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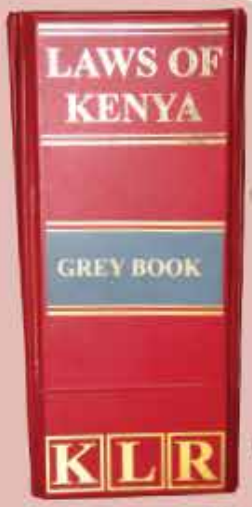

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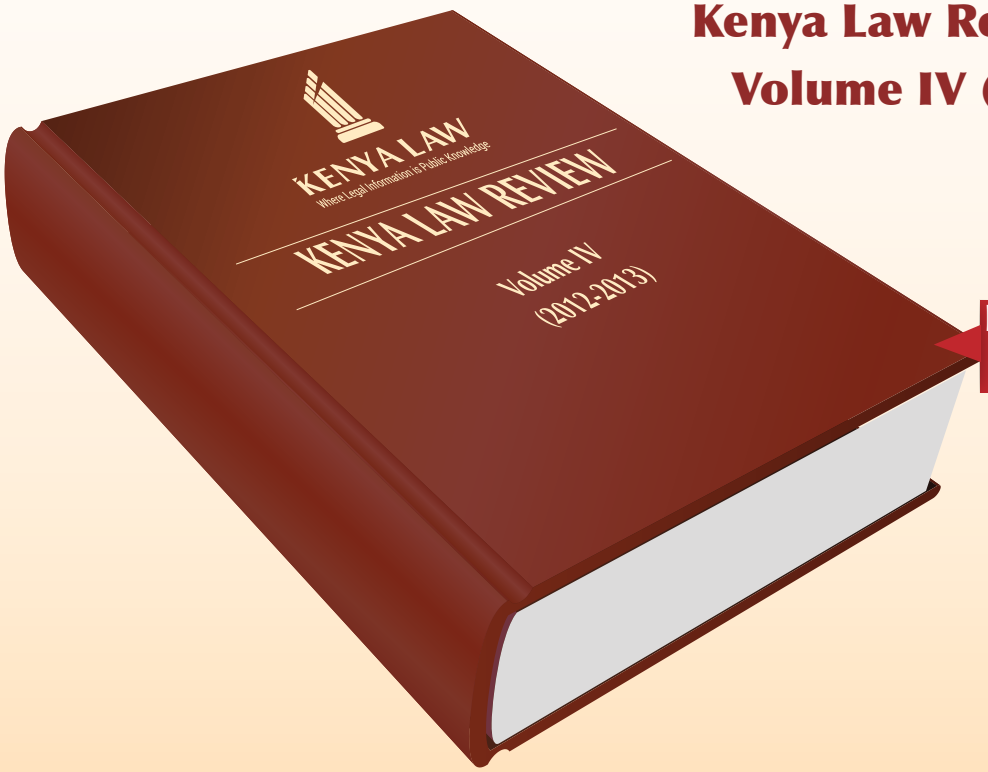

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It is with great pleasure that Kenya Law publishes the fourth edition of the **Kenya Law Review Journal**. The Journal is a platform for scholarly analysis of Kenyan law and interdisciplinary academic research on the law. It seeks to serve as a platform where prominent scholars and distinguished legal practitioners alike can share their views on various aspects of the Law.

Scope of the series

This edition sees authorship of fifteen scholarly articles on a diverse range of subjects from the Constitutional Domain of Elections in Kenya to the prospect of trying an Incumbent Head of State in a foreign Country.

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For all your inquiries please contact;
The Marketing and Communication Department
ACK Garden Annex, 5th Floor, 1st Ngong Avenue, Ngong Road, Upper Hill
P.O Box 10443 - 00100, Nairobi - Kenya
Tel: +254 (020) 2712767, 2011614 ,2719231 020 2604142, 2611322
Mobile: +254 718 799 464, 736 863 309
Email: marketing@kenyalaw.org

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| Cornelius Lupao |

Senior Law Reporters
| Andrew Halonyere | Njeri Githang'a Kamau |

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Publishing, Design and Layout
| Catherine Moni | Robert Basweti | Cicilian Mburunga | Josephine Mutie |

Proofreaders
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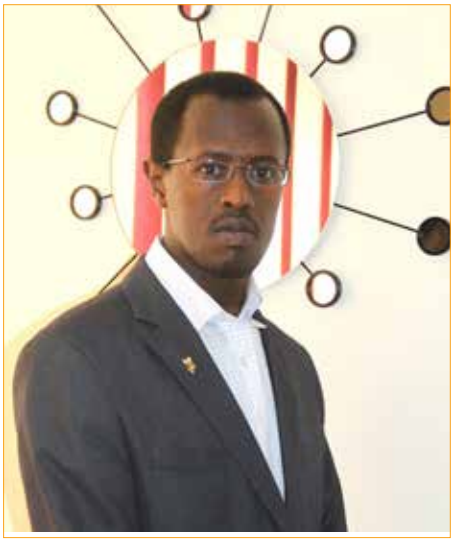
Ag Editor/CEO's Note

The FY 2015/2016 began on a high note for Kenya Law. We held a successful annual staff conference where we were able to reflect on the past financial year; interrogate our challenges; and savour our successes. It was also a time to recognize the effort of each and every member of team Kenya Law, more so the exemplary performers.



Long'et Terer
CEO/Editor

We are committed, in this financial year, to dedicate our energies and efforts to ensuring that the Kenya Law Reports, our flagship products, are published and distributed in a timely manner.

In this edition of the Bench Bulletin, you will find two feature cases, both of which speak to our current affairs. The case on the *teacher's salaries* has captivated our national attention not just on the legal question of how much should be paid to teachers, who are very instrumental in building our nation and its future, but also for it's wider implication on the country's economy and the wage bill. We break down the sequence of events with regards to this case.

The other case is on euthanasia, a topic that raises both moral and legal questions. The High Court in South Africa has held that just as a living person has an interest in the disposal of their body, similarly, a patient's wishes expressed when in good health should be given effect. In this case the court held that a patient suffering from terminal cancer had a right to request for termination of their life so that they may not suffer and live but die with dignity. In effect therefore a person who is terminally ill has a right, while capable and of sound mind, to make a decision on his life, including how it should be terminated, and any abrogation of this right to life constitutes a restriction on the persons dignity and autonomy.

It will be interesting to see how this decision will be considered in subsequent legal decisions, not just in South Africa but also here in Kenya where we are seeing a rise in the number of terminal diseases, including cancer.

I wish you happy reading!

Long'et Terer

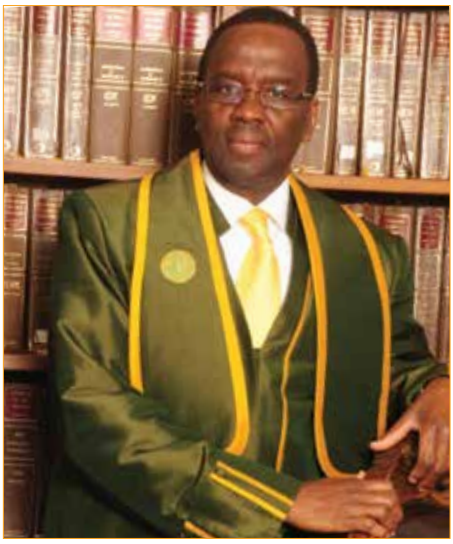
CEO/Editor

CJ's Message

Transforming Judiciaries in Africa: Lessons from the Kenyan Experience

Keynote Address delivered at the Annual General Conference of the Nigerian Bar Association International Conference Centre, Africa Hall, Abuja, Nigeria Sunday, August 23, 2015

Protocols:



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

I have been told that the refrain, "All Protocols Observed" is Nigerian, an ingenious attempt to apologize to the audience after subjecting it to a roll call of those individuals that are supposed to be respected in the audience. I guess that is why in the spirit of Pan-Africanism Kenyans have interpreted the refrain to mean, "I respect and honour you all." So, I respect and honour you all, but I must acknowledge the presence of His Excellency the President of the Federal Republic of Nigeria Muhammadu Buhari, (and let me congratulate you, Mr. President, on your election early this year, and your predecessor President Goodluck Jonathan and the people of Nigeria for conducting peaceful elections, peaceful handover of power and respecting constitutional term limits). His Excellency the Vice-President of the Republic of Nigeria, Professor YemiOsinbajo, Chief Justice of Nigeria Honourable Mr. Justice Mahmud Mohammed, the President of the Nigerian Bar Association, Senior Counsel Mr. Augustine Alegeh, the Chairman of the Technical Committee tasked to organize this great conference, Mr. Dele Oye, jurists, Fellow Nigerians and friends of Africa, Nigeria, Kenya assembled here.

Opening remarks:

I am delighted to be here this evening. Thus, I would like to thank the Nigerian Bar Association for the invitation to its AGC and for sponsoring my visit.

My address this evening is organized in three parts with the first one offering a general commentary on claims pertaining to transformative constitutions and transformative constitutionalism. These claims seek to answer one of the burning questions of our time: Can Judiciaries contribute to the social transformation of countries in Africa? In the second part, I highlight key aims of Kenya's experience with struggles for a transformative constitution and transformative constitutionalism with a focus on:

a) The vision of Kenya's 2010 Constitution

b) It's new Judiciary

c) The Kenya Constitution's role in generating a theory of its interpretation.

And

d) Efforts by the Judiciary to decolonize its jurisprudence under the dictates of

a progressive and transformative constitution

In the last part, I highlight pivotal aspects of the Judiciary Transformation Framework that seeks to demonstrate that there is a **paradigm of Transformation from the Margins** that works notwithstanding resistance from external and internal anti-transformation forces. Thereafter, I very briefly conclude my address

Part I:

I: Transformation, Transformative Constitutions and Transformative Constitutionalism

A: THE CLAIM:

Social transformation in any society is located within its global, continental, regional, and national contexts. Hobsbawm states, "Our world risks both explosion and implosion. It must change."[1] Within the context of Africa and Global South this "World" is one of domination, oppression, exploitation largely

by Western contemporary capitalism, and by an elite in the South that is insular, selfish and unimaginative. Although in some parts of the Global South there are signs of gradual disengagement from world contemporary capitalism that is not the case for Africa and many states in the Global South. In the case of Africa the emergence of Afro-Chinese relations[2] have heralded the debate on what these relations mean to Africa. I do not want to go into these debates but to state that I agree with Professor Kwesi Kwaa Prah who argues that the debate should not be whether the West or the East dominates, exploits, and oppresses Africa, but whether Africa can identify, articulate its material interests, and negotiate with the West and the East on that basis. That argument entails serious interrogation of the crises of political leadership in Africa. In other words, can Africa (judges, politicians, scholars) summon its 'confidence quotient' to comprehensively identify its interests and engage the rest of the world on these terms?

In transforming judiciaries to contribute to social transformation those contexts are equally important.

The role of law in social transformation, [3] once the source of serious and continuous jurisprudential debates, has acquired a consensus that law, indeed, has a role to play in social transformation. This consensus is multi-disciplinary and is shared by lawyers, economists, political scientists and anthropologists.

I attempt to problematize the various schools of jurisprudence on this issue. Other than staunch positivists there is a consensus that that law has a role to play as an engine of social transformation. The Marxist school of state and law still problematizes in whose interests is social transformation. See Charles A Beard, An Economic Interpretation of the Constitution of the United States (New York: The MacMillan Company, 19130, Republished edition, Dover, 2004)

The question whether law and the courts can advance, stagnate or impede social justice and social transformation has a long genealogy. Perhaps one of the most trenchant critiques of the role of courts in producing social change is American Professor Gerald Rosenberg's book Hollow Hope: Can Courts Bring about Social Change?[4] in which he stridently argues:

> "courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government….. At worst, courts serve as 'fly paper' for social reformers who succumb to the 'lure of litigation'….. Court rulings divert scarce resources away from more productive uses while providing only an 'illusion of change."[5]

However, what is now generally acknowledged from this debate is that law has profoundly distributive effects and it cannot be ignored as a tool for social justice.[6] Clearly, 'Hollow Hope' makes a pertinently

[1] The Age of Extremes: A History of the World, 1914-1991 (New York: Vintage Books, 1996), 585.

[2] Ed.; Kwesi Kwaa Prah, Afro-Chinese Relations: Past, Present & Future (Cape Town: CASAS, 2007).

[3] In my doctoral thesis, *Relational Contract Outside National Jurisdiction* (1993) Osgoode Hall Law School, York University, particularly in Chapters 2and 3,

[4] (Chicago: University of Chicago Press, 1991, 2008)

[5] To supply the page

hollow claim for litigation on social and economic rights or land or public finance have such far reaching developmental implications that evidences the place of the law as a change agent.

In the coming into effect of the new phenomenon of Transformative Constitutionalism, this debate has been both enriched and transformed ***(pun intended).*** The very idea of a transformative constitution (like those of India, Colombia, Costa Rica, Bolivia, Ecuador, Venezuela, South Africa, and Kenya) is the idea that the Constitutional superstructure is embedded on a theory that the Constitution will be an instrument for the transformation of society rather than a historical, economic and socio-political pact to preserve the *status quo* as the earlier constitutions did. Fundamentally important to transformative constitutionalism are values of the rule of law, human rights, and social democratic sustainable development.

The claim, therefore, is that transformative constitutions and transformative constitutionalism are both engines of social transformation. A transformative Constitution and its attendant transformative constitutionalism are both about change from a status quo that is neither acceptable nor sustainable. Transformative constitutions are not revolutionary but could be the basis or fundamental revolutionary change in a society. Transformative constitutionalism is anchored to progressive jurisprudence from the Judiciary and observance of the Constitution by other State Organs, and all people. ***It is a jurisprudence that allows us, as Africa, also to be producers, developers and shapers of international law***. It is part of that 'Africa confidence quotient' needed in our relations with the rest of the world. At the economic, social, cultural and political levels transformative constitutions and constitutionalism aim at social change that can put any nation in a social democratic trajectory and a consequent basis for democratic sustainable development.

Testing these theoretical and practical claims requires in-depth study of particularly the many jurisdictions I have mentioned that claim to have transformative constitutions and attendant transformative constitutionalism. While the jurisprudence in these jurisdictions continue to enrich Kenya's jurisprudence I cannot in this Address discuss the various limitations that have been the subject of various studies by scholars. I will, however, touch on some of these when I discuss our experience:

II: The Kenyan Experience

A: The Vision of the 2010 Constitution

Kenya's constitution is not a child of fear resulting from the ethnic violence of 2007/2008. It is a product of ***40 years*** of struggle of ambition and aspiration whose frustrations by the Kenyan elite culminated in the violence. It is the reason Kenyans ignored both the political and religious elite to pass a constitution that embodies their aspirations as a people.

In their wisdom the Kenyan people saw the old constitution as legitimizing an unacceptable and unsustainable status quo. They thus reconfigured and reconstructed the state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the vision of the Constitution; premised on national unity and political integration, while respecting diversity; provisions on the a vision of nationhood democratization and decentralization of the Executive; devolution; decreeing values in the public service; giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state and society in Kenya; mitigating the status quo in ***the land sector*** that has been the country's Achilles heel in its economic and democratic development; the strengthening of institutions; the creation of institutions that provide democratic checks and balances among others.

[6] Morton Horwitz, The Transformation of American Law 1870-1960 (New York: OUP, 1992); For contributions from the Global South see Ed.; William Twining, Human Rights, Southern Voices: F ran cis Den g, Ab dullahi An'Na'im, Yash Ghai and Upendra Baxi (Cambridge: Cambridge University Press, 2009); and Eds.; Gargarella, Domingo, Roux, Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor? (Aldershot: Ashgate, 2006).

In one of its transformative pronouncements the Kenyan constitution provides that judicial authority, just like executive and legislative authority, is derived from the people.

The Kenyan people chose the route of transformation and not revolution to end their poverty and deprivation and regain their dignity and sovereignty.

It can be argued that the 2010 Constitution reflects the vision of those patriots who struggled and fought against our domination, exploitation, and oppression by ***British colonialism and post-colonial political and economic elites***.

History records invocation of discourses of reform, revolution, human rights, social justice, patriotism, freedom, nationhood, among others that the 2010 Constitution decrees.

B: The New Judiciary

The Kenyan distinguished professor and constitutional law scholar, Professor Yash Pal Ghai, has argued that:

> Perhaps realizing its own ambitious project, and hence its vulnerability and fragility, the Kenyan Constitution sets, through the judiciary, its barricades against destruction of its values and weakening of its institutions by forces external to itself. Such is the responsibility of Kenya's judiciary[9]

It is perhaps remarkable, and indeed, a paradox that, although disappointment with the judiciary was at least as great among the common Kenyan as frustration with politicians,[10] it is also true that they chose to place their faith in the institution of the new judiciary in implementing the new Constitution[11].

They did this by promulgating a Constitution that provides for the appointing of women and men of integrity by an independent and broadly representative Judicial Service Commission;[12] by providing for institutional and decisional independence of the Judiciary and the judicial officers respectively;[13] through the vetting of judges and magistrates who served before August 27, 2010 by a Board which had a broad criteria upon which to determine the suitability of these judicial officers;[14] by setting up the Judiciary Fund to signal financial independence of the Judiciary;[15] and finally by creating a new apex court, the Supreme Court that would act as the final protector and custodian of the supremacy of the Constitution.[16]

By vetting the old judicial officers and by recruiting new judicial officers in a transparent and competitive manner that called for public participation, the new Constitution created a new Judiciary.[17] The interview for the recruitment of judges, including the chief Justice, is carried out in the open, in the full glare of the media. The Constitution required that the Kenyan Judiciary to transform itself first so that it could be imbued with the ethos of the transformative constitution to lead the change and be the true engine of societal transformation. The old judiciary was the first victim of the new constitutional order. The Chief Justice was forced to resign after six months of its promulgation. This gave the judiciary the moral momentum to lead the transformation of the judiciary and society. The judiciary became the only source of oxygen for this new constitutional order.

[9] Unpublished mimeograph, Nairobi 2014

[10] "We found a judiciary so weak on its structures, so thin on resources, so low in its public confidence that to expect it to deliver justice was widely optimistic." CJ's address after 120 days in office, October 20, 2011.

[11] The High Court enjoys vast powers such as interpreting the Constitution which encompasses a power to determine whether "anything said to be done under the authority of this Constitution or any law is inconsistent with, or in contravention of" the Constitution (Article 165)(3)(d) and to declare such conduct, omission, or law null and void to the extent of its inconsistency. (Article 2(4).

[12] Article 171

[13] Article 160. Independence of the Judiciary under transformative constitutions faces challenge not only from the Executive, Parliament, corporate and civil society interests, but also from communities that judicial officers come from, family and friends. The divisive forces in society, namely ethnicity, race, religion, region, gender, generation, clan, xenophobia, and class are factors that too challenge an independent institution of the Judiciary.

[14] Section 23 of the Sixth Schedule of the Constitution

[15] Article 173

[16] Article 163

[17] The old judiciary was the first victim of the new constitutional order. The Chief Justice was forced to resign after six months of its promulgation. This gave the judiciary the moral momentum to lead the transformation of the judiciary and society. The judiciary became the only source of oxygen for this new constitutional order.

Let me add here that the old judiciary operated under very difficult circumstances, as indeed, all judiciaries in Africa do, but the Kenyan people wanted to create under the new constitution a new judiciary. A transformative constitution required a transformed judiciary to generate the requisite transformative jurisprudence. This is what we have been doing in Kenya and the progress is encouraging, difficulties and challenges notwithstanding.

C: Mainstreaming the Theory of Interpreting the 2010 Constitution[18]

The Kenya Constitution is also unusual in setting out a theory of interpretation. In the same vein the Kenyan Parliament, in enacting the Supreme Court Act 2011, (Supreme Court Act) has in the provisions of Section 3 of that Act reinforced this aspect of constitutional pre-occupation in its theory of interpretation.

The relevant provisions of the Constitution and the Supreme Court Act, 2011 respectively are:

> ***259. (1) This Constitution shall be interpreted in a manner that–***[19]
>
> ***(a) promotes its purposes, values and principles;***
>
> ***(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
>
> ***(c) permits development of the law; and***
>
> ***(d) contributes to good governance.***
>
> ***...***
>
> ***(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...***
>
> ***Section 3 of the Supreme Court Act provides:***
>
> ***3. The object of this Act is to make further provisions with respect to the operation of the Supreme Court as a court of final authority to, among other things-***
>
> ***a. ...***
>
> ***b. ...***
>
> ***c. develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;***
>
> ***d. enable important constitutional and legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya.***

In a recent judgment delivered on September 29, 2014 ***The CCK Petition 14 as Consolidated with Petitions 14A, 14B and 14C*** the Supreme Court revisited this critical issue of the theory of the interpretation of the 2010 Constitution.

[356] We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation.

[18] The genesis of the mainstreaming of the theory of interpreting the constitution is comprehensively analyzed in my Distinguished Lecture at University of Fort Hare delivered on October 14, 2014

[19] Article 10 of the Constitution provides for the national values and principles of governance to include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalized, good governance, integrity, transparency, accountability, and sustainable development. "

[232]...References to Black's Law Dictionary will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.

What is this interpretative theory? I believe it is a theory that shuns staunch positivism; that accepts judges make law; that by invoking non-legal phenomena in its interpretation it establishes the judiciary "as an institutional *political actor;* a theory that is a merger of paradigms and that problematizes, interrogates, and historicizes all paradigms in building a radical democratic content that is transformative of the state and society; it's a theory that values a multi-disciplinary approach to the implementation of the Constitution; its neither insular nor inward looking and seeks its place in global comparative jurisprudence and seeks equality of participation, development, and influence. Thus, this theory of interpretation of the Constitution will also undergird various streams and strands of our jurisprudence that reflect the holistic interpretation of the Constitution.

D: The Decolonizing Jurisprudence

The true hinge of the Transformative Constitution to social transformation lies in the jurisprudence and judicial practice that the courts generate in their everyday work.

The decolonizing jurisprudence of social justice does not mean being insular and inward looking. The values of the Kenyan Constitution are anything but. We can and should learn from other countries. My concern, when I emphasize "indigenous" is simply that we should grow our jurisprudence out of our own needs, without unthinking deference to that of other jurisdictions and courts, however, distinguished. And, indeed, the quality of our progressive jurisprudence would command respect in these distinguished jurisdictions. ***After all the Kenyan constitution is one of the most progressive in the world.***

While developing and growing our jurisprudence, Commonwealth and international jurisprudence will continue to be pivotal, the Judiciary will have to avoid mechanistic approaches to precedent. It will not be appropriate to reach out and pick a precedent from India one day, Australia another, South Africa another, the US another, just because they seem to suit the immediate purpose. Each of those precedents will have its place in the jurisprudence of its own country. A negative side of a mechanistic approach to precedent is that it tends to produce a mind-set: "If we have not done it before, why should we do it now?" The Constitution does not countenance that approach.[25]

The Constitution took a bold step and provides that "The general rules of international law shall form part of the law of Kenya" and "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".[26] We have become as noted earlier not only the users of international law, but also its developers and shapers.

Our jurisprudence must seek to reinforce those strengths in foreign jurisprudence that fit our needs[27] while at the same time rescuing the weaknesses of such jurisprudence so that ours is ultimately enriched as decreed by the Supreme Court Act.

[20] Upendra Baxi, "Demosprudence Versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies," in (2014) MACQUARE LAW JOURNAL, Volume 14, 3 at 10.

[21] *Op.cit;* note 1.

[22] Supreme Court Act, 2011 No. 7 of 2011, Section 3.

[23] See the Constitution of Kenya 2010: the Preamble, Articles 2(4), 10, 20(3),

20(4), 22,23,24, 25,159, 191(5) and 259. These articles decree how the Constitution is to be interpreted and, indeed, under Article 10(1) (b) any law, "any law" would include, in my view, rules of common law, as well as statute.

[24] Some of the key elements to this claim are: the most modern Bill of Rights in the World; uniquely provides for a theory of its interpretation; it reflects a social democratic transformation in a world still dominated by contemporary capitalism called neo-liberalism; and it calls for a progressive jurisprudence that shuns staunch positivism and its backwardness in a world that has to change. It has been argued that the claim that our constitution is progressive is not true because it does not guarantee abortion rights, gay rights, and the abolition of death sentence. My view is that these arguments must await the decisions of the courts on these issues once they are agitated in our courts. It is true, however, our constitution under article 40 protects private property, the major root cause of societal inequality.

[25] As a guide to the emerging tests by which we should judge the relevance of foreign precedents an example is where we adopt foreign precedents but explain the parallels between that country and Kenya and its Constitution.

[26] Art. 2 (5) and (6).

[27] The criteria for determining our needs can be based on the discussion above on the values, vision, objectives and purpose of our Constitution.

III: The Judiciary Transformation Framework (JTF), 2012 - 2016

The JTF is our blueprint for laying strong foundation for a transformed judiciary. The framework has four pillars: access to justice, infrastructure, transformative leadership, and using technology as an enabler for justice.

We dusted off many reports that had recommended radical reforms in the Judiciary, but the absence of political will made their implementation impossible. ***We simply told everybody in the Judiciary that we were going to implement reforms they themselves had agreed upon only that we had to take into account the new Constitution. This was a great strategy to nip internal resistance to the JTF in the bud.***

Knowing there was no political will internally and externally to transform the judiciary we cautiously started from the margins. We focused on the judicial culture that the public found repellent. ***The Judiciary Cultural Revolution*** hence begun.

Long regarded as distant, arrogant, bewigged and bewildering, the deliberate attempt to humanize the judiciary won much public acclaim and support. We debated and agreed that judges of the superior courts would not wear wigs;[28] that all judicial officers, from the Magistrates to the Supreme Court would be addressed as "your honor" that stopping judges from playing God;[29] deconstructing why we are called "justices" when we commit injustices to the people; creating a pledge from judicial officers and staff that humanized our administration of justice.

The judiciary cultural revolution also included re-orienting the institution as a service not lording institution. It included simple messages to the public to demand better services from us coupled with basic re-training and re-immersion for our officers to learn the basics of public service. It included, for example, the innovation of the SIX PLEDGES displayed on all our court stations and which all Judicial Officers were required to adhere to. The first two of which, human as it is, were remarkable in its absence in the "old" Judiciary: They read:

- *We pledge to cordially greet you and welcome you to our courts.*
- *We pledge to treat you with courtesy, dignity, and respect.*

We made the Judiciary a service institution, a Judiciary for all Kenyans. We established a public complaints mechanism – the Office of the Judiciary Ombudsperson, located in the Office of the chief Justice.

We allowed internal equity of voice and horizontalized the institution through a process of inclusion.

(For those who are not Africans, it is difficult to understand why this is an important transformative practice. Suffice to say that, drinking tea is deeply embedded in Africa and Kenya; but access to this socio- cultural good was underpinned by power dynamics in the judiciary. In Kenya chai (tea) also means a bribe. So our slogan became the judiciary must give tea (justice) to Kenyans and never take it!).

At any rate, with the ushering of our cultural revolution in the judiciary, drinking tea was democratized and all staff in the Judiciary in all court stations were henceforth entitled to tea; something that was bizarrely a preserve of the heads of stations and their secretaries! ***The internal resistance to this policy remains one of the most bewildering aspects of our transformation.*** We kept telling judicial officers and staff that if they could not give justice to their colleagues how could they convince other Kenyans that they would get justice.

We also started monthly tea sessions at the Supreme Court, sessions that were attended by the CJ and staff and judges. There was an important lesson here: by giving the rank-and-file within the institution a voice and dignity to speak up and participate in the governance of the institution, we were also locking them into the transformation ideology; giving them a stake; and insuring against backsliding by their seniors. By delivering our colleagues from administrative tyranny; whimsical transfers across court stations in the country; stagnated promotions and sexually-transmitted promotions (STPs), we gave them a reason to believe in an institution that could stand for their rights and justice; and they reciprocated

by serving the citizen better; and finding innovative solutions to their local problems.

We revived the Judiciary Training Institute (JTI) to become our institution of higher learning, the nerve centre of our progressive jurisprudence. JTI co-ordinates our academic networks, our networks with progressive jurisdictions, our training by scholars and judges, starting with our own great scholars and judges.

As we have sought to rid the judiciary of corruption we[31] have encountered the resistance of corrupt cartels inside and outside the Judiciary, including the bar.

The struggle to make the Judiciary a beacon for anti-corruption struggles in the country continues. We have established internal structures in the Judiciary to undertake our own investigations. After relative successes owing to recruitment, better terms to judicial officers and staff, rigorous disciplinary procedures by the JSC, vetting of judicial officers, we are now undertaking forensic lifestyle audits that will begin at the Supreme Court, and indeed, with the Chief Justice. We are guided by the wisdom of the Nigerian proverb from the Igbo that *"A bad habit that lasts more than a year may turn into a custom."*

We also sought support from the donors to create capacities in the new offices in the Judiciary set up under the Constitution. In 2011 the OCJ had two secretaries and eight bodyguards. Through the help of donors the capacity of the OCJ includes Chief of Staff, Communications expert, Legal Counsel, and the Office of the Judiciary Ombudsperson.

It's worth noting that some judicial reforms have become irreversible, irrevocable, indestructible, and permanent. Historically, the judiciary[32] has been predominantly male- dominated. By 1993, when[33] Kenya Women Judges Association (KMJA) was inaugurated, there were **only three** women judges . Over the years, there has been a rise in the number of female judges in the Judiciary. At the magistracy level, for instance, there is almost gender balance with **47**% representation of female magistrates or **215** out of the **458** magistrates. Out of the **69** High Court judges, **29** are Lady Justices. At the Court of Appeal, **8** of the total **26** Appellate Judges are female while at the Supreme Court, we have **2** female Justices in the **7** member bench. The message here is thanks to the 2010 Constitution the implementation of gender equity in the Judiciary is irreversible.

These reforms include promoting colleagues on merit and in a transparent and accountable manner; equalizing salary disparities to reflect the values of equity and equality; making training and travel fair and just; having in place transfer policies that are fair and just and that are authored by the staff; making access to insurance for all; car and house mortgages accessible to all; the pivotal position of JTI is guaranteed; the existence of Judges and Magistrate's Association and Judicial Staff Association that participate in the governance of the Judiciary; ensuring that the administrative arm of the judiciary facilitates the judicial arm that ensures the core business of administering justice is not jeopardized; democratizing governance in the judiciary as decreed by the constitution; the emergence and development of progressive jurisprudence is on course; the project of "judgment as a dialogue" where judicial officers in their judgment seek to convince the loser that they had justice is now acceptable; and creating a vibrant judicial and public constituency that will make sure that these reforms are permanent.

Despite resistance from judicial officers and staff, the Office of the Judiciary Ombudsperson that receives and acts on complaints against judicial officers and staff has become a critical institution and is now irreversible.

It has restored public confidence in the Judiciary, as have Court Users Committees (CUCs) that are cradles of public participation in judicial affairs and judicial accountability.

[28] See Willy Mutunga, "Dressing and addressing the Judiciary etc

[29] And the Christians supported this change! There is only Lord and that is Jesus Christ.

[30] The pledge included welcoming litigants to court, keeping eye contacts with litigants and accused persons; allowing litigants and lawyers to walk out of the court to use bathrooms, and developing what we have come to call "judgments as dialogue" in line with the constitutional value of accountability.

CUCs are grassroots structures reflected at the centre by the National Council for the Administration of Justice (NCAJ). The NCAJ is established under the Judicial Service Act. NCAJ and CUCs are the centres of inter-agency dialogue, collaboration, coordination, and interaction. They reflect the vision of the Constitution that decrees robust independence of institutions, but calls for dialogue and inter-dependence for the public interest and good to nurture nationhood in Kenya.

The Judiciary has been a leader in the promotion of dialogue, interdependence, and collaboration as decreed by the Constitution. Although the three arms of the state are robustly independent under the Constitution, the Constitution decrees dialogue among them in the national interest. These dialogues have taken place through the Judiciary Training Institute workshops between the Judiciary and security agencies, Parliament, constitutional Commissions, and other state organs. The NCAJ is a vehicle for such dialogue. Tripartite dialogues between the President, the Speakers, and the Chief Justice have taken place on ad hoc basis should be institutionalized. In these meetings the Judiciary has been able to clarify to the other arms what it does, can do, and cannot do. It has sought to clarify the mandates of the three arms, the sovereignty of the people, checks and balances, and the supremacy of the Constitution. Through such dialogues mental shifts in favor of the implementation of the Constitution are taking place notwithstanding the resistance.

We have used scientific data in aid of the constitutional principle of accountability. Article 10 of the Constitution requires all State Organs, of which the Judiciary is one, to apply the national values and principles of governance enumerated thereunder, in the execution of their mandates. Article 10 (2) (c) in particular identifies 'good governance, integrity, transparency and accountability' as part of the body of these principles of governance.

Partly in furtherance of these constitutional provisions the Judicial Service Act 5(2) (b) provided that, every year, the Chief Justice is required to prepare the State of the Judiciary and the Administration of Justice Report (SOJAR), present the report to the public; present it to the National Assembly, and to the Senate for debate and approval; and to have the report gazetted.

