experts or consultants rendering services to the Community and delegates of the Partner States while performing services to the Community or while in transit in the Partner States to perform the services of the
Community shall be accorded such immunities and privileges in the Partner States as the Council may determine.

Article 138 – (1) The Community shall enjoy international legal personality.
(2) The Secretary General shall conclude with the Governments of the Partner States in whose territory the headquarters or offices of the Community shall be situated, agreements relating to the privileges and immunities to be recognized and granted in connection with the Community.
(3) Each of the Partner States undertakes to accord to the Community and its officers the privileges and immunities accorded to similar international organizations in its territory.

Article 151 – (1) The Partner States shall conclude such Protocols as may be necessary in each area of co-operation which shall spell out the objectives and scope of, and institutional mechanisms for co-operation and integration.
(2) Each Protocol shall be affirmed by the Summit on the recommendation of the Council.
(3) Each Protocol shall be subject to signature and ratifications of the parties hereto.
(4) The annexes and Protocols to this Treaty shall form an integral part of this Treaty

Held:
1. The conclusion of any protocol is at the instance and discretion of the summit where it deems such an action necessary to achieve the objectives of the community. Article 151(4) specifically provides that once concluded, a protocol becomes an integral part of the treaty. Integral means that it becomes a necessary part of the treaty and supplements it in the operationalisation of the area of co-operation that it is meant to address.
2. The language, structure and import of the proposed protocol, is in line with the harmonization, functioning, development and furtherance of the objectives of the community and the implementation of the provisions of the treaty and there are no inconsistencies therein.
3. The execution of any agreement under article 138(2) is not an ouster of the provision for conclusion of a protocol under article 151 where the situation so demands. The treaty provisions must be read as complimentary to each other and none should be seen as independent and in conflict with another. To argue otherwise, would lead to a legal absurdity and a negation of the principle that the treaty must be interpreted as a whole and not selectively to suit a set purpose.
4. The proposed protocol was not wholly about staff immunities and privileges. Article 138 could clearly create an area of cooperation to which a protocol could properly be concluded under article 151 of the treaty.
5. Article 131 was enacted to reduce frequent amendments of the treaty whenever a new area of co-operation arises and which cannot otherwise be managed outside existing provisions of the treaty. The issues arising from article 138 aforesaid fit that reasoning perfectly.
6. Articles 11,14,18,21 and 71 of the treaty, which create the functions of the organs of the community, provide that the secretariat is the only organ created by article 9 of the treaty to steer the ship of integration by implementing decisions of all the other organs and its crucial role thereby ought to be recognized and supported. The summit can direct the secretariat as well as the council in matters relating to the implementation of the treaty. Whether in one instance it directs one and later the other, is not in any way a breach of the treaty. These organs must all work in tandem towards the attainment of the objectives of the community and there is no error that was rectified when the summit acted as it did in the 14th summit.
7. Neither in the reference nor in submissions, written and oral, was the sum of US$ 60,000 justified or proved. The oral claim that because of the Communiqué, the applicant suffered high blood pressure and was therefore entitled to compensation was not sufficient evidence that the applicant was lawfully entitled to the said sum.

Reference dismissed and each party to bear its own costs.
EACJ faults treaty amendment but upholds dispute settlement mechanisms under the Common Market and Customs Union Protocols

The East African Centre for Trade Policy and Law v Secretary General of the East African Community
Reference No 9 of 2012
East African Court of Justice, at Arusha
(First Instance Division)
Johnston Busingye, PJ, Mary Stella Arach-Amoko Deputy PJ, John Mkwawa,
Jean Bosco Butasi, Isaac Lenaola, JJ
May 9, 2013
Reported by Linda Awuor

Background:
On 30th November 1999, the heads of state of Kenya, Uganda and Tanzania signed the Treaty for the Establishment of The East African Community. The Treaty entered into force on 7th July 2000. Article 9(e) established the East African Court of Justice (hereinafter referred to as “the EACJ”), as one of the organs of the Community. Article 23 of the treaty stipulated the role of the Court. The Applicant states that, during the course of its work, it discovered that the East African Community Summit had amended Chapter 8 of the treaty in particular, by introducing a proviso to article 27(1) and creating article 30(3) and had also concluded the East African Community Customs Union Protocol and the East African Community Common Market Protocol.

The applicant brought the reference arguing that the amendments to the Treaty and the dispute settlement mechanisms provided for in the two protocols, deny original jurisdiction to the EACJ, from handling disputes arising from the protocols contrary to the expectations of the treaty and that in as far as they limit/out the jurisdiction of the EACJ, were contrary to the provisions of the treaty.

Issues:

i. Whether the amendment of the treaty to introduce a proviso to article 27(1) and article 30(3) was inconsistent with or in contravention of articles 5, 6, 8(1), (4) & (5), 23, 27(1), 30(1),(3) 33(2) and 126 of the treaty.

ii. Whether the Customs Union Protocol and the Common Market Protocol in as far as they do not grant the East African Court of Justice jurisdiction of handling disputes arising from the implementation of these protocols infringe articles 5, 6, 8(1), (4) & (5), 23, 27(1), 30(1),(3) 33(2) and 126 of the treaty.

iii. Whether the applicant was entitled to the declarations sought.

International law – jurisdiction – jurisdiction of the East Africa Court of Justice – effect of amendment to article 30(3) of the Treaty – whether an institution of a partner state can handle references brought by legal or natural persons directly – whether the amendment of the treaty to introduce a proviso to article 27(1) and article 30(3) was inconsistent with the functional and operational principles of the treaty – Treaty for the Establishment of the East African Community articles 5, 6, 8(1),4 & (5), 23,33(2) and 126.

International law – interpretation of Treaty – Treaty for the establishment of the East African Community – whether provisions of the Common Market Protocol and the Customs Union Protocol conferring jurisdiction upon national judicial, administrative or legislative authorities were in contravention of the Treaty – articles 8(1)(a) and (c), 27(1), 33(2) and 38(1) and (2) of the treaty and articles 24(1)(e) of the Protocol Establishing the East African Community Customs Union and article 54(2) of the Protocol for the Establishment of the East African Community Common Market.

Treaty for the establishment of the East African Community

Article 27 – (1) The court shall initially have jurisdiction over the interpretation and application of this Treaty:
Provided that the court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.
institution of a partner state can now handle references brought by legal or natural persons directly, under article 30 of the treaty, if such jurisdiction is conferred on it by a partner state. This is likely to undermine the jurisdiction of the EACJ, since the EACJ will be powerless over such institutions. It is thus inconsistent with the object and the spirit of the treaty in the articles mentioned in this reference.

