

The

# BENCH BULLETIN

Issue 52  
January - March 2021

**Whether lands claimed to be ancestral lands dispossessed during colonial era would be returned to original native occupants or their descendants**



▶ Imposition of VAT on exported services amounts to double imposition of VAT and is contrary to the neutral application of VAT in International Trade law.

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▶ Employment and Labour Relations Court awards Kshs 1 (Kshs one) to a principal secretary found to be a beneficiary of proceeds of crime.

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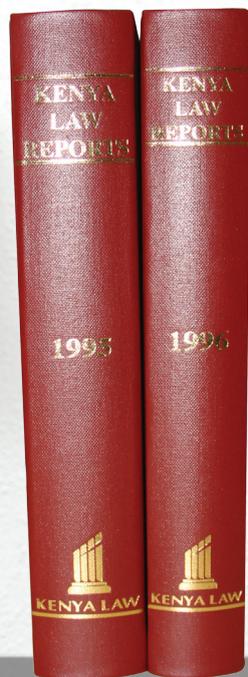


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# Editor's Note

**T**he Bench Bulletin is the definitive intelligence briefing for Kenya's judicial officers, the practitioners, managers and the business fraternity. It is a quarterly magazine of recent developments in law, particularly case law, law reform issues, international comparative analysis on case law, new legislation in the form of Acts of Parliament, rules and regulations, pending legislations contained in Bills tabled before Parliament and selected Legal Notices and Gazette Notices.

This edition of the Bench Bulletin highlights a significant range of ground breaking jurisprudence from the superior courts of record in Kenya and also from international jurisdiction.

From the Supreme Court we highlight the precedent in the case of *Henry Wambega & 733 others v Attorney General & 9 others* [2020]eKLR. The appeal before the Supreme Court dealt with the issue whether lands claimed to be ancestral lands dispossessed during colonial era would be returned to original native occupants or their descendants and what were the solutions to historical land injustices in Kenya. The Supreme Court held that the Constitution respected title to private land. If one had title to land, the Constitution protected that title. The petitioners could not therefore claim that their rights were any superior to the constitutionally protected rights of the title holders and that the solution to the land problem would not necessarily lie in giving out land. Other avenues of mitigating the effects needed to be looked at.

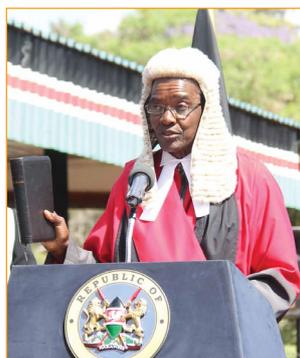
From the High Court segment we highlight the case of *Joseph Enock Aura v Cabinet Secretary, Ministry of Education, Science & Technology & 3 others; Teachers Service Commission & 6 others (Interested Parties)* [2020] eKLR where the High Court in determining the question whether the closure of schools following a directive issued by the President of the Republic of Kenya in a State of the National Address as part of the measures put in place to combat the COVID – 19 pandemic was unconstitutional. The High Court sitting in Nairobi ruled that the presidential state of the nation address directing the indefinite closure of schools was unconstitutional for causing psychological harm to school-enrolled children and was against the best interests of the child. The Court also stated that the best interest of any child was to be in school in-person as there was more control, guidance and provision of health safe measures in the school than leaving the children roaming in the villages or shanties or towns without observing any Covid-19 Health Protocols.

From the same segment we highlight an important decision in *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission(Interested Party); Kenya National Commission on Human Rights & 3 others(Amicus Curiae)* [2020] eKLR. The court ruled that the failure to conduct independent and effective investigations and prosecutions of sexual and gender based violence related crimes during the 2007 post-election violence was a violation of the positive obligation on the Kenyan State to investigate and prosecute violations of the rights to life; the prohibition of torture, inhuman and degrading treatment; and the security of the victims.

From the International Jurisprudence segment we highlight a decision from the East African Court of Justice First Instance Division in *Martha Wangari Karua v The Attorney General of the Republic of Kenya and Hon. Anne Mumbi Waiguru & Hon. Peter Ndambiri (Interveners)*, where the court in determining the question of whether the Kenyan state through the acts and/ or omissions of its judicial organs violated its commitments to the fundamental and operational principles of the EAC Treaty, especially the right to access to justice and a fair trial. The court held that the Supreme Court of Kenya's decision to dismiss the applicant's petition fell short of its constitutional duty and curtailed the applicant's right to access to justice. It contravened the rule of law principle enshrined in articles 6(d) and 7(2) of the Treaty. The court ultimately awarded USD \$ 25,000 to the applicant.

These are just but a few excerpts of the exciting and insightful decisions from our superior courts of record. It is our hope that you find the Bench Bulletin informative.

*Long'et Terer*  
Editor/CEO



# ▶ CJ's Message

**The Hon. Mr. Justice David K. Maraga, EGH**  
*Chief Justice and President, Supreme Court of Kenya*

## **VALEDICTORY MESSAGE BY HON. JUSTICE DAVID K. MARAGA, EGH CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT OF KENYA ON 11<sup>th</sup> JANUARY, 2021**

I stand here today full of gratitude and appreciation as I say goodbye to the Judiciary after about 18 years of service to the people of Kenya. During this time, I have served first as a Judge of the High Court, Judge of the Court of Appeal and finally as the Chief Justice of the Republic of Kenya. The time to say goodbye has come.

I want to start by thanking God for the opportunity He gave me to serve and the guidance He provided as I carried out my duties.

In my interview for the position of Chief Justice, given the fact that the Supreme Court must hear and determine Presidential Election petitions within 14 days, I was asked whether I would sit on a Saturday, my Sabbath day. I understood the question to require of me to make a choice between getting the job of Chief Justice and living out my faith. I determined to live out my faith and said I would not sit on Saturday. Thereafter, in accordance with His steadfast promises, God took over. The rest is history. He gave me the job and fought all my battles throughout my term as the Chief Justice. I don't know how to express my gratitude to Him for considering me worthy of His grace and favours.

A special Thank You goes to my dear wife and our children, as well as my extended family. Through your prayers and support, you have been to me what Harun was to Moses. I don't take that for granted. I sincerely thank you. I also want to thank you, the people of Kenya, for your unwavering confidence in and support for me. Your solidarity in moments of great adversity and peril, and your steadfast defence in moments of trials and tribulations, only strengthened my resolve and enabled me to serve you. Thank you too my dear colleagues, starting with the Deputy Chief Justice, my brother and sister Judges with whom I had the distinct pleasure of serving in the Supreme Court, the Court of Appeal and the High Court. My deep sense of gratitude also goes to all the other Judges, Magistrates, Kadhis, Judicial Officers and Staff of the Judiciary whose valuable support enabled me to satisfactorily discharge my duties. The milestones we have achieved in moving the Judiciary transformation to where it is today is our collective achievement, and from which I draw enormous pride.

I would also like to thank the Judicial Service Commission, the Commissioners, the Chief Registrar and all the Commission Staff. I know I pushed you very hard and made you sit for very long hours many times. Thank you for bearing with me. A special

Thank You also goes to the legal fraternity, through the Law Society of Kenya and the Justice Sector, in particular the National Council on the Administration of Justice. Your dedication to the rule of law and your unflinching demand for efficiency and equity in the administration of justice have been a source of motivation and inspiration to me.

Let me also thank the Executive and the Legislature for the work we have been able to accomplish as co-equal arms of Government in the service of the Kenyan public. I urge you to continue living by the constitutional edict of robust independence and constructive interdependence, which the Judiciary has embraced as a key philosophical and operational principle.

A special Thank You also goes to our Development Partners. Without your support, many of the Judiciary programs would have ground to a halt. Please continue supporting the Judiciary which, as you are well aware, is the beacon of hope for the people of this great country.

Today, I leave behind me a strong Judiciary, a professional and enthusiastic corps of Judges and Judicial Officers as well as staff who are deeply committed to the administration of justice, and an increasingly enlightened public whose confidence in and demand for our services grows by the day.

I urge you all to continue giving them your unwavering support, and to keep praying for them so that justice and the rule of law can continue flourishing in our beloved country. We must continue to invest in a strong, independent, fair, and effective Judiciary bearing in mind that sustained economic prosperity and the long-term political stability of this nation can only be guaranteed if the rule of law reigns.

Thank you very much, and may God Bless You All.



**HON. JUSTICE D.K. MARAGA, FCI Arb, EGH CHIEF JUSTICE & PRESIDENT OF THE  
SUPREME COURT OF KENYA**



# What they said

## **Supreme Court Judges - DK Maraga, CJ & P, MK Ibrahim, SC Wanjala, NS Ndungu & I Lenaola, SCJJ, in Alnashir Papat & 7 others v Capital Markets Authority [2020] eKLR**

*“Narrow interests such as fostering investor confidence in the securities market could not be used as an excuse to deprive the directors of their constitutional right to a fair hearing of the allegations against them. Despite the legality of the duality of the respondent’s mandate under section 11(3) (cc) (h) of the Capital Markets Act, in any matter that could be classified as judicial or quasi-judicial, or one where, in the view of a reasonable man conversant with the matter, there was likely to be bias or a reasonable apprehension of bias, the authority ought to have been impartial.”*

## **Supreme Court Judges- DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala & NS Ndungu, SCJJ, in Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR**

*“An illegal occupation of private land would not create prescriptive rights over that land in favour of the occupants but the same could not be said of an “illegal occupation” of public land. To the contrary, where the landless occupied public land and established homes thereon, they did not acquire title to the land but they had a protectable right to housing over the same. The Constitution of Kenya 2010, radically transformed land tenure in the country by declaring that all land in Kenya belonged to the people of Kenya collectively as a nation, communities and individuals. It also created a specific category of land known as public land. Therefore, every individual as part of the collectivity of the Kenyan nation had an interest, however indescribable, however unrecognizable, or however transient, in public land.*

*Faced with an eviction on grounds of public interest, potential evictees that occupied public land, had a right to petition the court for protection. The protection, need not necessarily be in the form of an order restraining the State agency from evicting the occupants, given the fact that the eviction may be entirely justifiable in the public interest.”*

## **High Court Judges- J W Lesiit, E C Mwitia & L M Njuguna, JJ in Katiba Institute & another v Attorney General & another [2020] eKLR** **Constitutional Petition 331 of 2016**

*“Public service was the collectivity of all individuals, other than state officers, performing a function within a state organ, while state organ was either a commission, office, agency or other body established under the Constitution. That meant that the collectivity of the individuals had to be performing a function within a state organ established under the Constitution. Offices in state corporations and parastatals were not commissions, offices, agencies or other bodies established under the Constitution. They were, therefore, not state organs within the meaning of the Constitution. Consequently, positions of chairpersons and members of boards of state corporations and parastatals were not offices in the public service.”*

**High Court Judge - W. Korir in Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission(Interested Party); Kenya National Commission on Human Rights & 3 others(Amicus Curiae) [2020] eKLR**

*“The State had a duty to maintain law and order including the protection of life and property. However, as a general rule, that duty was owed generally to the public at large and not specifically to any particular person within Kenya. For a person to succeed in a claim for alleged violation of constitutional rights, it had to be demonstrated that there existed a special relationship between the victim and the police on the basis of which there was assurance of police protection, or where, for instance the police had prior information or warning of the likelihood of violence taking place in a particular area or against specific homes but failed to offer the required protection. In such cases, therefore the State could be held liable where violations of the rights protected and guaranteed in the Bill of Rights were proved even when those violations were occasioned by non-State actors provided that the duty of care was properly activated.”*

**High Court Judges- P Nyamweya, W Korir & J Mativo, JJ, in Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties) [2020] eKLR**

*“Regularity meant compliance with the Constitution and the governing statute including obtaining required consents/approvals from the relevant bodies including the SRC. PSC’s failure to seek SRC’s consent or approval as the only body constitutionally mandated to set and pay salaries and remuneration of State officers contravened several statutory provisions including articles 230(4), 206 (4) and 259(11) of the Constitution. Accounting officers of independent bodies were obligated by law to comply with regularity and propriety and the need for efficiency, economy, effectiveness and prudence in the administration and use of public resources and to secure value for public money. Therefore, the accounting officers for the PSC and Parliament were culpable for failing to undertake their obligations under the Public Finance Management Act in that regard. The said accounting officers therefore broke the law and it was upon them to recover the money paid to the MPs”.*

**Employment and Labour Relations Court Judge- B Ongaya, in Chama Cha Mawakili (CCM) v Chairperson Independent Electoral and Boundaries Commission & 2 others [2020] eKLR - Petition No. 104 of 2019**

*“The petitioner had established that the 2<sup>nd</sup> respondent had violated section 10(1) and 27 of the IEBC Act and the national values and principles of governance in article 10 of the Constitution. The violated provisions provided for recruitment of the commission secretary through an open, transparent, and competitive process and appointment of a suitably qualified person. The evidence showed that the 2<sup>nd</sup> respondent made a decision to undertake the recruitment process through an independent consultant and thereafter decided to undertake the recruitment by itself. The shifting of the decisions as was done and without notifying the public cast a shadow of doubt on the integrity of the process.”*

**Employment and Labour Relations Court Judge- M Onyango, in Bernard Odero Okello & another v Cabinet Secretary for Industrialization, Trade and Enterprise Development & another; Cyprian Mugambi Ngutari & 7 others (Interested Parties)- Petition 100 of 2020**

*“Appointments to public office had to be done through a process that was open, merit-based, inclusive and competitive. Those appointed to the Business Premises Rent Tribunal did not apply, were not shortlisted, and were never interviewed for the positions. Public interest favoured respect for the Constitution and the law. Public interest could not be used to justify the violation of a statute or the Constitution. Approval given for the impugned appointments by the Judicial Service Commission could not regularize that which was not legal. Section 10 of the Public Service (Values and Principles) Act provided for competition and merit-based appointments. In making the appointments, the Cabinet Secretary did not comply with the requirements of the said section 10.”*



# Feature Case

## Whether lands claimed to be ancestral lands dispossessed during colonial era would be returned to original native occupants or their descendants

Henry Wambega & 733 others v Attorney General & 9 others [2020] eKLR

Constitutional Petition No. 2 of 2018

Environment and Land Court at Mombasa

**S Munyao, J**

October 22, 2020

*Reported by Long'et Terer*

The petitioners claimed that they, or their forefathers, were the original inhabitants of various parcels of land measuring over 800 acres (suit lands) owned by the 2<sup>nd</sup> – 7<sup>th</sup> and 9<sup>th</sup> respondents and asserted a right to be settled therein. They claimed that they, or their forefathers, were violently evicted from the suit lands. They also pleaded that being descendants of the original occupiers of the suit lands, their right to property had crystallized through the doctrine of ancestral domain or alternatively, through an implied inter-generational trust. They stated that their problems stemmed from the issuance of titles to the then registered owners without due regard to their occupation. They thus sought, among others, a declaration that the suit lands were ancestral lands and a declaration that they were entitled to have the suit lands declared trust land by virtue of the history of the land.

The respondents opposed the petition with the National Land Commission (NLC) arguing that the issues raised in the petition were of the nature of historical land injustice hence the appropriate avenue for seeking redress was by lodging a claim of historical injustice with the NLC for admission and subsequent investigation. That the issues raised in the petition were therefore prematurely before the court.

The issues for determination were: whether the Environment and Land Court had jurisdiction to hear claims of historical land injustices; what were the situations in which the Environment and Land Court could refer a matter to the NLC instead of determining it; what was the meaning and basis of the ancestral domain concept; whether the concept of ancestral domain was applicable in Kenya; whether lands claimed to be ancestral lands dispossessed during colonial era would be returned to original native occupants or their descendants and what were the solutions to historical land injustices in Kenya?

The Environment and Land Court (ELC) found that it had

jurisdiction to hear claims even those based on historical land injustices. However, just because a court was vested with jurisdiction did not mean that in all cases, it would proceed to exercise that jurisdiction, especially where there was another body that also had capacity to hear that dispute. Depending on the facts and circumstances surrounding the case, the court could defer jurisdiction to another body, or decline to take up the matter altogether, and that would not be because it had no jurisdiction, but because given the surrounding circumstances, it would be best for the court not to exercise its jurisdiction.

With regard to historical injustices and the NLC, the ELC noted that article 67(2)(e) of the Constitution provided that one of the functions of the NLC was to initiate investigations into present or historical injustices and recommend appropriate redress. The function was embodied in section 15 of the National Land Commission Act. NLC had wide jurisdiction on historical injustices. When it came to the choice of filing a claim before the NLC or before the ELC, one needed to make an assessment of what task was required.

If the facts were contested, with elaborate number of persons and not easy to verify them, and where a thorough investigative process was going to be needed, then probably the ELC would not be the best forum and it would be best that the NLC handled the matter. If a person filed such suit in ELC, the court, on being moved, or on its own volition, could refer the matter to the NLC for determination, rather than dismissing it outright. However, where facts were clear, the issues uncontested, and what was needed was for the court to determine the rights violated and the nature of redress, or the legal rights of the parties, then the court was at liberty to entertain the suit and determine it on its merits. In the instant case, the petitioners had opted to come to court and the court had admitted the petition and thus, it proceeded to determine it on merits.

The ELC found that there was no evidence that any of the forefathers of the petitioners ever resided on the suit lands. One could not tell with precision and finality, which forefather of which petitioner resided in which land, and what sort of occupation such person had. Some of the petitioners appeared to have roots in Kwale and not within the site of the disputed lands. There was a claim of dispossession, but absolutely no evidence of who was dispossessed, by whom, and when exactly that occurred.

The ELC held that the petitioners had not demonstrated any historical connection to the suit lands. When one was presenting a constitutional petition, then he had to back it up with cogent evidence. The petitioners needed to do more than just state that their forefathers were displaced and tortured. They ought to have provided cogent evidence of that, and there was none, save for hearsays which could not be proved. Some of the claims of the petitioners sounded like folklore. Slave trade was not there in the 1940s or 1950s in Kenya, and if there was any drawing and selling of blood, that would be criminal, even under the colonial laws.

The petitioners did not give the ELC any generational tree to identify their ancestry and demonstrate that it was actually their forefathers who were occupying the suit lands. There was no evidence that any of the claims of torture occurred. Neither was there any evidence of imprisonment. It was impossible to hold that any of the events that were claimed by the petitioners actually occurred.

The ELC noted it was impossible to connect the petitioners in any way to the suit lands. They had claimed that there were graves on the land, which was contested. But even assuming that there were graves on the land, there was no evidence that such and such grave was for the father or grandfather of any of the petitioners. Those could be graves of any person. Site notes of a judicial officer who visited the suit lands and her conclusion showed that none of the petitioners were on the land. What she observed were developments made by the current proprietors of the land.

The ELC appreciated that there was a strong probability that some persons were indeed displaced by the colonialists on the suit lands, but nothing before the court showed that the persons so displaced were the forefathers of the petitioners.

At the outset, the petitioners had hopelessly failed to tender any evidence of displacement, or any evidence of torture, either upon themselves or upon their forefathers. With that finding, there was no substratum in the petition and the same had to be dismissed.

The ancestral domain claim would mean that a generation had a historical right to own land that was previously in

the hands of their forefathers, the ELC found. It had some support in some jurisdictions, especially those with a minority population that was marginalized owing to colonialism or occupation by foreigners. Australia for instance enacted the Native Title Act, 1993, so as to *inter alia* appreciate that Australia was not *terra nullius* (land that was legally deemed to be unoccupied or uninhabited) at the advent of European occupation and to make amends to the native population that was dispossessed of land. The statute followed Australian High Court decision where the court pronounced itself on the native title, recognizing that there existed native title to land, the foundation of which was the traditional connection by the natives.

The court held that land issues were complex and were unique to each country. It followed that each country enacted laws that suited its circumstances. We could not impose what had been held in one jurisdiction into the country for Kenya's circumstances could be different. Australia had a large population of European origin with the native Aboriginals and Torres Strait Islander people representing only 3.3% of the population. It would follow, therefore, that there would be reason in ensuring the protection of that minority group. The situation in Kenya was radically different, with the native inhabitants being the overwhelming majority.

The court also noted that the proposition that government had not done its bit in enacting legislation to address historical land injustices was incorrect. The provisions of the Constitution at article 67(e) and section 15 of the NLC Act were some of the response of the government in addressing historical land injustices. In making those provisions, the people of Kenya had to balance the interests of those who were adversely affected by historical land injustices, and the interests of those that had title to land and expected the same to be protected.

The ELC appreciated that article 40 of the Constitution, thus, protected the right to property, and among the rights noted therein, was that the state was not to deprive a person of property without prompt payment in full, of just compensation. The Constitution also categorized land into private, public, and community land. Article 64 of the Constitution on the other hand defined what consisted of private land. The right to own property in a private capacity was, thus, protected. Such property could not be taken away without good reason and without just compensation.

As for the court, there was no backing in the Constitution or in any law that would entitle the petitioners to the lands that were privately held by the 2<sup>nd</sup> - 7<sup>th</sup> and 9<sup>th</sup> respondents, even assuming that the lands were originally settled by the forefathers of the petitioners. There was no law that said that a person had to be settled in land that

was previously owned by his/her forefather, irrespective of whether that land was privately owned. There was power to recommend restitution or compensation, if deemed appropriate, when dealing with historical injustices, but that was not to be construed to mean that a person had a right to be settled in land that belonged to his/her forefather who was dispossessed from it.

The ELC acknowledged that there was agitation for land from people who claimed to have faced historical injustices. The agitation was most intense in the coastal region. There was certainly injustice caused by colonialism and people were displaced and their lives destabilized. But that did not just occur in the coastal region, it was countrywide. Persons were displaced in Central Kenya and Rift Valley, where the colonialists established the so called white highlands. The Maasai were also displaced from a huge swathe of what would otherwise comprise their native land. So too the Nandi in Uasin Gishu, the Kipsigis in Kericho, and even the Taita at the Coast. Almost every community that had good land in the eyes of the colonial settlers was dispossessed to pave way for colonial occupation. There were native reserves dotted all over the country where displaced indigenous persons were concentrated while the colonialists hogged all the prime land. That was unjust and unfair.

The court noted that almost every other person in Kenya had been affected by the historical accident of colonial occupation. If all asserted that they had a right to be settled in the land that was originally occupied by their forefathers, it would open a Pandora's box and create an even bigger problem, for there would be a massive displacement of persons which would be catastrophic. Even Nairobi itself, with its Maasai origin, would be overrun. How to move on from the dark colonial past did not lie, in the circumstances of the country, by making an order for people to cede their land so that the original native occupants, or their descendants, be settled in it. Neither did the solution lie in invading land that one believed belonged to his ancestor, for that would be a total negation of the constitutional right to property.

It was observed by the court that time to recognize that the solution to the land problem in Kenya, considering the country's unique history and prevailing circumstances, did not lie in land invasion, or in asserting that land belonging to one's forefather be given, as of right, to a descendant. Doing so would mean bearing the brunt on very innocent people, and that would lead to even more unfairness. Most of the lands in question was purchased through hard earned money, or loans. They were investors and they had made sacrifices in order to invest. They were also Kenyans and they had a right to own land in any part of the country.

The Constitution was alive to the fact that there were

historical injustices. With a good case being presented, either before the ELC or before the NLC, there could be avenue for redress, but that avenue would not necessarily be an order for resettlement in the very land that was owned by the forefathers of such claimant/s. Redress certainly did not include the invasion of privately owned land and did not involve harassing persons who innocently purchased land. Title had to be respected even as historical injustices were being looked at.

The court respected that the Constitution respected title to private land. If one had title to land, the Constitution protected that title. The petitioners could not claim that their rights were any superior to the constitutionally protected rights of the title holders. One problem could not be solved by digging one hole to fill another. The solution to the land problem would not necessarily lie in giving out land. Other avenues of mitigating the effects needed to be looked at.

The ELC held that there was no law that gave an individual a right to own land that was previously owned by his/her forefather. Kenyans did not deem it fit to introduce such a law and that had been after considering the circumstances prevailing in the country. It had not been shown that there was any illegality in the manner in which all the suit lands were acquired. It had not been shown that the respondents violated any rights. No right entitling the petitioners to settle or to be settled on the suit lands had been shown. The court was unable to order the respondents to surrender the suit lands to the petitioners, nor order the government to purchase the suit lands and settle the petitioners in it.

The court found that the petitioners had gripe against the NLC, but that bile was misplaced. The petitioners did lodge a complaint before the NLC. There was a resolution, vide which the squatters on the land were settled. In relation to land owned by the 2<sup>nd</sup> respondent, the NLC had received a complaint by members of Buguluni community. There was also another complaint in relation to the land parcel owned by the 9<sup>th</sup> respondent. It had not been shown that the NLC had failed to act. Just because the NLC had not found it fit to order a resettlement of the petitioners in the land of the 2<sup>nd</sup> – 7<sup>th</sup> and 9<sup>th</sup> respondents did not mean that they had failed to act. There had not been a violation of the petitioners' constitutional rights or any violation of the international instruments that the petitioners had mentioned.

**Orders: -**

*Petition dismissed with costs payable jointly and/or severally by the petitioners.*

# Supreme Court

## The investigatory and enforcement mandates of the Capital Markets Authority were constitutional despite being held by the same institution.

Alnashir Popat & 7 others v Capital Markets Authority [2020] eKLR

Constitutional Petition No. 29 of 2019

Supreme Court of Kenya

DK Maraga, CJ & P, MK Ibrahim, SC Wanjala, NS Ndungu & I Lenaola, SCJJ

December 11, 2020

Reported by Beryl Ikamari & George Kariuki

**Constitutional Law** – Bill of Rights – right to fair administrative action – right to a fair hearing – whether a tribunal could act as both investigator and judge in its own case – whether the investigatory and enforcement mandate of the Capital Markets Authority were constitutional – Constitution of Kenya 2010, articles 25(C), 35, 47(1) and 50(1); Capital Markets Act (cap 485A), section 11(3)(cc) and 11(3)(b)

**Administrative Law** – natural justice – impartiality of the decision-maker – legality of the Capital Markets Authority's investigatory and enforcement – whether actual bias or an appearance of bias was the likely result of having the Capital Markets Authority serve as an investigator and an enforcer in the cases of infractions of the provisions of the Capital Markets Act and the regulations made thereunder.

### Brief facts

The petitioners non-executive directors of Imperial Bank Limited (the bank) which was under receivership. The respondent, a statutory regulatory authority established under section 5 of the Capital Markets Act is charged with promoting, regulating and facilitating the development of orderly, fair and efficient capital markets in Kenya.