Even though the accountability requirements of this statutory provision are clear, the methodology remains a work in progress. There was the necessity and utility from the inception of measuring performance. That is why the Performance Management Directorate was set up as a fully-fledged directorate. Its positive impact on the transformation program, especially on data gathering perspective, has been remarkable. The process of preparing the first two State of Judiciary Reports revealed the centrality of data as a key driver of transformation. The empirical data and evidence served to illuminate performance, or the lack thereof, and provided a scientific basis for the allocation of resources and policy decisions – decisions previously made on the basis of 'felt-needs', mere observation, or past practice. In its assessment of the outputs of courts, judges, magistrates, and other judicial staff it has engendered internal and external accountability. The internal leadership of the Judiciary is now more accountable in administrative decisions that are expected to be evidence-based. Data has emerged as the king of transformation.

Deepening the culture of data gathering and performance reporting institutionalizes accountability, induces performance through competitive and comparative tendencies, and secures transformation permanently. To entrench accountability practices as part of transformation, an expansive view of the provisions of the Judicial Service Act is necessary to entrench accountability as part of transformation.

On the promotion of access to Justice under the first pillar of our (JTF) we have decentralized the Court of Appeal into three regions (circuits) of Mombasa, Kisumu and Malindi; established Judicial Service Week for Criminal Appeals where we dedicate specific weeks for specific judges in a year to hear all criminal appeals in order to clear case back logs, decongest our prison system and in the end ensure that justice is seen to be done to those languishing in prison for at times illegal convictions; and Public Hearings and Live

[31] Knowing that the bar and bench are twins joined at the hip of the administration of justice some members of the bar now file various complaints against judicial officers and staff. Others have petitioned the JSC for the removal of judges on integrity issues, incompetence, gross misconduct and misbehavior under Article 168 of the Constitution.

[32] (KMJA is an association of female judges whose key role in engendering gender equality in areas of administration of justice and creating an enabling environment on access to justice)

[33] Hon. Lady Justice Effie Owuor (JA Rtd), Hon. Lady Justice Joyce Aluoch (currently with ICC) and Hon. Lady Justice Roselyn Nambuye JA.

media coverage on matters of Public Interest to comply with the constitutional value of public participation in the administration of justice. We also acknowledge that only 5% of Kenyans access our formal courts and in compliance with Article 159 of the Constitution we are promoting alternative dispute resolution mechanisms including court annexed mediation, and above all traditional justice systems. Access to justice is about the citizens accessing justice in forums they are convinced they will get justice. We are also working on pilots schemes on how to link the formal justice system to these other forums used by citizens to access justice.

The Kenyan case confirms that the implementation of devolution of political power and resources is ushering in the politics of issues, the central one being the equitable distribution of resources. Kenyans are seeking greater participation in how the resources received in counties are spent by the Governors and the Members of the County Assemblies. They want to be involved in the prioritization of projects and public participation at the grassroots is growing. At this level the vision of the constitution that all political and public power is derived from the people of Kenya, and thus the very first attempt to bring the state and its apparatuses under the sovereignty of the people is being made. This great movement of the people is challenged by the crisis of political leadership that focuses on the politics of divide and rule invoking ethnic, religious, regional, class, generational, gender, clan, and racial divisions to keep the political elite in power. What is worse is the lack of a visible organized alternative political leadership. The middle class civil society leadership still debates the principle of non-partisanship when their grassroots compatriots are debating the formation of political parties that will be anchored on transformative social movements. So, there is a great movement developing at the grassroots because of resources that are being directed there absent an alternative political leadership take political advantage of them.

There is still a great opportunity in Kenya for an alternative political leadership to contest political power on a manifesto based on the vision of the transformative constitution. A humanized state that has a social democratic content is possible. The devolution of political power expands the sovereignty of the people that can be a basis of the deepening of our transformation.[35]

IV: Conclusion:

Finally, as we envision progressive African jurisprudence based on our transformative constitutions, what is also called the gospel according to the Africans, we must concede that the project of social transformation is fundamentally a political project. In countries where the transformation of the judiciary has irreversible support from the political elites much progress can be quickly made. Where public participation in the politics of the society is robust and unified that could be a great ally to all institutions and to social transformation. We should, therefore, interrogate the limitations that face the various judiciaries.

Transformation as the Kenyan case study shows is at two levels, the theoretical or visionary level and at the level of implementation. At the theoretical level the vision of the constitution is clear as a manifesto for change and social progress. At the implementation level ideological and political struggles abound. The Kenyan Judiciary's experience of reforms from the margins to the centre is useful. It is testimony that reforms can actually take place in regimes that are anti-reform if the leadership of an institution is ready to struggle for them. It does not matter that positive outcomes are not readily discernible. The idea is to get the sovereignty of the people, that is, their material interests reflected in the reforms and they will provide the necessary support.

Political will, enabling constitution, credible and interested leadership and membership within the judiciary are primary conditions for rapid transformation of Africa's judiciaries. However, the absence of this bouquet of factors should not make Africa's judiciaries surrender and seek to conform to the status quo.

[34] Dr. David Ndii has authored articles in the Daily Nation, Nairobi, Kenya in praise of devolution.

[35] See John Bellamy Forster, "Chavez and the Communal State: On the Transition to Socialism in Venezuela" in *Monthly Review* (April 2015) Vol. 66 No 11, 1-17. This is a great analysis on how the state can be brought under the sovereignty of the people, the resistance from internal and foreign forces, the role that political leadership has to play in the promotion and protection of the sovereignty of the people. For Kenya this is an opportunity to rethink devolution of political power and whether the implementation of the constitution is a basis for more qualitative and fundamental restructuring of the society. It may be our contribution to the search of paradigms that will liberate Kenya and the world.

Historically, it has always fallen to some institution to lead the process of change and transformation, even in the most difficult of circumstances.

The church, trade union movements, peasant organizations, civil society groups have at various times in different societies been the agent of transformation. The second generation of constitutions in Africa not only provides the dynamic legal tools, but also places considerable responsibility on the judiciary to help engender societal transformation.

The transformation of the judiciary in Africa is an objective and standard need and I don't know of any African country, however dictatorial, where judges don't enjoy security of tenure. Realizing Africa's current pressing agenda of development, peace and security, and institution building can only be achieved through the Rule of law.

The narrative of Africa rising will only last if we build and fortify our constitutional democracies characterized by, among other things, judiciaries that are independent and that possess integrity. That is the legacy that our judicial and political leaders in Africa must aspire to create – a vision which recognizes the need for democratic and social transformation and the rule of law as the permanent and indestructible foundations of the future of Africa as a prosperous, equitable, peaceful, inclusive and secure civilization that can lead the rest of the world.

I thank you very much for your time.

May the Almighty Allah Bless Africa, Nigeria and Kenya

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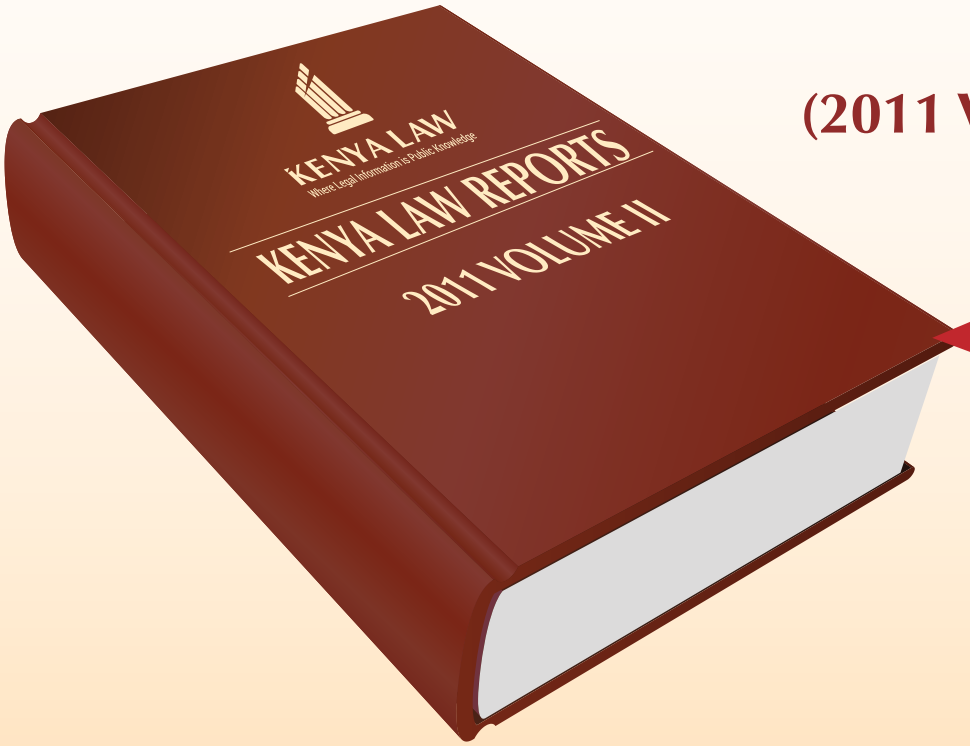

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The immediate aftermath of the General Elections held in December 2007 highlighted the fragile link between the application of electoral law and the stability of the Country's socio-economic and governance structures. Considerable public debate has since been generated on the condition of Kenya's electoral law and the role of the justice system in the resolution of disputes emerging from an electioneering exercise.

Scope of the series

Out of the need to provide the information necessary to inform and guide this debate, the National Council for Law Reporting (Kenya Law) has compiled Kenya's most comprehensive collection of judicial opinions on electoral law – The Kenya Law Reports (Election Petitions Volume 5) – Cited as (2014) 5 KLR (EP). It covers Decisions Emanating from 2007 General Elections.

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What they Said

Supreme Court Judges P K Tunoi, M K Ibrahim, J B Ojwang, S C Wanjala & S N Ndungu, in Isack M'Inanga Kieba v Isaya Theuri M'Lintari & another Application No 46 of 2014

"Despite the question of customary trusts or generational trusts being determined from time to time, the resulting body of precedent was not clear on the singular question on whether a claimant of trust in customary law needed to prove actual physical possession or occupation. Despite an overhaul and repeal of previous land laws and enactment of new ones, that question was affecting pending as well as future matters. The issue, therefore, was continually engaging the working of judicial organs."

"In the Circumstances, the Supreme Court lacked jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5 (2) (b) of that Court's Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court."

Supreme Court Judges W M Mutunga CJ P, K H Rawal DCJ & V-P, M K Ibrahim J S C, J B Ojwang J S C S C Wanjala J S C in Teachers Service Commission v Kenya National Union of Teachers and 3 others Application no. 16 of 2015

Court of Appeal judges E M Githinji, J W Mwera & F Sichale JJA in African Development Bank v Beatrice Agnes Acholla & Another (representatives of the estate of the late Bonaventure Eric Acholla Civil Appeal No. 135 of 2002

"According to article 52 of the ADB Act, the appellant enjoyed immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers. The plain, natural and ordinary interpretation of the provision was that the appellant bank could not be sued in a domestic court, unless the dispute arose out of an exercise of its borrowing powers, which was not the case"

The wording of section 91A was clear that the CDBs had the mandate to make inputs into the development plans and budgets of counties. Such inputs were completely outside the constitutional parameters of the functions of national government and its structures such as the Senate and the National Assembly. ... By purporting to create an oversight role for national government in the counties, section 91A purported to allocate to national institutions roles in the counties that were not in compliance with the Constitution.

High Court Judges, I Lenaola, M Ngugi & G V Odunga in Council of Governors & 3 others v Senate & 53 others, Petition No 381 of 2004

What they Said

"Whereas it was correct that Section 3(2) of the Prevention of Terrorism Act did not lay down the manner in which an entity could be informed of the suspicion of acting in terms of Section 3(1) (b) of the Act. Article 27 (1) of the Constitution guaranteed every person protection and equality before the law, and Article 29 the right not to be subjected to torture in any manner, whether physical or psychological. Article 244(c) of the Constitution required the National Police Service of which the Inspector-General of Police was its Chief Executive Officer, to comply with constitutional standards

Justice Emukule in Muslims for Human Rights (Muhuri) and another v Inspector-General of Police and 4 others, Petition No. 19 of 2015

Justice Lenaola, in Bernard Murage v. Fineserve Africa Limited & 3 others [2015] eKLR Nairobi Petition No. 503 of 2014

"In the instant case there was no violation of the right to privacy since the Thin SIM technology would be used by those customers that expressly consented to it and therefore there could not be a violation of privacy where a party had consented to the alleged act that may infringe on a particular right. However such violation was not proven by the petitioner. 9. The court could not halt the roll out of the Thin SIM technology pending the enactment of the Data Protection Bill into law. The Court could only interfere with the legislative process of Parliament especially before Parliament had concluded its deliberations on a Bill in very rare cases, the instant issue as to, whether a data protection law was necessary as a safeguard to the use of the Thin SIM technology was not one such case. The Court could not order Parliament to make specific laws but only test both the process leading to those laws and their contents against the constitutional muster. It could only intervene in very limited circumstances and in the clearest of cases for instance where it was being alleged that there was an abuse of discretion, or that the decision makers had exercised their discretion for an improper purpose or had acted unfairly or in excess of their statutory mandate, which was not the case."

A single judge deciding a matter was not obliged to follow a decision of the court delivered by three judges. 13. While both the courts envisaged would be exercising the same jurisdiction, the decision of three or more judges would have more jurisprudential weight than the decision of a single judge. The inclusion of article 165 (4) of the Constitution, requiring that a matter of substantial importance be heard by a bench of more than three judges, inferred that a substantial question would yield a substantial decision, and as such, that decision would bear more weight.

Court of Appeal judges P Waki, M Warsame & J. Mohammed JJA in Okiya Omtata Okoiti & Another v Anne Waiguru, Cabinet Secretary Devolution and Planning & 3 Others Court of Appeal at Nairobi Civil Application No. Nai 3 of 2015

Justice Korir in Republic v Commission on Administrative Justice, Ex-Parte National Social Security Fund Board of Trustees-High Court of Kenya at Nairobi, Judicial Review Division J.R Case No. 304 of 2014

"It was apparent that under section 30(h) CAJA Parliament intentionally limited the jurisdiction of the Commission on Administrative Justice in the identified circumstances. The reason for that limitation was that there was need to avoid conflicts between the Commission and other state agencies. The limitation was therefore reasonable considering that the Commission was not a super commission capable of investigating all the things done by state organs. Where another commission or any other person established by the Constitution or any other written law was dealing with a particular issue, the commission had no jurisdiction to venture into that matter"

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Summary of the dispute between the Teachers Service Commission and the Teachers Trade Unions

Teachers Service Commission v Kenya National Union of Teachers and 3 others

Reported by Teddy Musiga

Introduction

This case summary is presented in a question and answer (Q&A) format to explain the dispute between the teachers, their unions and their employers from the proceedings in court. It traces the dispute from the Employment and Labour Relations Court (a court with the same status as the High Court), to the appeal at the Court of Appeal and finally the appeal to the Supreme Court as well as the proceedings that followed after the Supreme Court decision.

What is the genesis of the dispute between the teachers, their trade unions and their employer (the Teachers Service Commission)?

In January 2015, the teachers' trade unions – The Kenya National Union of Teachers and the Kenya Union of Post Primary Education Teachers (KNUT & KUPPET respectively) called for a nation wide strike that paralyzed primary, secondary and tertiary colleges' education in Kenya.

The Teachers Service Commission (petitioner) filed a petition at the Employment and Labour Relations Court seeking *inter-alia* orders of a prohibitory injunction to restrain the officials and members of the Respondents (KNUT & KUPPET) from continuing with the strike pending the hearing and determination of the application *inter- partes*.

The Employment & Labour Relations Court granted the applicant (TSC) the orders they sought and directed that the Application and the Petition be served on the Respondents (KNUT & KUPPET) and the interested parties. At the date of the *inter-partes* hearing, the parties agreed that teachers would resume work pending the determination of the petition. The agreement resulted into a consent judgment that was entered between the parties. Once the consent was recorded in court, the respondents (KNUT & KUPPET) called off the strike and resumed duty.

What was the content of the Consent filed at the Employment and Labour Relations Court?

The consent was recorded on the 14th January, 2015 Before Nduma Nderi J, with the following terms;

i. That the parties had agreed to have the economic dispute adjudicated by the court.

ii. The KNUT & KUPPET were to file their memorandum by 19th January 2015

iii. The TSC was to file and serve its memorandum on or before 26th January, 2015

iv. The Central Planning and Monitoring Unit (CPMU) and the Salaries Remuneration Commission (SRC) were to file their reports within ten days from the 26th January, 2015

v. Meanwhile, the unions (KNUT & KUPPET) were to forthwith call off the strike that had been going on since the 5th January, 2015 and all the teachers were to resume duty by Monday the 19th January, 2015

vi. TSC undertook not to victimize any teacher/ union officials/ unions who could have participated in the strike including payment of salaries.

What was the effect of that consent?

First, it led to a national wide resumption of schooling effective from the 19th January, 2015 and the ceasefire has held to date. Secondly, on the consideration of calling off the national wide strike by the two unions and upon undertaking by the TSC not to victimize the teachers, officials of the unions and the unions that had participated in the strike, the Petition filed by the Teachers Service Commission was compromised and it was replaced by an economic dispute. The Unions (KNUT & KUPPET) became the claimants in the economic dispute and the TSC being the employer became the respondent. SRC remained an interested party in the economic dispute. All the parties agreed to have the economic dispute resolved before the same court and undertook to respect and participate in the prosecution of that economic dispute to its conclusion.

What then was the economic dispute about?

The applicant (TSC) upon realization of the industrial peace following the consent judgment of 14th January, 2015 filed another application seeking orders to set aside that consent. The Employment & Labour Relations Court upon hearing the said application filed by TSC *inter-partes* ordered the parties to *inter-alia* abide by/honour the initial consent orders pending the hearing and determination of a petition before court on Economic dispute filed pursuant to the consent orders.

TSC (the applicants') main contention before the court was that despite the several salaries reviews and Government's attempts to improve basic salaries of the teachers, the teachers still went on strike. The teachers (respondents) on their part claimed that the basic salaries and allowances were not periodically reviewed as agreed between the parties; they further submitted that the said increments had been done arbitrarily in the name of harmonization of teachers' salaries with those of civil servants.

What were the legal issues for determination in the economic dispute?

The legal issues raised for determination were first, whether the consent entered by the parties was valid and whether it could be vacated. Secondly, whether the unions (KNUT & KUPPET) were entitled to conclude a Collective Bargaining Agreement with the Teachers Service Commission in determining the terms and conditions of employment of all unionisable teachers in the country. Thirdly, whether the Salaries and Remuneration Commission had a role in the negotiations and determinations of the basic pay of the teachers. Fourthly, whether the teachers were entitled to a basic salary increment in the Collective Bargaining Agreement and fifthly, whether the teachers were entitled to a review of any allowances and if so, what was the effective date of the Collective Bargaining agreement?

What was the decision of the Employment & Labour Relations Court on the issues raised?

The court rejected the application to set aside the consent or even to open up the petition filed by the TSC since TSC had fully benefited from that consent order which brought to an end a nation wide strike of its employees. TSC was thus estopped in law and fact from reneging on the consent it had fully participated in crafting and having enjoyed the fruits of the consent order.

The evidence before the court suggested that TSC made an offer to the Unions of a basic salary increase between 50 – 60% for a period of four (4) years. It admitted that there was a huge disparity between the average salary increase for the lowest cadre of teachers (P1) at minus – 8.95% and that of the highest cadre of teachers (Chief Principal) at plus +48.82% for the period under review. It was also clear from the totality of evidence before the court that the average salaries increase for the teachers between 1997 – 2009 was way below that of civil servants. Therefore there was a dire need to harmonize the salaries of teachers within the different cadre and also with other civil servants.

The court then made the following orders;

a) *Basic salary increment of between 50 – 60% for four (4) years approved*

b) *The Collective Bargaining Agreement containing the 50 – 60% basic wage increase, effected from 1st July 2013 to 30th June 2017.*

c) *Allowances increment awarded to the teachers by TSC including House allowance, Leave allowance, Hardship allowance, Advance for motor vehicle purchase and Mortgage facility confirmed with effect from 1st July 2015, and were to be reflected in the Collective Bargaining Agreement for the period 1st July 2013 to 30th June 2017.*

d) *Other allowances and benefits in the Memoranda of the parties including; Responsibility allowance, Hazard allowance, Disturbance allowance, Accommodation and night out allowance, Mileage claims, Study leave, Sabbatical leave and any other allowances and benefits that the parties may wish to be reflected in the Collective Bargaining Agreement as negotiable items were to be reflected in the Collective Agreement for the period 1st July 2013 to 30th June 2017 in their existing status.*

e) *The CBA, duly signed by the parties to be registered with the Court in terms of Section 60(1) of the Labour Relations Act, 2007 within thirty (30) days from the date of the judgment.*

f) *Judgment to take effect immediately not withstanding any delay in preparation of the CBA document and its registration with the Court*

In making those orders, the court observed that those awards were hoped to bring to an end the era of arbitrary remuneration awards to the teachers and that the era of acrimony and regular national wide strikes by the teachers could be replaced by an era of guided collective bargaining in a four year cycle.

What was the appeal to the Court of Appeal about? Before Justices Warsame, J Mohamed & Ole Kantai, JJA

The Teachers Service Commission (TSC) being aggrieved and dissatisfied by the decision of the Employment and Labor Relations Court, in Nairobi Petition No. 3 of 2015 lodged a Notice of Appeal, pursuant to which it filed at the Court of Appeal an application for stay of execution of the Employment & Labor Relations Court's Judgment, under Rule 5(2) (b) of the Court of Appeal Rules, 2010. Upon hearing the application, the Court of Appeal granted a conditional stay of execution of the Judgment and Orders of the Employment and Labor Relations Court on the following terms;

i. That the applicant (TSC) and the interested parties (the Salaries & remuneration Commission & the Attorney General) were to implement the increment ordered by the judge in respect of the basic salary with immediate effect from 1st August, 2015.

ii. That the applicant (TSC) was to continue paying the increment ordered above until the hearing and final determination of the appeal.

iii. Implementation of the judgment in respect of arrears of salary and all allowances ordered by the judge was stayed until hearing and determination of the final appeal.

What was the appeal to the Supreme Court about? Before W M Mutunga CJ, K H Rawal DCJ, M K Ibrahim, J B Ojwang, S Wanjala, SCJJ

TSC was once again dissatisfied with the outcome of the Court of Appeal's ruling, and filed application seeking a stay of execution against the interim Orders granting conditional stay of execution against the Judgment of the Employment and Labor Relations Court. KNUT (1st respondent) filed a preliminary objection contesting the jurisdiction of this Court to re-consider, on appeal, the exercise of the Court of Appeal's discretion under Rule 5(2) (b). It specifically contested the power of the Supreme Court to entertain interlocutory appeals from the Court of Appeal.

What were the legal issues for determination at the Supreme Court?

The legal issues for determination were, first, whether an application challenging the Orders of the Court of Appeal under Rule 5(2) (b) can be regarded as an appeal, for the purposes of article 163(4) (a) of the Constitution of Kenya, 2010. Secondly, whether the Supreme Court had jurisdiction to hear "appeals" arising from interlocutory Orders of the Court of Appeal under Rule 5(2) (b) of the Court of Appeal Rules and third, whether there exists a distinction between the exercise of the Court of Appeal's power under rule 5(2) (b) with the inherent power of the Supreme Court to grant interim reliefs.

What was the decision of the Supreme Court?

Where the Supreme Court had been called upon to invoke its jurisdiction under article 163 (4) (a) of the Constitution, the Supreme Court had almost invariably proceeded on the assumption that there existed a substantive determination of a legal/ constitutional question by the Court of Appeal which the intending appellant sought to impugn. That was the rational meaning to be ascribed to the word "appeal", in an adversarial system, where jurisdiction is assigned by the legal norms to a

hierarchy of Courts.

An application under rule 5(2) (b) of the Court of Appeal Rules is not an appeal as envisaged by article 164(3) of the Constitution of Kenya, 2010. For purposes of judicial proceedings an appeal is broadly speaking, 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 consideration and review of the decision in his favor.

Discretionary decisions which originate directly from the appellate Court are by no means the occasion to turn the Supreme Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution. The application before the Supreme Court contested the exercise of discretion by the appellate Court, when there was neither an appeal, nor an intended appeal pending before the Supreme Court. The appeal before the Court of Appeal was yet to be heard and determined.

An application so tangential, could not be predicated upon the terms of Article 163 (4) (a) of the Constitution. Any square involvement of the Supreme Court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged, at the Court of Appeal, and for which the priority date had already been assigned. Therefore, an involvement of Supreme Court at such an early stage would expose one of the parties to prejudice, with the danger of leading to an unjust outcome.

In the Circumstances, the Supreme Court lacked jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5 (2) (b) of that Court's Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court. The court could not take jurisdiction if it did not have to, but, it was equally true that it had to take jurisdiction if it had to. The court had no more right to decline the exercise of jurisdiction which is given than to usurp that which was not given. The one or the other would be treason to the Constitution.

The Supreme Court thus allowed the preliminary objection and the application filed by TSC was disallowed.

What followed after the Supreme Court decision? – Before Justice Monica Mbaru.

Following the decision of the decision of the Supreme Court, the Teachers Service Commission moved to the Employment and Labour Relations Court in Petition No. 72 of 2015 challenging the legality of the on – going teachers strike. They argued that the teachers' trade unions failed to follow the requisite procedure in terms of the provisions of the Labour Relations Act that require a provision of notice to the employer before the commencement of the industrial strike. On the 4th of September, 2015, Justice Monica Mbaru ordered *inter alia* that the industrial action by the respondents was unprotected. She further ordered that both parties were to be heard with respect to the preliminary objection filed by the respondents which was to be filed and be heard on the 10th of September, 2015

What was the preliminary objection filed by the respondents about?

The preliminary objections as filed by the respondents were that;

a) The matters raised by the petitioner were *res judicata*, the court was *functus offcio*, the application was a blatant abuse of the court process and that the petitioner had become a vexatious litigant.

b) The respondents further contended that the Motion sought the review of the Judgment in Petition No. 3 of 2015 by Justice Nduma Nderi and reversed the decisions of the appellate courts including the Supreme Court. They also contended that the petition and the motion sought to elevate a simple contractual obligation disagreement into a constitutional issue hence an abuse of the court process.

What were the facts giving rise to the dispute in Petition No. 72 of 2015 at the Employment and Labour Relations Court? – Before Justice N J Abuodha.

As the strike was still on – going, the petitioners instituted the petition to challenge the legality of the teachers' strike. They argued that the teachers' strike had been called in violation of constitutional provisions and without observing statutory procedures under the Labour Relations Act No.

14 of 2007. Specifically, they argued that the strike violated the petitioner's rights under articles 30, 48 and 50 of the Constitution and the children's rights under article 53 of the Constitution and further that the strike was against public policy. The respondent on the other hand argued that the matters raised were *res judicata* and the court was *functus officio*, thus the application was an abuse of the court process. Further that the petition sought to review the judgment in Petition No. 3 of 2015 (the petition that awarded the 50 – 60% pay increase) and to reverse the decisions of the appellate courts including the Supreme Court. Also that, the petition sought to elevate a simple contractual obligation to a constitutional issue hence an abuse of the court process.

What were the main issues for determination in Petition No. 72 of 2015 at the Employment and Labour Relations Court?

i. Whether there exists circumstances in which parties to a labour relations dispute may participate in an industrial strike without issuing notice to the employer.

ii. Whether parties to a labour relations dispute could participate in a strike as a form of enforcement mechanism to compel compliance with orders from the court where the court has awarded such orders.

iii. Whether the Teachers Service Commission (a state organ) has the locus *standi* to institute and litigate on the Bill of Rights.

What was the determination of the court with respect to the above issues?

The court held that there were certain instances in which parties to a labour relations dispute could participate in a strike without giving notice to the employer as required by the Labour Relations Act.

The court stated that Parliament in enacting section 76 of the Labour Relations Act contemplated a smooth industrial relations where parties to a trade dispute engaged in good faith and not the scenario such as the instant one where the petitioner and the Cabinet Secretary who were supposed to facilitate the conciliation of the trade dispute had made their stand known concerning the very dispute.

The proposal for 50-60% increase was based on proposals presented to the court by the petitioner. It was therefore understandable for the respondents, that the omission or failure by the petitioner to honour its part of the bargain to pay 50 – 60% as proposed by them and reduced as the award of the Court was provocative and justified their right to call for a strike without notice.

However, the right to go on strike could not be said to be an enforcement mechanism for the judgment in Petition No. 3 of 2015. Industrial action either by way of strike or lock – out was not among the compendium of orders that a court could make. That was to say, that no court could order a disputant in a trade dispute to go on strike or to effect a lock – out. The Court's role was limited to making declaration on the legality or otherwise of an ongoing or threatened strike or lockout.

There was absolutely nothing wrong and it was not in breach of the Labour Relations Act for the respondent's members to go on strike to compel the petitioner to honour the judgment in Petition No. 3 of 2015. When the Court of Appeal declined to order a stay of execution of the judgment in Petition No. 3 of 2015, the respondents were left at liberty to use any lawful means recognized by the Constitution and the Labour Relations Act to agitate for what they deemed as their members entitlement as awarded by the Court in Petition No. 3 of 2015.

Article 237 of the Constitution of Kenya, 2010 as read together with article 249(1) clothed the petitioner with enough legal authority to bring the instant petition on its own behalf, the children in public schools and the people of Kenya generally. The definition of a person under article 260 of the Constitution included body of persons whether incorporated or unincorporated. The contention that an organ of state hence the state could not litigate on the Bill of Rights remained therefore novel and grey.

What were the orders of the Court?

a) In the interest of Children in public schools and the rights under article 53(1) (c) of the Constitution, the respondents were ordered to suspend the strike for 90 days with the consequence that the respondents' members were to resume duties immediately.

b) The petitioner and the respondents were within 30 days of the judgment, with the help of the Cabinet Secretary in charge of Labour, to appoint

a neutral and mutually agreeable conciliator or conciliation committee and engage in conciliation in good faith limited to exploring viable modalities of implementing the award in petition N0. 5 of 2015 bearing in mind the Government's fiscal policies and budgetary cycles.

c) *The Petitioner was not to victimize or in any way take any adverse step against the respondents' members for participating in the strike called on 1st September 2015 and that included payment of full salaries and allowances without any deductions whatsoever on account of the period the respondents' members participated in the strike.*

d) *Either Party could upon the expiry of the 90 day period stated in A and failure to conciliate the dispute as stated in B above, be at liberty to declare a trade dispute and exercise any of their rights as provided under article 41 of the Constitution as read with sections 76 of the Labour Relations Act.*

International Jurisprudence

South African Court Rules on the Right to Die With Dignity by Means of Euthanasia

Robert James Stransham-Ford V. Minister of Justice and Correctional Services & 2 Others
In the High Court of South Africa
Case Number: 27401/15
H.J FABRICIUS,
30/04/2015
Reported by Sussy Nyamosy & Kipkemoi Sang
Reviewed by Monica Achode

The Applicant was provisionally diagnosed with terminal prostate cancer on 19 February 2013. In March 2015, he underwent an ultrasound biopsy and it was established that the cancer had metastasized in his lymph glands. During the same period he was admitted to the Victoria Hospital as an emergency, and in great pain. He had since had to have his lymph node removed. It was further discovered that the Applicant's cancer had spread to his lower spine, kidneys and lymph nodes.

Due to the extent of the cancer the applicant's quality of life had deteriorated markedly. It was his assertion that he suffered from severe pain, nausea, vomiting, stomach cramps, constipation, disorientation, weight loss, loss of appetite, high blood pressure, increased weakness and frailty related to the kidney metastasis; that he was unable to get out of bed due to injections and drips; that he endures anxiety;, could not sleep without morphine or other painkillers; and that he used pain medication, which made him somnolent.

The applicant petitioned the High Court and prayed for a declaration allowing him to request a medical practitioner to end his life or to enable him to end his life by the administration or provision of some or other lethal agent; a declaration that the medical practitioner who administers or provided some or other lethal agent to him, would not be held accountable and would be free from any civil, criminal or disciplinary liability that may otherwise have arisen from the administration or provision of some or other lethal agent to the Applicant; a cessation of the Applicant's life as a result of the administration or provision of some or other lethal agent to the Applicant; and to the extent required develop common law, by declaring the conduct in prayers 2. & 3 lawful and constitutional in the circumstances of this matter. He further contested that it was an infringement of his constitutional right to dignity not to allow that.

The Justice and Health Ministers, Health Professions Council of SA, and National Director of Public Prosecutions opposed the application. The third respondent objected to the petition of the Applicant stating that there were palliative medical treatments available which could improve the situation for a lengthy period of time. The Applicant responded by saying that palliative care did not satisfy his need and right to die in dignity whilst fully aware of the moment of his death.

The issues before the court were whether it was conceivable that one's health (the sufferer) could deteriorate to a point that would justify taking his own life, whether another person (medical practitioner) could be allowed to assist the sufferer to end his life, and if so, what were the safeguards that needed to be in place for this to occur.

Section 1 of the Constitution of South Africa upheld the principle of human dignity and the achievement of equality and the advancement of human rights and freedoms. Section 7 in its Bill of Rights enshrined the rights of all people in the country and affirmed the democratic values of human dignity, equality and freedom. The State had to respect, protect, promote and fulfill the rights in the Bill of Rights. Further, under section. 8(3) when applying a provision of the Bill of Rights to a natural or juristic person a court in order to effect a right in the Bill, had to apply, or if necessary develop, the common law to the extent that legislation did not give effect to that right protected. Moreover section 12 gave everyone the right to freedom and security of the person which included the right not to be treated or punished in a cruel, inhuman or degrading way and the right to bodily and psychological integrity - including the right to security in and control over their body.