5. The court has the role and jurisdiction to interpret and apply the provisions of the two protocols as well, pursuant to the court’s jurisdiction under articles 23 read together with article 27(1) of the treaty. The provisions of the protocols did not oust the jurisdiction of the EACJ from handling disputes arising from the implementation of the said protocols.

6. It is clear from article 54(1) that disputes between partner states over the interpretation of the treaty remain governed by the treaty, which means that this court is primarily the one vested with jurisdiction over such disputes. This means that the protocol does not oust the jurisdiction of the court entirely.

7. The Common Market Protocol affords under article 54(2) opportunity to persons who feel that their liberties recognized under the protocol have been infringed upon by persons acting in their official capacities, to seek redress from their competent judicial, administrative, legislative or other authorities. While this would appear as if it is a parallel dispute resolution mechanism under the treaty these dispute resolution mechanisms are merely alternative dispute resolution mechanisms intended for the speedy and effective resolution of trade disputes by experts in technical and specialized areas.

8. The EACJ is an organ of the community established under Article 9 of the Treaty. For that reason, the EACJ takes precedence over national courts or institutions on matters pertaining to the implementation of the treaty, specifically, and with regard to the requirement of harmonization of activities in legal and judicial affairs under article 126, the amendments and the establishment of specific dispute settlement mechanisms was unlikely to have any adverse bearing on the court’s discharge of its functions as provided for under

Held:

1. Although the EACJ had the primacy and supremacy over the interpretation of the treaty, article 33 of the treaty, which is entitled “Jurisdiction of National Courts”, indicated that national courts also had some form of jurisdiction in interpretation of the treaty even before the impugned amendments. The jurisdiction of the EACJ was, prior to the impugned amendments, wide and unlimited.

2. There was a legal vacuum created by the delay in concluding the protocol for the extended jurisdiction of the EACJ, and the amendments did not fill the same. The act of amending the treaty in article 27(2) and 30(3) was actually inconsistent with the treaty, since it was retrogressive and did not fill the vacuum created by article 27(2).

3. Although the impugned amendments did not take away or oust the jurisdiction of the EACJ, they undermined the supremacy of the EACJ as the judicial body whose responsibility is to ensure adherence to law in the interpretation of the treaty as per article 23. Great caution and restraint ought to have been exercised by the Partner States in introducing the impugned amendments because the dream of the framers of the treaty was clearly that the interpretation of the treaty was to be a preserve of the community’s judicial body, namely, the EACJ.

4. The amendment to article 27(1) created a window for the amendment of the treaty or conclusion of protocols conferring the jurisdiction to interpret the treaty on organs of partner states to the exclusion of the EACJ. The amendment to article 30(3) indicates that an
article 23(1) and 27(1) of the treaty

9. The EACJ derives its jurisdiction from article 23 and the original article 27(1) of the treaty which includes all annexes and protocols negotiated to implement the treaty. As such, there was no vacuum as far as the jurisdiction of the court is concerned. The mechanisms were created for administrative expediency, and if any vacuum exists in the treaty then it is the absence of the protocol for the extended jurisdiction of the EACJ more than a decade after the conclusion of the treaty

10. The dispute resolution mechanisms under the two protocols do not jeopardize in any way the achievements and objectives of the treaty, given that articles 33(2) and 34 may cure any conflicting interpretation by national courts or tribunals since the court’s decision will prevail over the ones of national courts over similar issues.

11. The proviso to article 27(1) and article 30(3) of the treaty undermine the supremacy of the EACJ and therefore contravene articles 5, 6, 8(1), (4) & (5) and 23 of the treaty. The dispute settlement mechanisms provided for under the Customs Union and the Common Market Protocol do not oust the original jurisdiction of the court of handling disputes there under.

Reference partially succeeded in issue No 1, but did not make out a case of infringement of the treaty provisions mentioned in issue No 2. Each party to bear its costs, since the reference was public interest litigation
Special Miscellaneous Application No. 1 of 2013 – Tribute for the Late Departed Senior Advocates.

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT MOMBASA
SPECIAL MISCELLANEOUS APPLICATION NO. 1 OF 2013
TRIBUTE FOR THE LATE DEPARTED SENIOR ADVOCATES

IN THE MATTER OF:
1. INAMDAR INDRAVADAN TRIBHOVANDAS
2. CHUDASAMA NARBHERAM JESANG
3. SHYAMSUNDER PURUSHOTTAM MASTER
4. HAMZAALI ABBASBHAI TAIBJI ANJARWALLA
5. NAVINCHANDRA MOHANLAL DOSHI
6. JAMES GATHUKU KAMANJA
7. SYED KASSIM SHAH


• Mr. Eric Nyongesa Wafula, The Chairman Mombasa Law Society.

Law Society Representatives:
• Samir Inamdar for the late Inamdar Indravadan Tribhovandas
• Anil Suchak for the late Chudasama Narbheram Jesang
• K. M. Karimbhai for the late Navinchandra Mohanlal Doshi
• C. B. Gor for the late Hamzaali Abbasbhai Taibji Anjarwalla
• Ushwin Khanna for the late Shyamsunder Purushottam Master
• Dr. John Khaminwa for the late James Gathuku Kamanja
• Suhasini Gudka for the late Syed Kassim Shah

In Attendance:
• Hon. S. Mukunya – Land & Environment Court Judge
• Hon. S. Radido – Industrial Court Judge
• Hon. O. Makau – Industrial Court Judge
• Hon. M. Muya – High Court Judge
• Hon. S. Riechi – Chief Magistrate, Mombasa Law Courts
• All Magistrates Mombasa Law Courts.
• Professor Githu Muingai, EGH, SC. – The

CORAM:
Before: The Hon. The Chief Justice Dr Willy Mutunga, D. Jur., S.C., E.G.H.
The Chief Justice/ President of The Supreme Court of Kenya
Hon. Smokin Wanjala – Supreme Court Judge
Hon. Erastus Githinji – Court of Appeal Judge
Hon. Maureen Odero – Resident Judge, High Court Mombasa

Court Clerks:
• Cyrus Mutisya
• Benta Biwott

Stenographers:
• Evalyne Odongo
• Willis Oluga

Members of the families of:
1. Inamdar Indravadan Tribhovandas
2. Chudasama Narbheram Jesang
3. Shyamsunder Purushottam Master
4. Hamzaali Abbasbhai Taibji Anjarwalla
endeavors to enrich the legal profession. They generated a work ethic that continues to inspire the lawyers and pupils we train today. It is only befitting that their tribute should be placed in the court record.

Our esteemed colleagues will long be remembered as trailblazers, first among equals, inspiration to many, being the pioneer legal practitioners at the coastal region, who endeavored to develop the legal profession and made immense contribution to the legal jurisprudence. They were among the first Kenyans to travel abroad to study law and later would return, choosing to throw their weight behind a young country and profession, and this country is the better for it.