In August 2015, the respondent approved the bank's application to issue to the general public a corporate bond of Kshs. 2 Billion. Only the bank's Managing Director and the Chief Finance Officer were privy to that application.

In September 2015, the managing director passed on and the former head of credit was appointed acting MD and deputized the former CFO. In September, the two caught wind of an array of illegal transactions authorized by the late Managing Director and reported the same to the chair of the non- executive directors. The latter in turn contracted FTI consulting group, to carry out a forensic audit of the bank's financial affairs and report on its accurate financial position. It also resolved not to utilize the approved bond issue pending the outcome of the investigations by the consultant.

It was found that the former MD had indeed been running a scheme of fraudulent disbursements resulting in losses

running into billions of shillings and the board reported the same to Central Bank (CBK) who in turn placed the bank under receivership and appointed the Kenya Deposit Insurance Corporation its Receiver/Manager for a period of twelve (12) months. The appointment also included a declaration of a moratorium on the bank. On the same day, the respondent, on its part, instructed the Nairobi Stock Exchange (NSE) not to proceed with the listing of the bank's bond issue on the Fixed Income Securities Market Segment until further notice.

Circumstances surrounding the issuance of the bond were brought to the fore by the respondent. In exercise of its statutory authority, it served the petitioners with notices to show cause and required them to respond, within 14 days, to allegations of negligence in the discharge of their mandate as directors of the bank. No hearing took place on the designated day. However, the respondent-appellants claimed that an inquisitorial hearing presided by CMA's chair took place and a summary ruling entered against the bank's directors.

The petitioners appealed against that decision at the High Court citing conflict of interest. They said that the CMA had acted as licensee, investigator and judge in the issue of the bond. Additionally, they contended that the authority had acted as juror in its own case. The same officials who had greenlighted the issuance of the bond had gone ahead to rule against its regularity and legality.

At the High Court, the notices sent to the petitioners to show cause were quashed. The court's reasoning was that there existed a real possibility of bias. By acting in both inquisitorial and enforcement mandate, the authority was likely to be biased. It therefore ought to have delegated its functions to an independent body.

At the Court of Appeal, the authority's decision was upheld. The CMA expressly authorized the overlapping inquisitorial and enforcement functions of the respondent. Therefore, the respondent was expected to make unprejudiced judgement on matters it had investigated.

As a last resort, the appellants called upon the Supreme

Court to consider the propriety of the dual statutory mandate granted to the respondent as the sole investigator and enforcer of capital markets infractions in Kenya.

**Issues**

- i. Whether the overlapping investigatory and enforcement roles vested in the CMA constituted a violation of the rights to fair administrative action and fair hearing as recognized in articles 47(1) and 50(1) (as read with article 25(c)) of the Constitution.
- ii. Whether section 11(3) (cc) and 11(3)(h) of the Capital Markets Act which authorized the overlapping investigatory and enforcement mandate of the CMA was unconstitutional.
- iii. Whether the CMA's attempted enforcement proceedings after conduct of its investigatory role with the bank were biased or likely to be biased against the bank.

**Held:**

1. Prior to the enactment of the Capital Markets Act, the capital market in Kenya faced multiple challenges running from illicit intermediaries to lack of a proper legislative guide hence the need for a firm regulatory regime. Sections 5 and 11(cc) of the Capital Markets Act established the CMA with a mandate to remove impediments, promote wider performance of the general public in the securities commodities market and derivatives and for protection of investor interests. To achieve the objectives, section 13 of the Capital Markets Act granted the authority power to discipline errant members and to regulate and facilitate the development of an orderly, fair and efficient capital market.
2. The CMA power to inquire, either on its own motion or at the request of any other person, into the affairs of any person which the authority had approved or to which it had granted a license and any public company the securities of which were publicly offered or traded on an approved securities exchange or on an over the counter market.
3. Tenets of natural justice decreed that, no person should be allowed to be a judge in his or her own cause or in a cause they had an interest in the outcome including situations where one desired or was keen on obtaining a given result. A prosecutor, for example, had an interest in the conviction of a suspect he hauled into court.
4. There were exceptions to every general rule. The exception to the tenets of natural justice set out under article 25(c) as read with article 47 of the Constitution was enunciated in the Canadian case of *Re W. D. Latimer Co. and Attorney-General for Ontario* (1973), 2 O.R. (2d) 391 and affirmed in *Re W. D. Latimer Co. and Bray* (1974).

5. Where a statute authorized a tribunal to perform tripartite functions, disqualification on the ground of bias ought to have been founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which investigations were being conducted.
6. Mere advance information as to the nature of the complaint and the grounds for it was not sufficient to disqualify a tribunal from completing its task.
7. Where it was clear from an empowering legislation that certain activities which would otherwise be considered "biased" formed an integral part of its operations and the tribunal had not acted outside its statutory authority, the doctrine of "reasonable apprehension of bias" could not be sustained. A tribunal's structure and responsibilities as well as the manner of the discharge of its mandate ought to be considered.
8. Administrative tribunals were not necessarily supposed to operate like courts of law. That was why they were allowed to be masters of their own procedure albeit having to act fairly.
9. For purposes of efficiency and in the carrying out of the objectives of the Capital Markets Act, especially in the expeditious disposal of disputes that arose in the operations of the capital markets, the functions set out in section 11(3) (cc) and 11(3)(h) could not be performed by separate bodies.
10. Section 11(3)(cc) and 11(3)(h) of the Capital Markets Act were not unconstitutional. The overlapping mandate did not render those sections unconstitutional. What would have been unconstitutional would have been the discharge of that dual mandate.
11. It was important to determine whether the authority's discharge of a dual mandate in the petitioner's case was itself likely to be unconstitutional under a critical balancing of articles 47(1) and 50(1).
12. Among the canons of statutory interpretation was that the historical background of legislation ought to be considered. However, in the promotion of public policy and efficient administration of the securities market in Kenya, the right to a fair administrative action could not be sacrificed at the altar of efficiency or public interest.
13. Individual rights to be duly notified of a hearing, given adequate prior information and to be granted a fair hearing were so fundamental that they could not be limited by public interest.
14. The CMA could not be allowed to ride roughshod over the non-derogable constitutional rights of investors. It would be counterproductive by scaring away the very prospective investors it sought to entice.

15. Narrow interests such as fostering investor confidence in the securities market could not be used as an excuse to deprive the directors of their constitutional right to a fair hearing of the allegations against them.
16. Despite the legality of the duality of the respondent's mandate under section 11(3) (cc) (h) of the Capital Markets Act, in any matter that could be classified as judicial or quasi-judicial, or one where, in the view of a reasonable man conversant with the matter, there was likely to be bias or a reasonable apprehension of bias, the authority ought to have been impartial.
17. A reasonable apprehension of bias was the key test in determining whether a tribunal had acted impartially. A tribunal was required to observe and accord persons under investigations (and or any person) likely to be adversely affected by their decision a fair process and in particular, it was required to adhere to the principles of natural justice and comply with the provisions of articles 50 (1) and 47 of the Constitution.
18. Enforcement proceedings were not necessarily administrative merely because the enforcement body was an administrative one. Focus of the enquiry was not whether a particular conduct was an 'administrative action', but on the nature of the power being exercised.
19. An act would be judicial when there was opportunity to be heard and for production and weighing of evidence and a decision was rendered.
20. In the discharge of their statutory mandates, tribunals ought to always first determine whether or not their acts or decisions were judicial or quasi-judicial and whether or not they were likely to adversely affect the rights of persons or bodies under investigation.
21. The nature of the enforcement proceedings that the authority sought to enforce against the directors for non-appearance bespoke a quasi-judicial process because, based on the material evidence placed before it, the CMA would have had to determine the culpability or otherwise of the directors.
22. Had the directors been found culpable pursuant to section 11(3) (cc) of the Capital Markets Act, the authority would have imposed sanctions on them, including financial penalties.
23. There was a real possibility of bias in the petitioners' case. The authority had appraised and approved the bank's application. The same authority also initiated and conducted preliminary investigations into the bank's conduct in relation to the application and upon satisfying itself that the bank could have violated the relevant provisions of the Act and the Regulations, it made a decision to charge the petitioners and went ahead to formulate the requisite charges. It was the same Board of the CMA that also purported to preside over the hearing of the director's cases. That obviously led to an inescapable appearance of partiality on the Authority's part.

**Orders: -**

- i. *The petitioners' appeal was allowed to the extent that the respondent would proceed with the enforcement proceedings against the petitioners through its delegated authority under section 11A (1) and/or section 14(1) of the Capital Markets Act.*
- ii. *Each party was ordered to bear its own costs.*

**Structural interdicts are part of the remedies that a court could fashion to remedy a violation of fundamental rights and freedoms.**

Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR

Petition 3 of 2018

Supreme Court of Kenya

**DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala & NS Ndungu, SCJJ**

January 11, 2021

*Reported by Beryl Ikamari*

**Constitution Law** - *fundamental rights and freedoms - enforcement of fundamental rights and freedoms - remedies in human rights litigation - structural interdicts - whether structural interdicts were part of the remedies that the court could fashion as an appropriate relief for a violation of fundamental rights and freedoms - Constitution of Kenya 2010, article 23(3).*

**International Law** - *applicability of international law in Kenya - effect of articles 2(5) and 2(6) of the Constitution on how international law would take effect in a domestic court in Kenya - whether the U.N Guidelines on Evictions;*

*General Comment No. 7 were part of the laws of Kenya and were of binding effect either under article 2(5) or article 2(6) of the Constitution - Constitution of Kenya 2010, article 2(5) and 2(6).*

**Constitution Law** - *fundamental rights and freedoms - enforcement of fundamental rights and freedom - socio-economic rights - right to housing - principles related to the enforcement of socio-economic rights - when would the right to housing accrue - Constitution of Kenya 2010, article 43(1)(b).*

**Brief facts**

The petitioner was a registered society comprised of residents of Mitumba Village. Mitumba Village and the Mitumba Village Primary School were situated near Wilson Airport. A notice published in the newspapers on September 15, 2011 by the Attorney General gave the residents of Mitumba Village 7 days in which to vacate the premises. Despite the fact that the petitioner obtained conservatory orders from the High Court to restrain the demolition of Mitumba Village, the premises were demolished on November 19, 2011. The petitioner sought various declaratory reliefs including those that asserted their ownership of the premises and also stating that the forceful eviction and demolition without a relocation option was illegal, oppressive and violative of the petitioner's rights.

The respondent explained that Mitumba Village was situate in property belonging to the Kenya Airports Authority and that Authority was under a statutory duty to ensure air safety by removing any informal settlement which was on a flight path. The respondents explained that given the ongoing war in Somalia, the village posed a threat.

At the High Court, the findings of the court were that the petitioner (appellants) did not own the suit premises. The newspaper notice which was said to be a reminder notice was found by the High Court to be unreasonable, unconscionable and unconstitutional as there was no other notice preceding it and it required vacation of the suit premises within 7 days. The High Court noted that there was no legislation or guidelines developed in Kenya for the eviction of persons occupying land that they were not legally entitled to occupy.

The High Court made the determination that the right to property included the protection of goods and personal property and it extended to goods and building material that had been destroyed during the demolition. The High Court also found that the eviction and demolition of the premises pursuant to a 7 - day notice and the failure to provide alternative accommodation was a violation of the appellant's rights to housing and other socio-economic rights recognized under the Constitution. Further, the High Court found that evictions could be necessary but due process had to be followed. Due process included the issuance of reasonable notice and the conduct of consultations among those affected by the eviction. Additionally, the High determined that the demolition which left other nearby multi-storied buildings intact was discriminatory. The High Court noted that the demolitions included the demolition of a school and there was no evidence that measures were put in place to protect the needs of vulnerable groups particularly children and that children's rights were violated.

In response to the High Court judgment, the 1<sup>st</sup> respondent filed an appeal at the Court of appeal. The Court of Appeal made various findings to the following effect -

- a) Pamoja Trust was wrongfully given a role reserved for the court, when it was asked to be involved in ascertaining eviction terms and the creation of eviction guidelines because Pamoja Trust had no constitutional mandate of resolving disputes;
- b) the concept of partial judgment or interim judgment was unknown to Kenyan law; a court had to finally determine all the issues before it and it would then become *functus officio*;
- c) allowing parties to file affidavits and reports after the judgment introduced secondary litigation of issues that were not raised in the original pleadings;
- d) the security and safety of the flight paths was a limitation on enjoyment of the rights and freedoms in the Bill of Rights as permitted under article 24 of the Constitution;
- e) there was no legislation in Kenya meant to regulate forcible eviction and resettlement of persons occupying public or private land and before the enactment of such legislation courts had to interpret and apply the law as it was;
- f) The 1st respondent (Kenya Airports Authority) had no mandate to provide policies and programs on provision of shelter and access to housing as directed by the High Court;
- g) the trial Court erred in law in issuing orders and directions on un-pleaded issues.
- h) the court should not act in vain or issue orders it could not implement and policy formulation was not within the mandate of the courts;
- i) the enforcement and implementation of socio-economic rights could not confer proprietary rights in the land of another and that the realization of socio-economic rights did not override the provisions of the Limitation of Actions Act;

A second appeal was filed by the appellants at the Supreme Court. They obtained certification that the matter raised issues of general public importance under article 163(4) (b) of the Constitution.

**Issues**

- i. Whether structural interdicts were recognized reliefs in human rights litigation under the Constitution of Kenya, 2010.
- ii. What was the effect of article 2(5) and 2(6) of the Constitution regarding the applicability of international law in general and international human rights in particular?

- iii. Whether U.N Guidelines on Evictions; General Comment No. 7 were part of the laws of Kenya and were of binding effect either under article 2(5) or article 2(6) of the Constitution.
- iv. When would the right to housing under article 43 (1) (b) of the Constitution accrue?

### Held

1. The trial court issued interim orders requiring the respondents to furnish the court with information about policies and programmes on provision of shelter and access to housing. However, the Court of Appeal was of the view that the trial court could not reserve for itself any outstanding issue as it became *functus officio* after the delivery of the judgment. Therefore, the two superior courts held diametrically opposed views regarding structural interdicts or interim orders.
2. Article 23(1) and 23(3) of the Constitution were the launching pad of any analysis into the place and scope of interim orders in Kenya's human rights enforcement architecture. Article 23(3) provided that for a violation of the Bill of Rights the court could grant any appropriate relief including, a declaration of rights, an injunction, a conservatory order, a declaration of legal invalidity of any law that denied, violated, infringed or threatened a right or fundamental freedom in the Bill of Rights that was not justified under article 24 of the Constitution, an order for compensation and an order for judicial review. The list of appropriate reliefs that the court could grant were not exhaustive.
3. The Court of Appeal failed to consider Supreme Court decisions concerning interim reliefs that a court could issue to address the violation of a fundamental right. The appellate court appeared to shut the door on the use of interim reliefs or structural interdicts in human rights and other constitutional litigation.
4. Article 23 (3) of the Constitution empowered the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right.
5. The doctrine of *functus officio* retained validity and vitality in both criminal and civil cases but in certain situations the doctrine ought to give way. Subjecting article 23 of the Constitution, on the court's power to fashion appropriate reliefs for human rights violations, to the limitation of the Civil Procedure Act's provisions on the court becoming *functus officio* after judgment, would stifle the development of court-sanctioned enforcement of human rights as envisaged in the Bill of Rights.
6. Interim reliefs, structural interdicts, supervisory orders or any other orders that could be issued by the courts, had to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other state agency vested with a Constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, had to be realistic, and avoid the temptation of judicial overreach, especially in policy matters. When issuing interim orders the court could indicate that the orders were interim in nature and that the final judgment had to await the crystallization of certain actions.
7. Article 2(5) of the Constitution provided that the general rules of international law formed part of the laws of Kenya while article 2(6) of the Constitution provided that any treaty or convention ratified by Kenya formed part of the laws of Kenya under the Constitution. However, there were divergent views on the meaning of the provisions. One school of thought was that article 2(6) of the Constitution transformed Kenya from a dualist to a monist nation meaning that Kenya did not have to incorporate (domesticate) an international treaty into its domestic law before the treaty could take effect. The second school of thought was of the view that international law was subordinate to the Constitution and could only take effect subject to the supreme law of the land. The proponents of the school of thought were not supporters of the view that Kenya was a monist state.
8. The meaning to be attributed to the phrase "shall form part of the law of Kenya" in articles 2(5) and 2(6) of the Constitution was that in determining a dispute, a domestic court of law had to take cognizance of rules of international law to the extent that the same were relevant and not in conflict with the Constitution, statutes or a final pronouncement.
9. Articles 2(5) and 2(6) of the Constitution were both inward looking and outward looking. They were outward looking in the sense that they committed Kenya to conduct its international relations in accordance with its obligations under international law. On the other hand, they were inward looking because they required Kenyan courts of law to apply international law in resolving disputes before them as long as the same were relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement. International law could be applied to fill a *lacuna* in domestic law in the context of a dispute before a domestic court because international law was part of the laws of Kenya.
10. Articles 2(5) and 2(6) of the Constitution had nothing or little significance to do with the monist-dualist categorization. Most importantly, the expression "shall form part of the law of Kenya" as used in the articles did not transform Kenya from a dualist to a monist state.

11. Article 2(5) of the Constitution referred to general rules of international law and that did not refer only to peremptory norms of international law or *jus cogens*. The two main sources of international law were treaties and international customs. *Jus cogens* was a technical term given to those norms of general international law which were of peremptory force and as a consequence no derogation was allowed. *Jus cogens* accounted for only a tiny corpus of the general rules of international law. The suggestion by the Court of Appeal that the use of the phrase “general rules of international law” in the Constitution was limited to the evolving concept of *jus cogens* was inconceivable.
12. The U.N Guidelines on Evictions; General Comment No. 7, at best constituted what was known as international jurisprudence or soft law. UN Resolutions, Declarations, Comments and Guidelines did not ordinarily amount to norms of international law. However, certain UN General Assembly Declarations and Resolutions could ripen into a norm or norms of international law depending on their nature and history leading to their adoption.
13. The U.N Guidelines, General Comment No. 7 did not qualify as general rules of international law, which had a binding effect on members of the international community. However, the Guidelines were intended to breathe life into the right to dignity and the right to housing under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Civil Economic Social and Cultural Rights (ICESCR) respectively. They therefore constituted soft law in the language of international jurisprudence. The trial court could refer to the Guidelines but they could not be elevated to the status of general rules of international law under article 2(5) of the Constitution.
14. The U.N Guidelines in question were issued pursuant to article 21 of the International Covenant on Economic Social and Cultural Rights (ICESCR). Strictly speaking therefore, they could only be considered under article 2(6) of the Constitution, which referred to international treaties and conventions ratified by Kenya. The Guidelines could not be regarded as being part of the treaty under which they were issued. They were tools or aids directed to State parties to help the latter in implementing the treaty or better fulfilment of their obligations thereunder.
15. The Guidelines were not “binding” upon the states parties, nor were they part of the law of Kenya in the language and meaning of article 2(6) of the Constitution, unless they had ripened into a norm of customary international law, as evidenced by widespread usage.
16. Article 43 (1) (b) of the Constitution provided that every person had the right to accessible and adequate housing and to reasonable standards of sanitation. Further under article 21(1) of the Constitution the State and State organs had the duty to observe, respect, protect, promote, and fulfill the rights and fundamental freedoms in the Bill of Rights. Under article 21(2) of the Constitution, the State had to take legislative, policy and other measures, including the setting of standards in order to achieve progressive realization of the rights guaranteed under article 43 of the Constitution. Therefore, as a socio-economic right, the right to housing had to be realized progressively.
17. The expression “progressive realization” was neither a stand-alone nor a technical phrase. It simply referred to the gradual or phased-out attainment of a goal-a human rights goal which by its very nature, could not be achieved on its own, unless first, a certain set of supportive measures were taken by the State. The exact shape of such measures would vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures could involve legislative, policy or programme initiatives including affirmative action.
18. Under article 20(5) of the Constitution, the principles that should guide a court in the enforcement of rights provided for under article 43 of the Constitution, where the state claimed that it did not have resources to implement the right were the following: -
  - a) it was the responsibility of the State to show that the resources were not available;
  - b) in allocating resources the State had to give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals and
  - c) the court, tribunal or other authority could not interfere with a decision by a state organ concerning the allocation of available resources, solely, on the basis that it would have reached a different conclusion.
19. The court would exercise its powers under article 20(5) of the Constitution by issuing interim orders whose effect was to demand evidence that would exonerate the State from liability. The orders had to be directed at the State organ responsible for the requisite progressive realization measures. That was what the trial court appeared to have done when issuing the interim orders.
20. The question as to when the right to housing accrued depended upon its progressive realization. In turn,

its realization depended upon the availability of land and other material resources.

21. An illegal occupation of private land would not create prescriptive rights over that land in favour of the occupants but the same could not be said of an “illegal occupation” of public land. To the contrary, where the landless occupied public land and established homes thereon, they did not acquire title to the land but they had a protectable right to housing over the same. The Constitution of Kenya 2010, radically transformed land tenure in the country by declaring that all land in Kenya belonged the people of Kenya collectively as a nation, communities and individuals. It also created a specific category of land known as public land. Therefore, every individual as part of the collectivity of the Kenyan nation had an interest, however indescribable, however unrecognizable, or however transient, in public land.
22. Faced with an eviction on grounds of public interest, potential evictees that occupied public land, had a right to petition the court for protection. The protection, need not necessarily be in the form of an order restraining the State agency from evicting the occupants, given the fact that the eviction may be entirely justifiable in the public interest. However, under article 23(3) of the Constitution, the court could craft orders aimed at protecting that right,

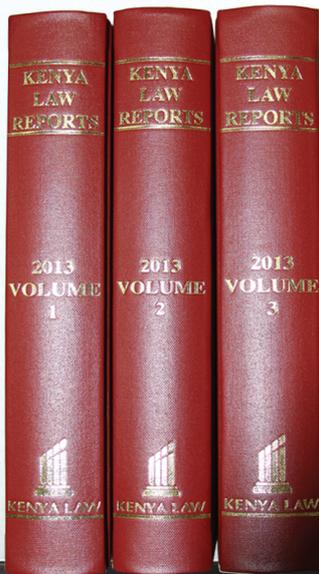
such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction (U.N Guidelines), the provision of alternative land for settlement, etc.

23. The trial court’s orders for the respondents to furnish the trial court with existing state policies and programmes on provision of shelter and access to housing were not of remedial benefit to the appellant. The trial court ought not to have included non-state actors, who were not parties to the suit in its orders.
24. The evictions that the appellant complained of were undertaken in breach of a court order. In the eviction, houses and other property were destroyed. Actions by state organs, carried out in flagrant disregard of court orders, undermined the constitutional order, more so, if they resulted in the violation of citizens’ rights.

**Orders: -**

- i. *The appeal dated February 5, 2018 was partially allowed.*
- ii. *The proceedings were remitted to the trial court, with instructions that appropriate reliefs be crafted and granted in accordance with the Supreme Court judgment and the pleadings at the High Court.*
- iii. *No orders as to costs.*

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# High Court

## The presidential “state of the nation address” directing the indefinite closure of schools declared unconstitutional for causing psychological harm to school-enrolled children and for being against the best interests of the child.

Joseph Enock Aura v Cabinet Secretary, Ministry of Education, Science & Technology & 3 others;  
Teachers Service Commission & 6 others (Interested Parties) [2020] eKLR

Constitutional Petition No. 2189 of 2020

High Court at Nairobi

JA Makau, J

November 19, 2020

Reported by Beryl Ikamari & George Kariuki

**Constitutional Law** - fundamental rights and freedoms - right to education - whether closure of schools for purposes of combating the COVID - 19 pandemic was constitutional and whether it exposed children to psychological harm - articles 10(2)(a), 10(2)(b), 22, 23, 53, 131 (2) (e), and 135; Children Act, No 8 of 2001, sections 4 32(2) and 22; Basic Education Act, No 14 of 2013, sections 4(l), 42, 55 and 70; Public Health Act, (cap 242) section 32.

**Constitutional Law** - constitutionality of subsidiary legislation - enactment relating to closure of schools in order to combat the COVID - 19 pandemic - role of the Cabinet Secretary for Health and the role of the Cabinet Secretary for Education, Science and Technology - whether the enactment met constitutional and statutory thresholds including provisions on the best interests of the child as a paramount consideration - Constitution of Kenya 2010, article 53(2) and Children Act, No 8 of 2001, sections 4 32(2) and 22; Basic Education Act, No 14 of 2013, sections 4(l), 42, 55 and 70; Public Health Act, (cap 242) section 32.

**Constitutional Law** - office of the Attorney General - the Attorney General as an advisor to the Executive - whether the Attorney General failed to advise the Executive on how to comply with the law when undertaking a closure of schools due to the COVID - 19 pandemic.

**Constitutional Law** – constitutional litigation – drafting of petitions - precision in drafting petitions - whether a petition had been drafted in a manner that sufficiently and precisely set out a claim so as to enable parties to respond to it and the court to make a determination.

**Constitutional Law** - national values and principles of governance - public participation - whether the process of the enactment of the community based learning program failed to meet public participation requirements and was therefore unconstitutional - Constitution of Kenya 2010, article 10.

### Brief facts

The petition was brought in response to the “State of the

Nation Address” by the President on March 15, 2020 that directed the indefinite closure of schools on the basis of the novel COVID-19 pandemic among other measures. The petitioner brought the petition on behalf of his children: JLA (aged 21 years), JMA (aged 18), and DTA (aged 16 years) for compensation for the psychological suffering inflicted on them by the Government of Kenya’s closure of in-person learning since March 16, 2020, in breach of their rights against such freedom from psychological torture and right to human dignity. The petition was also brought on behalf of millions of such other school going children.

The petitioner also contended that the Executive through the Ministry of Education and the Ministry of Health failed to provide the basis for the unilateral closure of schools without consultation with National and County Education Boards even after being probed by the petitioner. Those administrative actions were contended to be *ultra vires* the best interests of the child as constitutionally founded.

Lastly, the petition opposed the community based learning enacted by the Ministry of Education as a remedial measure for arresting the effects of COVID-19 on Education. The petitioners contended that the policy had no underpinning under the law.