The court found that the applicant's quality of life had deteriorated markedly during the course of his illness. The Applicant had undergone numerous treatments, medicines or traditional remedies and was currently under palliative care. He was acutely aware of and had accepted that his death was imminent. The applicant had shown that he was not

afraid of dying but dying while suffering.

The court noted that the current legal position was that assisted suicide or active voluntary euthanasia was unlawful. It also noted that provision of remedies was open-ended and therefore inherently flexible in the instant context. The appropriateness of the remedy would be determined by the facts of the particular case. It was therefore not a matter of discretion or personal inclination but rather a constitutional imperative.

The concept of human dignity had a wide meaning which covered a number of different values. There was a very close link between human dignity and privacy and as well as a close relationship with freedom. Although it was difficult to capture in precise terms, the concept required the court to acknowledge the value and worth of all individuals as members of society. It was the source of a person's innate rights to freedom and to physical integrity, from which a number of other rights flew, such as the right to bodily integrity. Persons had to be regarded as recipients of rights and not objects of statutory mechanisms without any say in the matter.

As far as active euthanasia was concerned, in terms of the current law, the court noted that a person could not be actively killed, but life-sustaining treatment could be withdrawn even if that would cause the patient to die from natural causes. This was a good example of *dolus eventualis*? The right to life had to be a life that was worth living. The right to life was, in one sense, antecedent to all other rights in the Constitution. The concept of human life was at the centre of the constitutional values. The Constitution sought to establish a society where the individual value of each member of the community was recognized and treasured. The right to life was central to such a society. The right to life, thus understood, incorporated the right to dignity. So the rights to dignity and to life are intertwined.

The current legal position was established in a pre-constitutional era. In a post-constitutional era, the law required development to give effect to the Applicant's constitutional rights. The underlying values, spirit and purport of the applicable sections in the Constitution, seemed to be supportive of the introduction of voluntary active euthanasia in South Africa. Such a dispensation, along the lines of the recommendation of the South African Law Commission, should be strictly regulated and monitored to ensure the autonomy of competent terminally ill patients while guarding against any possible abuse of the system. Ultimately, euthanasia was a matter of patient autonomy and individual choice.

The new Constitution with its Bill of Rights informed the court of what to decide and which appropriate order to issue. The norms of the Constitution should inform the public, and its values, not sectional, moral or religious convictions. Sacredness of the quality of life should be accentuated rather than the sacredness of life per se. The irony was that the State sanctioned death when it is bad for a person, but denied it when it was good. The timing of death – once solely a matter of fate was now increasingly becoming a matter of human choice.

It had long been recognized as humane to euthanize a severely injured or diseased animal, Section. 2 (1) (e) of the Animals Protection Act 71 of 1962 read with S. 5 (1) and 8 (1) (d) thereof. It was clear from those provisions that the owner of an animal was obliged to destroy such animal which was seriously injured or diseased or in such a physical condition that to prolong its life would be cruel and would cause such animal unnecessary suffering. It was universally accepted that to permit an injured or sick animal to suffer was not only merciless and cruel but was also a crime.

There had to be minimum safeguards in any given context, but at the end of the day each case had to be decided on its own merits, any envisaged legislation will provide for sufficient safeguards to be applied depending on the circumstances of each individual sufferer. Any future Court would also determine the necessary safeguards on its own facts. There was therefore no uncontrolled ripple effect.

The Court found that in an appropriate case and despite opposition, it could exercise its discretion in favour of declaring whether the adoption by an applicant of a certain cause of conduct would constitute a crime. When treatment was withdrawn, the question arose, in the context of causation, that the uncoupling of a ventilator, which undoubtedly would cause death, would not be the legal cause of death where a patient had suffered severe brain damage and was actually brain dead. The Court would approach those interests with a strong predilection in favour of the preservation of life, which did not however extend as far as requiring that life should be maintained at all costs, irrespective of quality.

Just as a living person had an interest in the disposal of his body, so a patient's wishes as expressed when he was in good health should be given effect to. An individual's response to a grievous and irremediable medical condition was a matter critical to their dignity and autonomy. The law allowed people in such situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life sustaining medical equipment, but denied them to request their physicians' assistance in dying. That interfered with their ability to make decisions concerning their bodily integrity and medical care trenched on liberty. And, by leaving to endure intolerable suffering, impinged on the

security of that person.

Laws that impose on life, liberty or security of the person must not be arbitrary, or have consequences that are grossly disproportionate to their object, the Commission's approach and the community's opinion was of limited value only and the ultimate question for determination was not what the public opined, but rather, what the Constitution provided. In the absence of legislation, which was the Government's prerogative, any other Court could scrupulously scrutinize the facts before it, and would determine on a case-by-case basis, whether any safeguards against abuse were sufficient.

A Court had to keep in mind that the primary responsibility for law reform rested with the legislature. A Court could develop the common law only incrementally. The judiciary could confine itself to those incremental changes which were necessary to keep the common law in step with the dynamic and evolving fabric of the society. A Court however had to remain vigilant and was not to hesitate to ensure that the common law was developed to reflect the spirit, purport and objects of the Bill of Rights. Where there was such a deviation, Courts were obliged to develop the common law by removing the deviation. The Constitution did not give the Court discretionary powers but imposed an obligation on the Court.

In allowing the application the court concluded that the absolute prohibition on assisted suicide in common law did not accord with the rights that the Applicant relied on, it did not mean that an individual was obliged to live, no matter what the quality of his life was. The court proceeded to allow the applicant to undergo assisted suicide and his doctor declared immune from prosecution when assisting him to die. However, the appellant died shortly after the Order was passed.

Relevance to Kenya:

The Bill of Rights, as enshrined in the Constitution of Kenya 2010, is the guiding principles as far as social regulation and human rights are concerned. Article 26(3) of the Constitution states that "A person shall not be deprived of life intentionally, except to the extent authorized by this constitution or any other written Law". Section 226 of the Kenyan Penal code makes it clear on suicide stating that *"Any person who attempts to kill himself is guilty of a misdemeanor "*while section 225 of the same on aiding suicide states *"Any person who-*

I. *Procures another to kill himself; or*

II. counsels another to kill himself and thereby induces him to do so; or

III. Aids another in killing himself

is guilty of a felony and is liable to imprisonment for life."

Like Kenya (Penal Code, Cap 63), South Africa has punitive measures on attempted suicide, yet the High Court in this case developed exceptional circumstances, when life is justifiable to be taken away upon the consent of an adult mentally stable but terminally ill who claims death with dignity rather than pain. The court found that such could be allowed in exceptional circumstances that were in accordance with the principle of fundamental justice. However unlike South Africa, Kenya has not evolved to the point where the courts can justify the taking of an individual's life through suicide.

Kenya Laws' ICT Systems Administrator Bags Prestigious 2015 Mandela Washington Fellowship.

By Martin Mbui (ICT Department)

Congratulations, you have been selected to participate in the 2015 Mandela Washington Fellowship for young……I just could not believe it. I strode carefully out of my office workstation ready to explode at any moment with Joy as it finally sunk that this was truly an amazing opportunity and perhaps an indication of Bigger, Better things to come.

The Mandela Washington Fellowship is a flagship program of U.S. President Barrack Obama's Young African Leadership Initiative (YALI) that empowers people through Academic Coursework, Leadership training, and Networking.

I was selected to participate in the Fellowship as one of the 500 fellows from over 30,000 applications from across Sub-Saharan Africa.

To me, transformation has been part of my life, but the Fellowship changed my perspective completely.

I was selected for my six week academic component at the Virginia Commonwealth University (VCU) in Richmond Virginia, where I learnt a lot about teamwork, built great relationships, Networked and conformed into a different way of life away from my generally accepted "comfort zone".

The cohort at VCU had a mix of 25 great individuals ranging from Elected Members of Parliament, Managers of various fields, Lawyers, Doctors, and of course me, an ICT Systems Administrator at Kenya Law. In all, we were from 12 different African Countries at the institution.

The training had an all round Public Management schedule ranging from In-class academic sessions to real life practicum's.

Upon completion of the Academic component, I travelled to Washington, D.C ., to participate in a 3day Presidential Summit hosted by President Barrack Obama where I met the entire 500 MWF from all corners of Sub-Saharan Africa.

I was also honored to shake hands with President Obama. He reminded me of why it was important to adhere to the principles of Servant Leadership.

I plan to inculcate the different Technologies I have come across while in the U.S. to further enhance the mandate of Kenya Law in the dispensation of Public Legal Information to the benefit of the people of Kenya.


LEGISLATIVE UPDATE: Synopsis of Bills and Acts of Parliament

By Faith Wanjiku and Jacques Walters Omondi (Laws of Kenya Department)

A. NATIONAL ASSEMBLY BILLS 2015

1. Companies Bill, 2015

Kenya Gazette Supplement No. 54 (National Assembly Bills No. 22)

The objects of the proposed Act are to facilitate commerce, industry and other socio-economic activities by enabling one or more natural persons to incorporate as legal entities with perpetual succession, with or without limited liability, and to provide for the regulation of those entities in the public interest, and in particular in the interests of their members and creditors. The aim is to develop a modern companies law to support a competitive economy in a coherent and comprehensive form. The Bill seeks to consolidate the law relating to the incorporation, registration, operation and management of companies and the registration, operation and management of foreign companies that carry on business in Kenya.

2. Health Records and Information Managers Bill, 2015

Kenya Gazette Supplement No. 70 (National Assembly Bills No. 24)

The objective of this Bill is to provide for the training, registration and licensing of health records and information managers. The Bill further seeks to regulate the practice of health records and information managers and provide for the establishment, powers and functions of the Health records and Information Managers Board.

3. Companies and Insolvency Legislation (Consequential Amendments) Bill, 2015

Kenya Gazette Supplement No. 72 (National Assembly Bills No. 25)

This Bill makes consequential amendments to other Acts consequent upon the enactment of the Companies Bill, 2015 and the Insolvency Act, 2015. The Bill is in keeping with the practice of making minor amendments which do not merit the publication of a separate Bill and consolidating them into one Bill. The Bill seeks to amend 24 laws relating to it.

4. Kenya Roads Bill, 2015

Kenya Gazette Supplement No. 77 (National Assembly Bills No. 26)

The principal object of this Bill is to give effect to the Fourth Schedule to the Constitution in relation to the roads sub-sector. It is proposed to review, consolidate and rationalize the legal and institutional framework for management of the road network and roads sub-sector in a more efficient and effective manner. With this object it is also proposed to amend the Kenya Roads Board Act (Cap 4084), repeal the Kenya Roads Act (Cap 408), and the Public Roads and Roads of Access Act (Cap 399).

5. Finance Bill, 2015

Kenya Gazette Supplement No. 78 (National Assembly Bills No. 27)

The Bill formulates the proposals announced in the Budget for 2015/2016 relating to the liability to, and collection of taxes and for connected purposes. It also seeks to amend 8 laws in relation to finance.

6. Excise Duty Bill, 2015

Kenya Gazette Supplement No. 79 (National Assembly Bills No. 28)

The main objective of this Bill is to consolidate the provisions on the imposition and collection of excise duty into a separate law. This is necessitated by the enactment of the East African Community Customs Management Act, into which the provisions on customs duty then in force under the Customs and Excise Act (Cap.472) were incorporated. These provisions were consequently repealed, from the Customs and Excise Act, leaving only the provisions relating to excise duty.

7. Tax Procedures Bill, 2015

Kenya Gazette Supplement No. 80 (National Assembly Bills No. 29)

The Bill provides harmonized procedural rules applicable to the administration of the tax laws of Kenya. Among other provisions, this Bill seeks to provide for registration and deregistration of taxpayers and connected matters which include information to be provided by taxpayers, the appointment of tax representatives, their liabilities and obligations and the appointment of tax agents.

8. Miscellaneous Fees and Levies Bill, 2015

Kenya Gazette Supplement No. 81 (National Assembly Bills No. 30)

This Bill is necessitated by the need to anchor in legislation the provisions for charging Export Levy, Import Declaration Fee and the Railway Development Levy which are currently in the Customs and Excise Act (Cap 472). The Customs and Excise Act is proposed to be repealed by the Excise Bill. The repeal of the Customs and Excise Act implies that the Railway Development Levy, Export Levy and Import Declaration Fee will have no legal basis for being charged and do not fit in the Excise Bill. The Bill provides for the imposition of fees and charges on imported or exported goods and for connected purposes.

9. Betting Lotteries and Gaming (Amendment) Bill, 2015

Kenya Gazette Supplement No. 82 (National Assembly Bills No. 31)

The Bill seeks to amend the Betting, Lotteries and Gaming Act (Cap. l3l) to introduce tax to be paid by gaming operators of lotteries, gaming and prize competition in Kenya, who currently do not pay any tax. The Bill formulates the proposals announced in the Budget 2015/2016 relating to the liability to, and collection of taxes and connected purposes. Under Article 209 of the Constitution, the imposition of taxation is the sole responsibility of the national government.

10. Ethics and Anti-Corruption (Amendment) Bill, 2015

Kenya Gazette Supplement No. 87 (National Assembly Bills No. 33)

The Bill seeks to amend the Ethics and Anti-Corruption Commission to increase the number of Commissioners from **three** to **five**. The Bill also seeks to provide for the Chairperson and the, members of the Commission to serve on a part-time basis.

11. Legal Aid Bill, 2015

Kenya Gazette Supplement No. 90 (National Assembly Bills No. 35)

The main object of the Bill is to establish a regime to facilitate the provision of legal aid. The Bill seeks to provide a legal framework for the regulation of persons and institutions offering legal aid services.

12. Access to Public Information Bill, 2015

Kenya Gazette Supplement No. 94 (National Assembly Bills No. 36)

The principal object of this Bill is to give effect to Article 35 of the Constitution and thereby facilitate access to information held by Government Ministries and other public authorities. The Bill recognizes access to information as a right bestowed on the Kenyan people, and seeks to promote proactive publication, dissemination and access to information by the Kenyan public in the furtherance of this right. It also spells out the mechanisms for ensuring public access to information, as well as the factors that may hinder the right to this access. The Bill is borne of the realization that access to information held by the Government and public institutions is crucial for the promotion of democracy and good governance.

13. Biomedical Engineers Bill, 2015

Kenya Gazette Supplement No. 97 (National Assembly Bills No. 37)

The main objective of this Bill is to provide a legislative framework for the training, registration and licensing of biomedical engineering professionals. The Bill further seeks to regulate the practice of biomedical engineering and provide for the establishment, powers and functions of a Biomedical Engineering Board which shall regulate the profession.

14. Constitution of Kenya (Amendment) (No 4) Bill, 2015

Kenya Gazette Supplement No. 112 (National Assembly Bills No. 38)

The principal object of this Bill is to amend the Constitution to ensure that the membership of the National Assembly and the Senate conforms to the two-thirds gender principle enunciated in Article 8 1 (b) of the Constitution.

15. Kenya Regiment (Territorial Force) (Repeal) Bill, 2015

Kenya Gazette Supplement No. 113 (National Assembly Bills No. 39)

The object of this Bill is to repeal the *Kenya Regiment (Territorial Force) Act, Chapter 200* of the Laws of Kenya.

16. Kenya Defence Forces (Amendment) Bill, 2015

Kenya Gazette Supplement No. 115 (National Assembly Bills No. 41)

The principal object of this Bill is to amend the Kenya Defence Forces Act (No. 25 of 2012) so as to ensure smooth implementation of the Act.

17. Election Laws (Amendment) Bill, 2015

Kenya Gazette Supplement No. 125 (National Assembly Bills No. 42)

The principal object of this Bill is to make minor amendments to election laws to give effect to Article 81(b) of the Constitution.

18. Petroleum (Exploration, Development And Production), 2015

Kenya Gazette Supplement No. 128 (National Assembly Bills No. 44)

The Bill seeks to provide a framework for the contracting, exploration and development of petroleum together with production of petroleum discovered within licensed petroleum exploration blocks. The Bill also provides a framework for the safe cessation of upstream petroleum operations. The Bill proposes to ·repeal the Petroleum (Exploration and Production) Chapter 308 of the Laws of Kenya. The Bill further seeks to give effect to the relevant articles of the Constitution of Kenya, 2010 in so far as they apply to upstream petroleum operations.

19. Community Land Bill, 2015

Kenya Gazette Supplement No. 129 (National Assembly Bills No. 45)

The principal object of this Bill is to provide for a legislative framework to give effect to Article 63 of the Constitution and to provide for the recognition, protection, management and administration of community land. The Bill proposes an institutional framework through which community land shall be owned, registered, managed and administered.

20. Physical Planning Bill, 2015

Kenya Gazette Supplement No. 130 (National Assembly Bills No. 46)

The Physical Planning Bill, 2015 gives effect to Article 66 (l) of the Constitution which provides that the State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning. Towards this end the Bill seeks to repeal and replace the Physical Planning Act, No. 6 of 1996. It intends to provide for the planning, use, regulation and development of land in Kenya.

21. High Court Organization and Administration Bill, 2015

Kenya Gazette Supplement No. 131 (National Assembly Bills No. 47)

The principal object of the Bill is to give effect to Article 165 (1) of the Constitution. Article 165 (1) provides that the High Court shall consist of the number of judges prescribed by an Act of Parliament and shall be organized and administered in the manner prescribed by an Act of Parliament. The Bill seeks to provide for organization and administration of the High Court to ensure the smooth operation and administration of the High Court to facilitate the efficiency in the conduct and management of judicial functions. The Bill provides for the composition, structure, sittings, decentralization of the High Court, administration, performance management and alternative dispute resolution.

22. Forest Conservation and Management Bill, 2015

Kenya Gazette Supplement No. 133 (National Assembly Bills No. 49)

This Bill is intended to give effect to Article 69 of the Constitution with regard to forest resources, and to repeal the Forest Act, 2005. It also makes provisions for the conservation and management of forest resources.

23. Energy Bill, 2015

Kenya Gazette Supplement No. 134 (National Assembly Bills No. 50)

The Bill seeks to consolidate the laws relating to energy, align the legal and regulatory framework of the energy sector with the Constitution of Kenya, 2010. It does this by setting out with clarity the specific roles of the National and County Government in relation to energy. The Bill proposes to repeal the Energy Act No. 12 of 2006 and the Geothermal Resources Act No. 12 of 1982 of the Laws of Kenya.

24. Small Claims Court Bill, 2015

Kenya Gazette Supplement No. 135 (National Assembly Bills No. 51)

The principal objective of this Bill is to give effect to Articles 48 and 169 of the Constitution. In furtherance of the said objective, the Bill proposes to establish a Small Claims Court, which shall resolve disputes informally, inexpensively and expeditiously in accordance with the principles of law and natural justice. The monetary jurisdiction of the proposed Small Claims Court has been limited to one hundred thousand shillings. However, the Chief Justice may review the prescribed limit by notice in the *Gazette*.

25. Court of Appeal (Organization and Administration) Bill, 2015

Kenya Gazette Supplement No. 136 (National Assembly Bills No. 52)

The main objective and purpose of this proposed law is to make further provision for the organization and administrative matters to enable the effective and efficient functioning of the Court of Appeal.

26. Election Laws (Amendment) (No. 2) Bill, 2015

Kenya Gazette Supplement No. 138 (National Assembly Bills No. 53)

The main objectives of the Bill are to strengthen the institutional framework for monitoring the implementation of equality policies not only in representation but also in participation; emphasize more on election of women in addition to nominations through the building of capacities, civic education, facilitation and participation in political party affairs; build on the gains so far realized and incrementally achieve the two-thirds gender principle, provide for sanctions for political parties who fail to meet certain thresholds and empower the Independent Electoral and Boundaries Commission and the Registrar of Political Parties to effectively discharge their mandates.

27. Natural Resources (Classes of Transactions Subject to Ratification) Bill, 2015

Kenya Gazette Supplement No. 139 (National Assembly Bills No. 54)

The main object of the Bill is to give effect to Article 71 of the Constitution. Article 71 of the Constitution requires Parliament to enact legislation to provide for the classes of transactions subject to ratification on account of the fact that the transaction involves the grant of a right or concession by or on behalf of any person to another person for the exploitation of a natural resource of Kenya.

28. Land Laws (Amendment) Bill, 2015

Kenya Gazette Supplement No. 140 (National Assembly Bills No. 55)

The Bill proposes to amend the Land Registration Act, the National Land Commission Act and the Land Act, which were enacted as required for the implementation of the Constitution, in order to clarify the roles and mandates of the Ministry of Land, Housing and Urban Development by rectifying inconsistencies and overlap of mandates in the land laws that have resulted in difficulties in the implementation of the Land Registration Act, the National Land Commission Act and the Land Act.

B. SENATE BILLS 2015

1. **County Library Services Bill, 2015**

Kenya Gazette Supplement No. 56 (Senate Bills No. 6)

The principal object of this Bill is to promote the establishment and use of libraries in counties so as facilitate access to information, improve education standards and reduce levels of illiteracy in the counties. By so doing, the Bill gives effect to paragraph 4(f) of Part 2 of the Fourth Schedule to the Constitution.

2. **Kenya National Examinations Council (Amendment) Bill, 2015**

Kenya Gazette Supplement No. 64 (Senate Bills No. 7)

The Bill seeks to amend the Kenya National Examinations Council Act, No. 29 of 2012, to ensure

that every candidate who has sat for examinations at the primary and secondary school level is issued with the certificate awarded to him or her by the Kenya National Examinations Council.

3. **Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill, 2015**

Kenya Gazette Supplement No. 69 (Senate Bills No. 8)

The principal object of the Bill is to give effect to Article 43 of the Constitution by ensuring the preservation of human dignity as set out under Article 19 of the Constitution. Article 43 of the Constitution guarantees economic and social rights for all persons. This also Bill seeks to establish a framework for national monitoring, benchmarking and evaluation of progress made in fulfilling economic and social rights by all actors in Kenya.

National Hospital Insurance Fund (Amendment) Bill, 2015.

Kenya Gazette Supplement No. 73 (Senate Bills No. 9)

The purpose of this Bill is to make amendments to the National Hospital Insurance Fund Act, to reduce the penalties imposed by the Act for late payment of standard contributions and special contributions. The penalty as imposed by the Act has been a deterrent to defaulters who may wish to continue remitting payments to the Fund.

4. **County Statutory Instruments Bill, 2015.**

Kenya Gazette Supplement No. 95 (Senate Bills No. 10)

The principal object of this Bill is to make provision for the procedure of consideration of Statutory Instruments by County Assemblies. The Bill seeks to provide a legal mechanism by which County Assemblies will scrutinize statutory instruments.

5. **County Outdoor Advertising Control Bill, 2015.**

Kenya Gazette Supplement No. 99 (Senate Bills No. 11)

The principal object of this Bill is to ensure that outdoor advertisements respect amenity and do not prejudice public safety, including road safety and that the display of outdoor advertisements contributes positively to the appearance of a well-cared for and attractive environment in the counties. This Bill therefore seeks to provide a legal framework for the control of outdoor advertising in order to achieve a balance between the need to advertise and the protection of amenity and public safety.

6. **National Cereals and Produce Board (Amendment) Bill, 2015.**

Kenya Gazette Supplement No. 123 (Senate Bills No. 15)

The principal object of this Bill is to amend the National Cereals and Produce Board Act to provide for the establishment of the County Cereals and Produce Committees. By providing for the establishment of county cereals committees, the Bill seeks to ensure enhanced production of maize, wheat and scheduled agriculture produce in the counties so as to ensure food security in the country.

7. **Constitution of Kenya (Amendment) Bill, 2015.**

Kenya Gazette Supplement No. 143 (Senate Bills No. 16)

This Bill seeks to amend the Constitution to give effect to the two-thirds gender principle through the creation of special seats that will ensure that the gender principle is realized in Parliament and further that the State takes legislative, policy and other measures including the setting of standards, to achieve the realization of the principle.

8. **County Boundaries Bill, 2015.**

Kenya Gazette Supplement No. 144 (Senate Bills No. 17)

The Bill mainly seeks to define the boundaries of the counties of Kenya; provide for the resolution of county boundary disputes through the establishment of a county boundaries mediation committee; and to give effect to Article 188 of the Constitution on the alteration of county boundaries.

Digest of Recent Legal Supplement on Matters of General Public Importance

Compiled by Jacques Walters Omondi and Faith Wanjiku (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 period between 17th April, 2015 and 31st July, 2015. For more of this visit ***www.kenyalaw.org***

LEGISLATIVE SUPPLEMENT NUMBER	CITATION	PREFACE
39	National Police Service Commission (Recruitment and Appointment) Regulations, 2015. L.N. 41/2015	This legislation provides for the procedure for recruiting or appointing police officers. It revokes *L.N. 18 of 2015.*
40	Labour Institutions (Registration Fees) Regulations, 2015. L.N. 42/2015	This legislation provides for the fees payable for registration, renewal and replacement of certificate of registration of an agency as follows: Fees for an application for the registration of an agency dealing with foreign recruitment- Ksh. 500,000.00 Fees for an application for the registration of an agency dealing only with local recruitment- Ksh 125,000.00 Fees for an application for the renewal of registration of an agency dealing with foreign recruitment- Ksh 250,000.00 Fees for an application for the renewal of registration of an agency dealing with local recruitment- Ksh 75,000.00 Fees for a replacement of a certificate of registration- Ksh 10,000.00
49	Public Health Officers (Fees and Rates) Regulations, 2015. L.N. 61/2015	This legislation provides for the fees payable by Public Health Officers for their Training, Registration and Licensing
63	Human Resource Management Professionals (Registration and Training) Regulations, 2015. L.N. 86/2015	These regulations provide for membership and registration, annual practicing certificates and continuing professional development on registration and training of human resource management professionals.
66	National Police Service Commission (Promotions) Regulations, 2015. L.N. 88/2015	These regulations provide for guiding principles, delegation to the Inspector-General, adherence to standards on promotions, determination of promotions, succession management, actual promotion among others on promotions in the National Police Service Commission.

66	National Police Service Commission (Transfer And Deployment) Regulations, 2015. L.N. 89/2015	These regulations provide for transfers, deployment secondments and attachments in the National Police Service Commission.
66	National Police Service Commission (Discipline) Regulations, 2015. L.N. 90/2015	This legislation provides for procedure to be adopted by the National Disciplinary Committee in dealing with disciplinary proceedings involving the National Police Service.
84	Human Resource Management Professionals Act (Elections to the Council) Regulations, 2015. L.N. 114/2015	These regulations provide for the election to the Council of the Human Resource Management Professionals. Among others, the regulations provide for the qualification and nomination of candidates, conduct of the election, validity of the election and the election offences.
102	Banking Act (Exemption), 2015. L.N. 136/2015	This legislation provides for the exemption of Kenya Commercial Bank Limited from the provisions of section 12 (a) and (c) of the Act in relation to Sharia compliant products for a period of five years with effect from the 1st September, 2014. Further, revokes L.N. 7 of 2015.
107	Stamp Duty Act (Exemption), 2015 L.N. 149/2015	This legislation directs that the instruments executed by or in favour of the Overseas Private Investment Corporation, which is an agency of the Government of the United States of America, shall be exempt from the provisions of the Act.

Public Participation in Counties

By Jacques Walters Omondi and Faith Wanjiku (Laws of Kenya Department)

Public participation is the process by which an organization consults with interested or affected individuals, organizations, and government entities before making a decision.

Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.

Public participation is two-way communication and collaborative problem solving with the goal of achieving better and more acceptable decisions.[1]

Public participation is a political principle or practice, and may also be recognized as a right (right to public participation that has accrued to the citizenry). The term public participation, often called P2 by practitioners, is sometimes used interchangeably with the concept or practice of stakeholder engagement and/or popular participation.

Generally, public participation seeks and facilitates the involvement of those potentially affected by or interested in a decision. This can be in relation to individuals, governments, institutions, companies or any other entities that affect public interests. Public participation implies that the public's contribution will influence the decision.[2]

Legal Basis of Public Participation

a) The Constitution of Kenya, 2010

Public participation is a political principle, which has now been recognized as a right – the right to public participation. Article 10(2) (a) of the Constitution of Kenya provides that the national values and principles of governance include…participation of the people. The objective behind public participation is to facilitate the involvement of those potentially affected by or interested in a decision, generally one of governmental bodies. There is an implied assumption in that this can influence the decision that is eventually reached. In essence, the principle is one of enabling a balance between governing FOR the people, and BY the people, a vital part of democratic governance. It is part of a 'people first' or 'people centered' methods of management, which avoid centralized, hierarchical decision-making.

Further, Part 1 of Chapter 13 sets out the values and principles for public participation in the public service. Specifically, Article 232(1) provides that the national values and principles of public service include, "... (d) Involvement of the people in the process of policy making...and (f) transparency and provision to the public of timely, accurate information." Article 232(2) (a) provides that the values and principles of public service apply to public service in all State organs in both levels of government.

A secondary, but related concept to direct public participation is the issue of transparency. Article 35 guarantees access to state information. The right to know is an important guarantee of accountability in institutional activities. Article 118 provides that Parliament shall conduct its business in an open manner to the public, include them in legislative business and only exclude them in exceptional circumstances. Article 196 (1) (b) requires that the county assembly facilitates public participation in the legislative and other business of the assembly. Article 201(a) also outlines public participation as one of the principles of public finance alongside openness and accountability.

b) The County Government Act, No 17 of 2012

Section 87 provides that citizen participation in county governments shall be based upon timely access to information, data, documents, and other information relevant or related to policy formulation and implementation. Further, section 115(2) provides that each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation.

Judicial Commentary on Public Participation

Article 1(3) (c) of the Constitution of Kenya provides that the Sovereign power under the Constitution is

1 International Association for Public Participation. (2007). IAP2 Core Values. Available: http://www.iap2.org/accessed on 15-9-2015.

2 "Principles of Public Participation"Co-intelligence.org. 2008-05-23. Retrieved 2015-07-07.

delegated to the judiciary and independent tribunals. It is in this regard that it is important to take into account what the courts have said on the same.

In the case of ***Robert N. Gakuru & Others v Governor Kiambu County & 3 others***[3], the Applicants were seeking a declaration that the Kiambu *Finance Act*, 2013 gazetted *vide* Kiambu County Gazette Supplement No. 8 (Act No. 3) violates various provisions of the Constitution *inter alia* that no consultations took place and no invitations were made by the Respondents before the said Act was enacted and thus should be declared null and void. The issue that was before the court was whether the Kiambu *Finance Act*, 2013 was passed with sufficient public participation as required by the Constitution of Kenya, 2010. The court upheld the Applicants' case as it held the particular law making process violated the Constitution particularly on public participation and that the same was null and void.

Generally speaking, public participation is recognized as a vital aspect of good governance. A good example highlighting this was the controversy associated with the Presidential nominations of the Chief Justice, Attorney General and other key public officials. The constitutionality of these appointments was challenged and they were overturned. This was not directed at the competence of those particular individuals to fulfill their duties, especially since the attorney general eventually retained his position. Instead, it was a recognition that decisions made without appropriate public consultation and participation, arbitrary decisions engender feelings of mistrust and suspicion amongst citizens[4].

Principles of Public Participation

1. Public consultations should be open to all citizens, without discrimination.

2. Safeguards should be established to prevent consultative forums from being dominated by any one political group, organized interest, or politician.

3. Public consultations must have clear and specific purposes.

4. The timeline and venues for public consultations should be made known at least two weeks in advance of the consultation.

5. Public consultations must set aside dedicated time for public feedback and questions.

6. Public participation in the planning and budget process should occur at all stages in this process.

7. The public must have access to all relevant plan and budget documents in a timely fashion.

8. All plan and budget documents should contain an executive summary and a narrative of the same.

9. Citizens should be able to provide input into public consultations through direct participation, through representatives, and through written comments.

10. There should be a feedback mechanism so that citizens know their inputs were considered[5].

Key Actors in Promoting Public Participation

In public participation, the 'public' refers to 'people with an interest in or are likely be affected, by a decision made, either positively or negatively'. It should be noted that inclusion of everyone takes into consideration gender related issues. The government has to take a proactive role to ensure there are opportunities for public involvement. For instance, the success and effectiveness of public hearings depends majorly on the commitment of local government to transparency and public participation.

Civil society organizations should not only act as watchdogs, but also influence public opinion in terms of supporting or being against local government policies and practices. They often initiate the formation of watchdog committees and citizen advisory groups and facilitate their activities. Civil society organizations have for long played a significant role in enhancing a culture of participation across the world[6].

Significance of Public Participation

Public participation aims at bridging the gap between state actors, civil society, private sector and the general public. A society with heavy civic culture participates more in managing their affairs. It is now a legal requirement to consult stakeholders and make development plans and services more responsive to local needs. The responsibility has now increased two fold for the average Kenyan. The

3 Robert N. Gakuru & Others v Governor Kiambu County & 3 others Petition No 532 of 2013

4 Francis Kairu & Mary Maneno public-participation-in-governance-gives-kenya-a-chance against graft and poor governance available at tikenya.org/.../129-public-participation-in-governance-gives-kenya-a-chance against graft and poor governance Accessed on 15-9-2015.

5 National Taxpayers Association Public Participation in Budgeting www.nta.or.ke/reports/general Accessed on 15-9-2015

6 Francis Kairu & Mary Maneno public-participation-in-governance-gives-kenya-a-chance against graft and poor governance available at tikenya.org/.../129-public-participation-in-governance-gives-kenya-a-chance against graft and poor governance Accessed on 15-9-2015.

rallying call has changed from just "**haki yetu**" to "**haki yetu wajibu wangu**"

Kenyans now have an opportunity to enhance development and service delivery while entrenching governance and accountability. The baby must not be thrown out with the bath water. It's now or never and the merchants of impunity, deplorable leadership and architects of a moribund public service must now be stopped in their tracks. The UK House of Lords has epitomized Kenya's Constitution as exemplar in terms of devolution of power sharing and accountability. This is because it encompasses freedom of speech, assembly, voting and equal representation. External players provide special insight information, knowledge and experience which contribute to the soundness of community solutions.