The seven gentlemen that we are paying tribute to will be remembered as being pivotal in the growth and success of the Mombasa Bar, through their tireless contribution towards the same. Our distinguished colleagues gave hours of selfless service to make this and the whole of the Kenyan Bar what it is today.

This will also be remembered as mentors to the young lawyers whom they habitually trained and mentored through the pupillage programme as well as moulding them to be the good advocates they are today.

I urge the young advocates present to emulate these seven great men who have left an indelible mark in their pursuit of their legal careers.

On behalf of the entire staff at the State Law Office, the entire legal fraternity of which I am the titular head and on my own behalf, I extend my very sincere condolence to the family, friends and colleagues of our dearly departed.

I thank you.

MR. ERIC NYONGESA WAFULA

My Lords,

The Hon. Chief Justice of the Republic of Kenya, Dr. Willy Mutunga, the Hon. Judge of the Supreme Court, Justice Dr. Smokin Wanjala, the Hon. Judge of the Court of Appeal Justice Erastus Githinji, the Resident Judge of the High Court of Kenya at Mombasa, Justice Maureen Odero, the Judges of the High Court, the Industrial Court, Land and Environment Court, the Chief Magistrate Hon. Stephen Riechi, the Magistrates
present, the Hon. Attorney General of the Republic of Kenya, Prof. Githu Muigai, the Council Members of the Mombasa Law Society, the families of the departed Senior Advocates, the members of the legal fraternity present, Ladies and Gentlemen.

We are honoured to be invited by the Hon. the Chief Justice of the Republic of Kenya, Dr. Willy Mutunga to deliver an address at today's Special Court Session in honour of our departed Senior colleagues.

We are gathered here to pay tribute to the memory of Seven (7) of our Learned Friends and Colleagues who left us and passed on at different times in the course of last year, 2012, specifically:-

1. The Late Inamdar Indravadan Tribhovandas on 24th August, 2012;
2. Chudasama Narbheram Jesang on 4th August, 2012;
3. Navinchandra Mohanlal Doshi on 16th April, 2012;
4. Hamzaali Abbassbhai Taibji Anjarwalla on 28th June, 2012;
5. Shyamsunder Purushottam Master on 1st August, 2012;
6. James Gathuku Kamanja on 6th October, 2012; and
7. Syed Kassim Shah on 2nd August, 2012;

My Lords on behalf of the Council and the members of Mombasa Law Society, I wish to fully associate myself with the sentiments and tribute expressed by the Hon. Attorney General, Prof Githu Muigai in respect of each of the departed Counsels so named.

For each of them, I wish to convey our deepest sense of loss and our condolences to the respective Family so sadly left behind.

I believe the year 2012 could from the view point of human calamity witnessed in the law family be called the Year of the Flight of the Great Ones. In the month of August, 2012 we lost four (4) Advocates and that had a chilling effect on me and my entire Council members. I thought the cycles of life were getting shorter and that there could be possibly less time for us in the legal fraternity than I had thought. The departed Senior Advocates being honoured today had at of their demise practiced for periods ranging from 32 years at minimum to 65 years and were all in practice at the time of death.

As humans and for the love we shared together with them, their demise was a painful affliction on us. Nonetheless, we ought to be saying “Glory be to God” given all their separate great achievements and values as outstanding family men, distinguished legal practitioners and patriots.

They made great strides and excelled in their professional and socio-economic lives through rewards for their legitimate self-endeavors, sacrifices, diligence, commitments, brilliance, integrity, erudition and perfectionism. They in spite of their success remained very humane and persons of good humour who were easily acknowledged as legal icons and role models par excellence.

The men we have all gathered to honour were to many legal practitioners larger than life and indeed legends. They were by their training and discipline Advocates of rare distinction. They had easily distinguished and proven themselves as oracles. Through their dint of hard work and dedication to practice they easily stood out as Senior Advocates to reckon with.

My Lords, I did not have the privilege of knowing Mr. Inamdar Indravadan Tribhovandas and Mr. Chudasama Narbheram Jesang at close quarters, but I take particular note of each of their respective background from their contribution to the legal practice and development of jurisprudence from the various reported matters handled separately by each of them and the contribution of each of them to the Law Society during the duration of their practice. I am particularly saddened that they passed away at a time when they could have still contributed much more to the legal profession and how I wish any one of them had found time to immortalize their deeply rich experience in the legal practice for the posterity of the profession. We all knew in the legal profession that Inamdar Indravadan Tribhovandas was easily one of the best Senior Advocates this nation has ever produced and was one Advocate who mesmerized opposing Counsel and even Judges with his brilliant submissions on the issue at hand, with remarkable power to recall and cite offhand relevant authorities to demolish opposition arguments. Chudasama had for the past several decades his hand on about 70% of the affidavits filed at the Law Courts in Mombasa.

However I did, My Lords, have the singular honour
and the singular privilege of having personally known the other five (5) departed Senior Advocates and with your Lordships’ permission I wish to say a few words on each of them:-

Navinchandra Mohanlal Doshi: Is the most Senior Advocate that amongst the departed colleagues that I encountered in a matter immediately subsequent to my admission to the Bar in 1998. In appreciation of the challenges I faced as a new Advocate and to avert my being taken advantage of by another fairly Senior Counsel appearing in the matter he advised me to adjourn the matter and to call at his chambers subsequently thereafter for advice. He gave me the Building Code. To me N.M. Doshi was an Advocate who did his best to live up to the philosophy of the law and the ideals of the legal profession, showing us the path of good will in the pursuit of justice.

Hamzaali Abbaspahi Taibji Anjarwalla: I had several matters with him and he believed in the settlement as opposed to unnecessary Court determination of disputes. Mr. H. A. T Anjarwalla was an Advocate who was ever courteous, ever calm and never making an issue of something unless there was an issue to be made. His quietly spoken demeanor masked a very intelligent, very determined and very skillful Advocate. He was a formidable opponent.

Shyamsunder Purushottam Master: We all recall S. P. Master as a disciplinarian and one who never hesitated to take a brief in professional negligence against errant colleagues. He always interacted freely with young Advocates whom he urged relentlessly to uphold virtues of honesty and hard work. He was a man of large intellect, large vision and wide interests, which interests extended to his exalted pass time as a musician with unmatched dexterity at his piano. He spoke in a distilled way with great charm and grace and always sticking close to those radical issues he had identified amongst practitioners. I could not help but admire him for his principles, the strength of his character and the depth of his conviction.