### Issues

- i. Whether the closure of schools following a directive issued by the President of the Republic of Kenya in a “State of the National Address” as part of the measures put in place to combat the COVID – 19 pandemic was unconstitutional
- ii. Whether the closure of schools as part of the measures put in place to combat the COVID – 19 pandemic caused psychological harm to school-enrolled children
- iii. What was the role of the Cabinet Secretary for Health in the enactments of legislative measures about COVID-19 pandemic

- iv. Whether enactments related to the COVID- 19 pandemic met legal and constitutional thresholds with respect to the right to education of school enrolled-children
- v. Whether the Cabinet Secretary for Education, Science and Technology discharged its mandate under article 53(2) of the Constitution as read together with section 32(2) of the Children's Act, in the face of the open-ended closure of schools over the COVID – 19 Pandemic and whether it was in 'the best interest of the child' to re-open schools
- vi. Whether the Attorney-General was liable for his failure to advise the Executive to adhere to the relevant statutory requirements when closing schools due to the COVID – 19 Pandemic
- vii. Whether the amended Petition was sufficiently and precisely pleaded or it was based on conjecture
- viii. Whether the community based learning program as enacted was legal

**Held:**

1. In exercise of executive authority, the President was bound to promote service to the people for their well-being and benefit. In doing so, the President was required to consult with the County and National Executive Boards.
2. According to rules of practice, petitioners approaching the constitutional court were required to disclose in their petition a brief statement of facts with reference to exhibits, attached to the petition, issues arising for determination and a concise statement of argument on each issue incorporating the relevant authorities referred to.
3. The petitioner failed to specifically plead the breach allegedly committed in the President's address. In that regard, the court had inherent jurisdiction to prevent an abuse of its process and it therefore had a duty to intervene and stop such proceedings to prevent abuse of the court process.
4. In issuance of the "State of the Nation Address" pursuant to article 10 of the Constitution, the President was entitled to address the nation on any issue of national concern, as it arose anywhere. The closure of schools following a directive issued by the President of Republic of Kenya in a "State of the Nation Address" was therefore constitutional and did not violate the Constitution of Kenya in any way.
5. Injuries suffered as a result of discrimination, harassment or inhuman and degrading treatments were no less real because they did not possess tangible physical or financial consequences. The difficulty in assessing the amount of compensation for that type of injury ought not to deter the court from recognizing its potential.
6. There was genuine prospect that the effects of the indefinite closure of schools would permanently alter the lives of children caught in the apex of the COVID-19 pandemic.
7. Evidence was adequately adduced to the effect that children who faced acute deprivation in nutrition, protection or stimulation, or periods of prolonged exposure to toxic stress, during the critical window of early childhood development were likely to develop lifelong challenges as their neurological development would be impaired.
8. Children who dropped out of school would not only face a higher risk of child marriage, child labour, and teenage pregnancies, they would also see their lifetime earning potential precipitously fall. Children who experienced family breakdowns during the period of heightened stress risk would lose the sense of support and security on which children's wellbeing depended.
9. Constitutionally, information required by any person ought to have at first been requested for the enforcement or protection of another right and been denied before a violation of the right to information could be alleged. The petitioner failed to prove the allegation against provision of information to the required standard of proof.
10. The benefit of the petitioner's school going children and other school children attending school in-person out-weighed the risks of COVID – 19 as urged by the respondent as long as the respondents ensured that COVID – 19 measures and safety protocols were put in place and fully complied with in each and every school by both the learners and the teachers.
11. The best interest of any child was to be in school in-person as there was more control, guidance and provision of health safe measures in the school than leaving the children roaming in the villages or shanties or towns without observing any COVID-19 Health Protocols.
12. It was important for school-going children to have the social interaction and academic development that could be reaped only from in-person learning. Therefore, the school going children would reasonably be safe in school given that health conditions that would place children at health risk were given priority.
13. The acts of default alleged against the Attorney General were not particularized or specifically pleaded and there was no demonstration from the petitioner that any such impugned acts were done. There was no demonstration on part of the petitioner that the impugned acts were done in bad faith for executing the functions, power's or duties of the commission so as to render the Attorney General liable to any action, claim or demand whatsoever.

There was therefore no basis in the petitioners' allegation that the Attorney General failed to advise the Executive.

14. The petition was drawn in accordance with guidelines statutorily set out for drawing constitutional petitions. The petition was therefore not an abuse of the court process as the relevant articles were clearly stated as were the particulars.
15. Evidence was sufficiently adduced to the effect that the interest of justice as regards the welfare of children would be better served when the children were at school than when out of school without any control as regard person-to-person contact. The respondents could have given directions when most of the children were at school.
16. The Executive stepped beyond what the law and the Constitution permitted. They could therefore not seek refuge in illegality and hide under the twin doctrines of parliamentary privilege and separation of powers to escape judicial scrutiny.
17. The respondents did not rebut the petitioner's contention that the community Based Learning program was unilaterally commenced, that there were no consultations with the stakeholders and that they were not on relevant provisions of the Basic Education Act.
18. There was a sixteen-member Committee appointed by the Minister but there was no evidence that the committee made any report on Community Based Learning Program and even if they did so, it was not supported by any provisions of the Basic Education Act. The project was *ultra vires* the Act and was therefore null and void for all purposes and intentions.

#### **Orders:-**

- i. *A declaratory Order was issued declaring that each of the petitioner's school-going children subject of this petition, JLA (aged 21 years), JMA (aged 18), and DTA (aged 16 years) and all equally implicated Kenyan school-going children and learner's fundamental rights and freedoms in relation to their education as enumerated in the petition were contravened and grossly violated by the respondents as enumerated in the petition.*
- ii. *An order was issued declaring that pursuant to article 10 (2) (a) and 10 (2) (b) of the Constitution of Kenya, the 1st respondent was bound by the principles of patriotism, public participation, transparency, fairness, human rights, and good governance in the execution of the terms of his portfolio and duties appurtenant to the education sector in Kenya as spelt out in the applicable statutory regimes, and any recommendations by any person or entity to the 1st respondent on the closure*

*and reopening program of schools in Kenya at any time conducted without involving the National Education Board, the respective County Education Boards, the County Parents' Associations from school through a delegate system as mandated in the Third Schedule to the Basic Education Act was null and void.*

- iii. *A declaratory order was issued declaring that, in prolonging the open-ended closure of schools and learning institutions in Kenya from March 16, 2020 to date without any consultations with the parents, guardian of school-enrolled children, affected learners in diverse learning institutions, in conjunct with the National Education Board and respective County Education Boards, the 1st respondent's (Cabinet Secretary, in charge of Education's) action was ultra vires Section 4 (I) and Section 70 of the Basic Education Act.*
- iv. *A declaratory order issued declaring that the "community-based" learning project announced by the 1st respondent on July 30, 2020 in conjunct with the 1st Interested Party, (Teachers Service Commission) was null and void for want of public participation and consultation with the National Education Board, respective County boards across Kenya, and the petitioner via his cited children's school, and like parents of school-enrolled children across Kenya.*
- v. *An order of injunction was issued to restrain the 1st respondent by himself, his assistants and partners, agents, servants, or otherwise howsoever, together with the 1st interested party, Teacher Service Commission from undertaking, or further executing the "community-based learning" project in schools and learning institutions across Kenya as announced by the 1st respondent on July 30, 2020.*
- vi. *An order of mandamus was issued to compel the 1st respondent to immediately direct the re-opening of in-person learning institutions and schools in Kenya, observing the health and safety guidelines and considering a safe environment, commencing forthwith and not later than 60 days of the order for learning institutions and schools across the Republic of Kenya so as to have all the learners in learning institutions and schools enjoying in-person learning.*
- vii. *An order of certiorari by way of judicial review was issued to bring into the court for purposes of quashing, the 1st respondent's decision made on July 30, 2020 purporting to declare and execute "community-based learning" program in schools, learning institutions, churches and places of worship across Kenya, for lacking of public participation and being ultra vires Section 42 (1) of the Basic Education Act, Act No. 14 of 2013.*
- viii. *Each party was directed to bear their own costs in the petition.*

## State corporations and parastatals were not offices in the public service

Katiba Institute & another v Attorney General & another [2020] eKLR

Constitutional Petition 331 of 2016

High Court at Nairobi

J W Lesiit, E C Mwita & L M Njuguna, JJ

December 4, 2020

Reported by Chelimo Eunice

**Constitutional Law** – interpretation of the constitution – principles applicable in constitutional interpretation – holistic interpretation of the Constitution – meaning of holistic interpretation of the Constitution – constitutionality of statutes – principles for determining constitutional validity of a statute – constitutionality of statutory provisions which conferred discretion on the President and his cabinet secretaries to make appointments in a manner other than as contemplated by Constitution and applicable values and principles, in that they did not require the appointments to be open, transparent or competitive – construing statutes enacted prior to the 2010 Constitution – Constitution of Kenya, 2010, articles 232, 259, sixth schedule, section 7; Public Officer Ethics Act, section 22; Public Service (Values and Principles) Act, section 10.

**Constitutional Law** – constitutional commissions – Public Service Commission (PSC) – establishment of the Public Service Commission – functions and mandate of the Public Service Commission – whether the Public Service Commission had the mandate to appoint chairpersons and members of boards of state corporations and parastatals – Constitution of Kenya, 2010, articles 233 and 234.

**Constitutional Law** – national values and principles of governance – values and principles of public service – requirement that national values and principles of governance bound all state organs, state officers and public officers – requirement that values and principles of public service applied to public service in all state organs in both levels of government and all state corporations – requirement for fair competition and merit as the basis of appointments and promotions in the public service – whether it was mandatory to comply with the constitutional principles of good governance and values and principles of public service or they could be realized progressively – whether the appointment of various chairpersons and members of boards of state corporations and parastatals either by the President or respective cabinet secretaries met the constitutional test of transparency, openness, meritocracy and competitiveness – Constitution of Kenya, 2010, articles 10 and 232; Public Service (Values and Principles) Act, section 10.

**Statutes** – interpretation of statutory provisions – Public Officer Ethics Act, Public Service Commission Act – interpretation of section 2 of the Public Officer Ethics Act and section 2 of the Public Service Commission Act on definition of public officer – whether the definition of public officer in section 2 of both the Public Officer Ethics Act and

the Public Service Commission Act conformed with the definition provided for by the Constitution – who was a public officer – who was a public office – test for determining whether an office was a public office – whether state corporations and parastatals were offices in the public service – whether positions of chairpersons and members of boards of state corporations and parastatals were offices in the public service – Constitution of Kenya, 2010, article 260; Public Officer Ethics Act, section 2; Public Service Commission Act, section 2.

**Constitutional Law** – public finance – public money – what was meant by public money – public funds – consolidated fund – management of the consolidated fund – whether state corporations and parastatals were funded using public money – whether remuneration and benefits of state corporations and parastatals were drawn from the consolidated fund – Constitution of Kenya, 2010, article 206; Exchequer and Audit Act, section 2; Public Finance and Management Act, section 2; State Corporations Act, sections 10 and 11.

### Brief facts

The petition challenged the selection and appointment by the President and members of his cabinet, of persons to the positions of chairpersons and members of boards to various state corporations and parastatals. They sought to have all appointments made by the President or cabinet secretaries gazetted in Gazette Notice volumes; CXVIII – No. 23, CXVIII – No. 28, CXVIII – No. 62, CXVIII – No. 66, CXVIII – No. 70 and CXVII – No. 72 (impugned appointments) invalidated. The basis for that challenge was that the mandate to select and appoint persons to those positions ought to be exercised by the 2nd respondent, and in accordance with the values and principles in articles 10 and 232 of the Constitution. They also sought to nullify provisions in various statutes that purported to give power to the President and his cabinet secretaries to make such appointments (impugned provisions).

The petitioners further sought a declaration that any selection and appointment of persons as chairpersons and members of boards of state corporations and parastatals had to be based on the principles including fair competition and merit and that the process had to be transparent and accountable. They argued that such positions were public offices in the public service, and that those appointed to those positions were public

officers and were, therefore, subject to the constitutional provisions applicable to public service.

The respondents opposed the petition arguing, among others, that state corporations and parastatals were not offices in the national or county governments or public service, that most of the impugned provisions were in existence before the 2010 Constitution, and that the Constitution provided a solution where such Acts were found not to be in conformity with it.

#### Issues

- i. Who was a public officer and what constituted a public office?
- ii. Whether state corporations and parastatals were offices in the public service.
- iii. Whether remuneration and benefits payable to state corporations and parastatals were drawn from the consolidated fund or money directly provided by parliament.
- iv. Whether positions of chairpersons and members of boards of state corporations and parastatals were offices in the public service.
- v. What principles applied in constitutional interpretation?
- vi. What principles were applicable in determining constitutional validity of a statute?
- vii. Whether statutory provisions which provided for appointment of chairpersons and members of boards of state corporations and parastatals in a manner other than as contemplated by Constitution and applicable values and principles were constitutional.
- viii. How were statutes enacted prior to the 2010 Constitution, construed?
- ix. Whether the Public Service Commission had the mandate to appoint chairpersons and members of boards of state corporations and parastatals.
- x. Whether constitutional principles of good governance and values and principles of public service could be realized progressively.

#### Held

1. Article 259(1) of the Constitution enjoined courts to interpret the Constitution in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance.
2. The Constitution was not simply a statute which mechanically defined the structures of government and the relationship between government and the governed. It was a mirror reflecting the national soul, the identification of ideas and aspirations of a nation, the articulation of the values bonding its people and

disciplining its government. The spirit and tenor of the Constitution had to preside and permeate the process of judicial interpretation and judicial discretion.

3. The Constitution was an organic instrument. Although it was enacted in the form of a statute, it was *sui generis*. It had to be interpreted broadly, liberally and purposively so as to avoid the austerity of tabulated legalism and to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation. Constitutional provisions had to be read to give values and aspirations of the people. Courts had to appreciate throughout that the Constitution, of necessity, had principles and values embodied in it. That the Constitution was a living piece of legislation, it was a living document.
4. Holistic interpretation of the Constitution was advocated for. Holistic interpretation meant interpreting the Constitution in context. It was contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution meant in light of its history, of the issues in dispute and of the prevailing circumstances. Such scheme of interpretation did not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result.
5. The Constitution established various commissions and independent offices. Article 233 of the Constitution established the 2nd respondent (Public Service commission). Article 234(2) of the Constitution as read with the Public Service Commission Act (PSC Act) provided for the functions and mandate of the 2nd respondent. According to the PSC Act, the functions of the 2nd respondent included, establishing and abolishing offices in the public service, appointing persons to hold or act in those offices and promoting values and principles in articles 10 and 232 of the Constitution throughout the public service. Article 232(2) of the Constitution set out the principles of public service and stated that the values and principles applied to public service in all state organs in both levels of government and all state corporations.
6. Different statutes defined what was meant by a public officer. They included section 2 of the Public Officer Ethics Act and section 2 of the PSC Act. The Leadership and Integrity Act, and Public Service (Values and Principles) Act adopted the definition of public officer assigned by article 260 of the Constitution. The definitions in the statutes had to be considered alongside that in the Constitution. Article 260 of the Constitution defined public officer to mean any state officer or any person, other than a

state officer, who held a public office.

7. The Public Officer Ethics Act, PSC Act and Public Service (Values and Principles) Act did not define public office but adopted the meaning of public officer in article 260 of the Constitution. On the other hand, the Leadership and Integrity Act did not define public office, but defined public entity.
8. According to article 260 of the Constitution, determination of whether an office was a public office depended on two tests. The first test being whether it was an office in the national government, county government or public service. The second test was if the remuneration thereof was from the consolidated fund or money directly provided by parliament.
9. On the first test, state corporations and parastatals were not offices in the public service because they were neither offices in the national government nor county government as defined by the Constitution. The Constitution was also clear that to be a public service, there had to be the collectivity of individuals who were performing a function within a commission, office, agency or other body established under the Constitution, except state officers. More importantly, state corporations and parastatals were not offices established under the Constitution. On the second test, even if state corporations and parastatals were to be deemed to be offices in the public service, they would still not pass the test, if remuneration and benefits thereof were not payable directly from the consolidated fund or out of money provided by parliament.
10. Article 206 of the Constitution established the consolidated fund and its management. The consolidated fund was the main bank account of the national government into which all money raised by it or received on its behalf was paid. Money from that account could only be withdrawn with the authority of parliament and such withdrawal approved by the Controller of Budget. In that regard, there was no submission before court that remuneration and benefits of state corporations and parastatals were either drawn or not from the consolidated fund.
11. Section 2 of both the Exchequer and Audit Act and the Public Finance and Management Act, 2012 defined what is meant by public money. It followed, therefore, that public money was any money in the possession of the national government, either raised on its behalf or held by it in trust for third parties.
12. According to sections 10 and 11 of the State Corporations Act and the definition of public money, state corporations were funded using public funds by the treasury through line ministries. That funding though was not exclusive since they also generated their own money from other sources. That was borne by the fact that they submitted estimates of their revenue and expenditure for the following financial year, accompanied by proposals for funding of the projects to be undertaken. That was testimony to the fact that state corporations and parastatals generated their own revenue for expenditure and their funding was not necessarily wholly provided for by parliament.
13. State corporations and parastatals, therefore, were not offices in public service, state organs or bodies established under the Constitution. Remuneration and benefits of chairpersons and members of boards of those bodies were not drawn from the consolidated fund. They were, however, funded by public money from the treasury through line ministries. That funding notwithstanding, and not being state organs or bodies established under the Constitution, they did not qualify as offices in the public service.
14. Public service was the collectivity of all individuals, other than state officers, performing a function within a state organ, while state organ was either a commission, office, agency or other body established under the Constitution. That meant that the collectivity of the individuals had to be performing a function within a state organ established under the Constitution. Offices in state corporations and parastatals were not commissions, offices, agencies or other bodies established under the Constitution. They were, therefore, not state organs within the meaning of the Constitution. Consequently, positions of chairpersons and members of boards of state corporations and parastatals were not offices in the public service.
15. Since positions in state corporations and parastatals were not positions in the public service, the argument that the impugned appointments ought to have been made by the 2nd respondent was untenable. Whereas the 2nd respondent was the institution responsible for establishing and abolishing offices in the public service and appointing persons to hold or act in those offices, appointments to positions in state corporations and parastatals could only be made pursuant to provisions in the statutes establishing those bodies.
16. The Constitution in article 132(4)(a) conferred on the President powers to perform any other executive function provided for in the Constitution or in national legislation. The impugned provisions were national legislations which gave the President power to appoint persons to positions of chairpersons or members of boards in respective state corporations and parastatals. Where national legislation provided that an appointment be made by the President, the appointment could only be made as provided for.
17. The constitutional architecture created room under article 132 for the President to perform some duties

as a Head of State, which was a noble thing in a constitutional democracy. One of the noble tasks given to the President was to make state and public appointments even where he had no other role to play in the process of appointment.

18. The argument that cabinet secretaries could not make the impugned appointments was also untenable. The appointments were made pursuant to statutory provisions in statutes establishing those state corporations and parastatals. In that regard, the accusation leveled against the 2nd respondent, of its inaction or omission, to appoint chairpersons and board members to state corporations and parastatals was unjustified. The 2nd respondent could not be blamed for not appointing persons to those positions, given that the laws in place were clear on the appointing authorities. There was no justifiable cause to accuse the 2nd respondent as having committed dereliction of duty. The 2nd respondent could not purport to act where the law dictated otherwise which would result into unwarranted antagonism. There was no fault on the part of the 2nd respondent in that regard. The President and cabinet secretaries had the statutory mandate to make the impugned appointments.
19. In the preamble to the Constitution, the people aspired a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. According to article 4(2) of the Constitution, Kenya was a multi-party democratic state founded on the national values and principles of governance. The national values and principles of governance which bound all state organs in article 10 of the Constitution included the rule of law, democracy and participation of the people, transparency and accountability. The supremacy of the Constitution was emphasized in article 2(1) of Constitution.
20. Article 10 (2) of the Constitution was on national values and principles of governance, while article 232 of the Constitution was on values and principles of public service. Article 232 of the Constitution provided that fair competition and merit was the basis of appointments and promotions in the public service. That was subject to ensuring representation of Kenya's diverse communities and affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of men and women, members of all ethnic groups and persons with disabilities. Values and principles of public service applied to public service in all state organs in both levels of government and all state corporations.
21. Parliament was mandated to enact legislation to give full effect to article 232 of the Constitution. In compliance with that mandate, parliament enacted Public Service (Values and Principles) Act. Section 10 of the Public Service (Values and Principles) Act provided that the public service, a public institution or an authorized officer, ought to ensure that public officers were appointed and promoted on basis of fair competition and merit. That, however, was subject to affirmative action as demanded by both the Constitution and the Public Service (Values and Principles) Act. Section 10(3) of the Public Service (Values and Principles) Act required each public institution or authorized officer to develop a system for the provision of relevant information that promoted fairness and merit in appointments and promotions.
22. The respondents did not show at all that the impugned appointments were made transparently, openly and competitively. There was no attempt at all to ensure compliance with the constitutional principles of public service, which applied to state corporations and parastatals.
23. Kenya's constitutional scheme did not require deliberate or progressive reforms. It was the supreme law and bound all persons, state and public officers. Compliance with constitutional principles of public service entailed putting in place mechanisms that guaranteed enforcement of those requirements. When the Constitution spoke of transparency, fair competition and merit, it meant just that. The constitutional principles of public service were not mere suggestions. They were commands that had to be complied with and obeyed without exception.
24. The Constitution also required appointments to be subject to affirmative action. The marginalized, gender and persons with disabilities were to be considered and adequately represented. That conferred a guaranteed right to those groups, which right was protected by the Constitution. The constitutional theme was maximization and not minimization, expansion not constriction, when it came to enjoyment and concomitant facilitation and interpretation. Public institution or authorized officer concerned had to ensure that public officers were appointed and promoted on the basis of fair competition and merit and demonstrable transparency, subject to affirmative action. The 1st respondent was required to demonstrate that there was indeed an open and transparent process, leading to the impugned appointments, in compliance with the constitutional command.
25. The respondents did not discharge their noble duty. The Constitution provided for compliance with the principles of good governance and values and principles of public service. It did not provide that those principles be progressively realized.

The respondents had an obligation to show, to the satisfaction of the court, that the appointments were made as demanded by the Constitution and not otherwise.

26. The argument that the court could not invalidate the appointments because that would amount to making adverse orders against persons who were not parties to the petition would not stand in the face of clear constitutional provisions. The petitioners had not challenged the competence of the persons whose appointments had been questioned. What was challenged was the process through which the appointments were made. Even if those persons were made parties to the petition, they could not argue that their appointments complied with the Constitution. Moreover, some were joined in the petition but did not attend at the hearing. Their failure to participate in the petition could not in any way affect the outcome of the petition.
27. The people of Kenya desired that appointments to be made in an open, transparent and inclusive manner taking into account, the marginalized and people with disabilities. They deserved no less. They were entitled to their wish as a matter of right and not privilege. It was a constitutional compulsion. Thus, the impugned appointments did not comply with constitutional values and principles in articles 10 and 232 of the Constitution and the Public Service (Values and Principles) Act.
28. Article 2(4) of the Constitution provided that any law that was inconsistent with the Constitution was void to the extent of the inconsistency, and any act or omission in contravention of the Constitution was invalid. Courts had developed general principles on which to test constitutionality of statutes. First, there was a general but rebuttable presumption that a statute or statutory provision was constitutional and the burden was on the person alleging unconstitutionality to prove the invalidity. It had to be assumed that the legislature understood and appreciated the needs of the people and that the laws it enacted were directed to the problems which were made manifest by experience and that the elected representatives assembled in a legislature, enacted laws which they considered to be reasonable for the purpose for which they were enacted. Presumption was, therefore, in favour of constitutionality of an enactment.
29. The second principle for determining constitutional validity of a statute was by examining its purpose or effect. The purpose of enacting a legislation, or the effect of its implementation, would lead to nullification of the statute or its provision, if found to be inconsistent with the Constitution. If its purpose did not infringe a right guaranteed by the Constitution, the court had to go further and examine the effect of its implementation. If either its purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the impugned statute or section, thereof, would be declared unconstitutional. The object and purpose could be discerned from the intention expressed in the statute itself.
30. The common denominator in all the impugned provisions, save for, the Tourism Act, The National Youth Service Act, 2018 and the National Youth Council Act, was that they conferred discretion on the President and his cabinet secretaries to appoint chairpersons and members of boards of state corporations and parastatals, in a manner other than as contemplated by the Constitution and Public Service (Values and Principles) Act, in that they did not require the appointments to be open, transparent or competitive.
31. Section 22 of the Public Officer Ethics Act provided that a public officer ought to practice and promote the principle that public officers were to be selected on the basis of integrity, competence and suitability, or elected in fair elections. On the other hand, section 10(1) of the Public Service (Values and Principles) Act, a normative derivative of article 232 of the Constitution, provided that the public service, institutions or authorized officers were to ensure that public officers were appointed and promoted on the basis of fair competition and merit, subject to affirmative action.
32. Some of the impugned provisions did not require that appointments be made in a transparent and competitive manner. The provisions simply conferred discretion on the appointing authorities to make such appointments as they deemed fit. Most of the provisions did not require that vacancies be advertised, that applicants be subjected to interviews and that only the best would be appointed. Some of the provisions merely laid down qualifications without demanding that there be transparency, and that appointments be based on fair competition and merit. They conferred discretion on the President and his cabinet to make appointments without regard to the Constitution and applicable values and principles. That violated the founding values of transparency and accountability in articles 10 of the Constitution and the values and principles of public service in article 232(1) of the Constitution, which were also emphasized in section 10 of the Public Service (Values and Principles) Act.
33. Ordinarily, a statute or its provision ought to be declared constitutionally invalid for going against the Constitution. However, the challenge was directed to statutes, some of which were enacted

prior to the 2010 Constitution. Section 7 of the sixth schedule of the Constitution demanded that laws enacted prior to 2010, be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution. That was, the impugned provisions on appointment ought to be read as requiring that the appointments be made as required by article 232 of the Constitution, as amplified in sections 10 and 22 of the Public Service (Values and Principles) Act and Public Officer Ethics Act, respectively. That was the bare minimum institutions and authorized officers had to meet when making appointments to state corporations and parastatals, not only those of chairpersons and members of boards, but also all appointments within those institutions.