It is also common knowledge that public participation leads to behavioral change. This arises when people are aware, informed, and self-convinced that the change is needed. It encourages civic and community responsibility in that citizens feel obligated to support a particular activity.[7]Citizen oversight promotes transparency in government and ultimately prevents abuse of power. Emancipation as greatly emphasized by the great Martin Luther King Jnr, empowers vulnerable groups to demand and exercise their rights[8].

Tools of Public Participation

The question then begs: How can citizens actively engage with the highest echelons of power? Civil society movements and organizations have embodied various avenues to include: Public hearings, forming lobby groups, citizen report cards, social audits and citizen action groups.

Other avenues include citizens' fora which are provided for under the **Urban Areas and Cities Act, No. 13 0f 2011** and development pacts or memoranda of understanding (MOUs) signed between public service providers and representatives of citizens.

A great future for our country lies in a government that is proactive and not reactive and a citizenry that is active rather than passive[9].

Challenges

Policy concerns emanating from the examination of the past and present devolved structures are:

• All of these efforts are piecemeal in nature. Though the law has provided avenues for engaging, they result in random and uncoordinated engagements with the public and county structures since they are derived from separate legislative and policy mandates that are more often on ad hoc basis.

• There is no integration and readily available and comprehensible information on how effective, efficient and responsive the county government structures are to the public.

• The need to create awareness amongst duty bearers and citizens on what public participation is and its importance.

• The need to build the capacity of citizens to enhance their participation in the management of local affairs and projects, and to hold duty bearers accountable. Duty bearers also need continuous capacity enhancement on participatory methodologies.

• Poor information management on the part of the duty bearers thus leading to poor communication[10].

Way Forward/ Reforms

1. Participation
    a. Establish a Public Participation Board.
    b. Facilitate collection of information and/or evidence from members of the public.
    c. Lobby for publication participation schedule
    d. Develop a website for public engagement.
    e. Public information campaign on the public participation process (including using local media and local languages)
2. Monitoring
    a. Develop a monitoring mechanism to evaluate integrity of process.
    b. Develop mechanisms for verifying information and/or evidence.
    c. Maintain detailed records of the process.
    d. Update public on Participation process developments.
    e. Lobby participation board for public, written decisions.
    f. Create stakeholder Committees to monitor

7 A Booth & N Babchuk 'Personal Influence Networks and Voluntary Association Affiliation' (1969) 39 Sociological Inquiry 179-188

8 Francis Kairu & Mary Maneno public-participation-in-governance-gives-kenya-a-chance against graft and poor governance available at tikenya.org/.../129-public-participation-in-governance-gives-kenya-a-chance against graft and poor governance Accessed on 15-9-2015.

9 Ibid.

10 Western Cape on Public Participation https://www.westerncape.gov.za/ Accessed on 15-9-2015

processes.

3. Technical Support

a. Collaborate with Public Participation Boards to jointly undertake a capacity audit to determine the technical and resource requirements of the body.
b. Get stakeholder Committees to develop an operational manual.
c. Get stakeholder Committees to adopt public participation tools
d. Jointly develop rules of procedure
e. Create central information repository or databank for gathering information on the issue for public participation
f. Monitor recruitment process at public participation board secretariat
g. Fund raise.

4. Coordination

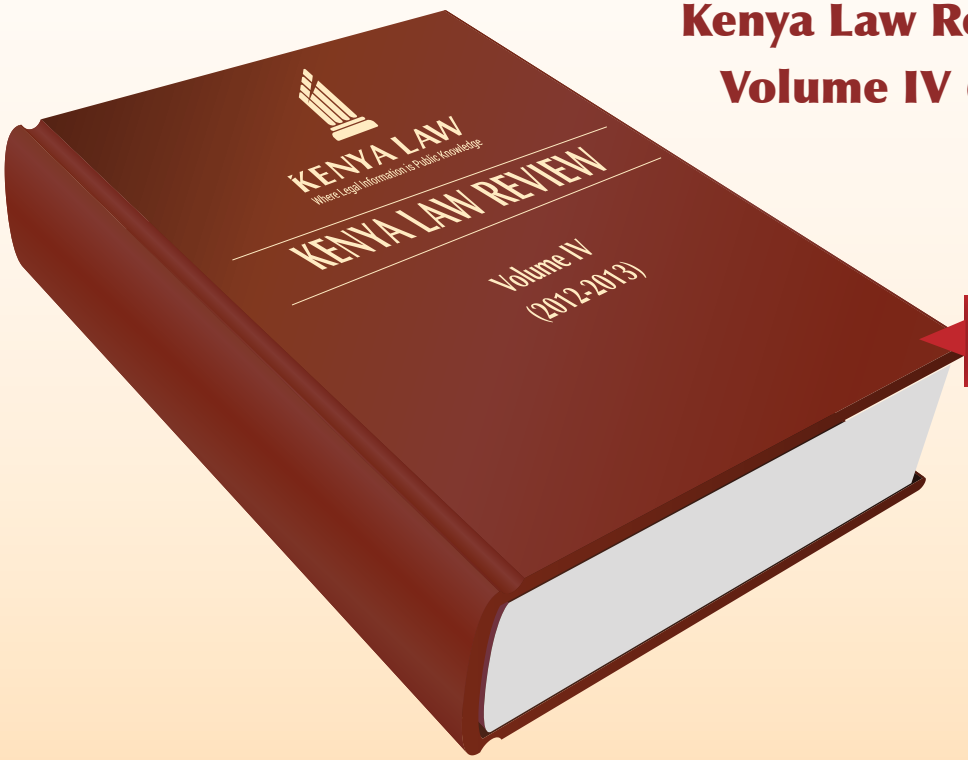
a. Coordination through interventions of civil society coalitions
b. Consult and utilize Media outlets
c. Consult and utilize grassroots networks for outreach work
d. Have regular meetings.

KENYA LAW

Where Legal Information is Public Knowledge

KENYA LAW REPORTS

Kenya Law Review Journal
Volume IV (2012-2013)



Ksh 4,500/=

It is with great pleasure that Kenya Law publishes the fourth edition of the **Kenya Law Review Journal**. The Journal is a platform for scholarly analysis of Kenyan law and interdisciplinary academic research on the law. It seeks to serve as a platform where prominent scholars and distinguished legal practitioners alike can share their views on various aspects of the Law.

Scope of the series

This edition sees authorship of fifteen scholarly articles on a diverse range of subjects from the Constitutional Domain of Elections in Kenya to the prospect of trying an Incumbent Head of State in a foreign Country.

**Kindly note that all deliveries out of Nairobi County shall attract a separate shipping charge.*

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Kenya Law Participates in the LSK Justice Cup, 2015

By Erick Obiero Odiwor HR Department

Once again Kenya Law took part in this year's annual 'Justice Cup' tournament which is a six-a-side football tournament annually organized by the Law Society of Kenya (LSK). The event brings together teams drawn from various stakeholders involved in the administration of justice, including judges and magistrates, auctioneers, advocates, law students, the police, parliamentarians, human rights NGOs and media houses from the country.

This year, the Justice Cup's Football Tournament was held on Saturday, 29th August, 2015 at the Parklands Sports Club under the theme of "**Security is Your Responsibility**".

Among others, the guests who graced the occasion were Mr. Sam Nyamweya, the President of the Federation of Kenya Football (FKF), Mr. Mohammed Omar, the Football Kenya Federation's National Executive Committee (NEC) Coast member, Mr. Eric Mutua, the president of the Law Society of Kenya, Mr. James Aggrey Mwamu who is a council member of the Law Society of Kenya as well as Mr. Apollo Mboya, the Secretary/CEO of the Law Society of Kenya (LSK).

With the unwavering support from the cheering staff members, the Kenya Law's Team made it to the finals of the Plate cup competition for the second year in a row. However, the team narrowly lost to Amollo & Gachoka Advocates via penalty kicks after a barren draw in the normal regulation time. The cup was won by Rachier & Amollo advocates' law firm.

Participating in the tournament was not only a great sporting event, but helped in enhancing the visibility of Kenya Law as a key stakeholder in the legal sector and also provided an opportunity to interact and share various experiences with the stakeholders both from the legal and non-legal fraternity.

We are only looking forward to Kenya Law's football team reaching the main cup finals and bringing the coveted trophy home during next year's edition of Justice Cup.

KENYA LAW

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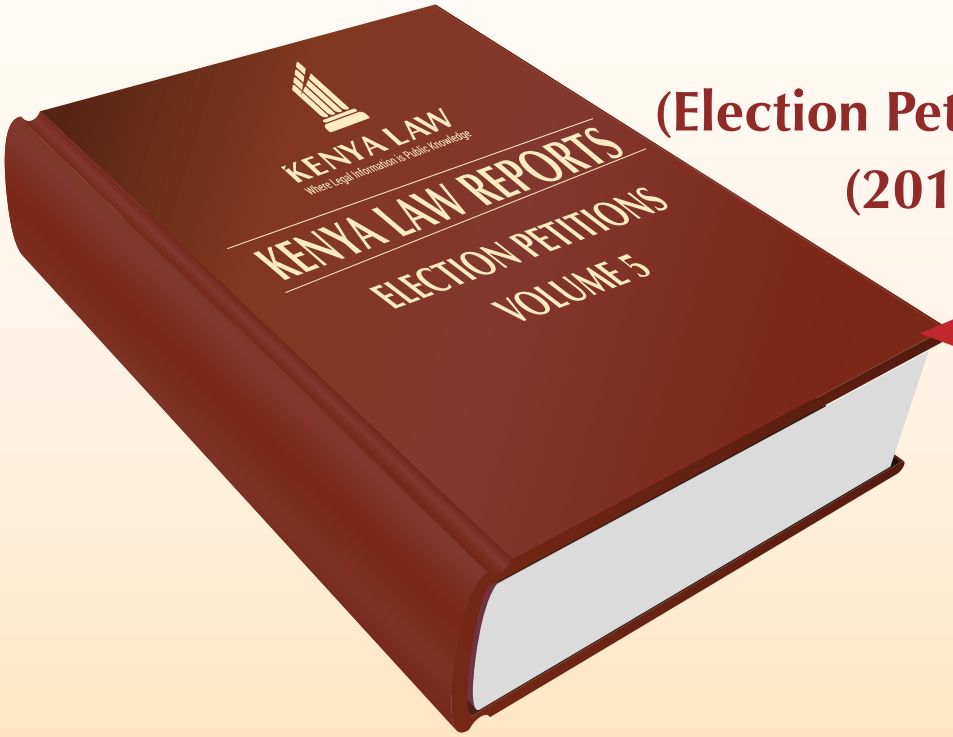

(Election Petition Volume V)
(2012-2013)

Ksh 4,500/=

The immediate aftermath of the General Elections held in December 2007 highlighted the fragile link between the application of electoral law and the stability of the Country's socio-economic and governance structures. Considerable public debate has since been generated on the condition of Kenya's electoral law and the role of the justice system in the resolution of disputes emerging from an electioneering exercise.

Scope of the series

Out of the need to provide the information necessary to inform and guide this debate, the National Council for Law Reporting (Kenya Law) has compiled Kenya's most comprehensive collection of judicial opinions on electoral law – The Kenya Law Reports (Election Petitions Volume 5) – Cited as (2014) 5 KLR (EP). It covers Decisions Emanating from 2007 General Elections.

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Kenya Law Celebrates Remarkable Service delivery to the Public at the Annual Staff conference held on the 21st August, 2015.

By Erick Obiero Odiwor and Janette Watila HR Department

KENYA LAW's annual staff conference was held on Friday 21st August 2014, at Safari Park Hotel, Nairobi. The event is an annual celebration to reflect on the previous year's achievements and challenges and to prospect on the new financial year.

This year's event was graced by the chief guest, the Hon. Lady Justice R. Nambuye, a member of the board of the National Council for Law Reporting.

The event kicked off with an opening prayer followed by opening remarks by the CEO/ Editor, Mr. Long'et Terer. Mr. Terer spelt out the successes and challenges of the financial year 2014/2015 and affirmed strategic goals for the financial year 2015/2016. He termed Kenya Law as an award winning organization despite the normal challenges and limitations. "Thirteen years of exemplary law reporting is worth celebrating", Long'et said. He gave an account of the history of law reporting in the country and especially where Kenya law came


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1. Law Reporting Department celebrates after being declared the Department of the year.
2. Mr. Cornelius Lupao receives award for the Team - leader of the year, 2014 from Hon Lady Justice R. Nambuye as the CEO Mr. Longe't Terer looks on.
3. Mr. Longe't, and Linda Awuor, Team Leader, Research and Development present award to her departmental team player of the year, Mr. Ken Oduor.
4. Kenya Law Staff during a group Photo.
5. Mr. Dache, CEO of the Law Reform Commission and board member of the Council presents award for the team player of the department to Ms. Vivian Etya'ng of the Laws of Kenya Department
6. Ms. Jacinta Moraa, the overall team player of the year, 2014
7. Mr. Longet and Janet Watila, Human Resource Manager, present award for team player, Human Resources and Administration to Mr. Erick Obiero Odiwor.
8. Mr. Dache, addressing members of staff
9. Hon. Lady Justice R. Nambuye, addressing members of staff

from, comparing the current year and the previous year as having been both a rich as well as an inspiring journey.

While acknowledging the team leaders and staff members for the great work done during the previous financial year, the CEO/Editor singled out the clearance of backlog cases of law reports, updated laws of Kenya database and increasing sales in a number of Kenya Law's products. He went further and pointed out that publication of current years' law reports, publishing of specialized editions of the laws of Kenya, a one stop database of the laws of Kenya, including county laws among others will form part of Kenya Law's strategic direction for the current year in line with our mandate. Mr. Long'et emphasized that all these publications will be done in a timely manner to ensure the citizens access public legal information in line with article 35 of our constitution which gives all citizens the right to access information.

On the reviews and packaging of Kenya Law's reports and any other appropriate products, Mr. Long'et reiterated on being keen on comparative jurisprudence with focus on how other law reporting agencies package their legal information as a way for effective output to ensure timely and accessible products to the citizens. He gave an example of such trainings in Extensive Markup Language (XML) which is a universal application that allows production of the laws in a range of devices displaying contents in a variety of file types in order to curb challenges in presentation of the laws online.

During the conference, Team leaders presented their reports for the previous year as well as outlined their plans for the new financial year while members of staff who carried out their dutiesin exemplary manner were recognized. Team players from each department, 2nd runners up, 1st runners up, the overall team player of the year and the manager of the year were recognized and rewarded. Ms. Jacinta Moraa of Finance Department was recognized as the team player of the year while Mr. Victor Cheruiyot from ICT department was the 1st Runners up and Ms. Vivian Etyang from Laws of Kenya department was recognized as the 2nd Runners up. On the other hand, Mr. Erick Obiero Odiwor was recognized as the team player from Human resources and Administration department, Ms. Emma Kinya Mwobobia and Mr. Ken Oduor were recognized as the best team players from Law Reporting and Reearch & Development Departments respectively.

Among the guests who graced the occasion were Mr. Joash Dache, the Chief Executive Officer of the Kenya Law Reform Commission and a member of the board of the National Council for Law Reporting and Mrs. Flora Mutua, who is also a board member of the Council. Mr. Dache while giving his remarks congratulated the Kenya Law's team for the good work done. He inspired the members of staff by sharing his personal experience of having risen to his current position at a relatively younger age due to hard work and determination. 'Do not become moribund but keep on improving'. Said Mr. Dache.

Ms. Flora Mutua applauded the team for the good work and encouraged the team to always make others feel important by considering their ideas in order to strategically move forward. She advocated for an open door policy which is ideal for any place of work.

The Hon. Lady Justice Nambuye, who was the chief guest for the day, inspired the team with words of wisdom. The judge applauded the team for the hard work citing that Kenya Law had made her grow in her career. 'I write long judgments and I have always used your cases when arriving at decisions, my work has been made easier because of your work". She said. The Hon. Lady Justice went further and urged the staff to be innovative and always turn challenges into strengths while growing both at the individual as well as at the organizational level. She assured the staff of the members of the Board's support in their growth and promised to continue supporting Kenya Law to ensure continued growth and urged the team to always maintain the spirit of being oneself.

Mr. Pepe Minambo, a celebrated motivational speaker summed it up all by emphasizing on the factors that distinguish an organization; He spoke of culture, leadership and standing up for something. 'Culture is an important strategy in an organization, it drives performance' he said. He reiterated that simplicity, speed and trust are core parts of culture that have seen organizations succeed. 'Great organizations are leaderless' said Mr. Pepe. He advised application of the law of simplicity, speed and trust in order to realize organizational goals and to always stand up for something and be a brand not a commodity at the place of work.

After such a wonderful and refreshing annual staff conference, Kenya Law staff can only get motivated towards achieving the set mandate and ensuring legal information become public knowledge.

Access to Information

By Edna Kuria Muthaura, HoD SQAPE Department

The Kenya Law website receives 4,200 visitors daily with Cause List section being the most visited site. Case Law, Kenya Gazette and Laws of Kenya Databases are the second most visited site. The website, *www.kenyalaw.org* is considered by many as the repository for law reports and a centre of knowledge of the Kenyan Law. The most viewed and commented article on the website is "Highlights of the Marriage Act, 2014" with 65,000 viewers. Laws on Devolution are the most searched followed closely by County Legislation.

Kenya Law intends to reduce knowledge barriers by informing and educating the legal practitioners and the general public on the Kenyan Laws and other legal matters through the website. Under the Judicial Performance Improvement Project (JPIP) which is supported by the World Bank, Kenya Law will be working towards having a mobile friendly website to enhance access to legal information. Kenya Law aims at being responsive to the high demand of legal information. It was noted that between the ages of 25 – 34, 68% of those who interacted with Kenya Law on social media were men with 32% being women. Kenya Law will in future ensure the website is mobile friendly and works to engage Kenyans in-order to reduce knowledge barriers.

Kenya Law printed 100,000 copies of the Constitution of Kenya which were distributed to the general public, public institutions and other organizations. The copies are disseminated to inform and educate the users on legal matters and most important reducing the legal barriers that exist.

Kenya Law activities under the Judicial Performance Improvement Project (JPIP) which is supported by the World Bank, also publishes laws which impact on the citizen especially in the areas of land, traffic and devolution.

Copies of the Constitution were circulated during various forums, workshops and seminars conducted by the Office of the Ombudsman, Transparency International, National Environment Management Authority (NEMA), Kenya Copyright Board, Kenya School of Government, Kenya National Audit Office, National Intelligence Services, Kenya Prisons and the Council for Legal Education. Schools including St. Georges Secondary, institutions of higher learning such as Kabarak and Strathmore Universities, also received the materials.

Kenya law could only distribute the materials to few County governments and hopes to reach out more to facilitate similar exercise countrywide.

Kenya Law caseback

A CASE ALERT SERVICE FOR JUDICIAL OFFICERS

Feedback For Caseback Service

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

Maina Steve.

Good morning great people, Guess what! you have made my/our day.
we have been struggling to obtain a REPORT OF THE COMMITTEE ON AFRICAN WAGES,Report of the Commission on the Civil Services of KENYA,TANGANYIKA, UGANDA & ZANZIBAR 1947 -48 and several others .we have googled, paid people to get us a copy without any luck.someone from a resource centre reported that all document that were written before independence were transfered to London - very funny
To cut my story short, you are amazing-great pple. is it possible to have policies online?
warmest greetings.

Dolphina Alego
Eldoret Law Courts

Thank you Team Kenya Law!
Thank you for your feedback and personal feedback to my cases from the High Court .!
Always appreciated!
Kind regards,

KENYA LAW

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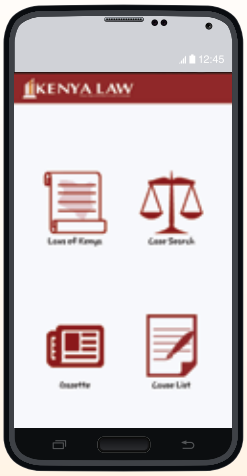
The Kenya Law Android app



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The Kenya Law Android app contains:

- The Constitution of Kenya, 2010.
- Selected Statutes of high public interest.
- The Kenya Gazette.
- Cause List (integrated with Kenya Law's website).
- Case Search (which is integrated with Kenya Law's Case law database).

This mobile app was borne out of collaboration between:

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ACK Garden Annex, 5th Floor, **1st Ngong Avenue, Ngong Road**, Upper Hill P.O Box 10443 - 00100, Nairobi - Kenya

Tel: +254 (020) 2712767, 2011614 ,2719231 **Mobile:** +254 718 799 464, 736 863 309

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Supreme Court Cases

Questions regarding intergenerational trusts or trusts in Customary Law deemed to be matters of general public importance for purposes of Supreme Court appeals

Isack M'Inanga Kieba v Isaya Theuri M'Lintari & another
Application No 46 of 2014
Supreme Court of Kenya at Nairobi
P K Tunoi, M K Ibrahim, J B Ojwang, S C Wanjala & S N Ndungu, SCJJ
July 16, 2015
Reported by Beryl A Ikamari & Robai Nasike Sivikhe

Brief facts

The Applicants sought a review of a Court of Appeal decision which effectively denied them leave to lodge an appeal at the Supreme Court. The leave had been sought pursuant to article 163(4) (b) of the Constitution of Kenya 2010. Under the stated article 163(4)(b), an Appeal could be lodged at the Supreme Court after the issuance of certification that the intended appeal raised matters of general public importance.

The subject of the intended appeal was a land dispute in which it was successfully claimed that the Applicants held title to the land in trust for the descendants in their clan. The claim was that the land was ancestral land owned by members of the Athimba clan and that during consolidation and demarcation in 1963, the title was issued to the Applicants in trust for the descendants of the clan. The 1st Applicant died and the 2nd Applicant was an uncle to the two Respondents who were brothers.

The High Court found that the titles were subject to overriding interests which included the rights of trustees. The Court also found that the fact that the property was ancestral land, passed on from generation to generation, meant that there was a trust which qualified as an intergenerational trust. An appeal at the Court of Appeal was dismissed as the appellate Court found that the land was subject to a trust.

The Applicants sought certification for purposes of lodging a further Appeal at the Supreme Court. The Court of Appeal found that the issues raised in the appeal neither transcended the circumstances of the case nor did they have a bearing on public interest. Therefore, they did not warrant certification as matters of general public importance. The Applicants sought a review against the Court of Appeal decision on certification at the Supreme Court.

Issue

Whether questions regarding intergenerational trusts or trusts in customary law could be considered matters of general public importance for purposes of an appeal to the Supreme Court.

Jurisdiction *– jurisdiction of the Supreme Court – appeals- certification of appeals as matters of general public importance-threshold to be met for a matter to be considered to be of public importance- whether issues raised regarding generational trusts or trusts in customary law fulfill the threshold considered regarding matters of general public importance- Constitution of Kenya, 2010, article 163 (4) (b); Supreme Court Act, No. 7 of 2011, section 3; Registered Land Act, Cap 300, section 28 & 30 (g); Land Registration Act, No 3 of 2012, section 28 (b).*

Land Law *– interests in land- overriding interests in land- intergenerational trusts or trusts in customary law- precedents set regarding intergenerational trusts or trusts in customary law - whether questions regarding intergenerational trusts or trusts in customary law required extensive explication by courts- Registered Land Act, Cap 300, section 28 and 30; Land Registration Act, No. 3 of 2012, section 28 (b).*

Held

1. The major factor considered at leave stage was whether an intended appeal met the appellate yardstick founded upon article 163(4) (b) of the Constitution. Diverse principles were already formulated for guidance in relation to matters of public importance. The following principles were set as particularly important in those matters;
    a) For an intended appeal to be certified as one involving a matter of general public importance, the intending Appellant was to satisfy the Court that the issue canvassed on appeal was one whose determination transcended the particular case, and had a significant bearing on public interest.
    b) Where the matter raised a point of law, the intending Appellant was to demonstrate that such a point was a substantial one, whose determination

would have a bearing on public interest.

c) Such questions of law must have arisen in the courts below and must have been the subject of judicial determination.

d) Where the Application for certification had been occasioned by a state of uncertainty in the law, arising from contradicting precedents, the Supreme Court could either resolve the uncertainty or refer the matter to the Court of Appeal for its determination.

e) Mere apprehension of miscarriage of justice was not a proper basis for getting certification for an appeal to the Supreme Court. For the matter to be certified for a final appeal at the Supreme Court, the matter had to fall within the terms of article 163 (4) (b) of the Constitution.

2. The High Court and Court of Appeal had, over the years, determined numerous matters relating to acquisition of title, trust in land and other competing interests in land. Land is of constant interest to the people due to its standing as the very foundation of the economy, in an agrarian setting, and as a physical framework for all social intercourse.
3. The main questions raised in the intended appeal were; first, the connection between possession, occupation and customary trust and second, inter-generational equity. The concepts and the essential relationships entailed had not been the subject of elaborate or conclusive treatment. Therefore, the nature of undefined land interests which appeared in sections 28 & 30 of the Registered Land Act (repealed) and were covered under section 28 of the Land Registration Act have not received full explication by the Courts.
4. The questions raised were weighty questions of law and the interpretation of the unspecified interests under sections 28 & 30 of the Registered Land Act (repealed) and currently provided under section 28 of the Land Registration Act, presented complex issues of law which had not been sufficiently addressed by the High Court or the Court of Appeal.
5. Despite the question of customary trusts or generational trusts being determined from time to time, the resulting body of precedent was not clear on the singular question on whether a claimant of trust in customary law needed to prove actual physical possession or occupation. Despite an overhaul and repeal of previous land laws and enactment of new ones, that question was affecting pending as well as future matters. The issue, therefore, was continually engaging the working of judicial organs.
6. The intended appeal satisfied the threshold for admission set under article 163 (4) (b) of the Constitution. The Applicant demonstrated that the matter in question had specific elements of real public interest and concern and that its due consideration would give certainty to the law.

Application allowed. (The ruling of the Court of Appeal declining the application for leave to appeal was set aside. The appeal was found to be one which raised matters of general public importance & conservatory orders were granted.)

The Supreme Court does not have jurisdiction to entertain appeals arising from interlocutory orders of the Court of Appeal in exercise of it's discretionary powers

Teachers Service Commission v Kenya National Union of Teachers and 3 others

Application no. 16 of 2015

The Supreme court at Nairobi

W M Mutunga CJ P, K H Rawal DCJ & V-P, M K Ibrahim J S C, J B Ojwang J S C S C Wanjala J S C

August 24 2015

Reported by Teddy Musiga & Daniel Hadoto

Brief Facts

The applicant, being aggrieved and dissatisfied by the decision of the Employment and Labor Relations Court, in Nairobi Petition No. 3 of 2015 lodged a Notice of Appeal, pursuant to which it filed at the Court of Appeal an application for stay of execution of the Employment & Labor Relations Court's Judgment, under Rule 5(2) (b) of the Court of Appeal Rules, 2010. Upon hearing the application, the Court of Appeal granted a conditional stay of execution of the Judgment and Orders of the Employment and Labor Relations Court.

Dissatisfied with the outcome of the Court of Appeal's ruling, the applicant filed the present application seeking a stay of execution against the interim Orders granting conditional stay of execution against the Judgment of the Employment and Labor Relations Court to which the 1st respondent filed a

preliminary objection contesting the jurisdiction of this Court to re-consider, on appeal, the exercise of the Court of Appeal's discretion under Rule 5(2) (b). It specifically contested the power of the Supreme Court to entertain interlocutory appeals from the Court of Appeal.

Issues

I. Whether an application challenging the Orders of the Court of Appeal under Rule 5(2) (b) can be regarded as an appeal, for the purposes of article 163(4) (a) of the Constitution of Kenya, 2010.

II. Whether the Supreme Court had jurisdiction to hear "appeals" arising from interlocutory Orders of the Court of Appeal under Rule 5(2) (b) of the Court of Appeal Rules.

III. Whether there exists a distinction between the exercise of the Court of Appeal's power under rule 5(2) (b) with the inherent power of the Supreme Court to grant interim reliefs.

Jurisdiction *– appellate jurisdiction of the Supreme Court - - jurisdiction of the Supreme Court to entertain interlocutory appeals from the court of appeal - whether an application challenging the Orders of the Court of Appeal under Rule 5(2) (b) can be regarded as an appeal, for the purposes of article 163(4) (a) of the Constitution of Kenya, 2010 – , rule 5 (2) (b) Court of Appeals Rules, article 163 (4) (b) Constitution of Kenya, 2010*

The court of appeal rules, rule 5(2) (b) of Rules-
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—

(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.

The Constitution of the republic of Kenya 2010 Article 163 (4);
Appeals shall lie from the Court of Appeal to the Supreme Court—

(a) as of right in any case involving the interpretation or application of this Constitution; and

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

Held

1. Article 163 (4) (a) of the Constitution had to be seen to be laying down the principle that not all intended appeals lay from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution could be entertained by the Supreme Court. Towards that end, it was not the mere allegation in pleadings by a party that clothed an appeal with the attributes of constitutional interpretation or application.
2. It was clear that rule 5(2) (b) of the Court of Appeal Rules was essentially a tool of preservation. It safeguarded the substratum of an appeal if it were invoked by an intending appellant, in consonance with principles developed by that Court over the years.
3. In dealing with rule (5) (2) (b) of the Court of Appeal Rules, the Court of Appeal exercised original and discretionary jurisdiction and that exercise did not constitute an appeal from the Judge's discretion to the Supreme Court.
4. Where the Supreme Court had been called upon to invoke its jurisdiction under article 163 (4) (a) of the Constitution, the Supreme Court had almost invariably proceeded on the assumption that there existed a substantive determination of a legal/constitutional question by the Court of Appeal which the intending appellant sought to impugn. That was the rational meaning to be ascribed to the word "appeal", in an adversarial system, where jurisdiction was assigned by the legal norms to a hierarchy of Courts.
5. An application under rule 5(2) (b) of the Court of Appeal Rules was not an appeal as envisaged by article 164(3) of the Constitution of Kenya, 2010. For purposes of judicial proceedings an appeal was broadly speaking, 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 consideration and review of the decision in his favor.
6. Rule 5 (2) (b) of the Court of Appeal Rules of 2010 was derived from article 164 (3) of the Constitution, 2010. It illuminated the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal.
7. The exercise of that discretionary jurisdiction could not be described as "original", the term "inherent" more accurately captured the nature of that jurisdiction. The Court of Appeal had nonetheless defined the contours of that discretion succinctly and consistently and had employed it effectively to aid the conduct of its appellate jurisdiction.

8. There existed a parallel between the exercise of the Court of Appeal's power under Rule 5(2)(b), with its inherent powers to grant interim reliefs. The grant of interlocutory reliefs by the Supreme Court did not encroach on the jurisdiction of the Court of Appeal. Interlocutory applications in the nature of injunctions and stay of execution were made within the substantive matter of the appeal. The Supreme Court had jurisdiction to hear and determine such interlocutory applications with special regard to the circumstances of each case.
9. Where necessary, the Court could also exercise its discretion to decline to grant interlocutory relief, if the same would imperil its ultimate function to render justice in accordance with the Constitution and the ordinary law.
10. Where the Supreme Court had appellate jurisdiction derived from the Constitution and the law, it was equally empowered not only to exercise its inherent jurisdiction, but also to make any essential or ancillary orders such as would enable it to sustain its constitutional mandate as the ultimate judicial forum. A typical instance of such exercise of ancillary power was that of safeguarding the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issues.
11. The general stand of the law was that there would be a pending, or an intended appeal, as a basis for this Court to entertain an application for stay of execution, or for grant of an injunction. The Supreme Court had inherent jurisdiction to grant stay of execution, or injunction, so as to preserve the substratum of an appeal, or intended appeal.
12. An appeal against a Court of Appeal decision declining to extend time was not a matter falling under the purview of article 163(4) (a) of the Constitution. In the absence of a judgment by the Court of Appeal, in which constitutional issues had been canvassed, there was nothing for the Supreme Court to sit on appeal over.
13. Discretionary decisions which originated directly from the appellate Court were by no means the occasion to turn the Supreme Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution.
14. The application before the Supreme court contested the exercise of discretion by the appellate Court, when there was neither an appeal, nor an intended appeal pending before the Supreme Court. The appeal before the Court of Appeal was yet to be heard and determined.
15. An application so tangential, could not be predicated upon the terms of Article 163 (4) (a) of the Constitution. Any square involvement of the Supreme Court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged, at the Court of Appeal, and for which the priority date had already been assigned. Therefore, an involvement by Supreme Court at such an early stage would expose one of the parties to prejudice, with the danger of leading to an unjust outcome.
16. In the Circumstances, the Supreme Court lacked jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5 (2) (b) of that Court's Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court.
17. The court could not take jurisdiction if it did not have to, but, it was equally true that it had to take jurisdiction if it had to. The court had no more right to decline the exercise of jurisdiction which is given than to usurp that which was not given. The one or the other would be treason to the Constitution.

Preliminary objection allowed
Application disallowed
Applicant to bear the costs of the 1st and 2nd respondents, The 3rd and 4th respondents to bear their own costs.