James Gathuku Kamanja: I met James Gathuku when I was a pupil chambering with Mr. Lumatete Muchai Walubengo and we became good friends as his chambers were in the same building with my Pupil-Master. Mr. Gathuku was urbane, disciplined and modest and unfailingly courteous. One outstanding attribute is whatever mode of dressing he wore, he appeared elegant. He taught me several unforgettable lessons, one of which has particularly guided me in practice, that is – cases are won or lost in chambers and not in Court. He maintained that briefs are not written in a vacuum, the authorities being the matrix of a good brief. Mr. Gathuku was independent of mind and of spirit in both thought and deed.

Syed Kassim Shah: Mr. Kassim Shah’s reputation for legal skill and legal knowledge was second to none. His reputation for industry and integrity was equally second to none. He was the epitome of efficiency in the case management and his brilliance earned him the respect of his peers throughout the length and breadth of the Country. He was home with any subject or discipline of law in his practice and he remains the greatest mind that the Judiciary never fully exploited and the best brains that the Judiciary ought to have retained following the short stint he served as a Commissioner of Assize at the High Court of Kenya, Mombasa.

I hasten your Lordships to make mention of the subject of tribute session we are holding today in honour of the departed Advocates and which tribute or reference as is generally known within the Common Wealth is an age-old one going back into time and into tradition held at the instance of passing on of a member of the Bar or of the Bench. Sometimes in the Nineties we almost lost it and indeed we lost it for many years. We the membership of Mombasa Law Society who love all our traditions, were grateful when it was revived in 2011 at the Special Tribute for the Late C. Kanji and Sadiq Ghalia.

Today with the departure of our above Seven (7) Senior Advocates they have re-opened for the Bar a past tradition that had been extinct for many years now.

My Lords, it is over 2 years since the last tribute was held in our Courts and with it ended one of the cherished traditions that set the legal profession apart from the other professions.

“The practice of references for deceased Judges and Advocates serve to remind us that we belong to one body with one objective, namely, the pursuit of Justice through the legal process. In that collective effort, governed by the unwritten rules of etiquette and tradition which are just as important as the written
ones, the death of one of us diminishes the whole, and so we gather to mourn the loss to pay tribute and remind ourselves that the journey must be made and the faith must be kept.” (Words of the President of the Malaysian Bar at Reference of Dato Ronald Khoo on 24.4.1998 at the Federal Court).

With your Lordships sitting in togetherness today from 3 differently ranked Courts in the Country is to us members of Mombasa Law Society of great meaning as it serves to remind us not just one of our cherished traditions but also indicates to the Bar your Lordships concern for the maintaining of that tradition and the bonding between the Bar and the Bench.

I extend to his Lordship the Hon. Chief Justice and the other Judges presiding with him the thanks and appreciation of the membership of Mombasa Law Society for this wonderfully meaning gesture.

I again convey to each family, on behalf of the Council and membership of Mombasa Law Society, our deepest sense of loss and sincere condolences.

May their Souls Rest in Peace.

SAMIR INAMDAR FOR THE LATE INAMDAR INDRAVADAN TRIBHOVANDAS

On behalf of my family present here today in the form of my mother who has traveled in for this occasion from Nairobi, my uncle and senior partner of the firm of Inamdar and Inamdar, who has also traveled in from Nairobi, and my wife and son, I would at the outset express my sincere thanks to the Chief Justice and distinguished members of the Judiciary for convening and attending this function to the honour not just my late father I. T. Inamdar, popularly known as Bill Inamdar, who passed away on 24th August last year at the age of 81, but also the other advocates who also sadly passed away in the last year. I am also very appreciative of the efforts of the Law Society and I thank the advocates, particularly those coming from afar, who have taken the trouble to be present today.

Some 30 years ago, I recall my father standing in court on one occasion very similar to this one. I was, at the time, a trainee solicitor in England and had come back to Kenya for the funeral of my grandfather, the late T. J. Inambdar QC who had passed away in Mombasa at the age of 93.

As many of us here would readily acknowledge, my father was a man who was rarely lost for words. However, in commencing his address to the judges and the members of the legal fraternity then present on the occasion he began by expressing his profound regret at how difficult his task was as a son to speak about a father on his passing at such an occasion. I must confess that today I find myself equally stupefied.

I will nevertheless hazard an attempt to justify my own presence here today to speak about my father and my words today have been greatly assisted by members of my own family. To me he was a father as well as a partner in our legal practice. He was only 21 when called to the Bar in England from Lincoln’s Inn in 1952 and then admitted as an advocate of the High Court of Kenya a year later in 1953.

A fiercely protective husband and father. A fastidious man with a work ethic that boggled the imagination. A lawyer’s lawyer, with a voracious appetite for meticulous and detailed preparation. Some of you here today have appeared against him in court. I don’t pity you. Why? Because you need to understand that I had to appear before him both at home and in the office, every day!

An avid reader, an idealist and a fine orator, he could not, in his early years, keep himself away from politics and the freedom struggle of Kenya which was fast gathering momentum. He could foresee the unstoppable tide of freedom and plunged into politics, being one of the founders of Kenya Freedom Party in 1958, which wholeheartedly supported the Kenya African National Union (KANU).

He was nominated to the East African Legislative Assembly where between the years 1961 – 1964 he espoused the cause of early freedom and gave a voice to the views of progressive young Asians.

After Kenya became free, he devoted all his time to his first love, the law. He soon became one of the most celebrated and elegant trial lawyers, named by Chambers and Legal 500 as the top lawyer in Kenya for several years. He ultimately became a senior statesman of the legal profession. The tributes of his intellect, integrity and commitment to the rule of law were well known and respected amongst the legal fraternity.

Externally, he had a soft and sentimental heart. As is said in Sanskrit, “the hearts of the great are harder than steel
but softer than a flower”. Deeply loved and respected by a closely knit family of a devoted wife, children, brothers, sisters, nephews, nieces, and grandchildren and in deed by a large circle of friends, his kindness and humility are a testimony to his commitment to the essential values of life.

The Hindu Holy text, Bhagwad Geeta, tells us that life is but an interval between two rests in our quest for eternity and when we leave this body, we only discard an old garment to don a new one. It is not important how long we live in this brief interval but how well we live. And very few people can claim to have lived as long and as well.

PASSING

For death is but a passing phase of life
A change of dress, a disrobing,
A birth into the unknown again,
A commencing where we ended,
A starting where we stopped to rest,
A crossroad of eternity,
A giving up of something to possess all things,
The end of the unreal, the beginning of the real

-Edween Leiberfired.

ANIL SUCHAK FOR THE LATE CHUDASAMA NARBHERAM JESANG

I stand before you today to offer tribute to the late Mr. N. J. Chudasama, who died in Mombasa on 4th August 2012 and pray for bliss and eternal peace for his departed soul.