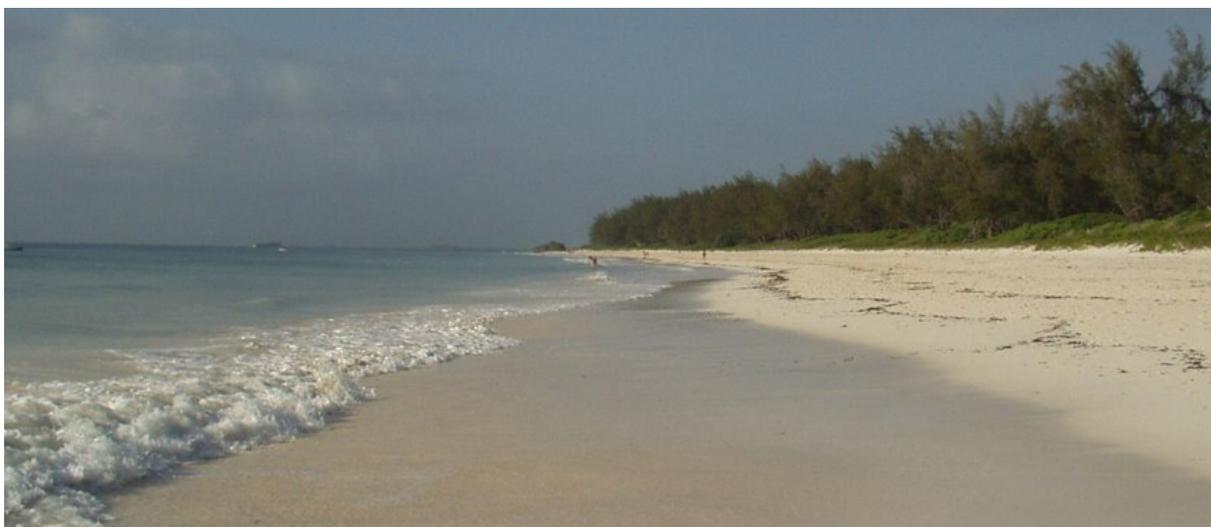
34. Even though some of the post 2010 statutes did not expressly state that appointments be made in an open, transparent, and based on fair competition and merit, the institutions and authorized officers responsible for making the appointments, had no excuse for not complying with the Constitution and the law. Any appointments whether made under the pre or post 2010 statutes, had to be in tandem with the Public Service (Values and Principles) Act, 2015, which Act was enacted to give effect to the provisions of article 232 of the Constitution. That was the best way to read the impugned provisions, so as to be in conformity with the Constitution, rather than invalidating them. A law or regulation ought to, as much as possible, be read to be consistent and be declared unconstitutional or void, only where it was impossible to rationalize or reconcile it with the Constitution or the Act. It was the duty of a judicial officer to interpret legislation in conformity with the Constitution, so far as that was reasonably possible, while on the other hand, the legislature was under a duty to pass legislation that was reasonably clear.
35. It was not prudent to invalidate the impugned provisions when the appointments could be made

in conformity with articles 10 and 232 of the Constitution, as read with section 10 of the Public Service (Values and Principles) Act. The appointments had to, however, be transparent, accountable, competitive and merit based, subject to affirmative action. In order to achieve that, parliament had a duty to ensure that legislations were aligned with the Constitution and Public Service (Values and Principles) Act, when it came to appointments in state corporations and parastatals. The court was, thus, unable to declare the impugned provisions unconstitutional. It, however, emphasized that all appointments to state corporations and parastatals had to comply with the principles in article 10 and 232 of the Constitution and Public Service (Values and Principles) Act.

*Petition partly allowed, with each party bearing own costs.*

#### Orders

- i. *A declaration issued that all appointments made by the President or cabinet secretaries on; March 11, 2016 and gazetted in Gazette Notice Vol. CXVIII – No. 23; March 18, 2016 and gazetted in Gazette Vol. CXVIII – No. 28; June 10, 2016 and gazetted in Gazette No. Vol CXVIII-No. 62; June 17, 2016 under Gazette Notice Vol. CXVIII – No. 66; June 24, 2016, Gazette Notice Vol. CXVIII – No. 70; and July 1, 2016 vide Gazette Notice Vol. CXVII– No. 72, were unconstitutional for violating articles 10 and 232 of the Constitution and the Public Service (Values and Principles) Act, and therefore invalid.*
- ii. *An order issued quashing the appointments made on March 11, 2016 and gazetted in Gazette Notice Vol. CXVIII – No. 23; March 18, 2016 and gazetted in Gazette Vol. CXVIII – No. 28; June 10, 2016 and gazetted in Gazette No. Vol CXVIII-No. 62; June 17, 2016 under Gazette Notice Vol. CXVIII – No. 66; June 24, 2016, Gazette Notice Vol. CXVIII – No. 70; and July 1, 2016 vide Gazette Notice Vol. CXVII– No. 72.*



## Failure to investigate and prosecute sexual and gender based violence related crimes is a violation of the rights to life; the prohibition of torture, inhuman and degrading treatment; and the security of the person

Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (*Amicus Curiae*) [2020] eKLR

Petition No. 122 of 2013

High Court at Nairobi

W Korir, J

December 10, 2020

Reported by Kakai Toili

**Constitutional Law** – *fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to life, right to freedom and security of the person, freedom from torture and cruel, inhuman or degrading treatment or punishment and the right to appropriate remedy – claim that the police failed to investigate rape reports and also failed to make arrests during the 2007/2008 post-election violence period - factors to consider in determining a claim for violation of constitutional rights - factors to consider in determining whether the Government was liable for civil disorder - whether the failure to investigate and make arrests amounted to a violation of the victims constitutional rights – Constitution of Kenya, 2010, articles 23, 156, 157 and 165; Constitution of Kenya (Repealed) sections 70, 71 and 74; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, article 16; International Covenant on Civil and Political Rights, 1966, articles 6, 7 and 9; Universal Declaration of Human Rights, 1948, articles 3 and 5; African Charter on Human and People's Rights, 1981, articles 4, 5 and 6; Protocol to the African Charter on Human and People's Right on the Rights of Women in Africa, 2003, article 4.*

**Constitutional law** – *application of the Constitution – retrospective application of the Constitution - whether article 22 of the Constitution on the right to institute public interest litigation could apply retrospectively – whether the right to information under the Constitution of Kenya, 2010, could be applied to requests to information on the 2007/2008 post-election violence which predated the Constitution - Constitution of Kenya, 2010, article 22 and 35; Constitution of Kenya (Repealed) section 84.*

**Constitutional Law** – *fundamental rights and freedoms – freedom from torture and cruel, inhuman or degrading treatment or punishment - elements and the nature of torture - whether forced circumcision amounted to rape.*

**Constitutional Law** – *fundamental rights and freedoms – right to information - what were the factors to consider in determining a violation of the right to information – Constitution of Kenya, 2010, article 35.*

**Civil Practice and Procedure** – *res judicata – elements of res judicata - what were the elements required to prove that*

*a case was res judicata.*

### Brief facts

Following the announcement of results of the December 2007 general election, widespread violence and demonstrations ensued. During that period of unrest several women, men and children were subjected to forms of sexual and gender based violence (SGBV). The petitioners brought the instant petition against the respondents for their failure to anticipate and prepare adequate and lawful policing responses to the anticipated civil unrest that contributed to the SGBV, and the failure to provide effective remedies to the victims of SGBV which violated the fundamental rights of the 5th to 12th petitioners and other victims. The rights alleged to have been violated included; the right to life; the prohibition of torture, inhuman and degrading treatment; the right to security of the person; the right to protection of the law; the right to equality before the law and freedom from discrimination; the right to information; and the right to remedy and rehabilitation.

The petitioners brought the instant action against the 1st and 4th respondents for among others the failure to train State security agents (police) in lawful methods of conducting law enforcement operations to prevent the commission of crimes by the police; failure to take adequate security measures, particularly the failure to plan and prepare law enforcement operations during PEV to protect victims from SGBV; and failure to supervise police and to prevent and punish crimes committed by police. It was claimed that the 5th and 6th respondents' staff and or employees failed to provide emergency medical services, particularly where the perpetrators were public officials such as police officers.

The petitioners contended that the 1st, 2nd, 3rd and 4th respondents had failed to investigate or take meaningful steps towards ensuring the redressing of gross human rights violations perpetrated against the victims. The petitioners therefore sought among others; a declaratory order to the effect that the right to life, the prohibition of torture, inhuman and degrading treatment, the right to security of the person, the right to protection of the law,

the right to equality and freedom from discrimination, the right to information, and the right to remedy were violated in relation to the petitioners 5 to 12 (both inclusive) and other victims of SGBV during the PEV, as a result of the failure of the Government of Kenya to protect those rights;

#### Issues

- i. Whether article 22 of the Constitution of Kenya, 2010, on the right to institute public interest litigation could apply retrospectively.
- ii. What were the elements required to prove that a case was *res judicata*?
- iii. What were the elements and the nature of torture and whether forced circumcision amounted to rape?
- iv. What were the factors to consider in determining a claim for violation of constitutional rights to life and property by the Government?
- v. What were the factors to be considered in determining whether the Government was liable for civil disorder?
- vi. Whether the failure by the police to investigate a rape report and make arrests amounted to a violation of the right to life, security of the person and protection from torture, inhuman and degrading treatment or punishment and right to appropriate remedy.
- vii. Whether the right to information under the Constitution of Kenya, 2010, (Constitution) could be applied to requests to information on PEV which predated the Constitution.
- viii. What were the factors to consider in determining violation of the right to information?

#### Relevant provisions of the law

##### Constitution of Kenya, 2010

##### Article 22(1)

*Every person has the right to institute court proceedings claiming the right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*

##### Article 35

1. *Every citizen has the right of access to—*
  - (a) *information held by the State; and*
  - (b) *information held by another person and required for the exercise or protection of any right or fundamental freedom.*
2. ....
3. *The State shall publish and publicise any important information affecting the nation.*

#### Held

1. There was no equivalent of article 22 of the Constitution of Kenya, 2010 (Constitution), under the repealed Constitution and according to section 84 of that Constitution; proceedings could only be instituted for the violation of rights on behalf of a detained person. Moreover, the words used in article 22(1) did not contain suggestions of retrospectivity. The right to institute public interest litigation only existed in the context of the Bill of Rights of the Constitution. Therefore, article 22 and the right to institute proceedings on behalf of all victims of SGBV could not apply retrospectively.
2. The elements required to prove that a case was *res judicata* were:
  - a. The suit or issue was directly and substantially in issue in the former suit.
  - b. The former suit was between the same parties or parties under whom they or any of them claimed.
  - c. The parties were litigating under the same title.
  - d. The issue was heard and finally determined in the former suit.
  - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.
3. From a perusal of the pleadings in Petition No. 273 of 2011, the International Commission of Jurists-Kenya Chapter was a petitioner in the matter and the 1st respondent in the instant case was the 1st respondent therein. The interested party in the instant case was also the petitioner in that matter, hence it was not litigating under the same title.
4. There was no similarity of parties in the previous suit and the instant suit. The court was alive to the principle that parties could not evade the application of the doctrine of *res judicata* to their case by litigating under different names.
5. Beyond the issue of parties, *res judicata* was concerned with direct and substantive issues. Although the issue of SGBV was also pursued in the previous matter, it did not form the crux of the petition as it did in the instant petition. Furthermore, the subject matters of the two petitions differed since the previous petition was exclusively concerned with persons living in IDP camps, whereas the instant matter concerned persons who were generally victims of SGBV which occurred during PEV. The respondents had not averred nor proved that the claims specific to the 5th to 12th petitioners had been previously addressed by a court of competent jurisdiction. The instant matter was not *res judicata* and even though two of the parties were litigating under the same title, the issues in the instant petition were not directly or substantively in

issue in the previous petition.

6. The right to life, the right to protection from torture and right to security of the person were guaranteed under sections 70, 71 and 74 of the repealed Constitution, and were also protected by articles 3 and 5 of the Universal Declaration of Human Rights (UDHR); articles 6, 7 and 9 of the International Covenant on Civil and Political Rights (ICCPR); articles 4, 5 and 6 of the African Charter on Human and People's Rights (Banjul Charter); and article 4 of the Protocol to the African Charter on Human and People's Right on the Rights of Women in Africa (Maputo Protocol).
7. According to the Human Rights Committee's General Comment No. 31 on the ICCPR at paragraph 8, the State had an obligation to prevent violations by State actors and non-State actors. In other words, the State had to protect citizens from threats to their rights.
8. The State had to respect the right to life by refraining to engage in conduct which would arbitrarily deprive the right. Sexual violence was recognised as an infringement on the right to life under article 4 of the Maputo Protocol as it expressly stated that States, in protecting and realising the right of women to life, and the integrity and security of their person, should enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex.
9. Rape had elements of torture which were: the severe infliction of pain or suffering for a number of purposes including intimidation or discrimination. However, torture was perpetrated by State actors or with their acquiescence, consent or instigation. The UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) in its General Recommendation No. 19 acknowledged that gender-based violence violated the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and the right to liberty and security of person.
10. There was no reason why the definition of torture should not be extended to cases of forced circumcision. The elements of inhuman and degrading treatment or punishment described in article 16 of the Convention of Torture were present in such a case.
11. Article 9 of the ICCPR placed an obligation on the State to protect the right to security of the person of non-detained persons. The 6th, 5th and 9th petitioners testified to having been raped by GSU officers. The 5th and 9th petitioners did not report the incidents to the police. However, they were certain that they identified their violators as GSU officers due to their uniform. Their testimonies demonstrated that State actors were involved in acts of sexual violence against the citizenry, and were directly responsible for the violations of their rights. The State could not escape liability, there was a violation of the right to life, protection from torture, inhuman and degrading treatment and right to security of the person of the 5th, 6th and 9th petitioners.
12. The 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> petitioners who were assaulted by members of the public had unfortunately not provided evidence to the effect that the persons who assaulted them did so with the instigation, consent or acquiescence of a public official or other person acting in an official capacity.
13. The police relinquished their responsibility to investigate the 8th petitioner's report fully and arrest all the three men who had raped her. That was a prime example of how the State could be liable for the violation of right by third parties as once the petitioner reported the rape, the police had a duty to investigate her claim and protect her from further harm. There was no averment by any of the respondents that the Director of Public Prosecutions (DPP) made a determination that the evidence provided to the police by the 8th petitioner was insufficient to mount a prosecution against the two suspects who were not arrested by the Police.
14. The State had a duty to maintain law and order including the protection of life and property. However, as a general rule, that duty was owed generally to the public at large and not specifically to any particular person within Kenya. For a person to succeed in a claim for alleged violation of constitutional rights, it had to be demonstrated that there existed a special relationship between the victim and the police on the basis of which there was assurance of police protection, or where, for instance the police had prior information or warning of the likelihood of violence taking place in a particular area or against specific homes but failed to offer the required protection. In such cases, therefore the State could be held liable where violations of the rights protected and guaranteed in the Bill of Rights were proved even when those violations were occasioned by non-State actors provided that the duty of care was properly activated.
15. For the Government to be liable for civil disorder;-
  - a. the victim had to prove that the Government owed him a specific duty of care;
  - b. that the police ignored impeccable information of an impending attack against specific person(s);
  - c. that the police negligently or deliberately failed to offer protection to the victims and their property;

- d. that the police or other Government agencies played a part in the creation of state of insecurity or did some acts that rendered the victims more vulnerable or increased their danger.
16. As evidenced by the statements of the victim-petitioners, the State did indeed take into account any intelligence that it could have received on impending violence and put in place police officers to maintain peace. The true magnitude of the 2007-2008 PEV could not have been foreseen or avoided, due to its sudden and drawn-out nature. It was impossible to have a police officer protect every Kenyan citizen from harm, particularly due to the low ratio of police officers to the population of Kenya. As such, the State and the police did what they could to protect the population at large, even if the petitioners themselves did not benefit from that protection.
  17. Regarding the 5th, 6th, and 9th petitioners who were assaulted by State actors, their rights to life, the security of the person, and protection from torture were infringed by the actions of the State actors which, in line with national, regional and international law, were regarded as actions by the State itself. Additionally, the 8th petitioner who was assaulted by non-State actors was owed a duty of care by the police to investigate her report and make arrests, and when they failed to do so they in effect violated her rights to life; security of the person; and protection from torture, inhuman and degrading treatment or punishment.
  18. The 7th, 10th, 11th, and 12th petitioners who were assaulted by non-State actors failed to show that the police failed to exercise reasonable diligence in the circumstances of their individual cases.
  19. The UDHR and ICCPR provided for the right to protection of the law in articles 6 and 16 respectively. The right to remedy from the High Court was guaranteed under section 84 of the repealed Constitution. That right was also protected under article 8 of the UDHR, article 3 of the ICCPR, and article 25 of the Maputo Protocol.
  20. The petitioners had failed to put forward any evidence to the effect that they were denied or precluded from accessing and benefiting from medical and psychological rehabilitative services provided by the respondents. The Government had not failed to provide the appropriate medical and psychological services to the petitioners. Where there was alleged denial of treatment by one public institution, the same was quickly availed by another public facility.
  21. To determine whether the petitioners' right to remedy was violated, one had to look at their individual cases. Because the 5th, 6th and 9th petitioners were violated by police officers and no investigations, arrests or prosecutions had been initiated, the State was liable for violating their right to appropriate remedy which in such cases would include compensation.
  22. The State was liable for the violation of the rights of the 8th petitioner who was violated by non-State actors, and the State failed to investigate her claim even though she identified her assailants. Therefore, the 8th petitioner was entitled to appropriate reparations from the State including compensation. Other victims of post-election violence were compensated without necessarily seeking court orders. For instance, those who lost their homes were resettled. There was no reason why those who suffered sexual violence and could establish that they were indeed violated could not as well be compensated.
  23. The 7th, 10th, 11th and 12th petitioners were assaulted by civilians and did not report their assaults to the police. The police could not be faulted for failing to investigate and prosecute cases of violence which they did not know of.
  24. The State owed a duty to the victims of 2007-2008 PEV to investigate the violations of their rights, prosecute the perpetrators, and provide appropriate remedies to the victims. The State fulfilled its obligations to some victims of PEV by investigating their claims and compensating them for their losses. However, for some of the victim-petitioners who were equally victims of PEV, their claims were not investigated fully and no prosecutions (where there was evidence) were carried out. There had been discrimination towards the 5th, 6th, 8th and 9th petitioners as they were owed a duty of care by the State to not only refrain from causing harm to them but also to pursue those whose acts or omissions caused them harm, and to compensate them appropriately.
  25. The right to information, although protected under the Constitution of Kenya, 2010, and international human rights law, was not guaranteed under the repealed Constitution. The events of the 2007-2008 PEV pre-dated the promulgation of the Constitution of Kenya, 2010, and therefore its provisions could not be applied retrospectively. Requests for information, if any, could have occurred after the coming into force of the Constitution of Kenya, 2010, hence making its provisions applicable.
  26. None of the witnesses had raised any complaints against the State or Mbagathi District Hospital regarding the alleged denial of treatment records. The individual witnesses had not made any claim that they attempted to access information or medical documents from Mbagathi District Hospital and were not provided with their documents. In the absence of any proof that any Government medical facility withheld medical records from the 5th to 12th petitioners, there had not been a violation of

the right to information.

27. Article 35(1) and (3) of the Constitution provided for the right to information. Additionally, article 232(1)(f) of the Constitution listed transparency and provision to the public of timely and accurate information as part of the values and principles of public service. There existed a right to information which was protected under the Constitution and regarded as an integral principle and value of public service.
28. The petitioners had not claimed nor produced evidence to the effect that they requested the Government to release any information or reports on the cases of SGBV during PEV. For that claim to succeed it would have been necessary for the petitioners to have made a request to the respondents for such information, and that the request was ignored or refused.
29. According to the Joint Declaration on Access to Information by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (2004), States were required to pro-actively publish a range of information which was in the public's interest in the absence of a request. Additionally, according to paragraph 4 of the Intern-American Juridical Committee's Principles on the Right of Access to Information, public bodies were required to proactively and routinely disseminate information on their functions and activities including on activities which would affect the public. Those instruments provided an interesting perspective on the matter. They appeared to breathe life into the provisions of article 232(1)(f) of the Constitution.
30. The petitioners failed to provide proof that they sought information from the respondents and that their requests were denied or ignored. Therefore, they had not proven that their right to information was infringed by the acts or omissions of the respondents.
31. In the absence of any complaints made to the 3rd respondent by the victim-petitioners, and given the short period the 3rd respondent had to investigate those violations before the instant proceedings precluded it from doing so, the 3rd respondent had not failed to undertake investigations into claims of violation of human rights by police officers during the 2007-2008 PEV.
32. Sexual violation just like any other violation of human rights and freedoms should be compensated. Sexual violence carried with it both physical and mental pain.
33. The 1st and 2nd respondents were independent offices respectively established under articles 156 and 157 of the Constitution, and were not subject to the direction or control of any other person or authority. The 4th respondent was only subject to the instructions of the DPP. Although the court was granted jurisdiction under article 23 of the Constitution to enforce and uphold the Bill of Rights through the issuance of appropriate remedies, that jurisdiction should be exercised in compliance with the other provisions of the Constitution. The court was also alive to its jurisdiction under article 165 of the Constitution.
34. It had not been established that the respondents had failed to discharge their constitutional and statutory mandates to the other SGBV victims of PEV who were not before the court to warrant issuance of orders directing the respondents to perform their duties in a given manner. The remedies that would be provided to the successful victim-petitioners would be sufficient in the circumstances of the instant case.
35. On the issue of the compensation for economic losses, the petitioners had failed to explain how they arrived at the figure presented, or any proof of their earnings before the PEV. Without any reference to how the petitioners had computed that amount, the claim could not succeed. The same position applied to the prayer for future medical treatment. No evidence was adduced to support the claim.
36. The general trend was to avoid award of exemplary or punitive damages in public law claims. That principle was grounded on two reasons namely that the State had improved in its respect of human rights and that the taxpayer should not be burdened with heavy awards in claims touching on the public purse. The court therefore declined to award the estate of the deceased exemplary or aggravated damages.

*Petition partly allowed.*

#### **Orders**

- i. *A declaratory order was issued to the effect that the failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence was a violation of the positive obligation on the Kenyan State to investigate and prosecute violations of the rights to life; the prohibition of torture, inhuman and degrading treatment; and the security of the person of the 5th, 6th, 8th and 9th petitioners.*
- ii. *A declaratory order was issued to the effect that the right to life; the prohibition of torture, inhuman and degrading treatment; the right to security of the person; the right to protection of the law; the right to equality and freedom from discrimination; and the right to remedy were violated in relation to the 5th, 6th, 8th and 9th petitioners during the 2007-2008 post-election violence, as a result of the failure of the Government of*

- Kenya to protect those rights.*
- iii. *The 5th, 6th, 8th and 9th petitioners were each awarded Kshs. 4 million as general damages for the violation of their constitutional rights.*
- iv. *The 5th, 6th, 8th and 9th petitioners were awarded costs of the suit against the 1st and 4th respondents. The other parties were to meet their own costs of the proceedings.*

**The Parliamentary Service Commission's unilateral decision to determine and operationalize a housing allowance for Members of Parliament without consulting Salaries Remuneration Commission declared *ultra vires* and unconstitutional**

Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties) [2020] eKLR

Constitutional Petition No. 208 of 2019 Consolidated With

Petition Numbers 185 and 339 of 2019

High Court at Nairobi

**P Nyamweya, W Korir & J Mativo, JJ**

December 10, 2020

*Reported by Beryl Ikamari & George Kariuki*

**Constitutional Law** - *Parliamentary Service Commission (PSC) – powers and functions of the PSC – whether the PSC had the mandate to set and make payments for accommodation or housing allowance for Members of Parliament (MPs) - Constitution of Kenya 2010, article 127(6)(a); Parliamentary Service Commission Act, No 13 of 2012, section 18.*

**Constitutional Law** - *Salaries and Remuneration Commission (SRC) - powers and functions - whether the SRC had the mandate to reduce sitting allowances for parliamentary committee meetings and to also cap the number of meetings - whether the SRC had the exclusive mandate to set the amount, that would be paid as accommodation or housing allowance to Members of Parliament - Constitution of Kenya 2010, article 230(4); Salaries and Remuneration Act, No 10 of 2011.*

**Constitutional Law** - *fundamental rights and freedoms - equality and freedom from discrimination - legality of differential treatment - whether the SRC discriminated against MPs when it failed to set accommodation or housing allowance for MPs while doing the same for governors, deputy governors, the President and the Deputy President - Constitution of Kenya 2010, article 27.*

**Constitutional Law** - *institution of a constitutional petition - joinder of parties - whether members of independent constitutional commissions could be sued in their personal capacities for acts or omissions of the commissions - when would a commissioner bear personal responsibility for loss of public funds - Constitution of Kenya 2010, article 250(9); Public Finance Management Act, No 18 of 2012, section 66.*

**Brief facts**

This consolidated petition arose from actions of the PSC to unilaterally prescribe to MPs housing allowances in lieu of the mandate constitutionally granted to the SRC.

PSC secretly resolved to pay a monthly house allowance of Kshs. 250,000/= to each of the 418 MPs backdated to August 2018. Consequently, PSC paid backdated house allowances of Kshs. 2.25 million in April 2018 to each MP.

Aggrieved by this turn of events, two independent petitions were lodged before the constitutional court; namely Petition 185 of 2019 and Petition 208 of 2019.

The gist of the two petitions was that not only was the housing allowance benefits paid to MPs already contemplated in their gross pay but they also received a housing mortgage of Kshs. 20 million per term to cater for their housing needs. Additionally, MPs could not purport to compare themselves to deputy governors, governors, the deputy president, the president among other senior state officers whose job descriptions required special housing such as hosting state delegations at their official residences.

Additionally, PSC had sought SRC's approval to pay MPs a housing allowance, which approval was declined. Despite the provisions of article 259(11) of the Constitution, PSC went ahead and authorized payment of the allowances.

The two petitioner's case was that PSC's unilateral decision had resulted in the loss of public funds in excess of Kshs 99,500,000/= per month and Kshs. 1.194 billion annually.

In response PSC lodged a cross petition (Petition 339 of 2019). PSC's case was that on March 1, 2013 and March 8, 2013, the SRC published the remuneration and benefits for state officers serving in Parliament, the Executive, constitutional commissions, independent offices and county governments. Further, that the MPs' remuneration was reduced from Kshs. 851,000/= to Kshs. 532,500/= a 37.4% reduction. Dissatisfied with this demotion of allowances and benefits, PSC began

negotiations with SRC to resolve such issues as ‘facilities and benefits’ which negotiations hit a brick wall.