The Court of Appeal Cases

The powers of the Public Service Commission to make the decision to reinstate a public officer after suspension or interdiction cannot be delegated

Geoffrey Kiragu Njogu v Public Service Commission & 2 others [2015]
Civil Appeal 57 of 2014
Court of Appeal at Nyeri
Visram, Koome, Odek, JJA
May 20, 2015
Reported by Njeri Githang'a

Brief facts

The appellant was the Assistant Chief of Karatina Sub- Location. On 3rd November, 2007 the appellant was arraigned in court and charged in Criminal Case No. 59 of 2007 for corruption. The appellant was interdicted on 14th November, 2007 by the then Provincial Commissioner and was paid half his salary. Thereafter, vide a letter dated 8th January, 2008 the 2nd respondent informed the appellant of the 1st respondent's decision to retire him in public interest with immediate effect. By a letter dated 4th March, 2008 the appellant pleaded with the 2nd respondent to reconsider the said decision and wait for the outcome of the criminal case.

Subsequently, the appellant was acquitted of the criminal charges against him on 11th January, 2010. By a letter dated 4th February, 2010 addressed to the District Commissioner, Kirinyaga South, the appellant requested for his reinstatement as an Assistant Chief. On 19th October, 2012 the 2nd respondent informed the appellant that his appeal for reinstatement had been rejected and his case closed. By a letter dated 7th December, 2012 the District Commissioner, Mwea West wrote to the appellant to clear with his office and return all his uniforms and any other government properties in his possession pursuant to his retirement. Unrelenting the appellant made further several appeals to the 2nd respondent without success. The appellant claimed to have resumed duty on the verbal instructions of the District Commissioner.

Indefatigable, the appellant initiated judicial review proceedings. In opposing the application before the High Court, it was argued that the letter dated 7th December, 2012 which the appellant sought to quash merely implemented a decision which had already been made to retire him; that quashing the said letter would not quash the decision to retire the appellant on public interest grounds. It was submitted that the appellant's judicial review application was founded on the merits of the decision to retire him. It was deposed that judicial review was concerned with the decision making process and not the merits of a decision.

Issues

i. Whether the powers of the Public Service Commission to make the decision to reinstate a public officer after suspension or interdiction can be delegated.

ii. whether the circumstances of the case justified the issuance of prerogative orders as sought by the appellant

Constitutional Law*-constitutional commissions-Public Service Commission (PSC)- powers of the PSC- suspension interdiction and reinstatement of public officers- whether the powers of the Public Service Commission to make the decision to reinstate a public officer after suspension or interdiction can be delegated.*

Held;

1. The letter dated 7th December, 2012 did not contain the decision to retire the appellant but was merely implementing the 1st respondent's decision to retire the appellant by requesting him to return his uniform and any other Government property in his possession. A District Commissioner had no power to retire a public officer and a plain reading of the letter could not be construed to be a retirement letter. The letter was not from the 1st respondent who was the employer of the appellant; the said letter was signed on behalf of a District Commissioner who was neither the employer of the appellant nor a person exercising powers delegated by the 1st respondent in relation to making the decision to retire a public officer.
2. The Court of Appeal could only interfere with the exercise of the court's judicial discretion if satisfied:-
   a. The Judge misdirected himself on law; or
   b. That he misapprehended the facts;

or

c. That he took into account of considerations of which he should not have taken account; or

d. That he failed to take into account considerations of which he should have taken account; or

e. That his decision, albeit a discretionary one, was plainly wrong.

3. Regulation 25 (2) of the Public Service Commission Regulations 2005 (Legal Notice 28 of 2005) empowered the 1st and 2nd respondents in a disciplinary process to retire the appellant from the public service in public interest. That being the case only the 1st or 2nd respondents could reinstate the appellant and not the District Commissioner. The powers and duties of the 1st respondent to discipline or reinstate an officer could not and was never delegated to the District Commissioner. The legal effect of an improper or unauthorized exercise of delegation was to render the decision of the delegate invalid.
4. There was nothing in the Public Service Commission Regulations which suggested that disciplinary process was tied to criminal process that may arise from the same facts. There was no provision in the Public Service Commission Regulations which made it necessary for employers to follow police investigations, or findings or indeed criminal court decisions in resolving employment disputes. The Public Service Commission Regulations did not merge disciplinary processes with criminal trials.
5. The 1st and 2nd respondents had no power to divest themselves of their functions and delegate the same to the District Commissioner. The contention that the appellant had resumed duty after he had been retired on the verbal instructions of the District Commissioner had no legal foothold and could not bind the 1st and 2nd respondents. The alleged resumption of duty by the appellant on the verbal instructions of the District Commissioner was null and void. It was not one of the duties, powers or functions of a District Commissioner to reinstate an officer who had been suspended or interdicted.
6. The appellant had not cited to the Court any express provision legitimizing delegation of the powers of the 1st and 2nd respondents to the District Commissioner.
7. The law as it stood then as per the *Public Service Regulations 2005* only the 1st and 2nd respondents could reinstate the appellant following his retirement. The 1st and 2nd respondents could not be estopped by the null and void action of the District Commissioner. No estoppel could legitimize action which was *ultra vires*. The doctrines of legitimate expectation and estoppel were hence inapplicable in the case.
8. The letter dated 8th January 2008 informed the appellant of his right to appeal within 42 days against the decision to retire him in public interest. The appellant responded to that letter requesting the 1st respondent to await the outcome of his criminal trial. The appellant was given a chance and opportunity to be heard on appeal; the 42 days was a fair and reasonable period to exercise his right of appeal. A person who opted not to exercise his right of appeal could not turn around and allege he was never heard.
9. The appellant did not adduce any evidence to show that the respondents had refused to pay his dues under the law hence the order of mandamus could not issue.

The appeal dismissed with no orders as to costs.

Circumstances where two separate life insurance payments can be issued to the dependants of a deceased person

Meshack Owino Onyango (Suing As Legal Representative of the Estate of Silas Ochieng Onyango (Deceased) v the Board of Trustees, National Social Security Fund

Civil Appeal No.87 of 2007

Court of Appeal at Nairobi

Nambuye, Karanja & Mwera, JJ.A

May 8, 2015

Reported by Njeri Githang'a

Brief facts

The deceased, *Silas,* was once an employee of the 1st respondent, the Board of Trustees, National Social Security Fund and a member of the Pension Scheme whose trustees were the 2nd to the 7th respondents. It was the plaintiffs/appellants case that the deceased was entitled to be insured by the 1st respondent's Group Life Assurance Scheme with UAP Provincial Assurance Company Ltd. It was argued that each of the two schemes provided for benefits to accrue

to the deceased and or his defendants in the event of his death – Sh.1,077.072/= and Sh.1, 137,072/ respectively worked on the formulae known and applicable. Silas died on 7th June, 2001 and thus his dependants were entitled to be paid a total of Sh.2, 214,144/= from the two stated schemes. After filing the suit the respondents paid the sum due under the group insurance, but the 1st respondent failed/ refused to pay the sum of Sh.1,077,072/=due under the pension scheme.

In defence, it was argued that it was a misconception on the part of the legal representative of the deceased, the appellant to expect two separate payments from the pension fund and the assurance policy in the event of the death of a member. It was further pleaded that if such two claims were tenable, the one against the 1st respondent was separate from the one laid against the 2nd to the 7th respondents whereupon the two claims were wrongly joined.

The High Court agreed with the respondents that two separate payments were not to issue both from the pension and group assurance funds hence the appeal.

Issue
Whether two separate life insurance payments can be issued to the dependants of a deceased person

Insurance law- *life insurance- life insurance payments- where the employer of the deceased had taken out two separate life insurance policies-whether two separate life insurance payments can be issued to the dependants of a deceased person*

"6. Death – In Service Benefits
(a) *Upon an eligible employee becoming member of the scheme the Trusteesshall provide for or effect such Assurance Policies as they shall think advisable in respect of each member for an amount equal to four (4) times such member's pensionable emoluments and shall increase such cover from time to time as shall be necessary to maintain its equivalent in amount to four times the members pensionable salary.*

Upon the death of a member the following payment shall be made:-

i. *Lump sum Payment*

Such sums as shall be received by the trustees from an insurance company in respect of such member pursuant to the provisions of Rule 6(a) shall be held by the Trustees upon trust to be paid by them in accordance with Rule 5(e)(1) mutatis mutandis.

b. *Pension payments.*

i.... *(iv) ..."*
Turning to Rule 5(e)(1), it fell under PART III, BENEFITS. It reads:

"5. Pension Benefits
(a)...(d)...

e. *Death of a Pensioner*

1. *Lump Sum Payment*

Should a pensioner die before sixty (60) monthly installment of pensions shall have been paid, then the Trustees shall hold a sum equivalent in value to the difference between the total monthly installments of such pension and the total of the monthly installments paid prior to the date of death of such pensioner UPON TRUST with power to be exercised (if at all) within two years of the rate of death of the pensioner;

(i) *...(ii) ...*

(2)(i)...(iv) ..."

Held;

1. There was nothing from the group assurance policy or the pension scheme document where it was stated that a deceased employees' estate could not be paid both under the insurance policy and the pension scheme. There being no clause or provision that a deceased's estate could not benefit under the group assurance policy as well as under the pension scheme, the appellant was entitled to the two payments calculated on the applicable formula.
2. In case the decision by the High Court was right that only one payment was deserved and warranted, and one was made from the group assurance scheme, what happened to the contributions and benefits due to the deceased under the pension scheme? Could it be presumed that it remained in the assets of the 1st respondent? Such a scenario was not right. Without a specific and express bar to benefit or justification not to benefit from two payments, from the group assurance and the pension scheme, then both were payable.
3. The High Court was correct to award half costs to the appellant since he had succeeded only in a part of his claim, not only was that in the discretion of the court, but it was the correct position. However, since the appellant was entitled to succeed on the whole of his claim, he was entitled to full costs.
4. The interest rate applicable would be court

rates and would run from the institution of the suit to the date the sum would be paid in full, and not from an earlier date. There had been no strong reason advanced as to why interest should cover that period.

Appeal allowed with costs to the appellant

International Organisations Vested With Diplomatic Immunity Against Employer/ Employee Disputes

African Development Bank v Beatrice Agnes Acholla & Another (representatives of the estate of the late Bonaventure Eric Acholla
Court of Appeal at Nairobi
Civil Appeal No. 135 of 2002
E M Githinji, J W Mwera & F Sichale JJA
July 3, 2015
Reported by Emma Kinya Mwobobia

Brief Facts

Bonaventure Eric P. Acholla (now deceased), had a plethora of complaints against the African Development Bank (the appellant herein). In the amended plaint, the deceased claimed, *inter alia*, that the appellant failed to give him a promotion yet he deserved; that instead he suffered a demotion in rank; that he was retired prematurely and that certain sums of money were illegally recovered from him. For all these infractions and others, the deceased claimed money owed to him, general damages, and special damages. The suit was opposed by way of a defence where the defendant denied the claim and maintained that no action could lie in the High Court or any other court in Kenya against the appellant by dint of article 52 (1) of the Schedule to the African Development Bank Act (ADB Act) which ousted the jurisdiction of the court in Kenya to hear the suit.

Issues:

i. Whether an Act of Parliament could oust the jurisdiction of the Court in Kenya to determine a suit
ii. What was the status and extent of immunity granted to an international organisation?

Jurisdiction *– jurisdiction of the High Court - immunity – international immunity – jurisdiction of the High Court in Kenya to determine a suit involving an international organisation that had been granted immunity – status and extent of immunity granted to an international organisation – whether the High Court had jurisdiction to determine the suit – African Development Bank Act article 52*

African Development Bank (ADB) Act, article 52 provided that

> *The Bank shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers*

Held:

1. Under Articles 22, 48 and 50 of the Constitution, citizens had a right to access courts and the State had a corresponding obligation to ensure that courts were accessible for the enforcement of rights and resolution of any grievance.
2. According to article 52 of the ADB Act, the appellant enjoyed immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers. The plain, natural and ordinary interpretation of the provision was that the appellant bank could not be sued in a domestic court, unless the dispute arose out of an exercise of its borrowing powers, which was not the case.
3. Immunity from a suit and legal process could be justified on the ground that it was necessary for the fulfilment of the purposes of the Bank, for the preservation of its independence and neutrality from control by or interference from the host state and for the effective and uninterrupted exercise of its multi-national functions through its representatives. If that would not to be the case, one may well imagine the various laws of the host courts that the employees of the bank would be subjected to. More so, if it was considered that the international employees were not confined to one host country but like all other employees and for good measure were subject to transfers.
4. An international organisation, whether incorporated or not was merely the means by which a collective enterprise of the member states was carried on and through which the relations with each other in a particular sphere of common interest were regulated. Any attempt by one of the member states to assume responsibility for the administration of the organisation would be inconsistent with the arrangements made by them as to

the manner in which the enterprise was to be carried on and the relations with each other in the sphere was regulated.

5. Sovereign states were free, if they wished, to carry on a collective enterprise through the medium of an ordinary commercial company incorporated in the territory of one of their members. However, if they chose instead to carry it on through the medium of an international organisation, no one member state, be it executive, legislative or judicial action could assume the management of the enterprise and subject it to its own domestic law. For if one could, then all could and the independence and international character of the organisation would be fragmented and destroyed.

6. One of the most important protections granted to international organisations was immunity from suits by employees of the organisation in actions arising out of the employment relationship. Courts of several nationalities had traditionally recognised the immunity and it was a doctrine of customary international law.

7. Like the other immunities accorded to international organisations, the purpose of immunity from employee actions was rooted in the need to protect international organisations from unilateral control by member nations over the activities of the international organisation in its territory. The sheer difficulty of administering multiple employment practices in each area in which an organisation operates suggested that the purposes of an organisation would be greatly hampered if it could be subjected to suits by its employees worldwide.

8. An attempt by the courts of one nation to adjudicate the personnel claims of international civil service would entangle the courts in the internal administration of those organisations. Denial of immunity opened the door to divided decisions of the courts of different member states passing judgment on the rules, regulations and decisions of the international bodies. Undercutting uniformity in the application of the staff rules or regulations would undermine the ability of the organisation to function effectively.

9. The immunity was granted to the International Organisation and not to the individual. There was no conflict between articles 51 & 52 of the Schedule to the African Development Bank Act.

10. In *Tononoka Steels Ltd v The Eastern and South African Trade and Development Bank* [2000] 2 EA 536, the court held that the decision by the Minister to grant the PTA bank absolute immunity from suits and legal process even in purely commercial transactions was contrary to international law. It was through a ministerial fiat contained in a gazette notice. However, in the instant case, the immunity was provided in an Act of Parliament. The other dissimilarity was that the case of the respondent was an employer/employee dispute, whilst in the *Tononoka* case the dispute was of a commercial nature. To stretch the argument that the respondents claim against the appellant being an employment transaction was also of a commercial nature was to over-stretch the meaning and purport of a commercial transaction.

11. The Constitution of Kenya, 2010 contained a wide range of rights, including labour rights and the right to access justice. However, under article 2 (6) of the Constitution, international treaties and legal instruments upon which Kenya had ratified formed part of the law of Kenya. The Articles of Agreement were such legal instruments and had been ratified through the enactment of the ADB Act. They were therefore a part of Kenyan law.

12. Section 7 of the Sixth Schedule on the Transitional and Consequential Provisions required that all existing laws enacted before the promulgation of the Constitution of Kenya, 2010 be construed in conformity with the provisions of the Constitution. Labour rights and fair hearing were enshrined in the Constitution. However, those rights could be limited. The right to a fair hearing, under article 50 (1) and the rights to fair labour practices could be limited. In particular, article 24 provided for the limitation of these rights.

13. The reason for limiting access to domestic courts was that it would be undesirable to have a situation where every employee in an international organisation who perceived that they had been wronged approach different courts in different jurisdictions. It would not only lead to challenges in execution, where an order against such an organisation was given, but would also create sheer difficulty of administering multiple employment practices in each area where an organisation operated and it was suggested that the purposes of an organisation would be greatly hampered if it could be subjected to suits by its employees worldwide. The

situation was remedied by the fact that there were internal dispute resolution mechanisms through which an employee could agitate claims against the appellant. Therefore, in the circumstances, the appellant is vested with diplomatic immunity.

Order:

Appeal allowed. High Court orders set aside.

Liability of an occupier for criminal actions of third parties (on his property) under section 3 of the Occupiers' Liability Act.

Soma Properties Limited v H A Y M (suing as the administrator of the estate of S H (deceased).
Civil appeal no. 74 of 2005
Court of appeal at Nairobi
J E M Githinji, W Ouko and J Mohammed, JJ.A
June 19, 2015
Reported by Teddy Musiga & Daniel Hadoto

Brief facts

The respondent had taken their children to Sarit center for an outing. As they walked out of the building, they walked right into cross fire of a gun battle between police officers and robbers who were fleeing the Kenya Commercial Bank. In the exchange of gun fire, their daughter (S) was hit on the neck and subsequently succumbed to the injuries.

The respondent blamed Soma Properties the appellant (proprietor of the land where Sarit Centre Shopping Complex stands) and instituted an action claiming general and special damages attributing negligence on the part of the appellant, that the shooting and resultant death of the deceased was due to the appellant's breach of common duty of care owed to the deceased by virtue of being in the premises lawfully.

The appellant denied liability and raised the defense of *Volenti non fit injuria*. The trial court dismissed that defence and held that the appellant owed but breached a common duty of care to the deceased and was as a result 100% liable for her death. The trial court also reviewed the consent recorded by the parties and substituted the original agreed award of Kshs. 20,000/= with Kshs. 1,000,000/=. In total, the trial court awarded the sum of Kshs 3,351,159.60/= which aggrieved the appellant hence this appeal.

Issues

i. Whether an occupier (the appellant) owes visitors (the respondent) a common duty of care to ensure that visitors are reasonably safe while using the premises for the purpose for which they are invited or permitted by the occupier to be there under the Occupier Liability Act.

ii. Whether the appellant met the expected statutory standard of care in exercising their duty of care.

iii. What is the standard of care provided for the in the Occupier Liability Act?

iv. Whether there exists a common duty of care imposed on an occupier to protect those lawfully on his premises against criminal acts of third parties.

***Tort** - negligence - occupier's liability - duty and standard of care imposed on a proprietor - duty and standard of care imposed on an occupier for criminal acts of a third party - whether there exists a common duty of care imposed on an occupier to protect those lawfully on his premises against criminal acts of third parties.*

Occupiers' Liability Act Section 2 provided that;

1) *The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate—*

   a) the obligations of a person occupying or having control over any fixed or movable structure, including any vessel, vehicle or aircraft; and

   b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.

Held

1. The Occupier Liability Act imposed a duty on the land owners to those who came onto their land to ensure their reasonable safety while on

the land.

2. Sections 2 and 3 of the Occupier Liability Act imposed a duty of care on an occupier and proceeded to define the standard of care that was necessary to fulfil that duty. The words "reasonable" and "reasonably" in those sections emphasized the exact standard of care expected of an occupier. It was a standard measured against the care to be exercised by a reasonably prudent person in the circumstances including the practices and usages prevailing in the community and the common understanding of what was practicable and what was to be expected.

3. The standard of reasonableness was not one of perfection. Thus an occupier could escape liability if it was established that in the circumstances of the case, there were reasonable systems in place to secure the premises against foreseeable risk and danger.

4. The party advancing a claim on tort bore the burden of proof; the standard of which is on a balance of probabilities. Section 3 of the Act did not create a presumption of negligence against the occupier of the premises whenever a person was injured on the premises. A plaintiff who invoked that section had to still be able to point to some act or omission on the part of the occupier which caused the injury complained of before liability could attach.

5. In Kenya, on the basis of the Occupiers' Liability Act and the common law there was a duty imposed on the occupier to maintain the premises, including all the common areas which were part of the premises in a manner that did not, in all the circumstances, pose any threat to injury or damage to those on the premises, including protection against criminal acts of third parties as long as the risk, injury and damage were foreseeable and the occupier had not restricted, modified or excluded his duty to any visitor or visitors by agreement or otherwise.

6. Even though the duty did not change, the factors which were relevant to an assessment of what constituted reasonable care had to be necessarily very specific to each situation on the question of foreseeability. To determine when a crime was foreseeable would depend on a number of factors such as the nature of the business, frequency and similarity of prior incidents of crime on the premises and the neighborhood.

7. By the very nature of the appellant's business, a larger traffic of people, going shopping and to the banks, were expected to visit the property. All the people lawfully on the premises expected, for the period they were there to be safe. Thus the trial court properly found that the appellant owed to the respondent a common duty of care.

8. From the records, there could be no question that there was a foreseeable risk in view of the previous robberies and thefts in the premises. There was a sub-lease in which tenants agreed to pay the appellant to enhance security in the premises as well as an indemnity insurance policy, pointing to the foreseeable risk. Bearing that in mind, could it be said that the appellant discharged its "common duty of care" to see that the deceased was reasonably safe in using the premises?

9. The common duty of care imposed on the occupier a duty to take such care as in "all the circumstances of the case was reasonable" for the safety of his premises. The shooting and wounding of the deceased was not due to lack of precautionary measures but an unfortunate misfortune thus the doctrine of *volenti non fit injuria* was applicable. Just like the appellant, the deceased did not have full knowledge of the extent of the risk that lay ahead before the shooting.

10. To demand, like the trial court did that the appellant ought to have done more, in the circumstances and requiring it to have put in place "adequate" measures, was to raise the threshold beyond that set by statute. Because even with the best precautions, robberies still occurred. But what was sought even in the circumstances was that reasonable efforts had to be employed to assure visitors of their safety.

11. [Obiter]The incident occurred in 1999 and the standard of care expected of the appellant was that which was practicable and expected of it in the circumstances of the time. Compared to today, there were then fewer security threats. Currently, things are very different and the standard of precaution is higher. The danger of armed robbery and increased threat of terrorist attack serves to remind every citizens, business, clubs, buses, aircrafts and shopping malls owners to maintain a high level of vigilance.

Concurring judgment of E M Githinji, JA

12 Section 3 (2) of the Occupier Liability Act provided that the common duty of care imposed by the Act was for the occupier to take reasonable care in all the circumstances of the case to see that the visitor was reasonably safe. The Act neither imposed on the occupier an absolute common duty of care nor guaranteed a visitor absolute safety. The standard or degree of care depended on the facts of each case.

13 The respondent failed to provide concrete evidence to prove on a balance of probabilities that the respondent breached the common duty of care. On the contrary, the appellant called on concrete evidence which tended to show that the premises were reasonably safe, that the security provided was reasonable and that there was no practice in the industry to install either metal detectors or CCTV cameras in shopping centers at that time and that it was not practical to use them without interfering with business.

14 The respondent did not establish a breach of common duty of care by the appellant. The appeal allowed on liability and set aside the judgment appealed from.

The learned Judge in failing to apply the correct principles of the law and the statutory standards erred and came to a wrong decision.

Appeal allowed with the result that the judgment and decree in HCCC No. 1517 of 2002 set aside.

The notice of cross-appeal had no merit and dismissed.

No orders as to costs on account of the unfortunate circumstances presented in this matter.

Court holds that, statutory notice to the AG is not required to sue Kenya Revenue Authority

Kenya Revenue Authority vs. Habimana Sued Hemed & Another
In the Court of Appeal at Nairobi
Civil Appeal No. 34 of 2008
Karanja, Mwilu & Azangalala, JJ.A
July 31, 2015
Reported by Emma M. Kinya & Kipkemoi Sang

Issues

i. Whether Kenya Revenue Authority Act, read together with the Government Proceedings Act required the Attorney General to be mandatorily notified in order to sue KRA (appellant)
ii. What was the intention of the legislature when it enacted section 13A of Government Proceedings Act?

***Company Law**-Statutory and state corporate bodies-capacity of statutory corporates to sue and be sued-whether Kenya Revenue Authority Act, read together with Government Proceedings Act required the Attorney General to be mandatorily notified in order to sue KRA (appellant)-Kenya Revenue Authority Act (cap 469), Section 3(2)*
***Constitutional Law** - interpretation-statutory interpretation-intention of the legislatures in enacting laws-, what was the intention of the legislature when it enacted section 13A of Government Proceedings Act-Government Proceedings Act (cap 40), section 13A (1)*
Kenya Revenue Authority Act (cap 469)
Section 3(2)
Any legal proceedings against the authority arising from the performance of the functions or the exercise of any of the powers of the authority under Section 5 shall be deemed to be legal proceedings against the Government within the meaning of the Government Proceedings Act.
Government Proceedings Act (cap 40)
Section 13 A
Notice of intention to institute proceedings
(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.

Held

1. The appellant KRA is a body corporate with the capacity to sue and be sued and it its own corporate seal different from that of the Government of Kenya. It can not drug the Attorney General into its proceedings every time there is an alleged breach of the law on its part.
2. The 30 days statutory notice to KRA before one could institute suit was anti-business and oppressive. Due to the nature of work and responsibilities bestowed on the appellant and the immense discretion, the Commissioner of the appellant has, it is necessary that a party who finds itself on the wrong side of the appellant would be greatly prejudiced if they shackled from accessing justice for a minimum of 30 days.
3. Notice under section 13A of the GPA enabled the Attorney General to determine which Ministry of Government department was complained against so that he could seek an explanation and perhaps remedy the situation and obviate Court Action which would otherwise be costly to the Government. KRA is not an organ of Government as contemplated under the GPA

4. There is only one KRA. If the Commissioner or any other of its officers or employees breached the law, the aggrieved party knew who to sue; there could not be any confusion. There would therefore be no need to serve the Attorney General for him to forward the complaint or statement of claim to the KRA. The appellant could not hide behind the cloak of the Attorney General when it was accused of breaching the law or otherwise violating people's right purely in order to take advantage of the 30 days statutory notice.
5. It would be ridiculous, nay fallacious even for one to imagine that KRA would be immunized or shielded by the law against issuance of injunctive orders against it, even where such orders were merited and could be necessary for preservation of property and protection of people's fundamental rights.
6. KRA needed to submit itself to the rigors of litigation and stop operating under the shadow of the Government when it comes to legal proceedings. The body parliament intended was a responsible and accountable one empowered to discharge its legal obligation without resorting to reserved privilege when obligation fall upon it.
7. Section 70 of the Finance Act of 1998 (repealed) was mischievous and only meant to enable the appellant steal a match against persons who had claims against it. The provision was under the retired constitution and under the current Constitution of Kenya 2010, this is unconstitutional. The said provision trampled on the rights of those who found themselves on the opposite or wrong side of the appellant. It carried with it unmitigated prejudice and discrimination. It furthermore, interfered with speedy right to justice. The proceedings before the high Court were regular procedure and properly before the court

Appeal against the second respondent dismissed with costs in its entirety to the second respondent

High Court Cases

Court awards costs to the Attorney - General and orders the same to be gifted to a Children's Home

George Morara Omare v Rama Dziwe Juma& 4 others [2015]
Constitutional Petition 41 of 2014
High Court at Mombasa

MJA Emukule, J
June 3, 2015
Reported by Njeri Githang'a

Brief Facts

The First Respondent borrowed a sum of Kshs. 200,000/= from the Petitioner on security of the motor vehicle KAN 665A Nissan Matatu (the motor vehicle), and in addition to the stated sum of Kshs. 200,000/= the expenses for engine repairs and other essential repairs would be added and become part of the loan moneys. The Petitioner would also be entrusted with the logbook and other essential documents in relation to the motor vehicle would be held by the Petitioner.Though the agreement of 18th September, 2011 only refers to Kshs. 200,000/= the Petitioner claims that he lent 137,000/= to the First Respondent for engine repairs making the claim Kshs. 337,000/=. The Petitioner claimed that after five (5) months, the first Respondent failed to pay the said moneys. He claimed that the vehicle would belong to him as he had all the documents of title.

The first Respondent complained to the Police at Mariakani Police Station that the Petitioner had conned him of the motor vehicle by use of tricks, and hence he needed assistance from the Police to trace and recover his vehicle. The Third Respondent and his colleague, a Mutua, traced the motor vehicle to Mazeras Township and found the Petitioner in possession thereof.

Though the Petitioner claimed that he had advanced a huge sum of money, the Third Respondent had also established that where the Petitioner advanced a sum of say Kshs. 5,000/= he would alter the figure by adding a zero at the end, and make the sum advanced to Kshs. 50,000/= and where he advanced a sum of Kshs. 10,000/= he would add another zero (0) to make the sum of Kshs. 100,000/=. In that manner whoever was lent the small sum would never be able to pay the tenfold increases of the original sum advanced.

The Third Respondent claimed he charged the First Respondent with obtaining money by false pretences in Mariakani Police and that the file was transferred to Kaloleni, when the magistrate at Mariakani Law Courts declined to deal with it. Neither the Petitioner nor the Third Respondent exhibited the charge sheet, and the court was unable to ascertain whether it was the complainant Rama Dziwe, or the Petitioner who was charged with obtaining money by false pretences. The case was however withdrawn under section 87 (a) of the Criminal Procedure Code as the Petitioner declined to give evidence; and he was subsequently instructed to hand over the investigations file and the subject motor vehicle to the Deputy OCPD, where he later learnt the file was taken to the PCIO's office. He also learnt later that the motor vehicle was released by the OCPD to the First Respondent who was the registered owner thereof. The Third Respondent concluded that the Petition was scandalous, frivolous and vexatious, and that it had no basis, and should be dismissed with costs.

Issue

Award of costs in frivolous, scandalous, and vexatious Constitutional Court's proceedings and whether the court can order costs awarded to the Attorney General to be gifted to a children's home.

***Civil practice and procedure**-costs-award of costs in frivolous, scandalous, and vexatious court proceedings-whether the court can order costs awarded to the Attorney General to be gifted to a children's home*

Held;

1. The primary duty of the Police service established under the Constitution of Kenya 2010 (articles 243 and 244), was to strive for the highest standards of professionalism and discipline among its members, prevent corruption and practice transparency. Under the National Police Service Act, it was to detect, deter and prevent the occurrence of crime. It was the role of the Police to carry out investigations once a complaint was made to them, and take remedial action as their investigations revealed. The Police Service was enjoined under article 244 to comply with Constitutional practices and

human rights and fundamental freedoms.

2. The Petitioner had not shown how his rights had been violated under articles 19 (rights and fundamental freedoms), 20 (application of the Bill of Rights), 21 (implementation of the rights and fundamental freedoms), 22 (enforcement of the Bill of Rights), 23 (the authority of courts to uphold and enforce the Bill of Rights), 25 (fundamental rights and freedoms which may not be limited), 27 (equality and freedom from discrimination), 28 (human dignity), 29 (freedom and security of the person), 31 (privacy), 33 (freedom of expression), 40 (protection of right to property), 47 (the right to fair administrative action), 48 (access to justice), 50 (the right to fair hearings, 51 (right of person detained, held in custody or imprisoned), 73 (leadership and integrity), 75 (conduct of state officers), 159(2) (the principles by which courts will be guided in exercise of their jurisdiction) and 165(3) (the high court has unlimited original jurisdiction in criminal and civil matters, and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated or threatened).
3. The terms frivolous, scandalous, and vexatious described a proceeding which had little or no basis in law, the effect of which whatever its intention, was to subject the Defendant to inconvenience, harassment and expense out of all proportion to any likely gain to the claimant, which involved the abuse of the court's process that was to say, using that process for a purpose or a manner significantly different from its ordinary and proper use.
4. The Petitioner's claim (if any), lay with the First Respondent, Rama DziweJuma to whom he lent (if at all), some money. He was the person whom the Police through the OCPD Mariakani Police Division established was the owner of the subject motor vehicle. He was granted access to it and took it away. It was an abuse of the Constitutional Court's process to claim a non-existent right under article 40 of the Constitution, and it was treating the court process with disdain to make spurious claims against the Police for investigating complaints and resolving them.
5. **(obiter)**"It is abuse of the court's process to treat courts as some form of lottery where a litigant and their counsel throw some dice in the form of a Petition, and hoola, hope to win a jackpot of special, exemplary, punitive and general damages as compensation for investigating and closing their investigations. Ordinarily, this court would direct that each party bears its own costs at the determination of a Petition on a matter of public interest, and affecting the fundamental rights and freedoms of the citizen"

Petition dismissed with a direction that the Petitioners do pay to the Attorney-General the sum of Kshs. 50,000/= to be gifted by the Attorney-General to Children Home in Mombasa County.

Circumstances in which the High Court may have jurisdiction over matters incidental to employment and labour relations

Republic v Principal Secretary Agriculture, Livestock and 3 others ex – parte Douglas M Barasa & 2 others.

Civil Miscellaneous Application No. 168 of 2015 (JR)

High Court of Kenya at Nairobi

G V Odunga, J

June 26, 2015

Reported by Teddy Musiga & Daniel Hadoto

Brief facts:

The applicants were farmers who were aggrieved with the decision of the public authority (The Principal Secretary of Agriculture & Livestock). In their view, it was not the mandate of the Board to extend the mandate of the Managing Director. They argued that the appointing authority was the Cabinet Secretary in charge of Agriculture & Livestock and not the Permanent Secretary. To them, their complaint was that it was the wrong person who extended the MD's term. They contended that the appointment of the Managing Director was only complete on gazettement of the appointment.

The applicants sought orders of *certiorari* to quash the 1st Respondent's decision that extended the Interested Party's term as the Managing Director (MD) of Nzoia Sugar Company alleging that it was irregular and *ultra-vires*. They also sought an order of prohibition against the said Respondent from renewing the said Interested Party's term as well as an order of *mandamus* compelling the said Respondent to withdraw and cancel the said extension.