Mr. Chudasama graduated as a lawyer from the University of Bombay (Now Mumbai) in the year 1954.

When I returned to Mombasa in late December 1958 after being called to the bar in 1957, I found Mr. N. J. Chudasama already practicing as an advocate, proficient in Civil Law in an office building, now totally in ruin, situate opposite the entrance to the Mombasa Club, Ndia Kuu, Mombasa. About 29 years ago, he moved into a new office in the building in Treasury Square where I also have my own office.

Always a workaholic, Mr. Chudasama would already be in his office promptly at 8:00 a.m., six days a week, to serve members of the public seeking his legal services.

Mr. Chudasama was a health freak who swam across the creek from the Old Port Mombasa to the then well known English Point early every morning and return later to the Old Port Mombasa.

In the evening Mr. Chudasama would everyday of the week undertake a 2½ mile walk from his home in Kizingo, along Mama Ngina Drie and then return home.

He was a very gentle person, easy to meet with and talk to. Mr. Chudasama, a widower, is survived by his brilliant sons, Mahesh, a gynecologist (with a wife who is also a gynecologist) and the last born Dr. Umesh, a dental surgeon in private practice, both of whom were brought up single handedly by Mr. Chudasama. After the death of their mother at a very young age, he educated and had both of them married, settled in life and their profession, not a mean feat.

May God bless his soul.

Amen.

K. M. KARIMBHAI FOR THE LATE NAVINCHANDRA MOHANLAL DOSHI

Mr. Doshi was aged 77 years old when he passed on. He was born on 13th October, 1935. He was a resident of Mombasa. He was married to one Mrs. Prafulata N. Doshi and their other state of residence was Rajkot, Gujarat, India. He moved there when he was four years old due to the second world war and continued his studies in India.

In 1953, he attended Alfred High School in Rajkot, and in 1957, attained a Bachelor of Science Degree from Siam College, Mumbai. In 1960, he got his LL.B from M. P. Shah; Rajkot being his second degree. In 1964, he completed his Post graduate Diploma (Bar exam) in Kenya.

Mr. Doshi had always wanted to be a medical doctor but did not have the finances and so he took up law as
Tribute for the Late Departed Senior Advocates

his second option. He moved back to Kenya on 1st of June 1963 (Kenya’s Madaraka Day).

He got married on 21st January, 1967 to Prafulata D Shah (maiden name). Mr Doshi had two sons and one daughter and a total of 4 grandchildren. Samir currently in Abu Dhabi is married with 2 children; Ketan currently lives in Mombasa and is married with a child. The last born is a daughter who currently resides in London and is married with one child.

Mr. Doshi started practicing as an advocate as an intern for the late DD Doshi. Later he started his own practice in 1969 and served as an Advocate of the High Court of Kenya up until 2008 when he retired. After retirement he spent some time in Singapore before moving back to his beloved Mombasa. He specialized in rent tribunal cases and was notable for handling such. It is noteworthy that certain rent tribunal precedents were based on cases he fought.

He was a good sportsman in his younger years and a very good leader. He was an active member of the community – Shree Navnat Vanik and was its legal advisor for 20 years. The late Doshi was also a culinary expert and used to cook for friends and family.

He was made an Honorary member of United Sports for winning a case where he represented the accused but was never paid any fees. He served for 20 years as the legal advisor for other communities such as Oshwal, Navnat and Aspara (Jain temple).

Mr. Doshi was a very generous, jovial and kind hearted man. He was a devout husband and a caring father. He used to be very principled which is a quality he passed down to his children. He did whatever he could to ensure a better life for his family. He was also very close to his grandchildren to whom he also passed his wisdom. A friend to all ages no matter the age. He always used to humour his family and friends and carry handkerchiefs and sweets etc for his friends in the legal fraternity. He used to always say life is uncertain but death is certain so make the most of time while you are here.

He used to have a number of names and nicknames, for example the name on his passport reads “Shashiskant alias Navichandra Mohanlal Doshi” while some of his friends in law used to call him “Nairobi Mombasa Doshi (N.M Doshi)” due to his frequent trips to Nairobi. To family he was known as Suresh which often created a humorous confusion when they interacted with his friends who knew him as Navin, they all used to get confused if they spoke of the same person. He died on 16th April 2012 in Mombasa. He passed away peacefully while asleep.

May God rest his soul in eternal peace.

C. B. Gor for the late Hamzaali Abbasbhai Taibji Anjawanwalla

Honorable The Chief Justice, Honorable the Attorney General, families of the departed colleagues, the Judges present and the members of the judiciary, Chairman of the Law Society of Mombasa, friends and colleagues.

I regard it as a singular privilege to have this opportunity of addressing this forum and say a few words for our departed colleague,

Mr. Hamzaali Anjarwalla.

Mr. Anjarwalla rose from a humble background. He was born in Malindi in 1928. Having schooled in Malindi and Zanzibar, he worked in Mombasa to earn his keep in the U. K. to study law. He graduated from the Exeter University in 1958 and was called to the bar in 1959 by the Honorable Society of Lincoln’s Inn. He was a self made man.

Mr. Anjarwalla completed his chambering at the offices of O’Brien Kelly & Hassan Advocates and started his own practice, under the name of H. A. T. Anjarwalla, in 1961. When he was being interviewed before being enrolled, the interviewers were so influenced by his knowledge of the law that they recommended that he be enrolled before the expiry of the then normal residential period of one year. The then Chief Justice accepted the recommendations and Mr. Anjarwalla was enrolled in March 1960. His son Fayaz joined the firm in 1996. I have been witness to their steady growth.

We had both started our practice of law in Mombasa around the same time and I have had the pleasure of working with him as well as against him in several cases.

Mr. Anjarwalla’s intimate knowledge of legal matters and litigation tactics was shown time and time again in the cases he handled. He had a great passion for
His father sent his son to London by ship where he was admitted at Lincoln’s Inn. Unfortunately his father died whilst he was still at Lincoln’s Inn which necessitated his return to Mombasa before he could complete his studies.

Master was compelled to take up work as a car salesman at the then Cooper Motors to pay back the debts incurred by his father, for his and his siblings education and to support his family. In 1959 he returned to Lincoln’s Inn where he successfully completed his studies and was called to the Lincoln’s Inn Bar in the same year. He was admitted as an Advocate of the High Court of Kenya in July 1960 and completed his pupillage at A B Patel & Patel Advocates in Mombasa.

Master was married in 1961 and he has two children; a son, Kartik, who was a pilot and is now an exercise therapist; as he feels he can do more good in helping the others in need; and a daughter, Aditi, who is married and living in Canada.

Master practiced law for 52 years a profession which he loved. He specialized in Criminal law for many years before he branched out into civil and commercial litigation.