Further, SRC on July 7, 2017 abolished the Kshs. 5 million car grants that had been prescribed to MPs, reduced the sitting allowance for committee meetings and limited the meetings to a maximum of 16 meetings per month. SRC also reduced the number of children that could be covered by the medical cover from 5 to 4 children, without providing any reasons, and abolished medical *ex-gratia* assistance to MPs and their families who exceeded their medical cover entitlement. Lastly, SRC reduced housing mortgage for MPs from Kshs. 35 million down to Kshs. 20 million.

PSC’s case was that the SRC had interfered with the independence of Parliament by purporting to limit parliamentary business (by limiting the number of committee meetings per month). PSC also made a case for discrimination against MPs by the SRC seeing that the SRC had failed to prescribe a housing allowance for MPs as it had for other state officers.

PSC further contended that it was a body corporate that could sue and be sued in its own name. Therefore, the enjoinder of its members as respondents in the petitions was irregular since they had discharged their mandate in their official capacities as members of PSC and in good faith.

The three petitions were consolidated as they raised similar and related issues.

#### Issues

- i. Whether the decision by the PSC to make a payment to MPs for their accommodation was *ultra vires* and unconstitutional.
- ii. Who between the PSC and the SRC had the legal mandate to make the payment for the accommodation of MPs?
- iii. Whether the SRC interfered with the constitutional mandate and independence of the PSC and Parliament when it adjusted the remuneration and benefits payable to MPs.
- iv. What legal instruments regulated the remuneration and benefits payable to MPs?
- v. Whether the SRC failed to set a house allowance for MPs and if so, whether it amounted to discrimination against MPs.
- vi. Whether the SRC acted *ultra vires* its constitutional and statutory mandate in capping the number of remunerable meetings the MPs and PSC could hold in one month.
- vii. Whether the suit against the 3rd to 12th respondents (members of an independent constitutional commission) and the 2nd Interested Party (individual

Members of Parliament) was incompetent as they were sued in their personal capacities.

#### Held:

1. In determining whether the decision by the PSC to make a payment to MPs for their accommodation was *ultra vires* and unconstitutional, it was important to strike a balance between SRC’s mandate under article 230 (4) of the Constitution of setting remuneration and benefits for all state officers and PSC’s mandate of provision of housing allowance or housing benefit to MPs under the ambit of “services and facilities” as under article 127 (6) (a) of the Constitution to ensure the efficient and effective functioning of Parliament.
2. Despite being premised on the doctrine of constitutional supremacy, principles of constitutional interpretation called upon courts to reconcile two conflicting constitutional goals: one, to establish a state system with enough power to govern, and two, to find ways of constraining and regulating such power so that it was not abused. Therefore, the rule of law, and the related principles of legality and accountability were the central constitutional doctrines governing the exercise of public power.
3. To demarcate the powers and functions of the two independent commissions, it was necessary to consider the input and meaning of “salary and remuneration” and “salaries and benefits” as provided under the Constitution as well as the subsidiary legislations governing the two bodies. According to the Salaries and Remuneration Act, “salary and remuneration” included the ordinary, basic or minimum wage or pay and any additional emoluments and benefits whatsoever payable, directly or indirectly, whether in cash or in kind, by an employer to an employee and arising out of the employment of that employee. The Act did not define the word “benefit”. On the other hand, the Parliamentary Service Commission Act defined “services and facilities” to include all means by which members of the National Assembly were officially assisted in performing their parliamentary duties. Just as the Salaries and Remuneration Act failed to define the phrase “services and facilities.”, the Parliamentary Service Commission Act did not define the words “remuneration and benefits.”
4. The argument by PSC that it was empowered to determine certain benefits for MPs to facilitate proper functioning of parliamentary business failed on several fronts, namely: -
  - a) In PSC’s letter to SRC dated February 22, 2019 PSC alluded to a request for “housing allowance” as opposed to the impugned “housing benefits. There was no mention of a “facilitative allowance.” In fact, the phrases “service”,

- “benefits” and facilities” and “facilitative allowance” were only introduced in Petition No 339 of 2019 after the impugned payment was challenged in the other two petitions.
- b) The operative words in articles 127 (6) (a) of the Constitution— powers and functions of the PSC and 230 (4) (a) of the Constitution – powers and functions of the SRC, were “services and facilities” and “remuneration and benefits” respectively. In searching for the meaning of the said words, it was inevitable to consult dictionaries, judicial pronouncements and a consideration of their statutory context.
  - c) The Black’s law dictionary defined “remuneration” to mean payment, compensation, the act of paying or compensating. On the other hand, it defined “a benefit” as an advantage or privilege. It also defined “fringe benefit” to mean a benefit (other than direct salary or compensation) received by an employee from an employer, such as insurance, a company car, or a tuition allowance.
  - d) Judicial interpretation of the terms defined the terms “salary” and “remuneration” as follows: “salary” meant a recompense or consideration made to a person for his pains, industry or work for another person, wages, allowances or other remuneration for work or service; while “remuneration” ordinarily meant “reward, recompense, pay, wages or salary for service rendered”.
  - e) Taken in that context, therefore, remuneration meant payment for services rendered or work done (salary) while benefit meant the allowance paid by the State to State officers and public officers. Consequently, a house allowance was a specific allowance payable as part of employees’ remuneration to cater for their housing costs. Therefore, whether it was named as accommodation allowance, a house allowance or a facilitative allowance, the cross-cutting and relevant feature for those purposes was that the payment made in the instant case was meant to for cater the MPs accommodation during the performance of their official duties.
  - f) The words “services and facilities” referred to the amenities, offices and equipment which were necessary for the MPs to perform their duties and therefore the function contemplated to PSC under article 127 of the Constitution and section 18 of the Parliamentary Service Commission Act.
  - g) The distinction between allowances on one hand and services and facilities on the other, was made even clearer by the provisions of sections 19 and 20 of the Parliamentary Service Commission Act which demonstrated the services and facilities envisaged under article 127(6) (a) of the Constitution to assist the MPs in the performance of their duties were physical and logistical in nature, and not in the nature of payment of funds.
  - h) A faithful reading of article 127 and the Parliamentary Service Commission Act therefore showed that PSC could not sustain the impugned meaning of “services and facilities” as extending to “facilitative housing allowance” for the MPs.
  - i) Additionally, even if PSC’s argument that “services and facilities” ought to have been construed to mean “facilitative house allowance,” it would amount to suggesting the existence of a contradiction between articles 127(6) (a) and 230 (4) (a) of the Constitution.
  - j) A reading of several judicial precedents on ambiguity between general versus specific provisions showed that general provision would not normally prevail over the specific and unambiguous provisions. The specific provision ought to have been construed as limiting the scope of the application of the more general provision. Therefore, if a general provision was capable of more than one interpretation and one of the interpretations resulted in that provision applying to a special field which was dealt with by a specific provision, in the absence of clear language to the contrary, the specific provision ought to prevail should there be a conflict.
5. The payment made to MPs was a remunerative allowance and not a provision of a service and facility within the meaning of article 127 (6) (a) of the Constitution.
  6. SRC’s mandate, codified under article 230 of the Constitution and section 11 of the Salaries and Remuneration Act was to set and regularly review the remuneration and benefits of all State officers and to advise the national and county governments on the remuneration and benefits of all other public officers without regard to whether such a decision was unpalatable to those whose remunerations and benefits were subject to the mandate of SRC. Additionally, any advice or directive from the SRC had legal force on any person or institution addressed, including the PSC.
  7. The mandate of PSC as provided under article 127 of the Constitution and section 11 of the Parliamentary Service Commission Act was merely to provide services and facilities to ensure the efficient and effective functioning of Parliament. PSC erred in

law by purporting to determine and operationalize housing allowances for MPs. Its argument that article 127 (6) (a) of the Constitution vested in it the mandate to set and provide a housing benefit to MPs was erroneous. PSC's decision was therefore *ultra vires* its constitutional mandate and offended the principle of legality which required that decisions by public bodies flow from a legal rule/the law.

8. The mandate to determine and set a housing or accommodation allowance, was a function exclusively and constitutionally vested in the SRC by article 230 (4) (a) of the Constitution and the Salaries and Remuneration Act.
9. Only the SRC was clothed with the requisite power and authority to determine allowances and benefits payable to state officers including Members of Parliament.
10. The Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013 was rendered void by virtue of Statutory Instruments Act, as was the reasoning in the case of *Parliamentary Service Commission v Salaries Remuneration Commission; Attorney General & 3 others (Interested Parties)*, High Court JR No. 686 of 2017; [2018] eKLR. The repeal of the regulations meant that any remuneration of the MPs of the 11th Parliament and any other consequent Parliament coming into existence (the existing Parliament included) could only be determined by the SRC.
11. Accounting officers of constitutional commissions, including the PSC, were expected to monitor, evaluate and oversee the management of public finances in the commission as per section 66 of the Public Finance Management Act.
12. Article 226 (5) of the Constitution addressed the issue of recovery of lost public funds and stated that where the holder of a public office, including a political office, directed or approved the use of public funds contrary to law or instructions, the person was liable for any loss arising from that use and was required to make good the loss, whether the person remained the holder of the office or not. It was the responsibility of the accounting officers in the PSC to ensure that public finances were used lawfully and in a prudent manner. Fundamental to the use of public finance was regularity and propriety. Regularity meant compliance with the Constitution and the governing statute including obtaining required consents/approvals from the relevant bodies including the SRC.
13. PSC's failure to seek SRC's consent or approval as the only body constitutionally mandated to set and pay salaries and remuneration of State officers contravened several statutory provisions including articles 230(4), 206 (4) and 259(11) of the Constitution.
14. Accounting officers of independent bodies were obligated by law to comply with regularity and propriety and the need for efficiency, economy, effectiveness and prudence in the administration and use of public resources and to secure value for public money. Therefore, the accounting officers for the PSC and Parliament were culpable for failing to undertake their obligations under the Public Finance Management Act in that regard. The said accounting officers therefore broke the law and it was upon them to recover the money paid to the MPs.
15. MPs could not purport to compare themselves to deputy governors, governors, the deputy president, the president among other senior state officers whose job descriptions required special housing such as hosting state delegations at their official residences. It was lawful to accord different treatment to different categories of persons if the circumstances so dictated.
16. The differential treatment between MPs and other superior state officers did not necessarily amount to discrimination. Anyone purporting to rely on article 27 of the Constitution was required to establish that because of the distinction made between the claimant and others, the claimant was denied equal protection or benefit of the law. It did not necessarily mean that differential treatment or inequality would *per se* amount to discrimination and a violation of the constitution.
17. A three-step test was established to determine discrimination due to differential treatment. The first step was to establish whether the impugned decision differentiated between different persons. The second step entailed establishing whether that differentiation amounted to discrimination. The third step involved determining whether the discrimination was unfair.
18. PSC failed to prove how the differential treatment amounted to a constitutional violation.
19. The mandate to set and determine remuneration including allowances, was a function constitutionally vested in the SRC by article 230 (4) (a) of the Constitution and the Salaries and Remuneration Act. No ground was established by the PSC to merit this court's interference in the manner in which the SRC set and determined the number of MPs remunerable meetings.
20. Members of the PSC who had been sued in their personal capacities had objected their enjoinder in the suit. Article 250 (9) of the Constitution provided that a member of a commission, or the holder of an independent office, was not liable for anything done in good faith in the performance of a function of office. Therefore, 3rd to 12th respondents enjoyed

immunity for actions performed in good faith in the performance of their duties.

21. The petitioners did not endeavour to establish bad faith on the part of the 3rd to 12th respondents. Therefore, the suit against the 3rd to the 12th respondents in their personal capacities offended article 250(9) of the Constitution, and was therefore unsustainable.
22. Members of Parliament enjoined in the suit were however found to have been *bona fide* parties to the petition. They had an identifiable stake or legal interest/duty in the proceedings in the constitutional petition. The named MPs were the beneficiaries of the impugned payments set and facilitated by the PSC, and would be directly affected by the decision of the court on the said payment, particularly because it had adverse effects.

#### Orders:-

- I. The prayers sought in petition No. 339 of 2019 by the SRC were declined, and the petition dismissed with no order as to costs.
- II. Petition No. 208 of 2019 and Petition No. 185 of 2019 filed by the 1st and 2nd petitioners respectively were found to be meritocratic and the following orders granted:
  - a) *A declaration that the setting and approval of the payment of an accommodation or house allowance to MPs was a function exclusively vested in the Salaries and Remuneration Commission by Article 230 (4) and (5) of the Constitution.*
  - b) *A declaration that the decision of the Parliamentary Service Commission to set and approve the payment of an accommodation or house allowance to Members of Parliament contrary to the structure of remuneration and benefits of all state officers in Parliament that was set and communicated by the Salaries and Remuneration Commission, and without the approval of the SRC was in violation of article 230 (4) and (5) of the Constitution.*
  - c) *A declaration that the decision of the Parliamentary Service Commission to set and approve the payment of an accommodation or house allowance to MPs contrary to the structure of remuneration and benefits of all state officers in Parliament as set out and communicated by the SRC, and without its approval was ultra vires the prescribed constitutional powers of PSC contained in article 127(6) of the constitution.*
  - d) *A declaration that the decision of the Parliamentary Service Commission to set, and approve the payment of an accommodation or house allowance to Members of Parliament contrary to remuneration and benefits of all state officers in parliament that was set and communicated by the Salaries and Remuneration Commission, and without the approval of the Salaries and Remuneration Commission was in violation of the provisions of article 259(11) of the Constitution that required the prior approval of Salaries and Remuneration Commission.*
  - e) *A declaration that the decision of the Parliamentary Service Commission to set, and approve the payment of an accommodation or house allowance to Members of Parliament contrary to the structure of remuneration and benefits of all state officers in Parliament that was set and communicated by the Salaries and Remuneration Commission, and without the approval of the Salaries and Remuneration Commission was an exercise of state authority not authorised by the Constitution and in violation of the provisions of article 2(2) of the Constitution*
  - f) *A declaration that the decision of the Parliamentary Service Commission to set, and approve the payment of an accommodation or house allowance to Members of Parliament contrary to the structure remuneration and benefits of all state officers in Parliament as set and communicated by the Salaries and Remuneration Commission, and without the approval of the Salaries and Remuneration Commission the functions was in violation of the provisions of article 73(1) of the Constitution - that any State authority assigned to a state officer was a public trust that ought to have be exercised in a manner consistent with the purposes and objects of the Constitution.*
  - g) *A declaration that the decision of the Parliamentary Service Commission to set, and approve the payment of an accommodation or house allowance to Members of Parliament contrary to the structure of Remuneration and Benefits of all State Officers in Parliament that was set and communicated by the Salaries and Remuneration Commission, and without the approval of the Salaries and Remuneration Commission the functions that are exclusively vested to the SRC was in violation of the binding national values and principles of governance prescribed in article 10 of the Constitution on the rule of law, transparency and accountability.*
  - h) *An order of certiorari to bring into court and remove (quash) the decision of the Parliamentary Service Commission to set, and approve the payment of an accommodation or house allowance to Members of Parliament contrary to the structure of remuneration and benefits of all state officers in parliament as set and communicated by the Salaries and Remuneration Commission, and without the approval of the Salaries and Remuneration Commission in disregard of article 230(4) (a) of*

the Constitution.

- i) *An order of mandamus directing the clerk of the Senate and the clerk of the National Assembly to, within a period of twelve calendar months from the date of order, recover in full from the salaries and allowances of each Member of Parliament the entire amount of monies paid as accommodation and/or house allowance to the Members of Parliament, pursuant to the illegal and unconstitutional decision of the Parliamentary Service Commission to set, and approve the*

*payment of an accommodation or house allowance to Members of Parliament contrary to the structure of remuneration and benefits of all state officers in parliament as set and communicated by the Salaries and Remuneration Commission, and without the approval of the Salaries and Remuneration Commission.*

- j) *Each party was ordered to bear their respective costs in the two petitions.*

## **Imposition of VAT on exported services amounts to double imposition of VAT and is contrary to the neutral application of VAT in International Trade law.**

Coca-Cola Central East and West Africa Limited v Commissioner of Domestic Taxes [2020] eKLR

Income Tax Appeal 19 of 2013

High Court at Nairobi

**F. Tuiyott, J**

November 23, 2020

*Reported by Beryl Ikamari & George Kariuki*

**Tax Law** – Value Added Tax (VAT) – impact (original or initial burden for the payment of tax) and instance (the settlement of the tax burden on the ultimate tax payer) of VAT – tax evasion – tax minimization – the destination principle – whether was VAT levied at the point of consumption or at the point of use - Value Added Tax Act, (cap 476) (repealed), sections 2 and 32; OECD International Guidelines on Value Added Tax, regulation 20(1) (a); Value Added Tax Regulations, regulation 2.

### **Brief facts**

The appellant, Coca-Cola Central East and West Africa (Coca Cola Africa), provided marketing and promotional services for all of Coca-Cola's world famous brands. Coca-Cola Africa operated as a subsidiary of the parent company (which owned and controlled the Coca-Cola trademark) and was located in United States of America.

Coca-Cola and its subsidiaries manufactured and sold proprietary concentrates used to prepare Coca-Cola beverage products with one such subsidiary being Coca-Cola Export which manufactured concentrates in various locations around the world but not in Kenya. The concentrates were sold to authorized bottlers who purchased, imported and in turn used the concentrates in preparing and packaging beverage products that bore the Coca-Cola trademarks. Value Added Tax was in turn paid for the concentrates by the bottlers at the point of import.

The chief purpose of the marketing and promotional services was to maintain, increase and grow the image, value and importance of the brands. It enhanced and encouraged sales of Coca-Cola Export and its subsidiaries to the Bottlers.

Contention arose between Coca Cola Africa (appellant) and the Commissioner of Domestic Taxes (respondent) on the instance and impact of Value Added Tax on Coca-Cola products being advertised in Kenya but meant for foreign market consumption. On one hand, Coca-Cola Africa postulated that the benefit of the marketing and promotion services accrued outside Kenya and that therefore, it should be treated as 'exported services' as per provisions of the VAT Act (Cap 476) (repealed). On the other hand, the respondent put forward an argument that marketing and promotion services provided by Coca-Cola Africa were consumed locally as the target audience was Kenya and they therefore ought to be treated as services locally consumed in Kenya.

At the Tax Tribunal, it was held that the marketing and promotional services were heard, seen, enjoyed and perceived by persons and households resident in Kenya and therefore physically consumed in Kenya, thus leaving no place for an interpretation of section 2 of the VAT Act, cap 476 (repealed). Therefore, VAT ought to have been charged at point of consumption since the same was a destination-based tax levied on commercial activities on the consumer as opposed to a charge on the business.

Aggrieved by that finding, the appellants lodged an appeal at the Commercial and Tax Division of the High Court.

### **Issues**

- I. Whether the Kenyan Bottlers benefited directly from the promotional services carried out by Coca-Cola Africa on behalf of Coca-Cola Exporters;
- II. Whether the business model adopted by Coca-Cola Export Corporation (Coca-Cola Export) resulted in the evasion or minimization of Value Added Tax

(VAT) payable in Kenya;

III. What was the nexus between the marketing and promotional services provided by Coca-Cola Africa and the activities of the Kenyan Bottlers?

**Held:**

1. The target audience for Coca-Cola Africa's promotional activities was the Kenyan public who were either existing or potential buyers of the Coca-Cola drinks. However, that did not out rightly make them the consumers of the promotional and marketing services.
2. A person became a user or consumer of Coca-Cola Africa's services only when, at the instigation or encouragement of the services, he consumed the Coca-Cola products.
3. Persons who saw, enjoyed, heard, perceived or even enjoyed an advertisement but failed to act on it could not be said to have used or consumed the products.
4. A promotion or marketing activity did necessarily lead to a sale or consumption of the promoted or marketed product. Consumption of the soft drink therefore ought not to have been confused with consumption of the promotional and marketing services.
5. "Consumption" was defined as the act of destroying a thing by using it or the use of a thing in a way that exhausted it.
6. The marketing and promotional agreement entered into between Coca-Cola Africa and Coca-Cola Exporters was to increase brand awareness resulting in increased consumption of Coca-Cola soft drinks which translated to increased sales and profits for Coca-Cola Exporters.
7. The marketing and promotional services were not provided so that members of the target audience could merely hear, see, enjoy, feel or perceive them. They were not provided for the sake of it but in the hope that it would trigger a purchase or a desire to purchase a Coca-Cola product.
8. For VAT purposes, the final consumer of the Coca-

Cola drink was the consumer of the marketing and promotional services. In that regard, Coca-Cola Africa supplied the marketing and promotional services to Coca-Cola Export at a fee by the latter.

9. Coca-Cola Africa did not receive any compensation for the performance of the promotional services from local independent bottlers who were the consumers of the services.
10. The Bottlers, whilst not paying for the promotional services, were a major beneficiary of the marketing and promotional services as it could lead to an increase in sales of the Coca-Cola brands. That was in line with an objective listed in the agreement which was to seek an increase in brand awareness resulting in increased consumption of Coca-Cola soft drinks.
11. No evidence was put forward to debunk Coca-Cola Africa's own admission that the mandate of marketing and promotion of the Coca-Cola brand in Kenya was very substantially, if not solely, its own. If Coca-Cola Africa did not provide marketing and promotional services, then the bottlers would have to undertake them. Payment for those marketing and promotional services would have attracted VAT in Kenya and that would have been passed to the final consumer.
12. The Commissioner failed to prove that that there was a leak in tax from Kenya and further that the business arrangement entered into led to unintentional non-taxation given that no tax similar to VAT was imposed on the services in the State where Coca-Cola Export was domiciled.
13. The business model adopted by Coca-Cola Africa and Coca-Cola Exporters did not therefore lead to an avoidance or minimization of VAT.

**Orders:-**

- i. *The Appeal was allowed.*
- ii. *The decision of the VAT Tribunal dated 26th November 2013 was departed from and set aside.*
- iii. *Costs of the application were awarded to the appellant.*

**The recruitment process of the Secretary to the Independent Electoral and Boundaries Commission declared unconstitutional for being in violation of the applicable law**

Chama Cha Mawakili (CCM) v Chairperson Independent Electoral and Boundaries Commission & 2 others [2020] eKLR

Petition No. 104 of 2019

Employment and Labour Relations Court at Nairobi

**B Ongaya, J**

October 16, 2020

*Reported by Kakai Toili*

**Labour Law** – employment – recruitment process – recruitment process through the use of an independent contractor – where the Independent Electoral and Boundaries Commission (IEBC) engaged an independent consultant for the recruitment of its commission secretary – where the IEBC thereafter decided to undertake the recruitment process without informing the public - whether it was mandatory for the IEBC to engage an independent consultant to undertake the recruitment process of its commission secretary - whether the IEBC had the responsibility, accountability and liability of the appointment process – what was the effect of IEBC engaging an independent consultant to recruit its commission secretary and thereafter deciding to undertake the recruitment process without informing the public - Constitution of Kenya, 2010, article 10; Independent Electoral and Boundaries Commission Act, 2011, sections 10(1) and 27.

**Labour Law** – employment – recruitment process – recruitment process of the Independent Electoral and Boundaries Commission's (IEBC) commission secretary – where the qualifications for the position of commission secretary for the IEBC were provided for in the Independent Electoral and Boundaries Commission Act – where the IEBC knocked out candidates who had the prescribed statutory requirements while shortlisting others who had qualifications described as added advantage - whether it was lawful for the IEBC to knock out candidates who had the prescribed statutory requirements while shortlisting others who had qualifications described as added advantage - what were the factors to be considered in determining whether the recruitment process was done in accordance with the relevant statutory and constitutional provisions - Constitution of Kenya, 2010, articles 10, 73 and 232; Independent Electoral and Boundaries Commission Act, 2011, section 10(2).

**Jurisdiction** – jurisdiction of the Employment and Labour Relations Court - jurisdiction to determine a dispute on the appointment of the commission secretary for the Independent Electoral and Boundaries Commission - whether the Employment and Labour Relations Court had the jurisdiction to determine a dispute on the appointment of the commission secretary of the Independent Electoral and Boundaries Commission - Constitution of Kenya, 2010, articles 162(2) and 165(5)(b); Employment and Labour Relations Court Act, 2011, sections 12(1) and (2).

**Constitutional Law** – fundamental rights and freedoms – right of access to information – timelines for receiving information after making a request for information – where a suit was filed a day after requesting for access to information – where the Access to information Act provided that access to information was to be allowed within 21 days from receipt of the request to access information - what were the circumstances in which a person who had requested for information would move to court before exhausting statutory procedure on access to information - Access to Information Act, 2016, section 9(1).

**Brief facts**

The petitioner filed the instant petition seeking among others a declaration that the recruitment process ensuing from the vacancy notice for the position of commission secretary/chief executive officer, Independent Electoral and Boundaries Commission (IEBC) was unconstitutional and an order of judicial review in the nature of *certiorari* to quash all or any recruitment process ensuing from the vacancy notice. The petitioner's case was that the recruitment of the 2nd respondent's commission secretary had to be in strict adherence to articles 10 and 35 of the Constitution of Kenya, 2010, (Constitution) sections 10 and 27 of the Independent Electoral and Boundaries Commission Act, 2011 (IEBC Act) as well as the 2nd respondent's own human resource recruitment policy.

The petitioner claimed that the recruitment process for the commission secretary had breached the cited provisions. The petitioner submitted that the respondent was conducting the recruitment process in a secretive manner and the public had not been informed about the progress despite the 1st respondent promising to inform the public accordingly. It was further argued that the process was in breach of article 10(2) of the Constitution because it was not participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and had not followed the rule of law. Further it claimed that the recruitment process was being conducted in secrecy and mystery.