The Respondents and Interested Party raised a preliminary objection on the ground that these proceedings ought to have been instituted before the Employment and Labour Relations Court and

not at the High Court.

Issues:

i. Whether the High court has jurisdiction over employment and labour matters.

ii. Whether the Employment and Labour Relations Court being a court of equal status with the High Court could issue orders of Judicial Review.

iii. Whether there were circumstances under which the jurisdiction of the employment and Labour Relations Court can be restricted?

Labour Law *– Employment – jurisdiction of the Employment and Labour Relations Court – jurisdiction of the High Court in entertaining disputes incidental to those of employment and labour relations – circumstances in which the jurisdiction of the Employment and Labour Relations Court can be limited – claim where the High Court had jurisdiction because the issue of employment relationship between the parties was a secondary issue to the main issue In dispute – article 162(2) (a), 165(5) (b), Constitution of Kenya, 2010; section 12, Industrial Court Act; section 87, Employment Act.*

Jurisdiction *- Jurisdiction of the High Court- circumstances in which the High Court has jurisdiction to entertain disputes incidental to those of employment and labour relations - Article 162(2) (a), 165(5) (b), Constitution of Kenya, 2010; section 12, Industrial Court Act; section 87, Employment Act.*

Held:

1. Article 165(5) (b) of the Constitution of Kenya, 2010 provided inter alia that the High Court had no jurisdiction to deal with matters falling within the jurisdiction of the courts contemplated under article 162(2). Article 162(2) (a) on the other hand empowered parliament to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and to determine their jurisdiction and functions. Whereas the High court was a creature of the Constitution itself, the Employment and Labour Relations court was a creature of Parliament (established under the Industrial Court Act, 2011); though the court was of equal status as the High Court.
2. Since the Employment and Labour Relations Court was a court of equal status as the High Court, it had the powers to issue orders of judicial review. However, such relief could only be granted "in exercise of its jurisdiction under the Industrial Court Act" as provided by section 12(3) thereof. In other words, that jurisdiction could only be exercised in the context of its jurisdiction as conferred upon it by the Constitution and the Legislation hence the court could only exercise its judicial review jurisdiction where the substance of the matter before it fell within its jurisdiction.
4 From section 12 of the Industrial Court Act, it was clear that the instant dispute did not fall within any of the subsection of the said section since the dispute did not relate to or arise out of employment, that is to say an employer and an employee. Further, a reading of article 162(2) (a) of the Constitution as read with the said section 12 of the Industrial Court Act was that any other jurisdiction not expressly provided for under the aforesaid section could only derive its validity from "any other written law". In other words, the jurisdiction had to be conferred by Parliament and not by implication.
5 For a matter to fall exclusively within the relevant provisions of the Industrial Court Act and the Employment Act, the parties to the dispute had to necessarily be employee, employer, trade union, employers' organisation or federation unless the same related to registration and enforcement of collective agreements. In the instant case, the Applicants did not in relation to the Respondents fall within the description of either of the aforesaid status. Whereas the relationship between the respondents and that of the interested party could well be that of employer and employee, that did not apply to the applicants.
6 Section 78(3) of the Employment Act clearly stipulated that the section did not apply to a suit where the dispute over a contract of service or any other matter referred to therein was similar or secondary to the main issue in dispute. In other words where the relationship or the issue which would otherwise have brought the dispute under the Employment Act was secondary to the main issue, the exclusive jurisdiction of the Employment and Labour Relations Court was expressly restricted.
7 In matters of jurisdiction of superior courts, It is, a well-established principle that no statute could be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect.
8 For the High Court to be stripped of jurisdiction, a dispute had to fall exclusively within the jurisdiction of the Courts established under Article 162(2) of the Constitution. Where for example the issues in dispute fell within the jurisdiction of the High Court and Courts of the same status, it would be unjust to compel a party to sever its case and file the same in different Courts. It would be ridiculous and fundamentally wrong, for any court to adopt a separationalistic

view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.

9 Even if the court was to find that the issues the subject of these proceedings could be resolved by the Employment and Labour Relations Court, the court was not satisfied that the same fell within the exclusive jurisdiction of that Court in order to deprive the instant Court (the High Court) of its jurisdiction under the Constitution.

The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question was straightforward and clear had to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law has to be guarded jealously and could not be dispensed with too lightly and the interests of justice and the rule of law demanded that.

The Respondent's motion of preliminary objection on jurisdictional mandate of the High Court disallowed.

The application of section 3 of the Prevention of Terrorism Act in relation to the right to fair administrative action under article 47 of the Constitution of Kenya, 2010

Muslims for Human Rights (Muhuri) and another v Inspector-General of Police and 4 others
Petition No. 19 of 2015
High court at Mombasa
J M J Anyara Emukule, J
June 11, 2015
Reported by Teddy Musiga & Daniel Hadoto

Brief Facts

On 7th April 2015, the Inspector-General of Police issued a Notice in the Kenya Gazette listing Al Shabaab as a terrorist organization under the Prevention of Terrorism Act. The same Notice contained a list of 85 entities and individuals suspected to be associated with Al Shabaab. Listed as number 45 and 46 respectively was Haki Africa (the second Applicant) and Muslims for Human Rights (MUHURI) (the First Applicant). On 8th April 2015, the National Treasury Principal Secretary Dr. Kamau Thugge announced at a press conference that the Government had frozen the bank accounts of people and institutions suspected to be funding terrorists pending investigations before action can be taken against them. The Petitioners soon found out on 8th April 2015 that they could not access their funds lying at Gulf African Bank Limited and NIC Bank Limited as their accounts had been frozen. The 5th Respondent in separate but similar letters dated the same day ("HKK2" and "HAA2") informed the Petitioners that their respective accounts had been suspended indefinitely and referred them to the Bank Supervision Department of the Central Bank of Kenya for further information. This prompted the Petitioners to file this Petition.

The application before court sought orders to unfreeze the Petitioners' bank accounts with the Fourth and Fifth Respondents, as well as an injunction to restrain both Inspector-General of Police from recommending to the Cabinet Secretary in the Ministry of Interior and Coordination of National Government, and the Cabinet Secretary from declaring the Petitioners as specified entities. They claimed that as a result of the government's actions, they had suffered public anger, ridicule and stigma; the lives of their officials and staff had been endangered; and they had been unable to continue with economic and social operations. The Petition thus sought *inter alia* declaratory reliefs that the actions of the Respondents were unconstitutional, an order unfreezing their accounts and an injunction restraining the first and second respondents from proceeding any further or declaring them as specified entities.

Issues:

i. Whether the actions of police under section 3 of the prevention of terrorism Act violated the right to fair administrative action as provided for under article 47 of the Constitution of Kenya, 2010.

ii. Whether the applicants had exhausted all the other remedies before approaching the courts for determination of the matter in issue.

Constitutional law *– fundamental rights and freedoms - Enforcement of fundamental Rights and freedoms- constitutionality of the conduct of the National Police Force- enforcement of the right to fair administrative action-limitation to enjoyment of the right to fair administrative action- The constitution of Kenya 2010, Article 29, Article 24, Article 244(4).*

Jurisdiction*- jurisdiction of the high court in the*

enforcement of fundamental rights and freedoms.

Section 3 of the Prevention Of terrorism Act No 30 of 2012

(1) *Where the Inspector-General has reasonable grounds to believe that—*
  (a) *an entity has—*
    (i) *committed or prepared to commit;*
    (ii) *attempted to commit; or*
    (iii) *participated in or facilitated the commission of, a terrorist act; or*

  (b) *an entity is acting—*
    (i) *on behalf of;*
    (ii) *at the direction of; or*
    (iii) *in association with,*

an entity referred to in paragraph (a), he may recommend to the Cabinet Secretary that an order be made under subsection (3) in respect of that entity.

(2) *Before making a recommendation under subsection (1), the Inspector-General shall afford the affected entity an opportunity to demonstrate why it should not be declared as a specified entity.*

(3) *Upon receipt of the recommendation under subsection (1), the Cabinet Secretary may, where he is satisfied that there are reasonable grounds to support a recommendation made under subsection (1), declare, by order published in the Gazette, the entity in respect of which the recommendation has been made to be a specified entity.*

(4) *The Cabinet Secretary shall, subject to subsection (5), inform the entity in respect of which the order is made, in writing, of his decision under subsection (3) together with reasons for arriving at that decision, within a period seven days from the date of declaring the entity a specified entity.*

Held:

1. Section 3(2) of the Prevention of Terrorism Act was clear, straightforward and unambiguous and required no more than the literal interpretation as to the procedure to be invoked before the Inspector-General of Police exercised his discretion to make recommendations to the Cabinet Secretary to declare an organization a "specified entity".

2. The Inspector-General of Police could have conveyed summons to the Petitioners/ Applicants and other persons listed in any number of ways to present themselves to him or his representatives on the ground in order to defend themselves. That he chose to summon the Petitioners in a Special Gazette Notice had not been shown to cause any particular prejudice to the Petitioners/ Applicants or infringed their constitutional rights.

3. Where, as in this case the choice of procedure, made by the Inspector-General of Police, had clearly traumatized the Applicants. It would have been difficult to conclude that the evidence obtained under circumstances which had to meet the test of having been given freely or voluntarily, and could constitutionally be excluded as having been obtained contrary to Article 50(2) (l) (4) of the Constitution.

4. Whereas it was correct that Section 3(2) of the Prevention of Terrorism Act did not lay down the manner in which an entity could be informed of the suspicion of acting in terms of Section 3(1) (b) of the Act, Article 27 (1) of the Constitution guaranteed every person protection and equality before the law, and Article 29 the right not to be subjected to torture in any manner, whether physical or psychological. Article 244(c) of the Constitution required the National Police Service of which the Inspector-General of Police was its Chief Executive Officer, to comply with constitutional standards of human rights and fundamental freedoms.

5. In summoning the Applicants' representatives by way of Gazette Notice without a prior notice to appear before him within twenty-four hours, the Inspector-General of Police subjected representatives of the Applicants to psychological torture which was prohibited by Article 29(d) and deprived those representatives of their dignity and equality before the law as guaranteed by Article 27 of the Constitution.

6. The court took judicial notice of the notoriety, callousness and viciousness of the actions of the designated entities, Al Qaida, Al Shabaab, ISIS, Boko Haram, as terrorist organizations. However, that was very far from saying that the Applicants had been or had acted on behalf of, at the direction of, or in association with any of the designated entities. For such a conclusion to be reached the Inspector-General of Police needed to comply with the requirements of Section 3(2) of the Prevention of Terrorism Act and show reasonable grounds that the Applicants

had been acting in breach of the Prevention of Terrorism Act, and in respect of the frozen accounts that the proceeds thereof were proceeds from the commission of terrorist acts, or are moneys intended to be used to commit terrorist acts, or to be used by a terrorist group or was property of a terrorist group. This was part of what is called fair administrative action.

7. The First Respondent being an independent constitutional body charged with the maintenance of security and protection of the citizens of Kenya, was bound to comply with basic requirements of natural justice that concerned themselves with procedural fairness and ensuring that a fair decision was reached by an objective decision-maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process.

8. The ingredients of fairness or natural justice that must guide all administrative decisions are – firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision maker, secondly, that no one ought to be a judge in his/her own cause, and this is the requirement that the deciding authority must be unbiased when recording or making the decision, and thirdly, that an administrative decision must be based upon logical proof or evidentiary material

9. Procedural fairness is flexible, and entirely dependent on the context. In order to determine the degree of fairness owed in a given case, the court set out five factors to be considered:-

    a. the nature of the decision made and the process followed in making it;

    b. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

    c. the importance of the decision to the affected person;

    d. the presence of any legitimate expectation, and

    e. the choice of procedure made by the decision maker.

10. Where the statute provides an adequate remedy, the remedies under the common law have no application, except as aids in the interpretation of such statute.

11. Article 22 and 258 of the Constitution gave unqualified right to every person to institute court proceedings, claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed, or was threatened and Article 258, that the Constitution had been contravened or threatened with contravention. In addition to a person acting in their own interest, court proceedings could be instituted by *inter alia*, an association acting in the interest of, a group or class of persons.

12. The rights and freedoms subsisted and were inherent at all times, both before, during investigations and at trial and are not divided in time and scope

13. Express jurisdiction was granted to the High court, in accordance with Article 165, to hear and determine applications for redress of a denial, violation, or infringement (contravention) of, or threat to, a right or fundamental freedom in the Bill of Rights.

14. On the question of jurisdiction therefore, there were not one, nor two but many unanswered questions firstly, from the point of view of Section 3(1) (2) of the Prevention of Terrorism Act itself, and secondly, the Bill of Rights provisions. From the point of view of the Prevention of Terrorism Act itself, there were unanswered procedural questions as to reasonable grounds for associating the Petitioners/Applicants with the designated entities when the grounds for such designation are unknown. In particular, it was unknown, (the Gazette Notice does not say so), whether the Inspector-General of Police made any recommendations to the Cabinet Secretary whether or not to declare the five organizations named in the Gazette as specified entities. In the absence of any such recommendations being made, the grounds upon which the Petitioners/Applicants could be named as associates of the specified entities or terrorist groups remain nebulous.

15. Jurisdiction of the instant court could not be taken away by the procedural aspects of the Prevention of Terrorism Act. A contrary reading would have put the provisions of the Prevention of Terrorism Act in conflict with supremacy provisions of the Constitution, and the High court could not advert to that route as it was unnecessary. The objection on grounds of jurisdiction equally thus failed.

Preliminary objection dismissed

A conservatory order by way of an injunction restraining the First Respondent from recommending to the Cabinet Secretary Interior and Coordination of National Government to declare the First and Second Petitioners as specified entity until the hearing and determination of the Petition herein.

A conservatory order restraining the Second Respondent from declaring the First and Second Petitioners as specified entities.

The costs of the Application and the Petition were to be in the cause

High Court declares the County Government's (Amendment) Act that introduced the County Development Board as unconstitutional

Council of Governors & 3 others v Senate & 53 others
High Court at Nairobi
Petition No 381 of 2004 (consolidated with Petition 430 of 2014)
I Lenaola, M Ngugi & GV Odunga, JJ
July 10, 2015
Reported by Andrew Halonyere

Brief facts

The facts giving rise to the consolidated petitions are that the National Assembly of Kenya had, pursuant to consultation with the Senate, enacted the County Governments (Amendment) Act. The County Governments (Amendment) Act amended the County Government Act by introducing a new provision, section 91A which established the County Development Boards (hereafter "CDBs") in each of the 47 counties in Kenya. The CDBs were to comprise, *inter alia*, members of the National Assembly representing constituencies within respective counties, members of county assemblies, as well as members of the executive operating within respective counties, and were to be chaired by the Senator from the county.

Following the enactment of the CGAA and the establishment of the CDBs, the Council of Governors (1st petitioner), a body comprising all the Governors of the 47 Counties, lodged a Petition challenging the constitutionality of the CDBs. The 1stpetitioner sought a declaration to declare the provisions of section 91A of the CGAA, which vested various functions in the CDBs, unconstitutional for violating articles 6 (2); 95, 96, 174(1), 175, 179 (1), 179 (4), 183 (1), 185 (3) and 189 (1) of the Constitution. The basis of the challenge was that through the CDBs, Senators and members of the National and County Assemblies would be undertaking executive functions at the County level.

The respondents on their part challenged the petition, the crux of the respondents' contention was that the Attorney General had to be cited as a respondent by virtue of these provisions as well as Article 156(4) (a) and (b) of the Constitution and could not, as the petitioners had done, involve him in the proceedings as an interested party; and further, that a 30 days' notice must be served on the state prior to institution of proceedings as required under section 13A(1) of the GPA.

Issues

i. Whether the amendment to the County Governments (Amendment) Act 2014, which introduced the County Development Board and assigned it a role in the planning and budgetary processes of counties, was unconstitutional.

ii. Whether section 13A of the Government Proceedings Act that required issuance of 30 days prior notice before suing the Government was an impediment to access to justice and unconstitutional.

iii. Whether the petitioner ought to have petitioned Parliament in accordance with the provisions of article 119(1) that gave a person the right to petition parliament on matters of legislation, prior to filing a petition before court.

iv. Whether the Attorney General, rather than the Senate, the National Assembly and the individual members of the Senate, should have been made the respondent in this matter as required by section 12 of the Government Proceedings Act.

v. Whether every Act of Parliament enjoys a presumption of constitutionality until the contrary is proven.

Constitutional law *– Senate – legislative power of the Senate – where Senate introduced an amendment to the County Governments (Amendment) Act that introduced the County Development Board – whether the introduction of the County Governments Board would undermine devolution – whether the creation of the County Governments Board was unconstitutional – County Governments (Amendment) Act*

Constitutional law *– legislation – interpretation of section 13A of the Governments Proceedings Act – whether the said provision that required issuance of 30 days prior notice before suing the Government was an impediment to access to justice and unconstitutional - whether every Act of Parliament enjoys a presumption of constitutionality until the contrary is proven - Government Proceedings Act section 13A*

Constitutional law *–– interpretation of statutes - jurisdiction of the High Court to interpret whether an Act of Parliament was inconsistent with or otherwise in contravention of the Constitution – whether the petitioner ought to have petitioned parliament prior to filing the petition before court – Constitution of Kenya 2010 articles 119(1), 165, 156(4)(b), 258;*

Held

1. The matter before court was not a civil matter relating to the affairs or property of government in the manner contemplated under the provisions of the Government Proceedings Act. The petition before the court sought the interpretation of the question whether an Act of Parliament was unconstitutional for violating the Constitution. It was brought under the provisions of article 165 and 258 of the Constitution which granted the Court the jurisdiction to interpret whether an Act of Parliament was inconsistent with or otherwise in contravention of the Constitution. It could not therefore have been deemed to be civil proceedings as contemplated in the Government Proceedings Act. The provisions of section 12 of the said Act did not apply to petitions alleging violation of constitutional rights or contravention of the Constitution.
2. Article 156(4) (b) of the Constitution provided that the Attorney General shall represent the national government in court or in any other legal proceedings to which the national government was a party. As the national government, through the Senate and the National Assembly, was part of these proceedings, the Attorney General was constitutionally mandated to represent the national government and he was automatically part of the proceedings.
3. The Constitution, 2010 allowed the Attorney General the right to represent the National Government in Court proceedings but did not stipulate that the Attorney General should be sued in all instances where any organ of the National Government had been sued and to say otherwise would be absurd.
4. The office of the Attorney General should have been made a substantive party to those proceedings, instead of an interested party. However, as it was evident both from the Constitution and the rules which required that substantive justice had to be done, the joinder, misjoinder or non-joinder of a party was not sufficient to defeat a matter. As rule 5(d) of the Mutunga Rules further made it clear, the Court could make substitutions, or require the joinder of a party either as a petitioner or respondent. In the circumstances, the objection by the respondents with regard to the position of the AG on the basis of section 12 of the Government Proceedings Act was without merit.
5. There was no prejudice that the Respondent had suffered by the alleged failure of the Petitioner to issue the 30 days' notice to the Attorney General as prescribed under the provisions of Section 13A(1) of the Government Proceedings Act. Since the issues in contest were solely to do with the conduct of the Senate which was an organ of State that could properly be sued as such. In fact, the Senate entered appearance in its own name and by Counsel and there was no reason why the failure to either enjoin the Attorney General as a party or failure to give him notice of the intended proceedings would advance (impair/impede) the cause of justice.
6. Only the Court could grant the relief that the petitioner was seeking in the matter, namely the declaration of invalidity of legislation on the basis that it was unconstitutional. The Attorney General could not have provided the petitioners with the relief that they sought and even had the court found that the 30 day notice was a requirement, it would have been a procedural step that would serve no purpose in a matter such as the instant case. Therefore the petition was properly before the court.
7. Under article 165 (3) (d)(i), the High Court had the jurisdiction to determine the question whether any law was inconsistent with or in contravention of the Constitution. The jurisdiction of the Court to invalidate laws that were unconstitutional was in harmony with its duty to be the custodian of the Constitution, which pronounced its supremacy at article 2 by proclaiming, at article 2(4), that any law, including customary law, that was inconsistent with the Constitution, 2010 was void to the extent of the inconsistency, and any act or omission

in contravention of the Constitution was invalid.

8. The High Court was vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under article 165(3) of the Constitution, it had the duty and obligation to intervene in actions of other arms of Government and State Organs where it was alleged or demonstrated that the Constitution had either been violated or threatened with violation. In that regard, the Petition before the court alleged a violation of the Constitution by the Respondent and in the circumstances, the doctrine of separation of power does not inhibit the High Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. Therefore the High Court had the requisite jurisdiction to determine the question whether the County Government Amendment Act 2014 was unconstitutional.

9. Where there was a clear procedure for redress of any particular grievance prescribed by the Constitution or An Act of Parliament, that procedure ought to be strictly followed. Article 3(1) of the Constitution enjoined every person to respect, uphold and defend the Constitution. Similarly, article 258(1) thereof donated the power to every person to institute court proceedings claiming that the Constitution had been contravened, or was threatened with contravention. If the High Court were to shirk its constitutional duty under article 165(3)(d), it would have failed in carrying out its mandate as the temple of justice and constitutionalism and the last frontier of the rule of law. In the circumstances, the argument that the petitioner should have approached Parliament under Article 119(1) was without merit.

10. The principle of presumption of constitutionality is a sound principle. That is so except in the case of legislation that limits fundamental rights which the Constitution had provided at article 24(3) the parameters against which the constitutionality of such legislation was to be weighed. With respect to legislation that is alleged to violate provisions of the Constitution other than the Bill of Rights, the obligation was on the petitioner to establish that the legislation violated a provision(s) of the Constitution. As the petitioners alleged a violation of the Constitution, the presumption of constitutionality applied in the case, and the petitioners had an obligation to establish that the County Governments Amendment Act was unconstitutional.

11. The principles applicable in determining the question whether an impugned legislation or part thereof meets the test of constitutionality are

    a. The High Court was enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promoted its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributed to good governance.

    b. The Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself.

    c. The court must have regard not only to its purpose but also its effect. Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.

    d. The Constitution should be given a purposive, liberal interpretation.

    e. The provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other.

12. Under the Constitution and legislation, it was the responsibility of the county executive comprising the governor and the county executive committees that he constitutes under section 30(2) (e) of the CGA to prepare and develop developmental plans and budget estimates and submit them to the respective county assemblies for approval. It was therefore evident that the powers of the Senate and the National Assembly did not include the powers to legislate at county level, which powers under article 185(1), were vested in the county assembly.

13. The governor, who under the Constitution was the Chief Executive Officer of the County was supposed to be the vice-chair of the CDB and deputise the Senator. The CDB, though chaired by the Senator and composed of members of the national legislature

and national executive, was intended to perform county functions and to be funded from county funds. Further section 91B provided that the operational expenses of the CDB would be provided for in the annual estimates of the revenue and expenditure of the respective county government. The composition and mandate of the CDBs upsets and was in violation of the framework created by the Constitution with respect to devolution and the separation of powers between the various institutions created under the Constitution which granted the approval of county development plans and budget to county assemblies.

14. The involvement of the Senate, National Assembly and national executive in the CDB violated the tenets and principles of the Constitution in three fundamental respects.

    a. It interfered with and compromised the roles of those organs in the exercise of their oversight functions over the functioning of counties and the use of revenue allocated to them.

    b. It undermined the principle of devolution, a key cornerstone of the Constitution, 2010 and the governance structure of the country.

    c. It violated the principle of separation of powers.

15. What the CGAA did was to involve the Senate in the formulation of plans and budgets for counties, the same plans and budgets that it would thereafter be required to subject for scrutiny to the Senate in exercise of its oversight role. It would be to defy common sense not to expect the inevitable conflict in the exercise of the oversight function of the Senate, and the consequent impact on devolution.

16. Under article 6 of the Constitution, National and County Governments had equal status as organs of state power, and in the exercise of their respective mandates, they had to do so in a spirit of mutual respect.

17. The structure of devolved government as envisioned by the people of Kenya and encapsulated in the Constitution could not be altered without an elaborate amendment process that required the direct endorsement of such a change by the people of Kenya in accordance with the requirements of article 255(1)(i) of the Constitution.

18. By establishing the CDBs composed of the Senator, Members of the National Assembly and women members of the National Assembly, as well as national government officers at the county level, with the mandate to consider and make inputs into county budgets and plans, the CGAA effectively altered the structure of devolution by involving in its functioning and operations persons and officers from other levels of government and It effectively vested in the same hands the powers of planning, implementation and oversight, in clear violation of the principles of checks and balances and separation of powers principles.

19. Separation of powers in its most basic form provides that the executive makes policy decisions, the legislature enacts laws and the judiciary interprets and applies the laws made by the legislature. The thinking behind separation of power was to ensure that there were checks and balances and that no-one person or institution exercised all powers within a state. Thus, the Constitution provides at article 94 that the Legislative Authority of the Republic is derived from the people and at National level was vested and exercised by Parliament.

20. The national legislature could not enter into the realm of the national executive with respect to planning and implementation, neither could the national legislature and executive enter into the executive functions at the county level without usurping the roles of the counties and thus violating the principles that separate national functions from county functions.

21. The wording of section 91A was clear that the CDBs had the mandate to make inputs into the development plans and budgets of counties. Such inputs, were completely outside the constitutional parameters of the functions of national government and its structures such as the Senate and the National Assembly.

22. By purporting to create an oversight role for national government in the counties, section 91A purported to allocate to national institutions roles in the counties that were not in compliance with the Constitution.

23. While the CDBs might be said to differ from the CDF in that they were intended to exercise oversight functions, they were in virtually every respect analogous to the CDF. The allocation of any functions in relation to county development plans to national

government institutions was not in line with the Constitution and offended the principle of devolution, separation of powers and allocation of functions.

24. The parallels between the CDBs and the CDF were obvious. In the same way that the legislature sought to retain its extension of powers in the counties through the CDF, and thus control funds that constitutionally fall within the mandate of the counties, a similar attempt was being made to extend the powers of the National Legislature, the National Assembly and Senate, into the county executive by assigning to the CDBs a role in the planning and budgetary processes of counties. That not only undermined devolution, but was a direct threat to the principle of separation of powers which was one of the cornerstones of Kenya's new democratic dispensation.

25. The principle of separation of powers was at the heart of the structure of Kenya's government each organ was independent of each other but acting as a check and balance to the other and also working in concert to ensure that the machinery of the state worked for the good of Kenyans.

26. The effect of the Constitution's detailed provision for the rule of law in processes of governance was the legality of executive or administrative actions to be determined by the Courts, which were independent of the Executive branch. The essence of separation of powers in this context was that the totality of governance powers is shared out among different organs of government, and that those organs play mutually-countervailing roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation.

27. Section 91A of the County Government (Amendment) Act was unconstitutional. By necessary extension, sections 91B and 91C, which were intended to bolster the provisions of 91A of the CGAA, were also of necessity unconstitutional. As the entire County Governments (Amendment) Act consisted of those three provisions, the entire Act was unconstitutional, and therefore null and void.

The County Governments Act (Amendment) Act 2014 declared unconstitutional null and void.

Each party to bear own costs since the petition raised issues of public interest & importance.

Any ambiguity in a taxing Act must be resolved in favor of the taxpayer and not the Public Revenue Authorities which were responsible for their implementation.

Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) Ex parte Barclays Bank of Kenya Limited

Miscelleneous Civil Application No.46 of 2013

High Court of Kenya at Nairobi

G V Odunga, J

May 20, 2015

Reported by Njeri Githang'a & Elizabeth Apondi

Brief facts

By a Notice of Motion dated the 18th February, 2013 the Applicant, Barclays Bank of Kenya Limited, challenged the decision and orders of the Commissioner of Domestic Taxes invoking section 35 of the Income Tax Act to demand payment of withholding tax from the Applicant on payments made to Card Companies namely VISA International Services Association, MasterCard Inc. and American Express Limited and payments made by the Applicant as an Interchange Fee to other Banks referred to as the Issuers. They also sought an order of Prohibition to prohibit the Commissioner of Income Tax from demanding withholding tax on the payments made by the Applicant to Card Companies and payments made by the Applicant to other Banks referred to as the Issuers known as interchange fees.

The applicant argued that the interchange (a fee paid by the applicant to the Issuers as an acquirer which was meant to act as an incentive to the Issuer and to subsidise the cost of issuing the card incurred by the Issuer) was a balancing mechanism which operated to the benefit of the VISA system as a whole and that there was no agency relationship between the acquirers and issuers and VISA, each of whom act independently and carried on their business in their own right and for their own benefit. The Respondent however submitted that the payments were for services provided by the card companies and that they were based on the volume of transactions and that the assessment was based on section 35(3)(f) as

the said fees were professional or management fees.

The applicant further submitted that despite the fact that the High Court had previously ruled on the issue and given guidelines to the Respondent in respect of the same issue of interchanges fees, the fresh assessments by the Respondent were contrary to the decision in *Misc Application No.1223 of 2007, R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd.* It was the applicant's position that in that decision, the court indicated that the Respondent had a duty to clarify and point out what the exact professional and management fees are so as to fall within the definition set out under Section 2 of the Income Tax Act (ITA) and that must determine whether the payments sufficiently defined constitute consideration for management, technical, consultancy or agency services.

The Respondent indicated that the Applicant paid for the facility to access to the VISANET network through its systems and that thus the Applicant was granted access to know how, formula or process by which it carries out its own business transactions and as such that the payment for the access amounted to a royalty and was thus subject to withholding tax.

Issues

i. Whether the issues raised ought to be determined in the proceedings in the nature of judicial review as opposed to an appeal

ii. Nature of the High Court's Judicial review jurisdiction

iii. Whether the payments made by the Applicant to the card companies were subject to withholding tax under s.35 (1) (b) of the Income Tax Act.

iv. Whether the respondent could claim tax from "professional or managerial fee" without distinguishing which particular category the service it falls into

***Civil Procedure and Practice**-judicial review-grounds for judicial review-remedies under judicial review-certiorari and prohibition-whether court can issue a judicial review remedy where there were other available remedies for the applicant*

***Statute law**-interpretation of statutes- interpretation of tax laws -section 2 and 35 of the Income Tax Act-interpretation where a provision in a Taxing Act was ambiguous-section 2 of the Income Tax Act on the definition of management or professional fees and royalty and 35 of the Income Tax Act-whether any ambiguity in a taxing Act could be resolved in favor of the taxpayer and not the Public Revenue Authorities which were responsible for their implementation.*

***Tax law**-interpretation of tax laws-interpretation where a provision in a Taxing Act was ambiguous-section 2 of the Income Tax Act on the definition of management or professional fees and royalty and 35 of the Income Tax Act-*

Income Tax Act

Section 2

"management or professional fee" means a payment made to a person, other than a payment made to an employee by his employer, as consideration for managerial, technical, agency, contractual, professional or consultancy services however calculated".

"royalty" means a payment made as a consideration for the use of or the right use-

a. the copyright of a literary, artistic or scientific work; or

b. a cinematograph film, including film or tape for radio or television broadcasting; or

c. a patent, trade mark, design or model, plan, formula or process; or

d. any industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific equipment or experience, and gains derived from the sale or exchange of any right or property giving rise to that royalty;

Held;

1. Where the exercise of a public power by a public body was being questioned judicial review was an eminently appropriate course. The bank was entitled to move the Court and the Court had the authority to consider whether the respondent had acted within or outside its jurisdiction and the inquiry may involve the examination of facts to determine whether the transaction was captured by the statute.

2. Judicial review was a central control mechanism of administrative law (public law), by which the judiciary discharged the constitutional responsibility of protecting against abuses of power by public authorities. It constituted a safeguard which was essential to the rule of law: promoted the public interest; policed parameters and duties imposed by Parliament; guided public authorities and ensured that they act lawfully; ensured that they are accountable to law and not above it; and protected the rights and interests of those affected by the exercise of public authority power.

3. Judicial review remedies presently had a constitutional basis in Kenya by virtue of articles 10, 25, 27, 47 and 50 of the Constitution of Kenya and the conventional grounds for judicial review took a secondary role after the constitutional benchmarks.

4. The Constitution required that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be

fused, intertwined and developed so as to meet the changing needs of the society so as to achieve fairness and secure human dignity.

5. The categories of judicial review grounds were not heretically closed as opposed to their being completely overtaken and the Court's jurisdiction under Order 53 of the *Civil Procedure Rules* included merit review. Once that distinction was made, there would be little difficulty for the Court to maintain that it must be concerned with process review rather than merit review of the decision of the Respondent.

6. Judicial review was concerned with the decision making process, not with the merits of the decision itself: the Court could concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant or irrelevant matters. The court could not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.

7. The basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review meant that the decision maker must understand correctly the law that regulated his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fell under the heading "illegality".

8. Procedural impropriety was due to the failure to comply with the mandatory procedures such as breach of natural justice, which included *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons.

9. Irrationality applied to a decision which was so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

10. Judicial review continued to enlarge the categories of its sphere of influence. Proportionality was considered to be one of the grounds upon which judicial review relief may be granted. the issue of proportionality ought to be seen in the context of rationality as;

a. Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions;

b. Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and

c. Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

11. The common law and practice by the High Court of England on judicial review still recognize and apply the conventional grounds for judicial review except within enlarged categories of intervention by the Court. In Kenya such expansion on a case to case basis was permitted by the Constitution as a way of ensuring a complete remedy was availed by the Court as a Court of law. Matters of fair trial and administrative action under article 47 and 50 of the Constitution were proper grounds for judicial review and were a codification of what was generally known as principles of natural justice. Article 47 of the Constitution was emphatic on the fairness of administrative action.