His greater passion and penchant was his love for music which was his only hobby. He was multi-talented as he could play any musical instrument be it a guitar, flute, trombone, sitar, piano or Indian tabla or even drums. In England whilst studying law he would spend most of his time visiting Jazz clubs where he had the opportunity to see Louise Armstrong live and play the piano with Ella Fitzgerald.

He is the only Advocate I know whose firm’s hours of business, printed on his firm’s letter head were 6.00 a.m. to 1.00 p.m. which he strictly applied and rarely did he go to court in the afternoons preferring to spend this time on his favourite hobby practicing and playing his musical instruments. He has performed many musical recitals publicly in Mombasa.

Master was most popular with his colleagues as he was always very jovial and had a cheerful and humble personality. He was always smiling and had a good sense of humour with a hearty laugh! He was a fine lawyer and was a hard working man who lived his life to the fullest with contentment and honour. He set high standards of principles of integrity and ethics which he never compromised.
He put in many hours of pro-bono work and always had time to assist and advise his juniors. He helped the needy and gave much to charity with discrete donations to a number of locally based organizations.

He continued practicing law to the very end despite undergoing an amputation of one of his legs. In the latter years of his life he was a familiar sight in the law courts of Mombasa when he would conduct his cases from his wheelchair with courage and dignity.

May his soul rest in peace.

DR. JOHN KHAMINWA FOR THE LATE JAMES GATHUKU KAMANJA

The Honourable Chief Justice, other Justices, the Attorney General, Honourable members of the Bench and the Bar, Families of the departed, friends, colleagues, ladies and gentlemen.

The Honourable Chief Justice, I am honoured to appear before you today. I wondered what the sitting here would be, whether a High Court or Supreme Court. It is my humble opinion that this is a High Court. I would be the last advocate to appear before you and raise an objection as to jurisdiction, since the Chief Justice, I believe can sit in any court in the land.

I wish to commend the Attorney General for his practice before this court. I urge his good office to continue to strengthen the practice and rule of law.

With regard to the matter at hand, I readily agreed to appear before this sitting.

I however I pray for leave to deviate from the set agenda and from the speeches of my colleagues from time to time and to speak in more general terms concerning the practice of law. I have tried to practice not only in Nairobi but in various parts of the country. I find it healthy for my practice and for my body. I recommend it to my colleagues, urging them not to confine themselves to Nairobi, whereas Kenya is much bigger than that.

In the 1980s, I specialized in burial dispute cases. During this time I read a bit in other disciples issues relating to death. One fascinating case I handled was the S. M. Otieno case. Mr. S. M. Otieno was an outstanding lawyer who made a mark in this country as a good criminal and civil lawyer. A dispute arose when he died over his burial ground – whether it would be in Upper Mattasia where he lived with his wife or in his rural home in Luo land. The court eventually ruled that he was to be buried in his ancestral home. Significantly, throughout his proceedings, no prayer was sought, and no appeal filed for a finding that he should come back to life. If it had been made, such application would have no doubt been ruled as frivolous and lacking in merit. What is my point? – Death tends to be sudden. It does not give hearing, is not reviewable, it does not give a right to appeal. Once it strikes, it strikes and nothing can be done. That was what happened to my brother in law, Mr. Gathuku, for we did not even know that he was sick.

One evening as I was at home with my wife, at about 10/11 p.m., I was shocked to receive the call that he was dead. My wife had just lost a number of relatives successively in the weeks preceding, so I did not want to tell her immediately. When she asked me what the call was about, I lied that it was my sister. I did it to protect her health. I organized for a committee to of close friends to gently break to her the news the next day.

Some colleagues of mine who have passed – Mr. Ghalia, Mr. Kalama Jacob, Mr. George Ngombo, Mr. William Muchiiri in Mombasa. I believe also made a great contribution to the bar, and with the court’s permission, I wish to recognize them.

I once acted for Mr. Oginga Odinga. He once told me that death is like an epidemic. We have lost a number of lawyers, in recent years and I would seek to mention some of them such as – Mr. Waruihiu, Mr. K’Owade, Mr. Mutula, Mr. Kivuitu, Mr. Kisegu, Mr. Bakhoya, Mr. Ben Ochieng’, and Mr. Nganga Thiongo, among others. Mr. Thiong’o was a man I had the great privilege to work with. Apart from knowing the law, you got the sense that he was a good man.

COURT

The point you make is significant, the ones you mention who practiced in Nairobi shall be accorded a similar ceremony, in addition to Mr. Satish Gautama also of Nairobi.

MR. KHAMINWA

Most obliged.
He then joined the law firm of Khaminwa and Khaminwa Advocates in Nairobi and later moved to Mombasa where he joined the law firm of Kiambo & Co. Advocates before he formed his own Law firm James Gathuku & Co. Advocates.

He developed a wide ranging practice, providing legal services in civil and criminal litigation, commercial and conveyancing. He was meticulous in his work and was well known for the high quality of his professional services. He trained many lawyers who grew to develop their own law firms and made a contribution to the development of the Law Society in Mombasa.

James passed on 6th October 2012, leaving behind a daughter Yvonne Nyawira.

May God Rest His Soul in Eternal Peace.

Amen.

The departed advocates have left their contribution in the Constitution of Kenya, which has transformed the society, where now every Kenyan is a lawyer and can talk with authority on Human Rights. We remain grateful to the Almighty for having had them among us.

And to the Court, I am grateful that I have had this opportunity to appear before you.

SUKASIN GUDKA FOR THE LATE SYED KASSIM SHAH

The achievements of Mr. Shah are well known and recorded and do not need to be emphasized. Kassim made a tremendous contribution through his very active practice in commercial and civil litigation, caselaw development in issues involving land conflicts and administrative disputes in the Judicial Review process. He was also a team member of the legal team that represented Hon. Justice Waki (as he then was) in the Tribunal established to investigate his conduct and the singular success the team achieved in exonerating Justice Waki. Kassim also represented the IEBC in disputes arising from delineation of boundaries. Kassim also served with great distinction as a Commissioner of Assize.

Through all these achievements runs a constant theme; Kassim’s, strong minded pursuit of achieving justice,
real substantial justice, not bound by technical rules and what he considered artificial impediments to the course of justice. He, therefore, occasionally had alarmed me by his tendency to disregard rules of procedure. Being of the old school, I am of the persuasion that rules of procedure are there to be followed and to be adhered to not slavishly, not rigidly but in a manner that makes the process of litigation smooth and predictable.

Kassim was my pupil and later became a partner and friend. Kassim and I had many arguments arising from these two opposing views and Kassim was never failed to point out that the civil procedure rules were the handmaiden of law. My reply was always the same, precisely because they were the handmaiden they had to be used to assist the process of litigation.