**Issues**

- i. What was the effect of the Independent Electoral and Boundaries Commission engaging an independent

- consultant to recruit its commission secretary and thereafter deciding to undertake the recruitment process without informing the public?
- ii. Whether the Independent Electoral and Boundaries Commission had the responsibility, accountability and liability of the appointment process where they involved a consultant to recruit its staff.
  - iii. Whether it was mandatory for the Independent Electoral and Boundaries Commission to engage an independent consultant to undertake the recruitment process of its commission secretary.
  - iv. Whether it was lawful for the Independent Electoral and Boundaries Commission to knock out candidates who had the prescribed statutory requirements while shortlisting others who had qualifications described as an added advantage.
  - v. What were the factors to be considered in determining whether the recruitment process for the position of commission secretary for the Independent Electoral and Boundaries Commission was done in accordance with the relevant statutory and constitutional provisions?
  - vi. Whether the Employment and Labour Relations Court had the jurisdiction to determine a dispute on the appointment of the commission secretary of the Independent Electoral and Boundaries Commission.
  - vii. What were the circumstances in which a person who had requested for information would move to court before exhausting statutory procedures on access to information?

**Held**

1. The petitioner had established that the 2nd respondent had violated section 10(1) and 27 of the IEBC Act and the national values and principles of governance in article 10 of the Constitution. The violated provisions provided for recruitment of the commission secretary through an open, transparent, and competitive process and appointment of a suitably qualified person. The evidence showed that the 2nd respondent made a decision to undertake the recruitment process through an independent consultant and thereafter decided to undertake the recruitment by itself. The shifting of the decisions as was done and without notifying the public cast a shadow of doubt on the integrity of the process.
2. It was only by the replying affidavit that the 2nd respondent disclosed that the independent consultant engaged had declined to sign the contract forcing the respondent to decide to undertake the process by itself. The recruitment process as undertaken by the 2nd respondent by itself was marred by conflict of interest. The breach of the constitutional and statutory provisions was blended with impairment of the outcome of the otherwise continuing recruitment process.
3. The 2nd respondent was entitled to appoint its secretary and chief executive officer but in strict compliance with the constitutional and statutory provisions on principles and values applicable to recruitment, selection and appointment of public and State officers. The 2nd respondent would in addition be expected and required to adhere to provisions of section 10(2) of the IEBC Act setting out the qualifications for a person to be appointed as its secretary and chief executive officer. There was no constitutional and statutory provision that the 2nd respondent had to engage an independent consultant to recruit its chief executive officer.
4. Even where the option to involve an independent consultant was exercised, the responsibility, accountability and any liability of the appointment process remained with the 2nd respondent as the principal. Further, where an independent consultant had been hired, subject to any applicable statutory or contractual provision, the 2nd respondent could by itself discontinue the consultancy and continue the recruitment, selection and appointment process as the 2nd respondent could consider reasonable in the circumstances.
5. Throughout the recruitment, selection and appointment process the 2nd respondent remained obligated to uphold the cited and applicable constitutional and statutory provisions. It was misconceived to urge that it was mandatory for the 2nd respondent to engage a consultant to undertake the process. It could be that hiring an independent consultant was desirable to enhance the recruitment, selection and appointment methodologies and efficiency or to remove unnecessary burdens that could conveniently be outsourced or to deal with likely situations of conflict of interest when done internally by the 2nd respondent but it was not mandatory for the respondent to hire a consultant.
6. It was most desirable for the 2nd respondent to engage an independent consultant for the recruitment and selection of its secretary and chief executive officer in view of the highest professionalism, transparency, accountability and management of any instances of conflict of interest which could not be easily achieved through an exclusively internal recruitment, selection, and appointment process.
7. Whereas the 2nd respondent's replying affidavit had set out the considerations that were taken in shortlisting the 10 successful candidates, there was no documented criterion which was predetermined to guide the shortlisting process. Similarly there was no predetermined criterion that would guide the interviews as was scheduled to take place. The development of such score sheets that were objective

and took into account the considerations in articles 232(1)(g), (h) and (i) and article 73(2)(a) of the Constitution and section 10(2) of the IEBC Act was a highly professional engagement which then made it desirable that the 2nd respondent engage a professional and independent consultant.

8. It was not sufficiently convincing that all candidates who had a recognised university degree per section 10(2) of the IEBC Act were automatically knocked out in priority to a master's degree and which was never a statutory requirement but introduced by the shortlisting committee without any explanation. The kind of experience that was required and scored accordingly in knocking out some candidates was not disclosed at all. It was not explained why the master's degree which was not a statutory requirement was invoked to knock out many candidates with the minimum statutory requirement of first degree and who could have possessed the best and suitable experience.
9. It was not lawful for the 2nd respondent to knock out candidates who had all the prescribed statutory requirements while shortlisting others upon qualifications described as added advantage and which were not prescribed in the statute at all. An objective and predetermined score sheet taking into account the qualifications in section 10(2) of the IEBC Act was crucial and mandatory. Similarly, it was mandatory to have an objective and predetermined score sheet for the interview process or other method invoked to recruit and select the most suitable candidate on headings contemplated in articles 232(1) (g), (h) and (i) and article 73(2)(a) of the Constitution and section 10(2) of the IEBC Act so as to demonstrate fairness and transparency and other values and principles in articles 10, 232, and 73 of the Constitution.
10. The score sheet had to be completed for the candidates who had the basic prescribed qualifications at the shortlisting stage and then for each candidate progressing to the subsequent steps such as oral or written interviews. The 2nd respondent enjoyed the discretion on the weight of scoring under any such headings in the score sheet but had to show it was predetermined and objectively applied to all applicants.
11. Individual scores were held in confidence to be disclosed to the concerned individual as he or she could request – but the score sheets and the related documentation guiding the process had to be available for ascertaining the compliance in the recruitment process. In absence of such documentation of scores upon predetermined and objective criteria, it was difficult to make a finding of a recruitment, selection and appointment process that was consistent with the relevant statutory and constitutional provisions. It could not be said that the recruitment, selection, and appointment process as challenged was continuing in accordance with the law.
12. The court enjoyed the relevant jurisdiction to hear and determine the petition. The dispute was about the appointment of the commission secretary. The court's jurisdiction flowed from article 162(2)(a), 165(5)(b) of the Constitution and the provisions of the Employment and Labour Relations Court Act, 2011. Appointment of the commission secretary was a human resource function and falling under the jurisdiction of the court.
13. Section 12(1) of the Employment and Labour Relations Court Act, 2011 was clear that the court had exclusive original and appellate jurisdiction to hear and determine disputes referred to it in accordance with article 162(2) of the Constitution and the provisions of the Act or any other written law. Section 12(2) of the Act further provided that an application, claim or complaint could be lodged with the court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. By that provision, the petitioner had lodged a complaint against an employer, the 2nd respondent.
14. By reason of section 12(2) of the Employment and Labour Relations Court Act the proceedings were not limited to parties listed in section 12(1) but the jurisdiction spread to disputes about employment even by and against persons not being employees or employers or parties to the contract of service. That was the position especially in view of article 162(2) as read with article 165(5)(b) of the Constitution.
15. The request for information was made on June 20, 2019, the request was received on June 21, 2019 and the following day the petition was filed. Section 9(1) of the Access to Information Act required the 2nd respondent to avail the requested information as soon as possible but in any event not more than 21 days of receipt of the application and, section 9(3) allowed for a further extension of 21 days.
16. The petitioner did not pray that the information be provided but wanted the impugned recruitment process arrested. Thus while the regime on access to information was set out in the law, it was obvious to the court that the petitioner would have suffered prejudice if it did not move to court promptly for want of exhaustion of the statutory procedure on access to information. Further, after full disclosure in the replying affidavit filed by the 1st respondent, it had been established that the petitioner's fears,

concerns and claims were valid because the recruitment process had been established to have been proceeding contrary to law and with manifest conflict of interest.

17. The independent consultant hired declined the engagement with the result that the recruitment process was continuing without informing the public the milestones therein as required by law, with manifest conflict of interest and without the due role of the required human resource expertise and professionalism that was lost when the independent consultant avoided the scene. Thus, the petitioner's failure to exhaust the statutory procedure on access of information did not impair the petition at all. The recruitment process was proceeding contrary to statutory and constitutional provisions.
18. In view of the functions of the 3rd respondent in article 156(4) of the Constitution as the principal legal adviser to the Government, the 3rd respondent was a proper party to the suit.

*Petition allowed; the 2nd respondent to pay the petitioner's costs; all the respondents to bear own costs of the proceedings.*

**Orders;**

- i. A declaration was issued that the recruitment process

*ensuing from the vacancy notice called "Vacancy in the position of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission Ref. No. IEBC/C/CEO/1/2019" dated May 21, 2019 was unconstitutional and in violation of the law.*

- ii. An order of judicial review of certiorari was issued to bring into the court for purposes of quashing all and any recruitment process ensuing from the vacancy notice called "Vacancy in the position of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission Ref. No. IEBC/C/CEO/1/2019" dated May 21, 2019.
- iii. In alternative to order(ii), the order of judicial review of prohibition was issued prohibiting the respondents from carrying on the process of recruitment ensuing from the vacancy notice called "Vacancy in the position of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission Ref. No. IEBC/C/CEO/1/2019" dated May 21, 2019.
- iv. A declaration was issued that the recruitment process of the Secretary to the Commission or CEO be commenced afresh by the 2nd respondent and in strict compliance with the applicable law.

**Appointments of the Chairperson and members to the Business Premises Rent Tribunal declared unconstitutional on grounds that the appointment process was not competitive and merit-based.**

Bernard Odero Okello & another v Cabinet Secretary for Industrialization, Trade and Enterprise Development & another; Cyprian Mugambi Ngutari & 7 others (Interested Parties)

Petition 100 of 2020

(Consolidated with Petition 99 of 2020)

Employment and Labour Relations Court at Nairobi

**M Onyango, J**

October 30, 2020

*Reported by Beryl Ikamari*

**Constitutional Law** - judiciary - definition of judicial officers - members of local tribunals - whether the chairperson and members of the Business Premises Rent Tribunal were judicial officers - Constitution of Kenya 2010, article 260; Judicial Service Act, (cap 185B), section 2.

**Constitutional Law** - judiciary - tribunals - appointment of the chairperson and members of a tribunal - role of the Judicial Service Commission - whether the Cabinet Secretary in the Ministry of Industrialisation, Trade and Enterprise Development had powers to appoint the chairperson and members of the Business Premises Rent Tribunal - Constitution of Kenya 2010, article 172(1)(c); Judicial Service Act, (cap 185B), section 32; Landlord and Tenant (Shops, Hotels and Business Establishments) Act, (cap 301), section 11.

**Constitutional Law** - values and principles of public service - appointment to public office - equal opportunity for appointment, fair competition and merit as the basis for appointment - whether an appointment process where candidates were not informed of the vacancy, applications, shortlisting and interviews conducted, was constitutional - Constitution of Kenya 2010, articles 10, 47 and 232; Public Service (Values and Principles) Act, No 1A of 2015, section 10.

**Constitutional Law** - fundamental rights and freedoms - equality and freedom from discrimination - two thirds gender principle - whether the appointment of only one woman and four men to Business Premises Rent Tribunal violated the two thirds gender principle - Constitution of Kenya 2010, article 27.

**Constitutional Law** - constitutionality of statutes - transitional and consequential provisions of the Constitution - establishment of tribunals by means of appointment by the relevant Minister under section 11 of the Landlord and Tenant (Shops, Hotels and Business Establishments) Act - role of the Judicial Service Commission in making such appointments under the Constitution - whether the assignment of the role of making such appointments to the Minister under the Landlord and Tenant (Shops, Hotels and Business Establishments) Act was unconstitutional - Constitution of Kenya 2010, Sixth Schedule, section 7; Landlord and Tenant (Shops, Hotels and Business Establishments) Act, (cap 301), section 11.

### Brief facts

Via Gazette Notice No. 4244 published in the special issue of the Kenya Gazette on June 26, 2020, the Cabinet Secretary in the Ministry of Industrialisation, Trade and Enterprise Development (the 1st Respondent) made appointments to the Business Premises Rent Tribunal (the Tribunal). The Chairperson and Vice-Chairpersons/members of the Tribunal were the 1st to 5th Interested Parties.

The petitioners challenged the appointments. They contended that the appointments were made in excess of power or without power and were contrary to section 11(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act as read with rules 2 and 21 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) (Tribunal) (Forms and Procedures) Regulations, 1966. They added that the appointments were not made through a process where there was fair competition and merit and that as such they were contrary to the Constitution. They said that they were also discriminatory as a fair opportunity to apply for the appointments was not afforded to all members of the public and only one woman was appointed.

It was also contended by the petitioner that the members of the Tribunal were judicial officers and it was only the Judicial Service Commission that could appoint them. He argued that the principle of separation of powers was violated when powers of the Judicial Service Commission to appoint judicial officers was exercised by a Cabinet Secretary. Therefore, the Cabinet Secretary acted in excess of her powers when she made the appointments. It was further argued by the petitioner, that the appointments which had only one woman appointee out of five appointees discriminated against women.

### Issues

- i. Whether the Chairperson and members of the Business Premises Rent Tribunal were judicial officers.
- ii. Whether the Cabinet Secretary in the Ministry of

Industrialisation, Trade and Enterprise Development had powers to appoint the chairperson and members of the Business Premises Rent Tribunal.

- iii. Whether appointments made to the Business Premises Rent Tribunal without following a process that was open and competitive, in that there were no applications made or interviews done, was constitutional.
- iv. Whether the appointment of one woman and four men to Business Premises Rent Tribunal violated the two thirds gender principle.
- v. Whether section 11 of the Landlord and Tenant (Shops, Hotels and Business Establishments) Act, which provided for the establishment of tribunals by means of appointment by the relevant Minister, was unconstitutional.

### Held

1. The term judicial officer was defined in article 260 of the Constitution to mean a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of a court established under article 169 (1) (d) of the Constitution. A further definition under section 2 of the Judicial Service Act provided that a judicial officer included a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of any other court or local tribunal as may be established by an Act of Parliament, other than the courts established to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land.
2. The term “local tribunal” as utilised in article 169(1) (d) of the Constitution was intended to distinguish that term from the term “international tribunal.” Under the Constitution, where the term “tribunal” was used, it referred to tribunals established under local legislation. Under the definition provided in article 260 of the Constitution, local tribunals were a form of subordinate courts and persons presiding in such local tribunals were judicial officers. The Chairperson and members of the Tribunal in question were therefore judicial officers.
3. The legislation contemplated under article 169(2) of the Constitution had not been enacted. The Tribunals Bill 2015 had not been enacted. In the absence of such legislation, the Judicial Service Act remained the primary legislation in respect of appointments to local tribunals.
4. Article 172(1)(c) of the Constitution as read with section 32 of the Judicial Service Act were the relevant provisions with respect to appointment of presiding officers of local tribunals. Therefore, the appointment of the 1st to 5th interested parties by the 1st respondent under section 11 of the Landlord and Tenant (Shops, Hotels and Business Establishments)

- Act was illegal.
5. Appointments to public office had to be done through a process that was open, merit-based, inclusive and competitive. The nomination of the 1st to 5th Interested Parties was discriminatory and lacked the transparency and openness necessary to uphold the rule of law and promote fair administrative action. Those appointed to the Business Premises Rent Tribunal did not apply, were not shortlisted, and were never interviewed for the positions.
  6. The 1st to 5th interested parties contended that the challenge to the legality of their appointment would lead to administrative chaos which would not be in public interest. Public interest favoured respect for the Constitution and the law. Public interest could not be used to justify the violation of a statute or the Constitution.
  7. The doctrine of separation of powers only applied within the confines of the Constitution and the law. The rule of law was supreme and no justification was valid if it offended the rule of law. Expediently, costs, convenience and legitimate expectation could never be valid justifications unless they were within the confines of the law.
  8. Approval given for the impugned appointments by the Judicial Service Commission could not regularize that which was not legal.
  9. Section 10 of the Public Service (Values and Principles) Act provided for competition and merit-based appointments. In making the appointments, the Cabinet Secretary did not comply with the requirements of the said section 10. Applications for appointment could not be made in abstract. There had to be an announcement of a vacancy and a statement on the minimum qualifications, followed by shortlisting and interviews.
  10. Section 11 of the Landlord and Tenant (Shops, Hotels and Business Establishment) Act provided for the establishment of tribunals by means of appointment by the Minister. *Inter alia*, section 7 of the Sixth Schedule to the Constitution provided that where a constitutional provision assigned a responsibility to a different state organ or public officer, other than the one that would otherwise be responsible for it, the Constitution would prevail to the extent of the conflict. Therefore, in view of an apparent conflict between section 7 of the Sixth Schedule to the Constitution and section 11 of the Landlord and Tenant Act, the Constitution would prevail.
  11. The solution to the constitutional non-conformity in section 11 of the Business Premises Rent Tribunal Act had been provided for under the Constitution and the legislation was not unconstitutional *per se*.
- The issue was not with the legislation but with its application and that application was addressed in section 7 of the Sixth Schedule to the Constitution.
12. Article 27 of the Constitution provided for equality and freedom from discrimination. It also provided for the gender rule to the effect that not more than two thirds of elective or appointive positions would be of the same gender. No valid reason had been given by the respondents for failure to appoint at least one third of women to the Tribunal. The legal fraternity was awash with women who met the qualifications that the respondents alleged they were looking for. All they needed to do was to advertise publicly for those qualified to apply.
  13. The 1st respondent was in breach of not only article 27 of the Constitution but also article 232(1)(i) of the Constitution by selecting only one woman appointee out of five appointees.
  14. Section 11(1) of the Landlord and Tenant (Shops, Hotels and Business Establishment) Act did not prescribe the minimum or maximum number of members of the Tribunal. Therefore, the appointing authority had discretion on the number of members to the Tribunal.

**Orders: -**

- i. *A declaration that the appointment of the 1st to 5th interested parties was in violation of articles 2, 10, 27, 47, 169(1)(d), 172(1), 232(1)(f) & (g) and 259 of the Constitution of Kenya, article 2 of CEDAW, article 2 of Maputo Protocol, section 32 of the Judicial Service Act together with section 10 of the Public Service (Values and Principles) Act.*
- ii. *An order of certiorari quashing Gazette Notice No. 4244 dated June 22, 2020 issued by the Cabinet Secretary for Industrialization Trade and Enterprise Development and any consequential actions arising therefrom.*
- iii. *Each party was to bear their own costs in both petitions*

## Employment and Labour Relations Court awards Kshs 1 (Kshs one) to a principal secretary found to be a beneficiary of proceeds of crime

Lillian W. Mbogo-Omollo v Cabinet Secretary Ministry of Public Service and Gender & another [2020]  
eKLR

Petition No. 86 of 2020

Employment and Labour Relations Court at Nairobi

**Radido Stephen, J**

October 21, 2020

*Reported by Kakai Toili*

**Labour Law** – employment – disciplinary proceedings – commencement and continuation of internal disciplinary proceedings against an employee -where an employee facing criminal charges before a court was dismissed - whether an employer had to wait for the conclusion of the criminal proceedings before dismissing an employee or commencing or continuing internal disciplinary proceedings against the employee – when would courts interfere with an employer’s internal disciplinary proceedings against an employee facing criminal charges in court - Constitution of Kenya, 2010, article 50(2)(a); Anti-Corruption and Economic Crimes Act, 2003, section 62(3).

**Constitutional Law** – Executive – principal secretaries – appointment and dismissal of principal secretaries – procedure to be followed - whether the President could dismiss a principal secretary at will - Constitution of Kenya, 2010, articles 132(2)(d), 135, 155, 236 and 259.

**Labour Law** – employment – unfair dismissal - claim that an employee was unfairly dismissed from employment – claim that the employee had been found to be a beneficiary of proceeds of crime and had not appealed against that decision - what was the effect of an employee being found to be a beneficiary of proceeds of crime in a suit for compensation for unfair dismissal.

### Brief facts

In 2017, the President nominated and appointed the petitioner as Principal Secretary. In May 2018, the petitioner stepped aside to allow investigations into alleged mishandling of funds and upon completion of the investigations, the petitioner was charged before the Magistrates Court with corruption-related offences. As a result of the criminal charges, the Cabinet Secretary, Public Service, wrote to the petitioner to inform her that her appointment had lapsed with the appointment of another person to the said office of Principal Secretary.

Aggrieved, the petitioner moved the court alleging that the decision violated articles 10, 41 and 236 of the Constitution of Kenya, 2010 (Constitution), and sought for among other orders that; a declaration that the revocation of her appointment was unconstitutional; service gratuity at the rate of 31% of the basic remuneration package for the term served; restoration

of all withheld salary and allowances for the years under suspension; general damages and compensation for the unlawful revocation of her appointment.

### Issues

- i. Whether an employer was obligated to wait for the conclusion of any criminal proceedings before dismissing an employee or commencing or continuing internal disciplinary proceedings against the employee.
- ii. When would courts interfere with an employer’s internal disciplinary proceedings against an employee facing criminal charges in court?
- iii. Whether the President had the power to dismiss a principal secretary at will.
- iv. What was the procedure for the appointment and dismissal of a Principal Secretary?
- v. What was the effect of an employee being found to be a beneficiary of proceeds of crime in a suit for compensation for unfair dismissal?

### Held

1. The petitioner was serving as a Principal Secretary appointed in terms of articles 132 and 155 of the Constitution. In terms of article 260 of the Constitution, the office of a Principal Secretary was designated as a State office and therefore being a State office holder, the petitioner was a State officer and a public officer as envisaged under the Constitution. However, not all public officers were State officers while all State officers were *ipso facto* public officers.
2. Suspension did not take away the right of the person so suspended to be presumed innocent, and the burden lay on the prosecution to prove his or her guilt beyond reasonable doubt. Indeed, under section 62(3) of the Anti-Corruption and Economic Crimes Act (ACECA), should one be acquitted or for any reason the proceedings against him or her terminated, the public officer ceased to be suspended. Therefore, section 62 did not violate the petitioner’s rights under article 50(2)(a) of the Constitution.
3. Article 50(2)(a) of the Constitution preserved an accused person’s right to be presumed innocent within the criminal trial process and did not constrain

- the hands of parties to a contractual relationship.
4. An employer did not need to wait for the conclusion of any criminal proceedings before dismissing an employee or commencing or continuing internal disciplinary proceedings, and courts only intervened if the employee could show that the continuation of the disciplinary proceedings gave rise to a real danger (not just a theoretical danger) that there would be a miscarriage of justice in the criminal proceedings if the court did not intervene. Therefore, the petitioner's right to be presumed innocent was not violated when she was placed under suspension.
  5. Article 132(2)(d) of the Constitution gave the President the discretion to dismiss a Principal Secretary in accordance with article 155 of the Constitution. Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. It obliged courts to promote; the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance. The duty to adopt an interpretation that conformed to article 259 was mandatory.
  6. Constitutional provisions had to be construed purposively and in a contextual manner. Courts were constrained by the language used. Courts could not impose a meaning that the text was not reasonably capable of bearing. In other words, interpretation should not be unduly strained, it should avoid excessive peering at the language to be interpreted.
  7. Articles 132(2)(d) and 155 of the Constitution should not be applied and/or interpreted in isolation from other provisions and more so article 236 of the Constitution which assured public officers of certain protections. There was no intention, given a holistic and contextual approach that articles 132(2)(d) and 155 of the Constitution intended to establish a limitation and/or derogation from the protection of due process assured to public officers in article 236.
  8. Unlike under the repealed Constitution under which the President could appoint and dismiss a Permanent Secretary at will, the Constitution of Kenya, 2010 required the Public Service Commission to recommend persons for appointment (appointment of Cabinet Secretaries followed a different process solely at the hand and discretion of the President).
  9. It was in the public domain that before the Public Service Commission so recommended a person for appointment as a Principal Secretary, it called for applications and conducted an evaluation or appraisal of the candidates to ensure they met the constitutional integrity test among other criteria. Once a person had been appointed as a Principal Secretary, he or she became a public officer. As such public officer, the Principal Secretary became entitled to the protections assured to all public officers by article 236 of the Constitution.
  10. The due process protection in article 236 of the Constitution suggested that public officers had a legitimate expectation that being public officers, due process as envisaged under article 236 would be observed in the process of their removal from office. The power to remove a Principal Secretary was placed upon the President. Article 135 of the Constitution required such decisions to be made and reasons given under the hand of the President.
  11. The petitioner was not subjected to due process, nor was she given reasons for the removal from office under the hand of the President. She was ingeniously notified that her tenure had ended because a replacement had been appointed. The removal of the petitioner in the manner it was conducted was unconstitutional.
  12. The petitioner was found by the High Court to be the beneficiary of proceeds of crime. The court was not informed whether the decision had been appealed against.
- Petition partly allowed; each party to bear its own costs.*
- Orders**
- i. *A declaration was issued that a Principal Secretary was entitled to the protections assured to public officers by article 236 of the Constitution.*
  - ii. *The petitioner was awarded a nominal Kshs 1 (Kshs one) for the violation of her right to due process.*

## Rules and guidelines governing sustainable harvesting of sand

John Muthui & 19 others v County Government of Kitui & 7 others [2020] eKLR

ELC Petition No. E06 of 2020

Environment and Land Court at Machakos

O A Angote, J

November 27, 2020

Reported by Chelimo Eunice

**Jurisdiction** – jurisdiction of the Environment and Land Court - jurisdiction of the National Environmental Tribunal (NET) - jurisdiction of the Environment and Land Court vis-à-vis jurisdiction of the National Environmental Tribunal (NET) – whether the Environment and Land Court had the unlimited jurisdiction to resolve disputes relating to land and the environment – whether the Environment and Land Court had jurisdiction to resolve a dispute alleging infringement of constitutional right to a clean and healthy environment – Constitution of Kenya, 2010, articles 129, 162 and 165.

**Civil Practice and Procedure** – institution of court proceedings – locus standi – locus standi to institute court proceedings claiming infringement of a right or fundamental freedom in the Bill of Rights – claim alleging infringement of constitutional right to a clean and healthy environment – who had the locus standi to commence proceedings for the enforcement of the right to a clean and healthy environment – whether it was necessary for a litigant to demonstrate personal interest or to have suffered loss or injury in order to institute a suit relating to the protection of the environment – reliefs that courts could grant on claims of infringement of constitutional right to a clean and healthy environment - Constitution of Kenya, 2010, articles 22, 42 and 70; Environmental Management and Co-ordination Act, section 3.

**Environmental Law** – environmental disputes – principles guiding courts when resolving environmental disputes – sustainable development, intergenerational equity and precautionary principle – meaning of sustainable development – elements comprising the principle of sustainable development - principle of intergenerational equity – meaning of intergenerational equity – what informed the development of the principle of intergenerational equity – difference between intra-generational equity and inter-generation - precautionary principle – meaning of precautionary principle - what informed the development of the precautionary principle - Constitution of Kenya, 2010, article 69; Environment and Land Court Act, section 18; Environmental Management and Co-ordination Act, section 3(5); Rio Declaration on Environment and Development, principle 15.