12. The purpose of judicial review was to check that public bodies did not exceed their jurisdiction and carry out their duties in a manner that was detrimental to the public at large. It was meant to uplift the quality of public decision making by holding the public authority to the limit defined by the law. Judicial review was therefore an important control, ventilating a host of varied types of problems.

13. The focus of cases could range from matters of grave public concern to those of acute personal interest; from general policy to individualized discretion; from social controversy to commercial self-interest; and anything in between.

14. Judicial review had significantly improved the quality of decision making by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It had also restrained or curbed arbitrariness, checked abuse of power and had generally enhanced the rule of law in government business and other public entities.

15. Judicial Review was a special supervisory jurisdiction which was different from both ordinary (adversarial) litigation between private parties and an appeal (rehearing) on the merits. The question was not whether the judge disagreed with what the public body had done, but whether there was some recognisable public law wrong that had been committed.

16. Whereas private law proceedings involved the claimant asserting rights, judicial review represented the claimant invoking supervisory jurisdiction of the Court through proceedings

brought nominally by the Republic.

17. Judicial review was a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It did not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. Evidence could be explored in order to see if the decision was vitiated by such legal deficiencies. It was perfectly clear that in a case of review, as distinct from an ordinary appeal, the court could not set about forming its own preferred view of the evidence.

18. Judicial review was concerned not with private rights or the merits of the decision being challenged but with the decision making process. The purpose of judicial review was to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches a conclusion which was correct in the eyes of the court.

19. It was not mere unreasonableness which would justify the interference with the decision of an inferior tribunal as it was a subjective test that placed the Court at the risk of determination of a matter on merits rather than on the process. In order to justify interference, the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at it.

20. Where the provisions of an enactment were penal provisions, they must be construed strictly and violence should not be done to its language in order to bring people within it, but rather to take care that no-one was brought within it who was not within it in express language.

21. Where the language used in the taxing statute was somehow obscure, the taxpayer was entitled to demand that his liability to a higher charge should be made out with reasonable clarity before he was adversely affected.

22. The Court was not entitled to attempt a discovery at the intention of the Legislature but was restricted to the clear words of the statute. Any ambiguity in a taxing Act must be resolved in favour of the taxpayer and not the Public Revenue Authorities which were responsible for their implementation. In a taxing Act, one had to merely look at what was clearly said since there was no room for any intendment. There was no equity about tax and there was no presumption as to tax. Nothing was to be read in, nothing was to be implied. One could only fairly look at the language used. That however, did not confine the courts to literal interpretation. The context and scheme of the relevant Act as a whole and its purpose had to be considered.

23. Whereas the Court appreciated the need to collect taxes, in carrying out their statutory obligations the tax authorities had to adhere to the law.

24. Section 2 of the Income Tax Act clearly identified "management or professional fee" as capable of falling in various categories such as managerial, technical, agency, contractual, professional or consultancy services. It was therefore incumbent on the Respondent to state in its decision which category of service was in its view provided by the Issuing banks or Issuers and it would not suffice for the Respondent to broadly state that the payments amounted to professional or management fees. By using the phrase "professional or managerial" the drafters were clear in their minds that the two words bear different meanings.

25. It was bad enough for the Respondent to communicate with the Applicant using such terms as "agency fees" and "contractual fees" but it was even worse for the Respondent to resort to "professional or managerial fee" when the said phrase encompasses a host of other services such as managerial, technical, agency, contractual, professional or consultancy services without distinguishing which particular category the service falls into.

26. The duty of the respondent in assessing tax was to identify transactions or payments that attract tax liability especially where there were objections to such categorization. Section 35 (1) (a) of the Income Tax Act identified specific types of payments that attract tax, the respondent was obligated by law to state with clarity its claim and state how the transaction fell within the terms of the statute. The respondent could not exercise its duty like a trawler in the deep seas expecting to catch all the fish by casting its net wide. The respondent's decision in that respect failed below that standard and the transactions and payments caught by the decision could not be said to fall within the statutory definition of the tax.

27. The manner in which the Respondent arrived at its decision did not meet the level of clarity required in taxation. The Respondent ought to have clearly identified the category in which the tax sought by it from the applicant, in its view, fell without resorting to an omnibus definition of "professional and managerial fee". In this case, the Respondent simply borrowed the phrase in the *Income Tax Act* and applied to the applicant's circumstances. In tax matters, the practice of "cut and paste" would not do.

Application allowed, Orders for certiorari and prohibition granted with costs to the applicant

Failure to accord a hearing to persons recommended to be enlisted as "specified entities" under section 3(2) of the Prevention of Terrorism Act is not a breach of natural justice

Egal Mohamed Osman v Inspector General of Police and 3 others.
Constitutional Petition No. 152 of 2015
High court at Nairobi (constitutional and human rights division)
W Korir, J
July 10, 2015
Reported by Teddy Musiga & Daniel Hadoto

Brief Facts:

On 7th April 2015 The Inspector General of Police published a Gazette in the which entities enlisted therein (of which the petitioner was number 37) were called upon to demonstrate within twenty four hours why they should not be recommended to the Cabinet Secretary for Internal Security and Co-ordination of National Government for declaration as specified entities within the meaning of Sections 2(1)(m) and 3 of the Prevention of Terrorism Act (POTA).

The petitioner contended that he came to know about the directive and the inclusion of his name late in the day on 8th April, 2015 "from third parties" and therefore contends that the said Gazette Notice was illegal as it breached the rules of natural justice and violated his fundamental rights to be heard

Issues:

i. Whether the act of publishing names without prior calling upon those persons enlisted therein to demonstrate within twenty four hours why they should not be declared as specified entities within the meaning of sections 2(1) (m) and 3 of the Prevention of Terrorism Act (POTA) was a breach of due process and violation of their fundamental rights.

ii. Whether Section 3(2) of the Prevention of Terrorism Act (POTA) requires the Inspector General of Police to first inform the persons concerned of the allegations against them and according them an opportunity to be heard before recommending to the Cabinet Secretary for Internal Security and Coordination of National Government to declare such persons to be enlisted as "specified entities".

iii. Whether the Inspector General of Police was obliged to give a person to be enlisted as "specified entities" the reasons as to why he was so suspected.

iv. Whether a person to be enlisted as "specified entity" had a right to be heard before his name was published in the Gazette Notice as a "specified entity".

v. Whether the failure to inform a person recommended to be enlisted as a "specified entity" without making known to him the allegations against him and according him an opportunity to be heard violated the right to fair administrative action under article 47(1) & (2) of the Constitution of Kenya, 2010

Constitutional law *– fundamental rights and freedoms - Enforcement of fundamental Rights and freedoms- right to fair administrative action- limitation of the right to fair administrative action- whether the failure to inform a person recommended to be enlisted as a "specified entity" without making known to him the allegations against him and according him an opportunity to be heard violated the right to fair administrative action under article 47(1) & (2) of the Constitution of Kenya, 2010 – Prevention of Terrorism Act; section 3(2); Constitution of Kenya, 2010; articles 24, 47 and 244(4)*

Constitutional law *– fundamental rights and freedoms - Enforcement of fundamental Rights and freedoms- enforcement of the right to fair administrative action- limitation to enjoyment of the right to fair administrative action- procedure of enforcing section 3(2) of Prevention of Terrorism Act – whether Section 3(2) of the Prevention of Terrorism Act (POTA) requires the Inspector General of Police to first inform the persons concerned of the allegations against them and according them an opportunity to be heard before recommending to the Cabinet Secretary for Internal Security and Coordination of National Government to declare such persons to be enlisted as "specified entities" - Prevention of Terrorism Act; section 3(2)- The constitution of Kenya 2010, Article 29, Article 24, Article 244(4).*

Article 47 of the Constitution of the Republic Of Kenya -

(1) *Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

(2) *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

Article 24 of the Constitution of the Republic of Kenya-

(1) *A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and*

justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including––

(a) *the nature of the right or fundamental freedom;*

(b) *the importance of the purpose of the limitation;*

(c) *the nature and extent of the limitation;*

(d) *the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*

(e) *the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

Prevention of Terrorism Act section 3:

(1) *Where the Inspector-General has reasonable grounds to believe that—*

(a) *an entity has—*

(i) *committed or prepared to commit;*

(ii) *attempted to commit; or*

(iii) *participated in or facilitated the commission of, a terrorist act; or*

(b) *an entity is acting –*

(i) *on behalf of;*

(ii) at the direction of; or

(iii) in association with, an entity referred to in paragraph (a), he may recommend to the Cabinet Secretary that an order be made under subsection (3) in respect of that entity.

(2) *Before making a recommendation under subsection (1), the Inspector-General shall afford the affected entity an opportunity to demonstrate why it should not be declared as a specified entity.*

Held

1. The provisions of section 3 of Prevention of Terrorism Act (POTA) granted powers to the Inspector General of Police (1st Respondent) to make recommendation to the Cabinet Secretary that a certain entity ought to be declared as specified entity. It was therefore clear that the Inspector General of Police (1st Respondent) had the powers to make such recommendation. However, section 3 (2) was to the effect that before making such recommendation, the Inspector General of Police (1st Respondent) ought to have afforded the affected entity an opportunity to demonstrate why it should not have been declared as a specified entity.
2. Article 47 of the Constitution of Kenya, 2010 was intended to subject administrative processes to constitutional discipline hence relief for administrative grievances was no longer left to the realm of common law but was to be measured against the standards established by the Constitution.
3. It was improper and not fair that an executive authority who was by law required to consider, to think of all the events before making a decision which immediately resulted in substantial loss of liberty left the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.
4. It was a cardinal rule of natural justice that no one could be condemned unheard. Natural justice was not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoyed superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, was null and void and of no effect. The rule as captured in the Latin Phrase *'audi alteram partem'* literally translated into 'hear the parties in turn', and had been appropriately paraphrased as 'do not condemn anyone unheard. That meant a person against whom there was a complaint had to be given a just and fair hearing.
5. It was a settled principle of law that the right to be heard required that whenever an administrative decision had to be made; the person affected by such decision had to be given an opportunity to express himself in that regard. If in the circumstances of a case it would have been impossible to hear any party affected, such a party had to been given reasons for the decision being made.
6. From the foregoing, the Inspector General of Police (1st Respondent) had not violated any of the petitioner's rights at the stage when he published his name in the impugned Gazette Notice. The Gazette Notice had specifically notified the Petitioner and other entities set out in the notice to demonstrate within twenty four hours why they should not have been declared as specified entities. Indeed that notification the gazette was in accordance with section 3(2) of POTA which required the Inspector General of Police to accord the entity an opportunity to demonstrate why they could not be recommended to the Cabinet Secretary in charge of Internal Security and Coordination of National Government to enlist them as "specified entities".
7. The law was clear that it did not call upon the Inspector General of Police to give reasons to the petitioners (persons recommended to be enlisted as "specified entities") at that stage as to why the Inspector General of Police had reasonable basis

to believe that the Petitioner had committed or was prepared to commit or had facilitated a terrorist act.

8. There had not been a violation of article 47 of the Constitution because the Petitioner would have had to undergone various stages before he was so specified as an entity. Section 3 of POTA was safe-checking and ensured that the decision of both the Inspector General and the Cabinet Secretary were in accordance with the law.

9. Under the provisions of section 51(1) of the National Police Service Act, the police service was charged with *inter alia* the function of taking all the necessary steps to prevent commission of offences and public nuisance and also to investigate crime. In performing its functions, the National Police Service worked closely with other national security organs such as the Defence Forces and the National Intelligence Service. It was also bound to observe and respect the provisions of the Constitution.

10. The First Respondent was not just an investigating body. It was an independent constitutional body charged with the maintenance of security and protection of the citizens of Kenya, the governors and the governed. The First Respondent in conducting its investigations was bound to comply with basic requirements of natural justice. The principles of natural justice concerned procedural fairness and ensured that a fair decision was reached by an objective decision-maker. Maintaining procedural fairness protected the rights of individuals and enhances public confidence in the process.

11. In the course of its work, the National Police Service received several complaints and various intelligence information that enabled it to perform its mandate. It would have been impossible to grant every person a hearing whenever adverse security reports were made against that person.

12. Whenever the Inspector General of Police had reasonable reasons to believe that a certain person had committed or was about to commit a crime, he ought to have taken prompt action, thus it became impossible to accord such a person a hearing at that stage.

13. In considering the applicability of rules of natural justice, it was not in every situation that the other side had to be heard. There were situations where a hearing would have been unnecessary and even in some cases obstructive. Each case had to be put on the scales by the Court and there could not be a general requirement for hearing in all situations. There would be for example situations when the need for expedition in decision making far outweighed the need to hear the other side and in such situations, the Court had to strike a balance.

14. It was clear that the right to be heard was not absolute and was not necessarily always strictly applied. It was a right that could be limited under the provisions of article 25 of the Constitution and to the extent set out under article 24 of the Constitution.

15. A party alleging a violation of a constitutional right or freedom had to demonstrate that the exercise of a fundamental right had been impaired, infringed or limited. Once a limitation had been demonstrated, then the party who would benefit from the limitation had to demonstrate a justification for that limitation. The State, in demonstrating that the limitation was justifiable, had to demonstrate that the societal need for the limitation of the right outweighed the individual's right to enjoy the right or freedom in question.

16. The ground rule was that the requirements of natural justice were not applicable in all situations involving the making of administrative and quasi-judicial decisions and the framers of the Constitution had not envisaged that it would have been applied in every case. Their application depended on the circumstances of each case, the nature of the inquiry, and lastly, whether the person concerned was given a reasonable opportunity of presenting his or her case.

17. The Gazette Notice itself was a notice to demonstrate why he should not have been listed. The Gazette Notice as published demonstrated that the Petitioner was to present his case before the Inspector General of Police could make his recommendation to the Cabinet Secretary in charge of Internal Security and Coordination of National Government. Therefore, he could not then be heard to complain that he had not been heard before the Inspector General of Police made his decision to recommend him if at all; when he actually had not controverted the averment by the respondents' witnesses that he was accorded a hearing.

18. The Inspector General of Police had not adhered to his timeline of twenty four hours. The Petitioner had been given sufficient opportunity to present his case. The Court could not question the process used by the Inspector General of Police in order to decide whether or not the Petitioner should have been recommended to the Cabinet Secretary in charge of Internal Security and Coordination of National Government for listing as a specified entity. The most important thing was that the Petitioner had been availed a

chance to present his side of the story.

19. The decision of the Inspector General of Police was not final and that POTA was self-guarding because the Petitioner had to undergo various other stages in which he would have been accorded a hearing as to whether he ought to be listed as a specified entity as provided for under section 3(3) of POTA. Even when the order had been made against an individual, under Section 3(5) of POTA he could make an application to the Inspector General of Police requesting him to revoke the said order. Under section 3(7) of POTA a person had the right to petition the Court when aggrieved against the decision of the 1st Respondent.
20. The notification was in accordance with section 3(2) of POTA which required the 1st Respondent to accord the entity an opportunity to demonstrate why it should not have been declared a specified entity.

The Gazette Notice did not violate any of the Petitioner's rights as alleged.

Petition dismissed

Each party was bear its costs.

The limitation of actions for recovery of debt does not apply in cases relating to breach of professional undertaking

Republic v Advocates Disciplinary Tribunal & 2 others Ex parte Mpuko Nahason Mwiti [2015] eKLR
Jr Misc. Civil Application No. 459 of 2014
Milimani Law Court
G. V Odunga J.
July 3, 2015.
Reported by Njeri Githang'a & Elizabeth Apondi

Brief Facts

The ex parte applicant sought an order of certiorari to quash the proceedings of the Respondent in the Advocates Disciplinary Tribunal against the Ex parte Applicant, an order of Prohibition to prohibit the Respondents, Interested Parties or any person acting in their behest from continuing with the Disciplinary Cause and the costs of the application.

The respondent (the Tribunal) commenced a disciplinary cause against the applicant on 24th April 2012 in a matter related to the enforcement of a professional undertaking that the applicant had issued to Industrial & Commercial Development Corporation (ICDC), the 1stinterested party on or about the 22nd September 1998 on behalf of Corik Investment Company Limited which proceedings were still ongoing.

According to the applicant, the said proceedings were prejudicial to him as he was not granted a chance for fair hearing and that the respondent upon receipt of the complaint proceeded with the hearing and the proceedings in general as though he had all the facilities to properly defend the claims against him. He further contended that the tribunal had no jurisdiction to enforce any alleged professional undertaking as the same was in the province of the High Court and further that since the limitation period for a claim for recovery of money under section 19 of the Limitation of Actions Act was 12 years the proceedings before the Respondents were time barred. The Applicant therefore contended that the proceedings were incurably unfair to him and the only remedies available to the Applicant were the orders sought herein.

On limitation, the respondent and the 1st interested party contended that section 19 of the Limitation of Actions Act was inapplicable, as the matter before the Tribunal was not for recovery of a sum secured, but was a matter in respect of the failure to honour a professional undertaking and in any case, time stopped running once a matter was filed with the Commission which in this case was on 14th February, 2010 hence limitation was inapplicable.

Issues

i. Whether under Order 52 rule 7 of the Civil Procedure Rules the High Court was the only court with jurisdiction to deal with allegations of breach of professional undertaking and not the Disciplinary Tribunal
ii. Whether section 19(1) of the Limitation of Actions Act Cap 22 which provided for the limitation period for a claim for recovery of money applied to cases of breach of professional undertaking.
iii. Whether the tribunal was in breach of the rules of natural justice in conducting its hearings.

***Civil procedure and practice**-jurisdiction- breach of professional undertaking- jurisdiction of the Advocates Disciplinary Tribunal -whether the Civil Procedure Rules 2010 vests jurisdiction to deal with breach of professional undertaking on the High Court only- Civil Procedure Rules 2010, Order 52 rule 7; Advocates Act, section 57*

***Civil procedure and practice**- Limitation of Actions- breach of professional undertaking- whether section 19(1) of the Limitation of Actions Act applied to cases of professional undertaking- Limitation of Actions Act, section 19(1)*

***Constitutional law**-right to fair administrative action-delay in prosecution-when criminal proceedings could be halted as a result of delay*

Constitution of Kenya, 2010

***Article 47(1)** Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

Civil Procedure Rules 2010

Order 52 rules 7(1)

(1) An application for an order for the enforcement of an undertaking given by an advocate shall be made—

(a) if the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or

(b) in any other case, by originating summons in the High Court.

Limitation of Actions Act

Section 19(1)

(1) An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.

Held:

1. An undertaking was a contract between Advocates after an offer and acceptance, with a resulting consideration which follows from one Advocate to another. It was a promise to do or refrain from doing something or acting in a manner which may prejudice the right of the opposite party. It was therefore an unequivocal declaration of intention addressed to someone who reasonably places reliance on it and could be made by an advocate either personally or through the name of the firm he usually practices under.

2. The breach of professional undertaking could result in lack of mutual or cordial trust between Advocates and invariably puts the administration of justice into disrepute. The advocates by relating together through a professional undertaking were officers of the court; therefore as far as possible it was mandatory for them to respect their words for the benefit of mutual continuity of their respective relationship.

3. The courts had inherent power to commit an advocate for breach of an undertaking on the basis that the court sought to exercise its punitive and disciplinary power to prevent a breach of duty by an officer of the court, which was quite distinct and separate from the client's right. Even if the court had no right, it had jurisdiction to make an order in exercise of its disciplinary jurisdiction. The purpose of the punitive and disciplinary powers of the court's jurisdiction over advocate was not for the purpose of enforcing legal rights but for enforcing honourable conduct among them in their standing as officers of the court by virtue of section 57 of the Advocates Act, Chapter 16 Laws of Kenya

4. The court was always reluctant to degrade an advocate unless the circumstances showed that his conduct was dishonourable as an officer of the court and it was for that reason that the court would exercise its punitive and disciplinary powers to ensure that advocates conduct themselves in a manner that pleases the eyes of justice. It would be difficult if not impossible for advocates to carry out their duty to each other and to the public, if an undertaking by advocates becomes unreliable and unenforceable.

5. The purpose of an undertaking was to achieve a desired goal of mutual trust. It was incumbent upon advocates to always honour their undertaking unless there is a vitiating factor which the court is bound to consider as failure to honour professional consideration amounted to misrepresentation or fraud.

6. Order 52 rule 7 of the Civil Procedure Rules 2010 did not purport to confer the exclusive jurisdiction of dealing with issues relating to breach professional undertakings on the High Court. The power of the Court in such matters is limited to ordering enforcement of the undertaking to be made after affording an opportunity to the advocate to honour the undertaking.

7. Under section 57 of the Advocates Act, the Disciplinary Committee [now the Disciplinary Tribunal] was mandated to receive, hear and dispose of complaints brought against an advocate in the manner prescribed under the Act and under section 60 of the Advocates Act, the Tribunal had the power to receive complaints of professional misconduct against an Advocate from any person. Since the Applicant was an Advocate, the Tribunal had jurisdiction to entertain any complaints made against him in his professional capacity pursuant to section 55 of the Act.

8. Failure to honour an undertaking was not only a professional misconduct but a criminal conduct with intent to defraud. An honorable member did not have to give an undertaking but when did, he had to endeavour to honour the same especially when it was given to a professional colleague. It was clear both on the law and on authorities that breach of professional undertaking amounts to a professional misconduct.

9. The fact that a party who had suffered a loss as a result thereof was entitled to invoke the Court's jurisdiction under Order 52 rule 7 of the Civil Procedure Rules did not bar a complaint being lodged with the Tribunal on the same issue.

10. Under Article 47(1) of the Constitution, every person had the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. It was therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible.

11. Where prosecution was undertaken long after investigations were concluded, the fairness of the process could be brought into question where the Petitioner proved that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself. It was not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it was the effect of the delay that determines whether or not the proceedings were to be halted.

12. From the material on record, there was no basis upon which the Court could find that the delay alleged by the applicant had adversely affected his ability to defend himself. From the replying affidavit filed by the Respondent, it would seem that a substantial delay in bringing the complaint to finality had in fact been occasioned by the manner in which the applicant participated in the proceedings before the Tribunal.

13. Section 19 of the Limitation of Actions Act, which dealt with recovery of principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land was inapplicable to the circumstances.

14. The manner in which the Tribunal was proceeding or proceeded with the complaint lodged against the *ex parte* applicant did not contravene the rules of natural justice.

Application dismissed with costs to the Respondent and the Interested Parties.

Determination of a question of law by a bench of three or more judges of the same court holds more jurisprudential weight than a court comprising of one judge

Okiya Omtata Okoiti & Another v Anne Waiguru,Cabinet Secretary Devolution and Planning & 3 Others

Court of Appeal at Nairobi

Civil Application No. Nai 3 of 2015

P Waki, M Warsame & J. Mohammed JJA

May 8, 2015

Reported by Emma Kinya Mwobobia

Brief facts

The applicants alleged in the petition that the Cabinet Secretary in the Ministry of Devolution and Planning had on occasion acted beyond her powers and unconstitutionally appointed and dismissed officers from the public service, and that she had created policies which undermined the rule of law and constitutionalism. In particular, it was alleged that the 1st respondent had created the *Policy on the Decentralisation of Human Resource Management in the Civil Service*, which was unconstitutional and created tyranny on civil servants by Cabinet Secretaries. The 2nd respondent who was the Chief of Staff at State House and the Head of the Public Service was said to have breached the Constitution and the Public Service Act by signing letters to dismiss and appoint officers in the public service, and also for meddling in affairs that are the preserve of the Public Service Commission. The applicants therefore made an application to the High Court seeking a certification that the matter raised substantial question of law and therefore required an empanelment of a bench of three to five judges pursuant to article 165 (4) of the Constitution. However, the court declined stating that the matter concerned irregular appointments and transfers which it was alleged constituted a violation of the existing scheme of service in the civil service and therefore declined to refer the matter to the Chief Justice. Hence, the appeal in the instant matter.

Issues:

i. Circumstances in which a High Court could certify a matter as one that raised a substantial question of law

ii. Whether the jurisprudence arising from a determination of a question of law by a court comprising of three or more judges would be of equal weight as a question of law that was determined by a court comprising of one judge.

iii. Whether a decision of a court comprising of a bench of three or more judges would be binding on a single judge in a court of the same jurisdiction

iv. Whether the appeal would be rendered nugatory should the application fail

Jurisdiction- High Court Jurisdiction – *jurisdiction of the High Court to certify a matter as raising a substantial question of law - allegation that a matter raised a substantial issue of law and therefore required an empanelled bench of three to five judges – whether the appeal had merit – Constitution of Kenya, 2010 article 165(4)*

Constitutional Law-*interpretation of the Constitution- substantial question of law – matters that constituted a substantial issue of law- requirement for a matter to be certified as having raised a substantial issue of law for determination by a bench of three to five judges - ruling by the High Court that the matter did not raise a substantial issue of law but concerned irregular appointments and transfers - whether the issue in question raised a substantial question of law - Constitution of Kenya, 2010 article 165(4)*

Judgements - *Precedent –principle of stare decisis – binding effect of decisions of superior courts – where there was a decision from a court of similar jurisdiction though differently constituted of a larger bench of three or more judges – whether the decision of a bench of more than three judges had a binding effect on a single judge bench court of the same jurisdiction*

Article 165 (4) Constitution of Kenya, 2010

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

Held:

1. The jurisdiction of the Court of Appeal under Rule 5(2)(b) of the Court of Appeal rules followed a well beaten path that jurisdiction was original and discretionary.
2. There were twin principles that the applicants ought to have satisfied before they could be granted an order of stay of proceedings. The first was that the applicants ought to satisfy the Court that the appeal if successful, would be rendered nugatory should the orders of stay not be granted; secondly, that the applicants ought to demonstrate that they had a good and arguable appeal that was deserving of ventilation before the Court.
3. An arguable appeal was not necessarily one that would succeed but one that raised an issue that should be argued before the Court.
4. By Article 165 (4) of the Constitution, the High Court could certify a matter as one that raised a substantial question of law if there was a question as to whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened or where it involved a question regarding the interpretation of the Constitution including the determination of:
   (i) the question whether any law was inconsistent with or in contravention of the Constitution
   (ii) the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of, the Constitution.
5. No party was entitled to have each and every petition so certified as raising a substantial question of law. It was the Court that would identify the issues which in its view raise substantial questions of law.
6. The mere fact that a numerically superior bench was empanelled whose decision differed from that of a single Judge did not necessarily overturn the single judge's decision. In order to overturn a decision of a single Judge, one would have to appeal to the Court of Appeal. Similarly appeals from decisions of numerically superior benches go to the Court of Appeal.
7. The only constitutional provision that expressly permitted the constitution of a bench of more than one High Court judge was Article 165(4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose, the High Court ought to certify that the matter raised a substantial question of law
8. The Constitution itself required the court to certify whether or not an issue raised a substantial question of law at Article 165 (4) which was to the effect that any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
9. The matter before the court revolves around the Policy on Decentralisation of Human Resource in the Civil Service as well as an alleged usurpation of the duties of the Public Service Commission by the 1st and 2nd respondent, as well as their alleged derogation from the Constitution, the Public Service Act and the Employment Act. While those were matters that at a first glance would seem to touch on only employment law, they raised important constitutional questions in line with Article 27, on equality and freedom

from discrimination, and Article 47 on the right to fair administrative action.

10. In addition to raising constitutional questions, the outcome of the petition before the Employment and Labour Relations Court would affect the entire civil service. The petition therefore had far reaching implications and could well be considered to be a matter of law that is substantial.
11. The empanelling of a bench of more than three judges to determine a matter of substantial importance of the law was limited to matters that concerned a threatened breach of the bill of rights or a matter relating to the interpretation of the Constitution. In the intended appeal, the Court that would eventually hear the matter would be tasked with considering whether issues surrounding the appointment of persons to the public service could be considered an issue of general public importance. In addition the court would be tasked to consider whether the creation of a human resource policy would be within the purview of a matter that raised a substantial issue of law as alleged by the applicants.
12. One matter that was associated to the determination of a substantial question of law was the fact that once the court certified it as such, the Constitution required that it be adjudicated over by a bench of not less than three judges. In its various determinations, the High Court had expressed the view that notwithstanding the provisions of article 165(4), the decision of a three Judge bench was of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter was not obliged to follow a decision of the court delivered by three judges.
13. While both the courts envisaged would be exercising the same jurisdiction, the decision of three or more judges would have more jurisprudential weight than the decision of a single judge. The inclusion of article 165 (4) of the Constitution, requiring that a matter of substantial importance be heard by a bench of more than three judges, inferred that a substantial question would yield a substantial decision, and as such, that decision would bear more weight.
14. The Constitution though promulgated five years ago, was still nascent, and many of the progressive provisions were yet to be fully realised, and had yet to be appropriately and conclusively construed. That also applied to the instant matter, and it was time that the Court did so.
15. There was no proper, adequate, appropriate or sufficient exposition of the parameters of what would amount to a substantial question of law, and as such, the barometer of the arguability of the appeal was raised. The High Court took a simplistic attitude to a very important issue, and it was therefore clear that the appeal raised *bona fide* and substantial issues which warranted further investigation by the Court.
16. The applicant did not particularise the damage he perceived would occur but was the order staying the proceedings not be granted, there was a real possibility that the appeal if successful, would be rendered nugatory as it was possible that hearing of the main petition would go on as directed, and as such his appeal on the issue would be overtaken by events. Therefore, the applicants had demonstrated the nugatory aspect of the appeal.

Appeal allowed. Proceedings in the High Court stayed pending

The Scope of government's obligation in the realization of the right to Education of Children from Marginalised and Minority groups

Ndoria Stephen v Minister for Education and 2 others.
Petition No. 464 of 2012
The High Court at Nairobi
Mumbi Ngugi, J
July 30 2015.
Reported by Teddy Musiga & Daniel Hadoto

Brief facts.

The petition was brought to challenge what the petitioner termed "discriminatory government policies" in provision of education to children from the north and north eastern regions as well as parts of the coast and Rift Valley(what are considered marginalised areas), that barred the children from enjoying their right to education. As a result of discriminatory educational policies by the government, children in those areas were unable to access the right to education on the same basis as children in other more developed parts of the country.

The petitioner amongst others urged the Court to stop the holding of Kenya Certificate of Primary Education (KCPE) and Kenya Certificate of Secondary Education (KCSE) examinations, arguing that if the examinations were allowed to proceed without the issues raised in the instant matter being determined would violate the right to education of the poor, marginalized and children displaced by war.

Issues

i. Whether the government of Kenya had violated the right to education of children from marginalised and hardship areas.

ii. Whether the children from marginalized and hardship areas were entitled to special provisions in the admission to secondary schools and public universities.

iii. Whether there was deliberate discrimination and consequently disparity in government resource allocation towards education that resulted into the violation of its obligation to provide access to basic and compulsory education to all children

iv. Whether the respondents had failed to provide learning facilities equitably, as a result of which children from marginalized areas were learning under extreme hardship, thereby, the respondents had violated the provisions of the Constitution and had to be compelled to provide a mechanism that would ensure that facilities were availed to those children.

v. Whether court could order the abolishing/ scrapping out K.C.P.E and K.C.S.E for being unconstitutional and in violation of the right to equality before the law and equal enjoyment of the benefit of the law.

vi. Whether court could order the respondents to produce before it the policies and quotas to be used to ensure that the students from marginalized areas are not disadvantaged or discriminated.

Constitutional law *- fundamental rights and freedoms – right to education - the right of every child to free and compulsory education- enforcement of the right to free and compulsory basic education - realization of the right to free and compulsory basic education by children from marginalised areas and minorities - provision of special education opportunities to children from marginalised areas and minorities- The Constitution of Kenya 2010; articles 53(1)(b) 56(b), 27, 10, 43 (1)(f) and 26; The International Covenant on Economic, Social and Cultural Rights (ICESR) Article 2(1); The Convention on the Rights of the Child (CRC) article 28.*

Administrative law *– formulation of government policies - duty of the executive to formulate and implement policies- supervisory power of court over formulation and implementation of policies - The constitution of Kenya 2010; article 21(2), 43*

Blacks Law Dictionary 11th Edition defines "discrimination" as under:

The effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found. Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not

Held

1. The Constitution of Kenya 2010 had expressly recognized education as a right for all. Article 43(1) (f) provided that every person had the right to education. With respect to children, article 53 of the Constitution guaranteed to every child the right to free and compulsory education; and article 56 of Constitution required that children from marginalized areas and minorities were to be provided with special educational opportunities.
2. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESR) and article 28 of the Convention on the Rights of the Child (CRC), provided that, the right to education had to be realized progressively through local and international economic and technical assistance to the maximum of a state's available resources.
3. The Committee on the rights of the child and the Committee on Economic, Social and Cultural General Comment No 13 on the right to education provided that, although the right to education was a progressive right and was subject to availability of resources, the prohibition against discrimination and inequality was subject neither to progressive realization nor availability of resources but applied fully and immediately to all aspects of education.
4. The government had taken steps with respect to realization of the right to education for all. Therefore there was no a basis for alleging discrimination against the children by government. The petitioner's arguments with respect to discrimination had not met the legal definition of the term.
5. The Constitution provided that, the formulation of policy and implementations thereof were within the province of the executive. The state had shown that it had policies in place, and that it had been taking measures, including affirmative action, to ensure that children in marginalized areas accessed education. Article 21 (2) of the Constitution of Kenya, 2010 enjoined the executive to "take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43 of the Constitution of Kenya, 2010."
6. Even assuming that the disparities in the area of education were as a result of discrimination, from the material placed before the court the state was acting in accordance with its constitutional duty under article 27(6) of the Constitution which required the state, "to give full effect to the realisation of the rights guaranteed under that article, the State had to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination."
7. The state had not failed in its obligations to set policies that would have accorded children in marginalized areas access to basic education.
8. The state had put in place a quota system for admission of children from marginalized areas to secondary and university. Making a declaration to the effect that children from marginalised and hardship areas were entitled to special provision in the admission to secondary schools and public universities in the circumstances would have been redundant as the state was already doing that which the petitioner wished it to be compelled to do.
9. The government had taken various steps to ensure access to education of children in the marginalized areas. Those included the setting up of grants and bursaries, mobile schools, boarding primary and secondary schools, and in some cases, lunch in school. What had not emerged from the proceedings was the effectiveness of such measures.
10. The state was taking deliberate steps to ensure that children in marginalized areas had access to education on the same level with children in other areas of the country.
11. Ordering the respondents to produce before the court policies and quotas that had to be used to ensure that the students from marginalised areas were not disadvantaged or discriminated was unnecessary as the respondents did produce the policies and measures aimed to ensuring access to education.
12. The petitioner by asking court to abolish Kenya Certificate of Primary Education (KCPE) and Kenya Certificate of Secondary Education (KCSE) was metaphorically speaking, asking the court to throw out the baby with the bath water: because the children from marginalized communities did not access educational facilities and opportunities at the same level as those from other parts of the country, then the entire examination system had to be thrown out.