Kassim always enjoyed an argument whether in court or outside. In court his arguments were brief and to the point sometimes even verging on dangerous bravery. However, outside of court, any discussion with him could lead to all sorts of avenues, away from the main topic and into unexpected topics. I would like to imagine that where he is, Kassim is enjoying an argument with his old sparring partner, Mr. Bill Inamdar, over a glass or two of beer, and each trying to prove his point. It would be a battle of wits interesting to be a part of.

Kassim leaves behind a large group of friends and colleagues and his very devoted wife who stood behind him and took care of everything leaving Kassim free to pursue his career unburdened in any way. He leaves behind two sons, one pursuing Medicine at the University of Nairobi and the younger son about to complete his A-Levels. I hope they will be able to cope with their loss, as we at the firm of A. B. Patel & Patel are trying to do.

Mr. S. M. Otieno, Mr. Omolo Okero, Mr. Gata Guti, Mr. Joseph Murumbi Mr. N. M. Doshi and I met while in college, where we had a Kenyan table. Our college was known as the college of rebels who would always criticize the British government. There was a strong wind of change in the air at the time and we were part of it. A lot of us were active in the freedom fight, Bill Inamdar in particular, we were afraid would be arrested.

Mr. S. M. Otieno’s case arose from inter-tribal marriage. It is something I am aware of, as among Indians there was the caste system. S. M. Otieno’s case was the beginning of the tribal recognition. I personally feel that a lot of money is spent in village burials. I propose that it may be time for the law to stipulate that as all of us are Kenyan, one should be buried wherever in Kenya one dies to avoid the unnecessarily huge costs incurred in conducting burials in the villages.

I. T. Inamdar, as I have known him was my childhood friend. We were together in Std I in Makupa Primary School. He later joined Convent Primary School, Mombasa and Sacred Heart Secondary School. He was a clever student and was not shy of acting on the stage in the school programme. Every late afternoon we used to meet on the sand bed and had a dip in the Indian Ocean below Fort Jesus near Mombasa Club. He was a born leader and a sportsman. He was captain of Old Town Football Club known as “Fort Jesus Club” and played as Center Forward while I played Center Half. He was like me an excellent cook and enjoyed entertaining friends off and on.

Mr. Chudasama was born at Mombasa in 1929. After Primary Education at Makupa Primary School he was promoted to Allidina Visram High School, Mombasa. Thereafter, he traveled to Rajcot, Gujarat and attained his Law degree in Bombay University. On his return to Mombasa he did his pupillage and was enrolled as Advocate of High Court of Kenya in 1955 and continued practicing law in Mombasa till he passed away in Mombasa in 2012. During his practice he mainly dealt with and handled civil matters.

Mr. S. P. Master was born at Mombasa in 1931. After Primary Education at Makupa Primary School he was promoted to Allidina Visram High School, at Mombasa. He went to the U.K were he did his law and returned to Kenya in 1959. Soon after his pupillage he was enrolled as Advocate of High Court of Kenya in 1960.

K. M. PANDYA

All has been said about my departed friends. All but Mr. Gathuku and Mr. Doshi were my childhood friends. I remember enjoying my school days with them. When Mr. Doshi’s car was mentioned, I recalled how it was once stolen but ran out of petrol at the Makupa Causeway. The police thanked Mr. Doshi for his car, as it had assisted them to catch the criminals!
From his earlier age he was extremely fond of music and all throughout his life he never left playing music. He could sing very well and would never say no to any invitation for a party which required him to play music and sing.

In Secondary classes he was fond of using flowery language full of difficult words and phrases in essays. The reader would have to look up a dictionary to understand what he really meant. Throughout his practice he preferred to defend his clients in criminal cases in which subject he had specialized.

The late Kassim Shah had a very clear mind and was a good lawyer right from day one in his legal practice. He was always successful. He mainly handled difficult, complex civil litigations. He was appointed Commissioner of Assize and was a member of the Rules Committee for several years. His contribution was great. He was Chairman of Mombasa Club which he managed well with distinction. He will be missed for many years to come.

I have enjoyed every moment of my life with each of these departed colleagues. Each meeting was pleasant. They made for good company. I seek the assurance from the court that a similar session would be held for me when my time comes.

Not enough can be said about the families of these departed colleagues. Mrs. Kassim, was devoted. Not enough has been said about her. Each of these departed, had a strong support system from the home-front in the form of love from their family. The wives, children and relatives of the departed were instrumental in their success. A loving and supporting family unit brings up good children, who like the children of these departed, are imparted with the good qualities and virtues of their deceased fathers. Their legacy continues to live through them.

May God rest their souls in peace.

PROFESSOR GITHU MUIGAI

May it please the court, allow me to thank Mr. Khaminwa for his kind remarks of my office on its involvement in legal development.

I also wish to respond to the words of Mrs. Gudka and those said of the departed advocates.

Mr. Inamdar and I acted in numerous cases. I developed a profound respect for him. The word erudite truly describes the manner in which he conducted his matters. Our friendship was not always a happy one, owing to our different clients who would place us on opposite sides. We would however, always make up over a cup of coffee, for which he always traditionally paid. He used to joke that while the younger lawyers were making all the money, the older advocates were still obliged to foot the bill for their juniors’ coffee.

Mr. Kassim and I served at the Disciplinary Committee. No one had a better sense of fairness than Mr. Kassim. He understood the difficulties of running a firm. He would often say to me when deliberating, “Chairman, this man is not a thief, he is a poor accountant.” And when I would in the end find for a steep penalty against the advocate in question, Mr. Kassim would comment, “Chairman, we will soon have no lawyers!”

Finally, I wish to thank all that have contributed to making submissions in these proceedings. I apply for these proceedings, to be certified as a record of the court. I pray further that the record be formally sealed by your Registrar and be made available to the families of the departed at no charge.

REPUBLIC OF KENYA
INT THE HIGH COURT OF KENYA
AT MOMBASA
SPECIAL MISCELLANEOUS APPLICATION NO. 1 OF 2011
TRIBUTE FOR THE LATE DEPARTED SENIOR ADVOCATES

IN THE MATTER OF:
1. INAMDAR INDRAVADAN TRIBHOVANANDAS
2. CHUDASAMA NARBHERAM JESANG
3. SHYAMSUNDER PURUSHOTTAM MASTER
4. HAMZAALI ABBASBHAI TAIBJI ANJARWALLA
5. NAVINCHANDRA MOHANLAL DOSHI
6. JAMES GATHUKU KAMANJA
7. SYED KASSIM SHAH

RULING

Your Honours, The Judges and Magistrates, learned
counsel, the families of the late:

a) Syed Kassim Shah  
b) Inamdar Indravadan Tribhovandas  
c) Shyamsunder Purushottam Master  
d) Navinchandra Mohanlal Doshi  
e) Hamzaali Abbashbhai Taibji Anjarwalla  
f) Chudasama Narbheram Jesang  
g) James Gathuku Kamanja

Ladies and Gentlemen.