**Environmental Law** – protection of environment - laws meant to protect the environment – rules and guidelines governing sustainable sand harvesting – the National Sand

Harvesting Guidelines of 2007 – purpose of the National Sand Harvesting Guidelines – requirement for every county where sand harvesting activities took place to establish a Technical Sand Harvesting Committee – mandate of the Technical Sand Harvesting Committee – where relevant authorities failed to provide evidence to show that the National Sand Harvesting Guidelines had been complied – whether in the circumstances, sand harvesting was being carried out in a sustainable manner - National Sand Harvesting Guidelines, 2007.

**Civil Practice and Procedure** – constitutional petitions – rules governing constitutional petitions – whether Civil Practice and Procedure Rules, 2010 applied to constitutional petitions - whether a petitioner was required to give notice to the affected parties before filing a representative constitutional petition - Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, rule 4.

**Constitutional Law** – rights and fundamental freedoms – right to a clean and healthy environment – components of the right to a clean and healthy environment - Constitution of Kenya, 2010, articles 42, 69 and 70.

### Brief facts

The petitioners filed an application seeking conservatory orders to restrain the respondents from licensing or allowing exploitation of resources more particularly sand harvesting from a river known as Tiva River (the river) until hearing and determination of the petition. They brought the suit on their own behalf and on behalf of the residents of Kitui County and beyond, who in one way or the other depended on, used and derived benefits from the river. They argued that the 1st to 6th respondents had permitted, allowed, licensed and let the 7th and 8th respondents and other persons under the umbrella of the 8th respondent to harvest sand from the river without following the regulations laid down by the 4th respondent for such activities and that as a result, the environment in and around the river had been degraded causing the river to dry up and as a consequence, put the lives of the petitioners and those of their future generations into uncertainty.

In opposing, the 1st and 2nd respondents' averred, among others, that the petition and the application were brought prematurely before the court, that the petition

ought to have been filed in the National Environmental Tribunal (the NET), that the petitioners had no capacity to institute the suit; that the harvesting and excavation of sand from the river was controlled, that there were in place strict laws governing and regulating sustainable use of the said resource and that the harvesting of sand by the 7th and 8th respondents was limited to internal use within the County Government of Kitui and local consumption only and that the Constitution allowed for sustainable exploitation of natural resource.

### Issues

- i. Whether the Environment and Land Court had unlimited jurisdiction to resolve disputes relating to land and the environment.
- ii. Whether the Environment and Land Court had jurisdiction to resolve a dispute alleging infringement of the constitutional right to a clean and healthy environment.
- iii. Who had the *locus standi* to commence proceedings for the enforcement of the right to a clean and healthy environment?
- iv. Whether it was necessary for a litigant to demonstrate personal interest or to have suffered loss or injury in order to institute a suit relating to the protection of the environment.
- v. What reliefs could be granted by courts on claims of infringement of the constitutional right to a clean and healthy environment?
- vi. What principles guided courts when resolving environmental disputes?
- vii. What elements comprised the principle of sustainable development?
- viii. What was the meaning and purpose of the principle of intergenerational equity?
- ix. What was the meaning and purpose of precautionary principle?
- x. Whether a petitioner was required to give notice to the affected parties before filing a representative constitutional petition.
- xi. What were the components of the right to a clean and healthy environment?
- xii. Which rules and guidelines governed sustainable sand harvesting?
- xiii. Whether failure to comply with the National Sand Harvesting Guidelines implied that sand harvesting was being carried out in a sustainable manner.

### Held

1. The requirement that a court or tribunal could only deal with a dispute in respect of which it had the requisite jurisdiction could not be overemphasized. The Environment and Land Court's (ELC)

jurisdiction emanated from the provisions of article 162(2) (b) of the Constitution and section 13 of the Environment and Land Court Act (ELC Act). Parliament enacted the ELC Act in compliance with the provisions of article 162(3). Article 165(5) of the Constitution divested the High Court the jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated under article 162(2) of the Constitution.

2. The reading of the Constitution and the ELC Act showed that it was the ELC that had the unlimited jurisdiction to resolve disputes relating to land and the environment. However, the ELC's jurisdiction was subject to the jurisdiction donated to the subordinate court and tribunals by statutes, whose decisions were appealable to the ELC. One such tribunal was the National Environmental Tribunal (NET). The jurisdiction of NET, which was a creature of the Environmental Management and Co-ordination Act (EMCA) was found at section 129 of EMCA.
3. The petitioners were not appealing against the decision of the National Environment Management Authority (4th respondent) either in issuing a licence or otherwise in respect of the harvesting of sand from the river by the respondents. Also, in view of the prayers sought in the petition, which were confined to the alleged infringement of the petitioners' rights, NET did not have the requisite jurisdiction to deal with the petition. ELC had the jurisdiction to deal with the issues raised in the petition and the application.
4. Article 22(1) of the Constitution guaranteed the right of 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. That meant that every person had a right of ensuring that their rights in relation to the environment were not violated or threatened by way of litigation. The Constitution gave any person alleging infringement of a right to a clean and healthy environment recognized and protected under article 42 of the Constitution, the right to apply to the court for redress, in addition to any other legal remedies that were available in respect to the same matter.
5. Courts were empowered to make any order, or give any directions, it considered appropriate to prevent, stop or discontinue any act or omission that was harmful to the environment, to compel any public officer to take measures to prevent or discontinue any act or omission that was harmful to the environment or to provide compensation for any victim of a violation of the right to a clean and healthy environment. Article 70 of the Constitution granted any person the right

to commence proceedings for the enforcement of the right to a clean and healthy environment.

6. One needed not to have a personal interest or suffered any injury before filing a petition alleging the infringement of the right to a clean and healthy environment. Article 70 of the Constitution and section 3(4) of the EMCA permitted any person to institute a suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. Litigation aimed at protecting the environment could not be shackled by the narrow application of the *locus standi* rule, both under the Constitution and statute, and in principle.
7. The principle behind the law permitting any person to institute a suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury was because the protection of the environment was not only for the benefit of the present generation, but also for the future generation. The preamble to the Constitution recognized the importance of protecting the environment for the benefit of the future generation.
8. Section 18 of ELC Act and section 3(5) of EMCA provided that the ELC ought to be guided by the principle of intergenerational equity while resolving environmental disputes. The quality of life for the future generation depended on the present generation's decisions. The need for change in human development for them to lead happy lives had been debated for decades.
9. The idea that members of the present generation held the earth in trust for the future generations informed the development of the principle of intergenerational equity. Therefore, any person could move the court with a view of protecting the environment, not only for his benefit, but for the benefit of the future generations. It was for that reason that in principle, the *locus standi* to file suits challenging the violation of the right to a clean and healthy environment was given to all and sundry.
10. The petitioners, whether they hailed from Kitui County or not, and whether the harvesting of the sand from the river affected them directly or not, had the *locus* to prosecute the petition which was premised on the ground that the respondents had infringed on their right to a clean and healthy environment. That right was applicable not only to them, but also the future generations. The petitioners had the requisite *locus standi*.
11. Constitutional petitions were governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (*Mutunga Rules*). Rule 4 of the *Mutunga Rules* allowed a petitioner to file a suit on his behalf and on behalf of a class of persons or in the public interest for infringement of right or fundamental freedom provided for in the Constitution. Such a petitioner was not required to give a notice to the affected parties before filing the petition. The petitioners herein were acting on their own behalf, and in the public interest of the people of Kitui County.
12. Article 42 of the Constitution provided that every person had the right and was entitled to a clean and healthy environment. That right included the right to have the environment protected for the benefit of the present and future generations through legislative and other measures particularly those contemplated in article 69 of the Constitution. The right extended to having the obligations relating to the environment under article 70 of the Constitution fulfilled. It was bestowed on every person and had been considered to be essential for the existence of mankind.
13. Unlike the other rights in the Bill of Rights which were guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment was an entitlement of present and future generations and it was to be enjoyed by every person with the obligation to conserve and protect the environment. It had three components, the right itself, the right to have unrestricted access to the courts to seek redress where a person alleged that the right had been infringed or was threatened and the right to have the court make any order or give any directions it considered appropriate to either prevent or discontinue the act harmful to the environment. The court could also compel any public officer to take measures to prevent or discontinue the act that was harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.
14. The Constitution under article 69 obligated all persons to protect and ensure a clean and healthy environment, which included but was not limited to elimination of processes and activities that were likely to endanger the environment as well as establish systems of environmental impact assessment and environmental audit and monitoring of the environment. Article 69 (1) (a) of the Constitution demanded the state, to which the 1st to 5th respondents belonged, to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits. Article 69(1)(d) of the Constitution required the state to encourage public participation in the management, protection and conservation of the environment.
15. Rivers all over the world were under immense pressure due to various kinds of anthropogenic

- activities, among them indiscriminate extraction of sand and gravel which was disastrous as the activity threatened the river ecosystem. Sand harvesting activities affected the environment by causing land degradation, loss of agricultural lands, low availability of water and poor quality of water in the affected rivers. Bed degradation of rivers due to sand harvesting undermined bridge support, and would change the morphology of a river, which constituted aquatic habitat. The loss of that ecosystem affected the environment in many and far reaching ways. To address the issue of sustainable harvesting of sand, the 4th respondent had come up with the National Sand Harvesting Guidelines of 2007 (the Guidelines).
16. Under the Guidelines, the Technical Sand Harvesting Committee (TSHC) was supposed to be established by every county where sand harvesting activities took place. TSHC had been given the mandate to ensure that sand dams gabions were constructed in designated sand harvesting sites, lorries were using designated access roads only to sand harvesting sites and designated sand harvesting sites were rehabilitated appropriately by Riparian Resource Management Association (RRMA), County Council (County Governments) and approved dealers under close monitoring and supervision by the TSHC in compliance with EMCA.
  17. The Guidelines restricted sand harvesting to riverbeds with no harvesting allowed on river banks in order to prevent the widening of rivers. No person was allowed to harvest sand from any area not designated as a sand harvesting site by the TSHC and the site had to have an environmental management plan to guide in the rehabilitation of the sites. In addition, harvesting of sand was not to exceed six (6) feet in depth, designated sand collection sites ought to be at least 50 meters from the riverbanks or dyke and harvesting of sand was to be done concurrently with the restoration of areas previously harvested.
  18. Sand harvesting was to be strictly open-cast harvesting. In case of underground tunneling or extraction of sand, appropriate technology was to be used to safeguard human safety, and river sand harvesting had to be done in a way that ensured that adequate reserve of the sand was retained to ensure water retention. Sand harvesting was not allowed on river banks and within 100 meters of either side of physical infrastructure including bridges, roads, railway line and dyke. Any person who sold sand would be required to issue a receipt to the purchaser and keep records of such for periodic inspection by the relevant authorities.
  19. The respondents did not provide to the court any evidence to show that the Guidelines had been complied with in respect to the harvesting of sand from the river or at all. There was no evidence to show that the 1st respondent had put in place a TSHC which was responsible for the proper and sustainable management of sand harvesting within the county.
  20. In the absence of a TSHC as required under the Guidelines, and in the absence of any evidence to show compliance with all the Guidelines, or a law passed by the 3rd respondent to regulate sand harvesting, the court found that the harvesting of sand in the river was not, *prima facie*, being exploited and utilized in a sustainable manner, contrary to the provision of article 69 (1) (a) of the Constitution. Although the respondents argued that the harvesting of the sand from the river was for the development of the county, and that the local community had immensely benefited from the said harvest, they ought to be aware that environmental considerations had to be at the center stage of all developments.
  21. Sustainable development was one of the national values and principles of governance in the Constitution that bound all state organs, state officers, public officers and all persons. Sustainable development was development that met the needs of the present without compromising the ability of future generations to meet their own needs. Essentially, sustainable development sought to address intra-generational equity, that was equity among the present generation and inter-generation equity, that was equity between generations. Sustainable development reaffirmed the need for both development and environmental protection, and neither could be neglected at the expense of the other.
  22. The four (4) recurring elements that comprised the principle of sustainable development were;
    - a) the need to preserve natural resources for the benefit of future generations (the principle of intergenerational equity).
    - b) exploiting natural resources in a manner which was sustainable, prudent, rational, wise or appropriate (the principle of sustainable use).
    - c) the equitable use of natural resources.
    - d) the need to ensure that environmental considerations were integrated into economic and other development plans, programmes and projects (the principle of integration).
  23. The principle of sustainable development sought to limit environmental damage arising from anthropogenic activities and lessen the depletion of natural resources and pollution of the environment. It was a principle with a normative value, demanding a balance between development and environmental protection, and as a principle of reconciliation in

the context of conflicting human rights, that was the right to development and the right to protecting the environment.

24. Sustainable use of natural resources was recognized under article 69 of the Constitution, where the state, including the 1st respondent, was obliged to ensure sustainable exploitation of sand in the river. The sustainable harvesting of sand from the river could only be accomplished if the guidelines were complied with fully, and legislation was passed by the 3rd respondent in compliance with article 42 of the Constitution.
25. Although the 1st respondent had stated that it had published a Gazette Notice banning the transportation of sand outside the county, the said Gazette Notice did not create any offence that was punishable in court. It did not amount to a law or a regulation to regulate how sand was to be harvested by the local community.
26. Criminal enforcement of environmental law was necessary to protect the integrity of the regulatory system, prevent harm to the environment and to punish the violators. It was for that reason that article 42 of the Constitution obligated the state, including the 1st respondent, to protect the right to a clean and healthy environment through legislative measures, which the 1st and 3rd respondents had not done.
27. Although the respondents argued that they had been relying on an environmental impact assessment report (report) that was prepared by the 7th and 8th respondents, the report was never submitted to the 4th respondent for approval pursuant to the provisions of sections 58 of EMCA. According to the second schedule of EMCA, the report was supposed to be submitted to the 4th respondent for all activities involving sand harvesting, where after, a license was issued. The respondents had not complied with the law. Where the procedures for the protection of the environment were not followed, then an assumption would be drawn that the right to a clean and healthy environment was under threat.
28. When determining environmental issues, the court was guided by certain principles, one of them being the precautionary principle. The principle was based on principle 15 of the Rio Declaration on Environment and Development, which Kenya was a signatory. The principle implied that where there were threats of serious or irreversible damage, lack of full scientific certainty ought not be used as a reason for postponing cost-effective measures to prevent environmental degradation. Central to the precautionary principle was the element of anticipation, reflecting a need for effective environmental measures to be based upon actions which take a longer-term approach. The principle evolved to meet the evidentiary difficulty

caused by the fact that information required to prove a proposition would be in the hands of the party causing or threatening the damage to the environment.

29. Waiting for scientific proof regarding the impact of sand harvesting on the river could result in irreversible damage to the environment and in human suffering. The short term economic stagnation that would result due to the conservatory orders of the court did not outweigh the environmental imperatives of the river.
30. The respondents had the responsibility of abiding by the guidelines and EMCA, and enacting a law or regulations to ensure that there was sustainable exploitation of sand from the river.
31. The respondents had failed, *prima facie*, to comply with the laws and guidelines pertaining to harvesting of sand from the river. The 3rd respondent had also failed to pass laws and regulations which would criminalize the exploitation of sand from the river in an unsustainable manner. That being so, the petitioners had established a *prima facie* case with chances of success.

*Application allowed.*

#### **Orders**

- i. *Conservatory orders issued restraining the respondents either by themselves or through their agents, servants, employees, proxies or any other person from licensing, permitting, allowing or in any other way exploiting resources more particularly sand harvesting from Tiva River in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County until hearing and determination of the petition.*
- ii. *The costs of the application ordered to be met by the 1st respondent.*

## Feedback For Caseback Service

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

**Fred A. Ochieng**  
Presiding Judge,  
High Court, Kisumu.

» As always, I reiterate that it is vital to get updates on the results of an appeal arising from the Judgement rendered by us. If the Judgement is affirmed, you are encouraged. If the Judgement is overturned, you learn from it.

**Hon. Charles Obulutsa**  
Chief Magistrate  
Nyahururu Law Courts.

» Thanks team Kenya Law for your continued support in sending us judgments on appeal. It enriches our jurisprudence.

**Hon. Martha Akoth**  
Opanga  
Senior Resident  
Magistrate  
Kangundo Law Courts.

» Thank you for case back. I'm now well informed on the subject matter.

**Hon. Bernard Kasavuli**  
Principal Magistrate  
Mavoko Law Courts.

» Thanks for the feedback

# ▶ Legislative Updates

*By Brian Kulei & Christian Ateka, Laws of Kenya Department*

This is a synopsis of Acts of Parliament and Bills introduced in both the National Assembly and the Senate. This legislative update covers the period between November, 2020 and February, 2021.

## A. ACTS OF PARLIAMENT

<b>ACT</b>	<b>STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT, 2020</b>
<b>Act No.</b>	No. 20 of 2020
<b>Commencement</b>	11 <sup>th</sup> December, 2020
<b>Objective</b>	<p>This Act amends the following laws:</p> <ol style="list-style-type: none"> <li>1. Interpretation and General Provisions Act (Cap. 2)</li> <li>2. Records Disposal Act (Cap. 14)</li> <li>3. Penal Code (Cap. 63)</li> <li>4. Public Holidays Act (Cap. 109)</li> <li>5. Firearms Act - (Cap. 114)</li> <li>6. Official Secrets Act - (Cap. 187)</li> <li>7. Kenya Roads Board Act, 1999 (No. 7 of 1999)</li> <li>8. Statistics Act, 2006 (No. 4 of 2006)</li> <li>9. Employment Act, 2007 (No. 11 of 2007)</li> <li>10. Accountants Act, 2008 (No. 15 of 2008)</li> <li>11. Judicial Service Act, 2011 (No. 1 of 2011)</li> <li>12. Kenya National Commission on Human Rights Act, 2011 (No.14 of 2011)</li> <li>13. Employment and Labour Relations Court Act, 2011 (No. 20 of 2011)</li> <li>14. Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011)</li> <li>15. National Police Service Commission Act, 2011 (No. 30 of 2011)</li> <li>16. Public Appointments (Parliamentary Approval) Act, 2011 (No. 33 of 2011)</li> <li>17. Universities Act, 2012 (No. 42 of 2012)</li> <li>18. Kenya Law Reform Commission Act, 2013 (No. 19 of 2013)</li> <li>19. Investment and Financial Analysts Act, 2015 (No. 13 of 2015)</li> <li>20. Witness Protection Act, 2016 (No. 16 of 2016)</li> </ol>
<b>ACT</b>	<b>SECTIONAL PROPERTIES ACT, 2020</b>
<b>Act No.</b>	No. 21 of 2020
<b>Commencement</b>	28 <sup>th</sup> December, 2020
<b>Objective</b>	<p>This Act provides for the division of buildings into units to be owned by individual proprietors and common property to be owned by proprietors of the units as tenants in common. The Act also provides for the use and management of the units and common property.</p>
<b>ACT</b>	<b>TAX LAWS (AMENDMENT)(NO. 2) ACT, 2020</b>
<b>Act No.</b>	No. 22 of 2020
<b>Commencement</b>	1 <sup>st</sup> January, 2021
<b>Objective</b>	<p>An Act of Parliament to make amendments to the following tax-related laws:</p> <ul style="list-style-type: none"> <li>• Income Tax Act (Cap. 470)</li> <li>• Value Added Tax Act, 2013 (No. 35 of 2013)</li> </ul>
<b>ACT</b>	<b>TEA ACT, 2020</b>
<b>Act No.</b>	No. 23 of 2020
<b>Commencement</b>	11 <sup>th</sup> January, 2021
<b>Objective</b>	<p>This Act provides for the regulation, development and promotion of the tea industry in Kenya.</p>

<b>ACT</b>	<b>ANTI-DOPING (AMENDMENT) ACT, 2020</b>
<b>Act No.</b>	No. 24 of 2020
<b>Commencement</b>	1 <sup>st</sup> January, 2021
<b>Objective</b>	This is an Act of Parliament to amend the Anti-Doping Act (No. 5 of 2016) to comply with the 2021 World Anti-Doping Code and to put in place an enhanced results management system for anti-doping rule violations.

## B. NATIONAL ASSEMBLY BILLS

<b>NATIONAL ASSEMBLY BILL</b>	<b>CHILDREN (AMENDMENT) BILL, 2020</b>
<b>Dated</b>	20 <sup>th</sup> November, 2020
<b>Objective</b>	The principal object of this Bill is to amend the Children Act, 2001 (No. 8 of 2001) to be in conformity with the Constitution of Kenya. The Bill seeks to vest equal responsibility for parental care and protection of a child in both the mother and the father whether they are married to each other or not. The Bill further provides that neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.
<b>Sponsor</b>	George Peter Kaluma <i>Member of Parliament, National Assembly</i>
<b>NATIONAL ASSEMBLY BILL</b>	<b>CRIMINAL PROCEDURE CODE (AMENDMENT) BILL, 2020</b>
<b>Dated</b>	20 <sup>th</sup> November, 2020
<b>Objective</b>	The principal object of this Bill is to amend the Criminal Procedure Code (Cap. 75) to make provision for the mandatory execution of bond for offences other than murder, treason, robbery with violence and attempted robbery with violence for persons arrested without warrant.
<b>Sponsor</b>	Nelson Koech <i>Member of Parliament, National Assembly</i>
<b>NATIONAL ASSEMBLY BILL</b>	<b>NATIONAL CONSTRUCTION AUTHORITY (AMENDMENT) BILL, 2020</b>
<b>Dated</b>	20 <sup>th</sup> November, 2020
<b>Objective</b>	The principal object of this Bill is to amend the National Construction Authority Act (No. 41 of 2011) to ensure women, youth and persons living with disabilities with startup businesses who apply to be registered as contractors under category six, seven and eight are exempted from paying the prescribed fee. The amendment seeks to recognize women, youth and persons living with disabilities as marginalized groups and to cushion them from the burden of paying registration fees.
<b>Sponsor</b>	David Gikaria <i>Member of Parliament, National Assembly</i>
<b>NATIONAL ASSEMBLY BILL</b>	<b>ANTI-DOPING (AMENDMENT) BILL, 2020</b>
<b>Dated</b>	7 <sup>th</sup> December, 2020
<b>Objective</b>	The principal object of this Bill is to amend the Anti-Doping Act, 2016 (No. 5 of 2016) to harmonize the legislative framework with the 2021 World Anti-Doping Code and Regulations.
<b>Sponsor</b>	Amos Kimunya <i>Leader of Majority Party, National Assembly</i>

<b>NATIONAL ASSEMBLY BILL</b>	<b>PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT)(NO. 3) BILL, 2020</b>
<b>Dated</b>	<b>10<sup>th</sup> December, 2020</b>
<b>Objective</b>	The principal object of this Bill is to amend the Public Procurement and Asset Disposal Act, 2015 (No. 35 of 2015) to enhance the amount for tenders where Kenya citizens are given exclusive preference from the sum of five hundred million shillings to twenty billion shillings. This is to protect the Kenyan traders from foreign competitors.
<b>Sponsor</b>	Benjamin Gathiru Mwangi <i>Member of Parliament, National Assembly</i>
<b>NATIONAL ASSEMBLY BILL</b>	<b>BUSINESS LAWS (AMENDMENT) (NO. 2) BILL, 2020</b>
<b>Dated</b>	<b>14<sup>th</sup> December, 2020</b>
<b>Objective</b>	The Business Laws (Amendment) Bill (No. 2 ), 2020 seeks to make various amendments to the following statutes: <ol style="list-style-type: none"> <li>1. Law of Contract (Cap. 23)</li> <li>2. Industrial Training Act (Cap. 237)</li> <li>3. Stamp Duty (Cap. 480)</li> <li>4. National Hospital Insurance Fund Act (No. 9 of 1998)</li> <li>5. National Construction Authority Act (No. 41 of 2011)</li> <li>6. Land Registration Act (No. 3 of 2012)</li> <li>7. National Social Security Fund (No. 45 of 2013)</li> <li>8. Companies Act (No. 17 of 2015)</li> <li>9. Insolvency Act (No. 18 of 2015)</li> <li>10. Small Claims Court Act (No. 2 of 2016)</li> </ol>
<b>Sponsor</b>	Amos Kimunya <i>Leader of Majority Party, National Assembly</i>
<b>NATIONAL ASSEMBLY BILL</b>	<b>LANDLORD AND TENANT BILL, 2021</b>
<b>Dated</b>	<b>12<sup>th</sup> February, 2021</b>
<b>Objective</b>	The principal object of the Bill is to repeal the Distress for Rent Act (Cap. 293) Rent Restriction Act (Cap. 296) and the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301). The Bill seeks to introduce a legal framework which balances the interests of landlords and tenants in a free market economy by ensuring that landlords earn reasonable income from their investment in housing and also protects the tenant. The Bill provides for consolidation of the laws relating to the renting of business and residential premises and seeks to regulate the relationship between the landlord and tenant.
<b>Sponsor</b>	Amos Kimunya <i>Leader of Majority Party, National Assembly</i>

**C. SENATE BILLS**

<b>SENATE BILL</b>	<b>CARE AND PROTECTION OF OLDER MEMBERS OF SOCIETY BILL, 2020</b>
<b>Dated</b>	<b>17<sup>th</sup> November, 2020</b>
<b>Objective</b>	The principal object of the Bill is to give effect to Article 57 of the Constitution of Kenya on the right of older persons to— <ol style="list-style-type: none"> <li>a) fully participate in the affairs of society;</li> <li>b) pursue their personal development;</li> <li>c) live in dignity and respect and be free from abuse; and</li> <li>d) receive reasonable care and assistance from family and the State.</li> </ol> <p>The Bill provides a framework through which the rights articulated under Article 57 of the Constitution can be realized. This Bill provides the necessary framework through which county governments are to put in place mechanisms for the implementation of policies and programmes necessary for the realization of the rights of older members of society under the Constitution of Kenya.</p>
<b>Sponsor</b>	Aaron Cheruiyot <i>Senator</i>