13. The prayers to abolish KCPE and KCSE, were essentially, somewhat reckless orders to seek, and the Court could in good conscience even not contemplate them.
14. There were concerted efforts being made to ensure access to education for the petitioner's target group. The challenge had been to monitor the implementation of the programmes to ensure realization of the right to education.
15. Scrapping the National examinations through an order of the Court, without careful consideration of the advantages or benefits of such action against the shortcomings of the present situation, could not work for the benefit of the children in marginalized areas.

Petition dismissed.

Each party was to bear its own costs of the petition.

Whether conservatory orders could be granted to stop a County official from chairing procurement meetings due to a procurement dispute

Zecharia Keango Mecha (Suing on his behalf and on behalf of other voters and residents of Bogichora Ward of Nyamira County) v Beauttah Omanga
Petition No 8 of 2015
High Court at Kisii
C B Nagillah, J
July 17, 2015
Reported by Beryl A Ikamari & Robai Nasike Sivikhe

Brief facts

The Petitioner indicated that he had filed the Application with the authority of voters from Bogichoria Ward whose names he had listed. He stated that the Respondent was elected by the Bogichoria electorate and was the vice-chair of the County Tender Committee Board. The Respondent was involved in the award of a tender for insurance cover for members of the County Assembly of Nyamira County and their families.

The tender was alleged to have been irregularly awarded and certain officials from the County Assembly had been subjected to interrogation by the Public Investment and Accounts Committee of Nyamira County. The interrogations culminated in recommendations for the removal of certain officials of Nyamira County including the Speaker and the Respondent. They led to the removal of the Speaker of Nyamira County from office.

Part of the Petitioner's contention was that the removal of the Speaker was selective. The Petitioner sought interim orders to prevent the Respondent from chairing any procurement meeting for the Nyamira County Assembly until his Application was heard and determined.

Issues

i. Whether the Petitioner had *locus standi* to institute the Petition.
ii. Whether conservatory orders could be granted to restrain a county official from chairing procurement meetings, as part of his official functions, while a procurement dispute was pending in court.

***Constitutional Law**-locus standi-public interest-locus standi to sue on behalf of voters-whether a Petition could be brought by an individual on behalf of himself and an electorate in a County against an official of a County Assembly-Constitution of Kenya 2010, articles 22(1), 22(2), 258(1) & 258(2).*

***Constitutional Law**-conservatory orders-circumstances in which conservatory orders would be granted-prima facie case-whether conservatory orders would be granted on the basis of recommendations arising from an investigation.*

Held

1. The Constitution of Kenya 2010 granted an individual wider scope in terms of *locus standi* (the right to sue) as compared to section 84(1) of the repealed Constitution. Under section 84(1) *locus standi* existed only where a contravention related to the Petitioner's rights personally and to the rights of a detained person. Articles 22(1) & (2) and 258(1) & (2) of the Constitution of Kenya 2010 conferred upon a person the right to bring an action in public interest and also in relation to a right or fundamental freedom.
2. The Petition was filed by the Petitioner on his own behalf, on behalf of the residents of Nyamira County and also in public interest. Those persons had a genuine interest in the functioning of the Nyamira County Assembly and the way the health cover for the members of the County Assembly was procured. The functions of the County impacted on the Petitioner and the ordinary residents of Nyamira County.

3. A party seeking conservatory orders was required to demonstrate that he had a *prima facie* case with a likelihood of success. Additionally, such a party had to show that if the orders were not granted, there was real danger that he would suffer prejudice as a result of a violation or threatened violation of the Constitution.
4. The Petitioner had failed to demonstrate the existence of a *prima facie* case as the recommendations did not mean that the Respondent had to be removed from office. Furthermore, the Petitioner had not tendered evidence that the recommendations had been adopted or endorsed by the County Assembly of Nyamira. Similarly documentary evidence, detailing the circumstances in which the Speaker of Nyamira County had been impeached, was not tendered.

Application dismissed.

The Commission on Administrative Justice cannot investigate a matter already under investigation by another commission.

Republic v Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees
High Court of Kenya at Nairobi, Judicial Review Division
J.R Case No. 304 of 2014
W. Korir J.
July 10, 2015.
Reported by Njeri Githang'a & Elizabeth Apondi

Brief Facts

Through a Notice of motion application the ex-parte Applicant, the National Social Security Fund (NSSF) Board of Trustees prayed for an order of Certiorari to remove into the High Court and quash the whole Investigations Report by the Ombudsman-Kenya on Abuse of Power and Disregard of Procurement Procedures by the Ag, CEO and the Management of NSSF in the awarding of Tassia II Infrastructure Development Project (April, 2014) and the costs for the application.

The Applicant's case was that by a letter dated 17th January, 2014, the Chairperson of the Respondent (the commission) requested the Managing Trustee of the Applicant to respond to allegations enumerated in the letter of Francis Atwoli in regard to Tassia II Regularization Scheme Infrastructure Development (the Project). The applicant responded to the letter and informed the respondent that its management had been invited to appear before the Public Investments Committee (PIC) of the National Assembly and the Ethics and Anti-Corruption Commission (EACC) to answer allegations regarding the Project. The respondent however proceeded to investigate two issues namely the approval of the contract by the Board of the Applicant and the administrative management of the process leading to the award of the contract. It was the Applicant's case that the Respondent's decision to proceed with the investigation and draft Investigations Report (the Report) on the Project and its findings and recommendations was in breach of Section 30(h) of the CAJA and the court should order the removal of the report from court.

The Respondent's case was that it was a constitutional commission established following the restructuring of the Kenya National Human Rights and Equality Commission pursuant to article 59(4) of the Constitution. Pursuant to article 59(5) of the Constitution as read together with section 4 of the CAJA, it had the status and powers of a commission within the meaning of Chapter 15 of the Constitution of Kenya and had been given a wide mandate under articles 59(2) (h)–(k), 249 and 252 of the Constitution as read with sections 8, 26, 27, 28 and 29 of the CAJA. Such mandate amongst other things included; to investigate any conduct in state affairs or any act or omission in public administration in any sphere of government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct and further to deal with maladministration through conciliation, mediation and negotiation where appropriate. The Respondent postulated that any legislation or policy that sought to constrict or hinder exercise of its jurisdiction was in breach of the express provisions of the Constitution. It was further argued, that section 31 of the CAJA expressly provided that the powers of the Respondent whilst investigating an administrative action shall not be limited by any provision in any written law.

Issues:-

i. Whether article 59(2) of the Constitution of Kenya, 2010 only envisaged two commissions which were the Kenya National Commission on Human Rights established by the Kenya National Commission on Human Rights Act, under Article 59(2) of the Constitution and the National Gender

and Equality Commission created by the National Gender and Equality Commission Act, 2011

ii. Whether the Commission on Administrative Justice acted in breach of section 30(h) of the CAJA by delving into a matter already under the investigation by the EACC and two committees of the National Assembly.

iii. Whether the Commission on Administrative Justice fell within the ambit of public service as contemplated by article 260 of the Constitution and section 29(1) of the CAJA.

iv. Whether the Commission on Administrative Justice had jurisdiction over NSSF.

***Constitutional law**-state corporations-constitutional commissions-Commission on Administrative Justice-whether article 59(2) of the Constitution 2010 did not envisage the CAJ-whether the Commission fell within the ambit of public service as contemplated by article 260 of the Constitution-whether the Commission could investigate a matter already under investigation by other commissions- Constitution of Kenya 2010, articles 59(2)(h)-(k) & (4)*

Constitution of Kenya

Articles 59(2)(h)-(k) & (4)

2. The functions of the Commission are—

(h) To investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;

(i) To investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;

(j) To report on complaints investigated under paragraphs (h) and (i) and take remedial action; and

(k) To perform any other functions prescribed by legislation."

i. (4) Parliament shall enact legislation to give full effect to this Part, and any such legislation may restructure the Commission into two or more separate commissions.

ii. Article 260

iii. "public office" means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;

Commision on Administrative Justice Act.

Section 2

"Administrative action" means any action relating to matters of administration and includes—

(a) A decision made or an act carried out in the public service;

(b) A failure to act in discharge of a public duty required of an officer in public service;

(c) The making of a recommendation to a Cabinet Secretary; or

(d) An action taken pursuant to a recommendation made to a Cabinet Secretary;

Section 30

The Commission shall not investigate—

(a) Proceedings or a decision of the Cabinet or a committee of the Cabinet;

(b) A criminal offence;

(c)A matter pending before any court or judicial tribunal;

(d) The commencement or conduct of criminal or civil proceedings before a court or other body carrying out judicial functions;

(e) The grant of Honours or Awards by the President;

(f) A matter relating to the relations between the State and any foreign State or international organization recognized as such under international law;

(g) Anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or

(h) Any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.

Held

1. Submissions were generally parties' marketing language, each side endeavoring to convince the court that its case was the better one and did not constitute evidence. There were many cases decided without hearing submissions but based only on evidence presented.

2. Article 59(4) gave room to Parliament to split the Kenya National Human Rights and Equality Commission into two or more separate commissions. The claim that article 59 only envisaged two entities was therefore not correct.

3. Although state corporations did not receive monies from the Consolidated Fund, they were empowered by Parliament through legislation to raise income through levies and other commercial ventures. Further, state corporations received funds from Parliament through their respective Ministries and fit the description in Article 260 regarding funds from Parliament.

4. Public fund had the meaning assigned to it by the Exchequer and Audit Act Public money was said therefore to include; revenue, any trust or other moneys held, whether temporarily or otherwise by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not.

5. NSSF fell under the jurisdiction of the Commission on Administrative Justice it being a public corporation.

6. The real purpose of the independence clause, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual.

7. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they were the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation.

8. The several independent Commissions and offices were intended to serve as 'people's watchdogs' and, to perform that role effectively, they had to operate without improper influences, fear or favour: which was the purpose of the "independence clause".

9. While the various Commissions and independent offices were required to function free of subjection to *"direction or control by any person or authority",* that expression was to be accorded its ordinary and natural meaning; and it meant that the Commissions and independent offices, in carrying out their functions, were not to take orders or instructions from organs or persons outside their ambit.

10. The Commissions or independent offices had to operate within the terms of the Constitution and the law: the "independence clause" did not accord them *carte blanche* to act or conduct themselves on whim; their independence was, by design, configured to the *execution of their mandate,* and performance of their functions as prescribed in the Constitution and the law.

11. Independence did not mean detachment, isolation or disengagement from other players in public governance. An independent Commission would often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, would ensure a seamless, an efficient and effective rendering of service to the people in whose name the Constitution had instituted the safeguards in question.

12. Commissions and independent offices were not to plead independence as an end in itself; for public-governance tasks were apt to be severely strained by possible clashes of independences.

13. A commission like the Commission on Administrative Justice was expected to operate within its constitutional and statutory mandate and cooperate with other state organs, public agencies and commissions. The aim was to ensure smooth operations that would deliver maximum benefits for the people of Kenya in whose interest the Constitution was promulgated. An expansionist commission would end up causing disharmony and thereby stalling delivery of services.

14. The roles of the Commission on Administrative Justice and EACC ran into each other and it was not easy to separate complaints of maladministration from those of corruption for the two evils were more often intertwined. For instance an officer of a public body who demanded a bribe before giving service was likely to delay delivery of service to a member of the public. In such a situation one would find both a case of lack of integrity which fell under the jurisdiction of EACC and a case of maladministration which was in the province of the Respondent. The commissions should therefore be able to coordinate their operations in a manner that maximized returns on the public funds allocated to them.

15. Where the commissions were not willing to harmoniously give way to each other, section 30 of the CAJA became useful.

16. The need to respect human rights was very important in the governance of the country and where there was an allegation of maladministration the Commission on Administrative Justice was under a duty to enquire into the complaint and act in accordance with the powers bestowed on it by the Constitution and legislation. The commission in the instance had jurisdiction to investigate the matter although the nature of the complaints could have been better dealt with by EACC.

17. It was apparent that under section 30(h) CAJA Parliament intentionally limited the jurisdiction of the Commission on Administrative Justice in the identified circumstances. The reason for that limitation was that there was need to avoid conflicts between the Commission and other state agencies. The limitation was therefore reasonable considering that the Commission was not a super commission capable of investigating all the things done by state organs. Where another commission or any other person established by the Constitution or any other written law was dealing with a particular issue, the commission had no jurisdiction to venture into that matter.

18. A Court's jurisdiction flow from either the Constitution or legislation or both. Thus, a Court of law could only exercise jurisdiction as conferred by the constitution or other written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law.

19. Where the Constitution exhaustively provided for the jurisdiction of a Court of law, the Court had to operate within the constitutional limits. It could not expand its jurisdiction through judicial craft or innovation. Nor could Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution conferred power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

20. The principles were applicable to the jurisdiction of all state corporations, government agencies and commissions. None of them had unlimited mandates and they could only do that which they were established to do. The commission's jurisdiction was not limitless. It could only do that which the Constitution and the law allowed it to do and nothing more.

21. The EACC acted in the manner expected of any good public organization by advising the applicant to cooperate with the CAJ as it could have had a lawful reason for carrying out the investigation and writing to the respondents asking them to have the areas that they were investigating to avoid duplicity.

22. The key reason why no more than one public agency should be engaged in investigation of the same matter was that it was a waste of public resources.

23. The jurisdiction of the Respondent was only taken away by section 30(h) of the CAJA where the matter was *"for the time being under the investigation of any other person or Commission..."* The matter under investigation by another body should be the same with the matter under investigation by the Respondent.

24. The Applicant had not demonstrated that the issues under investigation by EACC were the same with those under the investigation by the commission. It was also not clear whether by the time the Respondent commenced its investigations, EACC had already started its investigations. The same position applied to the investigations by the two parliamentary committees.

Application dismissed with an order that each party to bear its costs as the applicants' case was not frivolous.

International organizations exempted from legal process unless immunity is waived upon application for a waiver to the minister

Josephine Wairimu Wanjohi v International Committee of the Red Cross
Civil Appeal No. 100 of 2010
High Court of Kenya at Nairobi
J K Sergon, J
July 30, 2015
Reported by Beryl A Ikamari and Robai Nasike Sivikhe

Brief facts

The appellant was involved in a road traffic accident allegedly occasioned by the respondent's driver while driving a vehicle belonging to the respondent. The appellant sued the respondent at the lower court, seeking recovery of damages from the respondent.

At the lower court, the respondents filed an application stating that they were exempted from legal processes by virtue of section 9 and the Fourth Schedule of the Privileges and Immunities Act hence the suit should be struck out. According to the respondents, the appellants ought to have applied for a waiver before instituting the suit. The appellant argued that absolute immunity was against public policy since the legal action covered contractual and tortuous acts. Furthermore, the minister had no power under section 9 of the act to waive the jurisdiction of the act.

The trial court allowed the respondent's application and struck out the suit on grounds that it could not carry on with proceedings unless immunity enjoyed by the respondents was waived. The appellant filed an appeal to the high court against this ruling.

Issue

i. Whether the respondent was exempted from legal process by virtue of provisions of the Privileges and Immunities Act unless immunity was waived.

***International Law**- privileges and immunities- privileges and immunities of international organizations- exemption from legal process due to entitlement to privileges and immunities – application for waiver of immunity before commencing legal processes against*

international organizations - whether legal process against an international organization can continue without application for waiver-Constitution of Kenya, 2010, article 2 (5) & 2 (6); Treaty Making and Ratifications Act, No. 45 of 2012; Privileges and Immunities Act, (Cap. 179), Section 9 & section 17.

Constitution of Kenya, 2010, Article 2(5) and (6)

Article 2 (5) and (6)

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

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

Privileges and Immunities Act, Cap 179, Laws of Kenya

Section 9

9) Privileges, etc., of certain international organizations and persons connected therewith

(1) This section shall apply to an organization which the Minister may, by order, declare to be an organization of which Kenya, or the Government, and one or more foreign sovereign powers, or the government or governments thereof, are members.

(2) The Minister may, by order—

(a) provide that an organization to which this section applies (hereinafter referred to as the organization) shall, to such extent as may be specified in the order, have the immunities and privileges set out in Part I of the Fourth Schedule to this Act, and shall also have the legal capacities of a body corporate;

Section 17

17) Making of orders

Any order made under this Act shall, unless a draft thereof has been laid before Parliament and approved by resolution before the making thereof, be laid before Parliament without unreasonable delay, and, if a resolution is passed by Parliament within twenty days on which Parliament next sits after such order is laid before it that the order be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of a new order.

Held

1. Kenya's jurisprudence embraced absolute foreign sovereign immunity courtesy of the application of Vienna Conventions on Diplomatic Relations, and other privileges and immunities. In effect no suit could be entertained against a foreign sovereign without a waiver by the foreign sovereign. That position was affirmed through enactment of the Privileges and Immunities Act.
2. Judicial precedent had, however, departed from the absolute Immunity approach. Hence, the test applicable when dealing with diplomatic immunity became whether or not the foreign sovereign was acting in a governmental or private capacity. Consequently, protection could not be afforded in private transactions. The driver was allegedly driving the respondent's vehicle hence it was presumed that he was acting in the course of his employment. For that reason, the respondent was afforded immunity.
3. In the interpretation of the Constitution of Kenya, 2010, a treaty or convention once ratified by Kenya was adopted as part of the laws of Kenya without the necessity of a domesticating statute. That position was cured by the Treaty Making and Ratification Act which gave effect to article 2(6) of the Constitution. The Act addressed issues of initiation of treaties and consideration and approval by cabinet and Parliament before domestic application of the treaty. However, the Act only applied to treaties concluded by Kenya after its commencement.
4. The applicable law with regard to international organizations was the Privileges and Immunities Act. Section 9 of the Privileges and Immunities Act provided that a minister could make an order declaring that an organization was an organization in which Kenya, or the Government or any foreign sovereign power(s) were members. In such an order, the minister could stipulate that the immunities and privileges set out in Part I of the Fourth Schedule applied to the organization. That order would have to be presented before Parliament for approval as per section 17 of the Privileges and Immunities Act.
5. The ministerial order in relation to the respondent was made by L.N 115 of 1996. That meant that the respondent enjoyed the privileges and immunities set out in Part I of the Fourth Schedule while carrying out its operations in Kenya.
6. It was undisputed that the respondent was an international organization. Furthermore, its driver was in the course of business when the accident occurred.

Appeal dismissed. Trial court's ruling and orders upheld.

Court cannot recognize an agreement between parties in an application for recognition of a foreign judgment where the same has not been adopted by a foreign court in its judgment

N. M v A.M
Misc. Application No. 128 of 2013
High Court of Kenya at Nairobi.
L.A. Achode J.
July 23, 2015.
Reported by Njeri Githang'a & Elizabeth Apondi.

Brief facts

The application was brought by way of Originating Summons under sections 2, 5 & 6 of the Foreign Judgment and Reciprocal Enforcement Act (hereinafter referred to as the Act) and section 1A & 1B of the Civil Procedure Act and section 43 of the Laws of Kenya. It sought for orders that the court registers the agreement dated 17th September 2013 and enforces it as an Order of the High Court of Kenya at Nairobi in its entirety. The application was based on grounds that the parties had been married and were now divorced in Divorce proceedings filed in New York State. In the course of the divorce proceedings the parties entered into a comprehensive settlement in which they agreed to cooperate but the Respondent defaulted on the agreement and had made every effort to frustrate the agreement to the Applicant's detriment and that of the child of the marriage. The Respondent's actions were prejudicial to the minor who stood to suffer irreparable loss since she was about to be locked out of her school for failure by the Respondent to pay school fees. The Applicant was in the process of purchasing a home to live in with her daughter but that could not be achieved unless the orders sought were granted. The Applicant averred that the Respondent had refused/neglected to comply with the orders and unless the application was heard and orders granted, she stood to suffer irreparable loss.

The Respondent in his grounds of opposition stated that the Applicant had not complied with Section 5(4) and 16 of the Act; that the court could only register/enforce a judgment and not an agreement and that there was no proof of a judgment of the original court that could be registered or enforced. The respondent further contended that the alleged agreement or judgment sought to be enforced or registered arose from matrimonial proceedings and therefore, by virtue of section 3(3) (d) of the Act, the application was misconceived. The Respondent confirmed that he was a resident of South Africa and not Nairobi as alleged by the Applicant.

Issues

i. Whether an application for recognition of a foreign judgment or order without an annexed copy of the judgment of the divorce cause or the proceedings thereof could be entertained by court.

ii. Whether court can recognize an agreement between parties where there was no proof that the same was adopted in the judgment of a foreign court.

iii. Whether an agreement arising from matrimonial proceedings could be recognized as a foreign judgment by virtue of section 3(3) (d) of the Foreign Judgment and Reciprocal Enforcement Act

***Civil practice and procedure**-foreign judgment-application for recognition of a foreign judgment-whether an application for recognition of a foreign judgment or order without an annexed copy of the judgment of the divorce cause or the proceedings thereof could be entertained by court-whether court can recognize an agreement between parties where there was no proof that the same was adopted in the judgment of a foreign court-Foreign Judgement (Reciprocal Enforcement) Act, Cap 43, sections 3(3)(c)(d) , 5(4)*

Foreign Judgment (Reciprocal Enforcement) Act, Cap 43

Section 3(3)(c)(d)

This Act does not apply to a judgment or order—

(c) for the periodical payment of money as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of the person against whom the order was made;

(d) In a matrimonial cause or matter, or determining rights in property arising out of a matrimonial relationship, not being a judgment referred to in paragraph (a) or (b) of subsection (1), whereby a sum of money is payable or item of movable property deliverable;

Section 5(4)

(4) An application for registration of a judgment under subsection (1) shall—

(a) be accompanied by a certificate in the form set out in the Schedule or to the same effect issued from the original court under its seal and signed by a judge or registrar thereof or by an affidavit to the same effect;

(b) have attached thereto the judgment or the exemplification or a certified or duly authenticated copy thereof and, where the judgment is not in the English

language, certified by a notary public on the Registrar of the original court or authenticated by affidavit;

(c) be accompanied by an affidavit stating—

(i) that, at the date of application, the judgment has not been satisfied or, as the case may be, the sums or items of movable property in respect of which the judgment remains unsatisfied;

(ii) that, at the date of application, the judgment can be enforced by execution in the country of the original court;

(iii) where, by virtue of section 6(5), the judgment may be registered only in respect of certain of its provisions, the provisions in respect of which it is sought to register the judgment;

(d) unless otherwise ordered by the High Court, be accompanied, in the case of a judgment given by a superior court of a Commonwealth country, by a certificate under the seal and signed by a judge or registrar thereof certifying that the court is a superior court in that country;

(e)be accompanied by such other evidence as may be prescribed.

Held

1. The applicant by not attaching a copy of the judgment or divorce proceedings had not satisfied the requirements of section 5(4) of the Act which required among other things that the application annexed a copy of the judgment

1. Section 3(1) of the Act referred to a judgment or order of a designated court or an award in arbitration proceedings and did not include agreements entered into between parties, unless such agreements have been adopted by the court and have become orders of the court.

2. It had not been demonstrated that the agreement set out in the application was adopted as an order of the court, in the Divorce proceedings in the New York Court due to the fact that the judgment which was the subject matter of the application, had not been annexed.

3. Even if the Applicant had met the requirements of Section 5(4), of Cap 43 Laws of Kenya, the judgment adverted to was not among the judgments envisioned, by which the applicant could obtain relief under the Act.

Application dismissed with costs to the respondents.

Level of proof required to establish the commission of the offence of desertion in the Kenya Defence Forces

Jeffery Okuri Pepela & 25 others v Republic

Criminal Appeals Nos. 153 of 2014, 17 of 2015, 175 of 2014, 174 of 2014, 173 of 2014, 8 of 2015, 9 of 2015, 10 of 2015, 2 of 2015, 3 of 2015, 4 of 2015, 5 of 2015, 6 of 2015, 7 of 2015, 168 of 2014, 171 of 2014, 181 of 2014, 176 of 2014, 13 of 2015, 169 of 2014, 172 of 2014, 18 of 2015, 19 of 2015, 21 of 2015 and 22 of 2015 (consolidated)

High Court of Kenya at Mombasa

Muya, J

August 21, 2015

Reported by Beryl A Ikamari and Robai Nasike Sivikhe

Brief facts

The appellants were servicemen in the Kenya Navy as provided under the Armed Forces Act which was repealed and replaced by the Kenya Defense Forces Act. They decided to terminate their services by way of resignation between the years 2007 and 2008. They embarked on a clearing process and left the forces after submitting the requisite documentation.

In January and March 2014, they were summoned by the Defense Forces Council to report to their respective former bases for documentation and payment of their terminal dues. On reporting, they were placed under closed arrest until 5th April 2015 and they were charged with the offence of desertion contrary to section 74 (1) of the Kenya Defense Forces Act. Consequently, they were convicted and sentenced to life imprisonment. The appellants appealed against that judgment at the High Court.

Issues

i. Whether the appellants were on active service when they left the defence forces.

ii. Whether the charge sheet sufficiently disclosed the particulars of the offence of desertion preferred against the appellants.

iii. Whether the court martial was impartial given that investigations and prosecution were carried out by military personnel and the court martial was comprised of military officers.

iv. Whether the principles of sentencing and mitigating factors were considered and observed by the court martial in issuing life sentences.

Criminal Practice & Procedure*- charges- charge sheet- particulars of a charge- whether particulars of the offence*

of desertion were disclosed- whether the appellants were provided with sufficient detail to enable them answer to the charges- Constitution of Kenya, 2010 article 50 (2) (b); Kenya Defense Forces Act No. 25 of 2012, sections 2, 74, 75, 247 and 257.

***Criminal Practice & Procedure**- mitigation and sentencing- whether a blanket life sentence was appropriate after considering the applicable circumstances & mitigating factors-whether the life sentence was excessive.*

Constitution of Kenya, 2010

Article 50 (2) (b)

50 (2) every person has the right to a fair trial, which includes the right-

(b) to be informed of the charge with sufficient detail to answer it;

Kenya Defense Forces Act, No. 25 of 2012

Section 2

*"**enemy**" means—*

(a) any person or country committing external aggression against Kenya;

(b) any person belonging to a country committing such aggression;

(c) such other country as may be declared by the Cabinet Secretary, to be assisting the country committing such aggression;

(d) any person belonging to the country referred to under paragraph (iii);

***"on active service"**—*

(a) when used in relation to a person, means that the person is serving in or with a unit of the Defence Forces engaged in operations against an enemy;

(b) when used in relation to a unit of the Defence Forces, means that the unit is engaged in operations against an enemy;

Section 74

74. Desertion

(1) A person who is subject to this Act commits an offence if that person—

(a) deserts; or

(b) persuades or procures any person subject to this Act to desert.

(2) A person deserts if that person—

(a) with the intention, either at the time or formed later, of remaining permanently absent from duty—

(i) leaves the Defence Forces; or

(ii) fails to join or rejoin the Defence Forces when it is the person's duty to join or rejoin them;

(b) being an officer, enlists in or enters the Defence Forces without having resigned the person's commission;

(c) being a service member, enlists in or enters the Defence Forces without having been discharged from any previous enlistment;

(d) is absent without leave, with intent to avoid serving in any place outside Kenya, or to avoid service or any particular service when before an enemy; or

(e) is absent without leave for a continuous period of more than ninety days.

Section 75

75. Absence without leave

(1) A person who is subject to this Act commits an offence if that person—

(a) is absent without leave; or

(b) persuades or procures any person subject to this Act to be absent without leave

(2) A person who commits an offence under subsection (1) shall be liable, on conviction by a court martial, to imprisonment for a term not exceeding two years or any lesser punishment provided for by this Act.

Section 247

247. Termination of service of members of regular force

The service of a member of the regular force is terminated upon—

(a) retirement;

(b) resignation;

(c) termination of commission;

(d) dismissal from service; or

(e) discharge from service.

Section 257

257. Mode of discharge

(1) Subject to this Part, every service member becoming entitled or liable to be discharged shall be discharged immediately but shall, until discharged, remain subject to this Act.

(2) When a service member who is entitled or liable to be discharged is serving outside Kenya, the member shall be returned to Kenya free of cost and shall be discharged on arrival or, if the member consents to the discharge being delayed, within six months after arrival in Kenya.

(3) A service member shall not be discharged unless the discharge has been authorised by order of the Service Commander or an officer authorised in that behalf.

(4) Every service member shall be given, on discharge, a certificate of discharge containing the prescribed particulars.

(5) A service member who is discharged in Kenya shall be entitled to be conveyed free of cost from the place where the member is discharged to the place stated in the member's attestation paper to be the place of attestation, or to any place in Kenya at which the member intends to reside and to which the member can be conveyed at no greater cost.

Held

1. The Court Martial convicted and sentenced the appellants to life imprisonment for the offence of desertion. That decision ought to have been made by the court after being satisfied that the appellants were still on active service when they left the defense forces.
2. Evidence by the appellants and respondents at trial raised the question on whether it was communicated to the appellants that their units were engaged in operations against an enemy and whether the time the operations commenced was also communicated. There was scant communication made to the appellants about the operations. Furthermore, there was minimal evidence to show that they were on active service when they left the defense forces.
3. Determinations on whether the appellants intended to shirk important service was subjective, and the determination on whether the service was important was objective. It was the duty of the prosecution to prove beyond reasonable doubt that the appellants formed an intention to remain permanently out of duty, and whether it was an offence *per se* to leave the defense forces.
4. The conduct of appellants in following the right channels to obtain the requisite authority to leave active service was consistent with a desire to follow the laws governing termination of their service. Their superiors received their correspondence and acted on it. However, the appellants made a grave mistake when they did not wait for a discharge from the Service Commander as per sections 245 and 257 of the Kenya Defense Forces Act.
5. According to the Kenya Defense Forces Act, a person deserted if that person was absent from duty without leave for a continuous period of more than 90 days. Therefore, the offence of desertion crystallized after the expiry of 90 days and could not be said to be continuous.
6. Active service was defined as a unit engaged in operations against an enemy. Furthermore, an enemy was defined as any person or enemy committing external aggression against Kenya. In the charge sheet, there was no reference to an operation titled 'Operation Linda Mpaka' and the identity of the targeted enemy in 2007 was never disclosed. The charge sheet failed to disclose the particulars of desertion. Hence, the charges facing the appellants did not contain sufficient details to enable them to answer to the charges.
7. The Kenya Defense Forces undertook actions to advance the appellants process of being discharged from the defense forces. The actions that were undertaken were not a reflection of the fact that the force was facing aggression from an enemy. Therefore, the respondents failed to prove beyond reasonable doubt that the appellants were on active service when they left the defense forces.
8. The existence of the Court Martial was crucial for discipline and efficiency in defence forces. The role of judge advocates was stated clearly in the Kenya Defense Forces Act and it was not peripheral. They advised the court in matters of law and after submissions by all parties, they summed up the case. The summing up brought out issues in controversy and law for determination by court, whose determination was by voting. That procedure was in line with ensuring expeditious disposal of cases.
9. From the blanket sentence given, it was clear that mitigating factors were not considered and principles of sentencing were not adhered to. The wisdom of ensuring that discipline was enforced and would be deserters were deterred was well understood. However, a blanket life sentence was uncalled for bearing in mind circumstances surrounding the desertion.
10. The offence of desertion while on active service was not proven beyond reasonable doubt. However, the offence of absence without leave under section 75 of the Kenya Defense Forces Act was proved. That offence carried a sentence of two years in prison.
11. The period the appellants were in custody both for purposes of remand and the life sentence was approximately one and a half years. That period was enough punishment. The appellants had served their te*rm.*

Appeal allowed. Appellants set at liberty.

Address of Principal Office And Contacts:

Ack Garden Annexe, 5th Flr., 1st Ngong Avenue, Ngong Road
P.O. Box 10443 GPO 00100, Nairobi – Kenya
Tel: +254 20 271 2767, 20 271 9231, 718 799 464

website : www.kenyalaw.org
: Info@kenyalaw.org
: @mykenyalaw
: Kenya Law Reports
: www.youtube.com/kenyalawreports