There was a time in the history of the Judiciary in Kenya when both the Bar and the Bench assembled as we have done today to remember and pay tribute to the professional lives of our departed colleagues, judges and advocates alike. Such a gathering would occur within a few days of the departure of the judge or advocate.

Today we gather here, several months or even years after the death of those to whom we are paying tribute, yet these ceremonies are a time-honoured tradition in most of the Commonwealth jurisdictions. It is apparent from our records that this tradition was abandoned some 14 years ago, when a ceremony was held in Nairobi in 1999 following the death of Chief Justice Zacchaeus R. Chesoni. The last ceremony in honour of an advocate was on June 23, 1992 for the late Krishan Gautama. Like other deeply rooted traditions, such as the two minutes’ silence observed at 11 am on November 11 of each year to mark Remembrance Day in honour of the sacrifices made by members of the armed forces and civilians in times of war, I intend to renew and institutionalize this ceremony not only to celebrate the contribution to the country’s jurisprudence by our departed jurists, but also to honour retiring judges, advocates and members of the academia who have made great contribution to the development of the law and administration of justice. I have chosen Mombasa as the site of the revival of this tradition, given that this was the first location of the court in Kenya. Such proceedings will be published in the appropriate volumes of the Kenya Law Reports.

Perhaps after consultations between the Bar and the Bench, an agreement may be reached as to the timing of the ceremony — whether it should be annual or immediately upon the death of a judge or an advocate.

This day is a nostalgic reminder of days past during which the Chief Justice, in full judicial regalia while presiding over the ceremony in the company of other judges, would conduct “a trial” in formalistic court procedure with “arguments” by counsel (The Attorney General and the Law Society of Kenya chairman) followed by a “judgment” or an “order” and thereafter an “application” for adjournment.

We have dedicated today’s memorial to the following advocates who devoted their lives to the practice of the law in this region:

a) Syed Kassim Shah  
b) Inamdar Indravadan Tribhovandas  
c) Shyamsunder Purushottam Master  
d) Navinchandra Mohanlal Doshi  
e) Hamzaali Abbashbhai Taibji Anjarwalla  
f) Chudasama Narbheram Jesang  
g) James Gathuku Kamanja

Each one of them will be remembered for various reasons, but from my own personal knowledge of some of them, and from the background information I have gathered about the others, there is no doubt that they were consummate lawyers who combined talent and incredible mastery of the law. They believed in truth and justice. They were resourceful, respectful and humble. As lawyers, we must avoid being disrespectful to judges; overbearing and blustering to colleagues, or insulting to the parties.

Our departed colleagues, whom we cerebrate today, were more than lawyers. They were husbands and fathers. They had friends, relatives and neighbours, who have borne the pain of loss since their departure. But they will be sadly missed well beyond their own families. Their contribution to the society is their legacy. That is the lesson we must draw from their lives. It is therefore befitting while we remember them today to talk about the role of the legal profession in nation building. The legal profession has an ancient history and predilection. The modern legal professional, earning his living by fees paid for legal services became visible in the late Roman Empire.

Every so often, lawyers are a dmitted to the Bar. Lawyers in these proceedings have been admitted to the Bar. But how many of us recall the oath we took on our admission to the bar? I will remind you. We took the oath that bound us to protect the Constitution and the rule of law. Under Section 4 of the Law Society Act, Cap 18, one of the roles of a lawyer is to protect and assist the public in all matters legal. It is therefore...
widely acknowledged that lawyers have a great role to play in nation building. But how many of us take public interest litigation; how many today – apart from the upcoming lawyers – volunteer their time and resources in pro-bono work or pauper briefs, yet great lawyers such as the late Byron Georgiadis, the late S.M. Otieno and many others made their names in offering pro-bono services in criminal cases.

The lawyer's role transcends the client-advocate relationship. The whole concept of democracy is embodied in the principle of the rule of law where everything must be done in accordance with the law, with lawyers providing guidance. For this reason, the legal profession itself should be seen as a public service because it is expected to provide public service and leadership. The rights of the poor are constantly violated. But they are not able to access legal/judicial services. In the same way a doctor would stop at an accident scene to help the victims without first thinking about his charges, lawyers should also help those citizens who are in need but cannot afford their services.

Lawyers, judges and legislators are an integral part of a system of law and justice that fosters the economic, cultural and community freedoms so essential to a progressive society. Lawyers are in the heart of every dispute, from child custody contests to neighbours' boundary disputes, to commercial and environmental actions. Lawyers are literally entwined in people's problems and their solutions. There are so many important ways that lawyers and judges add immeasurably to our society that, when you think of it, without lawyers and judges dedicated to the rule of law, tempered by freedom, justice and equality, our society, even with all its problems, would not have progressed to the level that it is at today. There is no question that lawyers and judges working together in the system of justice are the bulwark of our democratic system of government; they are indispensable to a free society that respects the viewpoints of all.

It seems to me vitally important that all the entities involved with the courts on a daily basis work together whenever possible to ensure that our citizens have the best justice system possible. The establishment of the National Council on the Administration of Justice under the Judicial Service Act will ensure participatory and sector wide approaches in addressing issues of common interest in the justice sector.

I encourage both the Bar and the Bench to strengthen Court User Committees as well as the Bar-Bench Committees in order to enhance efficiency in the sector.

In conclusion, as we reflect upon the lives of the departed learned counsel, it is important to bear in mind the values they each stood for — an equitable and just legal system, justice, democracy and equality, the spirit of selflessness, dedication, discipline and clarity of purpose.

As we remember them, I believe the best tribute we can pay to their lives on this earth is not the kind things we said about them today but by emulating those values they stood for. May they rest in peace!

COURT:

I now proceed to grant the Orders sought herein as urged by the Attorney General. I hereby do order that:-

The Proceedings herein today be adopted and do form part of the Records and Archives of this court, The Supreme Court of Kenya. Also certified copies of proceedings be supplied to the families of the deceased advocates.

Orders accordingly.

Dated and Delivered at Mombasa this 5th day of July 2013.

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W. M. Mutunga, CJ

The Chief Justice /

President of the Supreme Court of Kenya
These three Volumes contain decisions covering the period between 1961 and 2007 from the Court of Appeal for East Africa (now defunct), the East African Court of Justice, the Court of Appeal of Kenya and the High Court of Kenya.

Available at our offices at Milimani Commercial Courts, Ground Floor or call +254 20 262 7228 to place an order.