<b>SENATE BILL</b>	<b>WILDLIFE CONSERVATION AND MANAGEMENT (AMENDMENT) BILL, 2020</b>
<b>Dated</b>	4 <sup>th</sup> December, 2020
<b>Objective</b>	The Bill seeks to amend the Wildlife Conservation and Management Act, 2013 (No. 47 of 2013), in order to make further provision for the allocation of adequate facilities to County Wildlife Conservation and Compensation Committees established under the Act. The Bill provides for a timeline of twelve months for the compensation for human death, human injury or crop and property damage caused by wildlife in accordance with the Act. The Bill makes further provision for the payment of compensation and other entitlements due to local communities affected by wildlife in accordance with the Act.
<b>Sponsor</b>	Johnes Mwaruma <i>Senator</i>
<b>SENATE BILL</b>	<b>COUNTY LICENSING (UNIFORM PROCEDURES) BILL, 2020</b>
<b>Dated</b>	4 <sup>th</sup> December, 2020
<b>Objective</b>	The principal objective of this Bill is to put in place uniform procedures for licensing of various activities by counties. This Bill seeks to establish uniform procedures for licensing to ensure certainty in the process and ultimately encourage private sector players to do business in the counties.
<b>Sponsor</b>	Mercy Chebeni <i>Senator</i>
<b>SENATE BILL</b>	<b>STARTUP BILL, 2021</b>
<b>Dated</b>	3 <sup>rd</sup> February, 2021
<b>Objective</b>	The objectives of the Bill <i>inter alia</i> include: <ul style="list-style-type: none"> <li>• To see to the establishment of Incubation Programmes and to provide for matters related to the role of the National and County Governments in relation to startups;</li> <li>• To mandate the national and county governments to put in place a national and county incubation policy framework for the development of the business incubation sector and startup system;</li> <li>• To mandate the Kenya National Innovation Agency established under the Science, Technology and Innovation Act, 2013 and county executive committee members responsible for matters relating to science, technology and innovation to establish incubation programmes and regulations on relationship between incubators and startups;</li> <li>• To provide for the registration of Startups by the Kenya National Innovation Agency and admission into an Incubation Programmes;</li> <li>• To provide for Certification of Incubators and issuance of incentives for Startups;</li> <li>• To expand the membership of the Board of Trustees of the National Research Fund and ;</li> <li>• To amend the Science, Technology and Innovation Act, 2013 by mandating the Kenya National Innovation Agency and the National Research Fund to financially support technological innovations.</li> </ul>
<b>Sponsor</b>	Johnson Arthur Sakaja <i>Senator</i>

# Legal Supplements

## *Digest of Recent Legislative Supplements on Matters of General Public Importance*

By Brian Kulei, *Laws of Kenya Department*

This part provides a summary of Legislative Supplements published in the Kenya *Gazette* on matters of general public importance for the period between August, 2020 to December, 2020

DATE OF PUBLICATION	LEGISLATIVE SUPPLEMENT NUMBER	CITATION	PREFACE
14 <sup>th</sup> August, 2020	88	Competition Act (Proposed Acquisition of all the issued share capital of Superior Homes at Vipingo Limited by Superior Homes (Kenya) PLC) Rules, 2020  (L.N. 140/2020)	The Competition Authority of Kenya, in the exercise of the powers conferred by section 42 (1) of the Competition Act, 2010, excludes the proposed acquisition of all the issued share capital of Superior Homes (Kenya) PLC for the following reasons- a. the merger will not affect competition negatively, and b. although the combined turnover/assets of the parties was above KShs. 1, 000, 000, 000 for the preceding year, 2018, the assets of the target were valued at as KShs. 450, 000, 000 which is below KShs 500 million and therefore it meets the prescribed thresholds.
14 <sup>th</sup> August, 2020	88	Competition Act (Proposed Acquisition of Assets and Shares in Radiotelle Limited by Alpha Vision CMA Kenya Limited) Exclusion, 2020.  (L.N. 141/2020)	The Competition Authority of Kenya, in the exercise of the powers conferred by section 42 (1) of the Competition Act, 2010, excludes the proposed acquisition of assets and shares in Radiotelle Limited by Alpha Vision CMA Kenya Limited for the following reasons- a. the merger will not affect competition negatively, and b. the acquirer turnover for the preceding year, 2018 was KShs. 1,000 000 while the value of target was KShs. 40, 000, 000, and therefore, the combined turnover transaction of KShs. 41, 000, 000, meets the threshold for exclusion as provided in the Competition (General) Rules 2019.
14 <sup>th</sup> August, 2020	88	Competition Act (Proposed Acquisition of Sole Control of Overdrive Holdings Inc by Aragon Parent Corporation) Exclusion, 2020  (L.N. 142/2020)	The Competition Authority of Kenya, in the exercise of the powers conferred by section 42 (1) of the Competition Act, 2010, excludes the proposed acquisition of sole control of Overdrive Holdings INC by Aragon Parent Corporation for the following reasons- a. the merger will not affect competition negatively, b. the combined turnover of the parties was above KShs. 1 billion value for the year 2018, while the target was KShs. 282, 800, which is below KShs. 500 million and therefore the transaction meets the threshold for exclusion as provided in the Competition (General) Rules 2019

14 <sup>th</sup> August, 2020	88	Competition Act (Proposed Acquisition of 50% of the Share capital in Securex Investment Limited by Balvinder Kishori Lai Sahni) Exclusion, 2020  (L.N. 143/2020)	The Competition Authority of Kenya in the exercise of the powers conferred by section 42 (1) of the Competition Act, 2010, excludes the proposed acquisition of 50% of the share capital Securex Investment Limited by Balvinder Kishori Lai Sahni for the following reasons- a. the merger will not affect competition negatively, b. the acquirer had no assets or turnover for the preceding year, 2018 while the target of asset valued at KShs. 757,655,987, therefore the transaction meets the threshold for exclusion as provided in the Competition (General) Rules, 2019.
14 <sup>th</sup> August, 2020	88	Competition Act (Proposed Acquisition of the entire issued share capital of Livewire Limited by Star Bright Holdings Limited) Exclusion, 2020  (L.N. 144/2020)	The Competition Authority of Kenya, in the exercise of the powers conferred by section 42 (1) of the Competition Act 2010, the Competition Authority of Kenya excludes the proposed acquisition of the entire issued share capital of Livewire by Star Bright Holdings Limited for the following reasons- a. the merger will not affect competition negatively, b. the combined turnover of the parties was more than 1 billion for the preceding year 2018, while the target was KShs. 378,656,620 which is below KShs. 500 million and therefore the transaction meets the threshold for exclusion as provided in the Competition (General) Rules 2019.
14 <sup>th</sup> August, 2020	88	Competition Act (Proposed Acquisition of 98% Share Holdings in Mybucks S A by Finclusion Africa Holdings Limited and Growth State Holdings Proprietary Limited) Exclusion, 2020  (L.N. 145/2020)	The Competition Authority of Kenya, in the exercise of the powers conferred by section 42 ( 1) of the Competition Act 2010 the Competition Authority of Kenya excludes the proposed acquisition of 98% of the shareholding Mybucks S A by Finclusion Africa Holdings Proprietary Limited for the following reasons- a. the merger will not affect competition negatively, b. the acquirer had no turnover for the preceding year, 2019, while the value of target was KShs. 723, 833,181, therefore the transaction meets the threshold for exclusion as provided in the Competition (General) Rules 2019, under the Merger Threshold Guidelines.

14 <sup>th</sup> August, 2020	88	<p>Competition Act (Proposed Acquisition of control of Life Care Holdings Limited by Oxford Medical Center LLC) Exclusion, 2020</p> <p>(L.N. 146/2020)</p>	<p>The Competition Authority of Kenya, in the exercise of the powers conferred by section 42 (1) of the Competition Act, 2010, excludes the proposed acquisition of control of Life Care Holdings Limited by Oxford Medical Center LLC from the provisions of Part IV of the Act for the following reasons-</p> <ol style="list-style-type: none"> <li>the merger will not affect competition negatively, and</li> <li>the acquirer had no turnover for the preceding year, 2018 while the target turnover was KShs. 371,690,468, therefore the transaction meets the threshold for exclusion as provided in the Merger Threshold Guidelines.</li> </ol>
14 <sup>th</sup> August, 2020	88	<p>Competition Act (Proposed Acquisition of 87, 603 Preference shares in Tulaa Holdings Limited by Acumen Fund INC) Exclusion, 2020</p> <p>(L.N. 147/2020)</p>	<p>The Competition Authority of Kenya in the exercise of the powers conferred by section 42 (1) of the Competition Act, 2010, excludes the proposed acquisition of 87, 603 preference shares in Tulaa Holdings Limited by Acumen Fund INC from the provisions of Part IV of the Act for the reasons that-</p> <ol style="list-style-type: none"> <li>the merger will not affect competition negatively,</li> <li>the acquirer's turnover for the preceding year, 2018, was KShs. 403,156,170, while the target was KShs. 3,631,953, and</li> <li>the combined turnover of KShs. 406, 788, 123 meets the threshold for exclusion as provided under the Merger Threshold Guidelines.</li> </ol>
14 <sup>th</sup> August, 2020	88	<p>Competition Act (Proposed Acquisition of control of AKS Nominees Limited by Nairobi Securities Exchange PLC) Exclusion, 2020</p> <p>(LN. 148/2020)</p>	<p>The Competition Authority of Kenya, in the exercise of the powers conferred by section 42 (1) of the Competition Act, 2010, excludes the proposed acquisition of control of AKS Nominees Limited by Nairobi Securities Exchange PLC, from the provisions of Part IV of the Act for the reasons that-</p> <ol style="list-style-type: none"> <li>the merger will not affect competition negatively,</li> <li>the acquirer had a turnover of KShs. 782, 137, 000 for the preceding year, 2018, while the target turnover was KShs. 2,160 000 therefore, the combined turnover of KShs. 784,297, 000 meets the threshold for exclusion as provided under the Merger threshold Guidelines.</li> </ol>

14 <sup>th</sup> August, 2020	88	<p>Competition Act (Proposed Acquisition of the business of Gina Din Corporate Communications Limited by Edelman Kenya Limited) Exclusion, 2020</p> <p>(LN.149/2020)</p>	<p>The Competition Authority of Kenya, in the exercise of the powers conferred by section 42 (1) of the Competition Act, 2010, excludes the proposed acquisition of the business of Gina Din Corporate Communication Limited by Edelman Kenya Limited from the provisions of Part IV of the Act for the reasons that—</p> <ol style="list-style-type: none"> <li>the merger will not affect competition negatively,</li> <li>the acquirer is newly incorporated and did not have turnover or assets in the preceding year 2018, while the target was KShs. 70,089,484, and</li> <li>the transaction meets the threshold for exclusion as provided under the Merger Threshold Guidelines.</li> </ol>
14 <sup>th</sup> August, 2020	88	<p>Competition Act (Proposed Acquisition of the business assets of Organic Growers and Packers (EPZ) Limited (under administration) by Fresh Pick Processors Limited) Exclusion, 2020</p> <p>(LN.150/2020)</p>	<p>The Competition Authority of Kenya, in the exercise of the powers conferred by section 42 (1) of the Competition Act, 2010, excludes the proposed acquisition of the business assets of Organic Growers and Packers (EPZ) Limited (under administration) by Fresh Pick Processors Limited for the reasons that—</p> <ol style="list-style-type: none"> <li>the merger will not affect competition negatively,</li> <li>the acquirer is newly incorporated and had no turnover nor assets while the target assets were valued at KShs 548,648,760 for the preceding year 2017 therefore, the transaction meets the thresholds for exclusion as provided for in the Competition (General) Rules, 2019.</li> </ol>
6 <sup>th</sup> November, 2020	112	<p>Protection Against Domestic Violence Act (Protection Against Domestic Violence Rules), 2020</p> <p>(L.N. 200/2020)</p>	<p>The Chief Justice makes the following Rules in exercise of the powers conferred by section 34 of the Protection Against Domestic Violence Act, 2015, to guide on the protection against domestic violence and for connected purposes.</p>
13 <sup>th</sup> November, 2020	113	<p>Traffic Act Traffic (Registration Plates) (Amendment) Rules, 2020</p> <p>(L.N. 201/2020)</p>	<p>The Cabinet Secretary for Transport, Infrastructure, Housing, Urban Development and Public Works in the exercise of the powers conferred by section 119 (g) of the Traffic Act , makes the following Rules to guide in the registration of plates.</p>
18 <sup>th</sup> December, 2020	121	<p>Traffic Act (Exemption), 2020</p> <p>(L.N. 210/2020)</p>	<p>The Cabinet Secretary for Transport Infrastructure Housing Urban Development and Public Works in the exercise of the powers conferred by section 120 of the Traffic Act exempts the vehicles described by reference to Chassis Number Make and Type as shown the Schedule from the provisions of section 55(2) of the Traffic Act with effect from the 18th November 2020.</p>

# International Jurisprudence

## Repossession of a vehicle subject of a hire purchase agreement if done in accordance with its terms and conditions does not constitute deficiency in service

M/s Magma Fincorp Ltd v Rajesh Kumar Tiwari

Civil Appeal No 5622 of 2019

Supreme Court of India

**D Y Chandrachud & I Banerjee, SCJJ**

October 1, 2020

*Reported by Faith Wanjiku*

**Commercial Law** – hire purchase – hire purchase agreements – default in payment – where a purchaser defaulted in payment and upon repossession merely gave assurances to clear outstanding balances – whether the financier was obliged to accept – whether repossession of a vehicle by a financier constituted deficiency in service – Consumer Protection Act, 1986, section 2(1)(g).

**Consumer Protection** – consumer complaint – hire purchase agreement – failure to produce a copy of the hire purchase agreement before the District Consumer Disputes Redressal Forum – whether adverse inference could be drawn against a financier for failure to produce a hire purchase agreement – Consumer Protection Act 1986, section 13(4) (iii).

**Consumer Protection** – consumer complaint – hire purchase agreement of a vehicle – repossession of vehicle by financier due to default in payment – plea of purchaser taking possession without pre-sale notice – whether a financier was obliged to divulge details of sale of vehicle to the complainant where all instalments had not been paid – what was the effect of error in address of the complainant in notice for repossession – whether repossession of a vehicle subject of hire purchase by the financier could amount to theft – Consumer Protection Act 1986, sections 11, 17 & 21(b).

**Commercial Law** – hire purchase – damages for breach of hire purchase agreements – taking repossession of a vehicle by financier where the complainant was admittedly in default – whether depreciation of the vehicle could be considered where the complainant had been given free use of vehicle for a considerable period of time – whether a court could award a complainant damages for an error in notice of repossession without considering the prejudice caused to him and without making any assessment of loss – Consumer Protection Act 1986, sections 11, 14(1)(c), 14(d), 17 & 21(b).

### Brief facts

The dispute arose from a hire-purchase agreement between the financier and the complainant over the hire purchase of a Mahindra Marshal Economic Jeep

bearing the Registration No. UP-42-T/1163 (vehicle). The complainant defaulted through post-dated cheques which were, according to the financier, dishonoured. In the circumstances, the financier took re-possession of the vehicle allegedly upon notice to the complainant, and in accordance with the conditions of the hire-purchase agreement and sold it.

Exactly two years after the financier took possession of the vehicle, the complainant filed the complaint under section 12 of the Consumer Protection Act, 1986, admitting that he had paid only 7 complete instalments. The District Forum allowed the complaint and directed the financier to pay Rs.2,23,335/- to the complainant, along with simple interest at 10% per annum from the date of filing of the complaint till payment, Rs.10,000 towards damages for physical and mental agony and Rs.1000/- as litigation expenses, within 45 days from the date of the order.

Aggrieved, the financier appealed to the State Commission contending that the vehicle had to be sold since the complainant had not paid an outstanding amount of Rs.2,80,132/-. His appeal was dismissed which then led to the instant appeal.

### Issues

- i. Whether there could be any impediment to the financier taking repossession of the vehicle when the hirer did not make payment of instalments in terms of the hire purchase agreement.
- ii. Whether the service of proper notice on the hirer was necessary for repossession of a vehicle which was the subject of a hire purchase agreement, and if so, what was the consequence of non-service of proper notice.
- iii. What amounted to a valid complaint under the Consumer Protection Act, 1986?
- iv. What was the purpose of a notice required to be issued to hirer before taking possession of a vehicle subject of a hire purchase agreement?

**Held**

1. The Consumer Protection Act, 1986 (the Act) was enacted to protect the interests of consumers, by making provisions for the establishment of Consumer Councils and other fora for speedy redressal of consumer disputes and for matters connected therewith. As per its statement of objects and reasons placed before Parliament, it was enacted to promote and protect the rights of consumers such as the right to be protected against marketing of goods which were hazardous to life and property; the right to be heard and to be assured that consumers' interests will receive due consideration at appropriate forums; and the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers.
2. The fora constituted under the Consumer Protection Act were quasi-judicial bodies, required to observe the principles of natural justice and to award relief of a specific nature and to award wherever appropriate, compensation to consumers. Section 11 of the Act conferred jurisdiction on the District Forum, having territorial jurisdiction, to entertain a complaint, subject to the pecuniary limit of the value of the goods or services and/or the compensation claimed. In the instant case, the territorial or the pecuniary jurisdiction of the District Forum, to entertain the complaint, was not in dispute. There could also be no dispute that the complainant was a consumer of services provided by the financier. The question was whether the complaint filed by the complainant was a complaint within the meaning of section 11, read with Section 2(1)(c) of the Act. The ingredients of a complaint were provided in sections 2(1)(c) (ii), (iv), (v) and (vi) of the Act. Further, there had to be a deficiency in the services availed by the complainant from the financier, within the meaning of section 2(1)(g) of the Act. The financier, as a service provider, had to have adopted any unfair trade practice within the meaning of section 2(1)(r) of the Act.
3. In the instant case, the complainant only made a vague assertion that the action of the financier in taking possession of the vehicle, admittedly for default in payment of instalments, and in not releasing the vehicle to the complainant, in spite of the complainant's assurance to the financier to clear outstanding instalments and pay timely future instalments, amounted to an act of unfair trade practice and constituted deficiency of service. Deficiency was defined in section 2(1)(g) of the Act as any fault, imperfection or shortcoming or inadequacy in the quality, nature or manner of performance which was required to be maintained by or under any law, for the time being in force, or undertaken to be performed by a person, in pursuance of a contract or otherwise, in relation to any service. Under the terms and conditions of the hire purchase agreement, the ownership of the vehicle was to stand transferred to the complainant from the financier, upon payment of all the 35 instalments and other dues, if any. Until then, the ownership was to be with the financier. As all the 35 instalments had not been paid by the complainant, the ownership of the vehicle remained with the financier.
4. The hire purchase agreement enabled the financier to take possession of the vehicle, on default in payment of any of the instalments. There was no term in the hire purchase agreement, that required the financier to give notice to the complainant before terminating the hire purchase agreement, upon breach of any term thereof, or before taking possession of the vehicle. On the other hand, clause 15 of the hire purchase agreement expressly provided for determination of the hire purchase agreement without notice to the complainant, upon default in hire instalments. Clause 15 enabled the financier and/or its agent to enter the premises of the complainant, where the vehicle under hire may be lying, and to take possession of the same.
5. The repossession of a vehicle under hire, in accordance with the terms and conditions of a hire purchase agreement, upon default in payment of hire instalments and refusal to release the same on mere assurance of the complainant to clear outstanding arrears of hire instalments, and pay future instalments in time, did not constitute 'deficiency' in service.
6. The financier claimed to have issued notice to the complainant before taking possession of the vehicle and also a pre-sale notice. Unfortunately, there was an error in the address of the complainant in the notice purported to be issued to the complainant before taking possession. It could thus, reasonably be assumed that an obligation to give notice to the complainant was implicit in the hire purchase agreement between the parties. The financier also construed the hire purchase agreement to contain an implicit requirement to give notice to a hirer before taking possession of the vehicle covered by the hire purchase agreement. The question thus, was whether the financier could have been directed to return the entire amount paid by the complainant, by way of instalments or otherwise, including Rs.1,04,000/- paid by the complainant directly to the dealer, and also to pay damages of Rs.10,000 for physical and mental suffering, only because of an error in the address of the complainant, in the notice sent by the financier, and that too, without even considering how the timely complainant was prejudiced by the error, when the vehicle had been taken away for non-payment of hire instalments and sold after about four months.
7. The object of a notice before taking possession of a vehicle on hire under a hire purchase agreement, was to enable the hirer, to make a written request to the financier to revive the hire purchase agreement in terms of clause 12 of the said agreement, upon payment of all outstanding dues together with damages, as might be mutually agreed upon.
8. A notice also drew the attention of the hirer to the alleged breaches of agreement on the part of the hirer, on the basis of which, the financier claimed to be entitled to take possession. Such notice gave the hirer an opportunity to show that the hirer had not, in fact, committed any breach of agreement. For example, the hirer could be able to show that the

financier had erroneously omitted to give credit to the hirer for payments made, or had not presented a cheque in its possession for payment, even though there were sufficient funds in the concerned bank account of the hirer, to honour the cheque.

9. Many self-employed hirers, operated vehicles taken on hire, to earn a livelihood. Such vehicles were often driven over long distances. A notice ensured that the hirer was not taken by surprise and had time to stop operating the vehicle, so that third persons using the vehicle on payment of charges were not put to sudden inconvenience by reason of re-possession of the vehicle.
10. On the face of the averments in the complaint, the complainant had approached the financier after possession of the vehicle was taken, to be told that the financier had taken possession of the vehicle, as the complainant had defaulted in payment of instalments. The financier had not agreed to release the vehicle, on the assurance of the complainant to clear outstanding instalments and to pay future instalments in time.
11. A District Forum constituted under the Consumer Protection Act, 1963, derived its power to grant relief from its section 14. If the District Forum was satisfied that the allegations contained in the complaint about the services were proved, it could direct the service provider to;
  - a) return the charges paid by the complainant [section 14(1)(c)];
  - b) to pay such an amount, as could be awarded by District Forum as compensation to the consumer for any loss or injury suffered by the complainant/consumer, due to the negligence of the service provider [section 14(1)(d)];
  - c) to pay punitive damages in such circumstances as the District Forum deemed fit [proviso to section 14(1)(d)];
  - d) to remove the deficiencies in the service in question [section 14(1)(a)]; and,
  - e) to discontinue the unfair trade practice [section 14(1)(f)].
12. Before a District Forum could grant relief to the consumer of a service, it had to be satisfied that the allegations in the complaint, and or the allegations which constituted a valid complaint were proved, i.e;
  - a) allegations of unfair or restrictive trade practice adopted by the service provider; or
  - b) the allegations of deficiency in the service hired, or availed of or agreed to be availed of by the complainant from the service provider; or,
  - c) the allegations of the service provider charging a price in excess of the price fixed for the service, under any law, for the time being in force or agreed between the parties; or,
  - d) allegations of offering spurious services or services hazardous to life or safety.
13. Section 13(2)(b) of the Consumer Protection Act, 1986 obligated the District Forum to decide a complaint on the basis of the evidence brought to its notice by the complainant and the service provider. Irrespective of whether the service provider adduced evidence or not, the decision of the District Forum had to be based on evidence relied upon by the complainant. The onus of proof was on the complainant making the allegation. Section 27 of the Consumer Protection Act required the District Forum, the State Commission or the National Commission to dismiss frivolous complaints with costs not exceeding Rs.10,000/-.
14. The evidence to which the complainant drew the attention of the District Forum was apparent from its judgment and order. The complainant produced a delivery receipt in respect of the vehicle, some payment receipts, Insurance papers in respect of the vehicle, an FIR unconnected with the financier and/or copies thereof and some documents relating to the filing of the complaint and payment of court fees etc., none of which established any deficiency of service or unfair trade practice on the part of the financier.
15. The District Forum drew adverse inference against the financier for not producing the hire purchase agreement and assumed that there was no provision in the hire purchase agreement for taking the vehicle back or selling it to a third party. Significantly, it was not even the case of the complainant in his complaint, that the hire purchase agreement, which the complainant had signed, did not authorize the financier to take possession of the vehicle upon default, or to sell the same to a third party. No adverse inference could have been drawn against the financier for not producing the hire purchase agreement before the District Forum, when there was no allegation in the complaint of breach by the financier of the hire purchase agreement, in taking possession of the vehicle. The District Forum did not exercise its power under section 13(4)(ii) of the Act to call upon the financier to produce the hire purchase agreement. Even otherwise, the District Forum did not direct the financier to produce the hire purchase agreement.
16. In the complaint, a copy of which was annexed to the Paper Book, there was not a whisper of application of any force in taking possession of the vehicle. The finding of the District Forum, of the vehicle having been lifted forcefully or snatched was, with the greatest of respect, contrary to the complainant's own case made out in the complaint, and therefore perverse. A new case could not be made out by way of evidence, when there were no pleadings to support the same.
17. The District Forum concluded that "snatching" the vehicle, without notice, was in breach of the hire purchase agreement and was a deficiency in service. The State Commission dismissed the appeal of the financier on the ground of delay and also on merits, on the ground of non-service of notice at the correct address of the complainant. The State Commission assumed that the error in the address of the complainant in the notice despatched by the financier was deliberate, in order to sell the vehicle

without the knowledge of the complainant. Such assumption was not based on any materials on record but patently conjectural. The State Commission observed that the complainant had been deprived of the opportunity to deposit the amount, due from him to the financier, which again was contrary to the complainant's own pleadings in his complaint.

18. The State Commission further found that there was no mention of the amount due to be paid by the complainant to the financier in the written statement filed by the financier before the District Forum. There was also no mention in that written statement of when the vehicle had been sold and the amount for which the vehicle had been sold, whether such amount was more than or less than the amount due from the complainant to the financier. Observing that the silence on the part of the financier in not divulging anything about the sale rendered the sale dubious, the State Commission concluded that the financier had surreptitiously sold the vehicle, without the knowledge of the Complainant, without notice to the complainant, and without disclosing the details of the sale. That observation overlooked the terms and conditions of the hire purchase agreement and did not consider the law governing hire purchase agreements.
19. A financier remained the owner of the vehicle taken by the complainant on hire, on condition of option to purchase, upon payment of all hire instalments. The hire instalments were charges for use of the vehicle as also for the exercise of option to purchase the vehicle in future. The financier being the owner of the vehicle, had no obligation to divulge details of the sale of that vehicle, and that too on its own, without being called upon to do so. Moreover, the finding of the State Commission that the financier sold the vehicle without the knowledge of the complainant was contrary to the complainant's own case in his complaint before the District Forum.
20. The complainant had established that there was a discrepancy and/or error in the address of the complainant in the notice for repossession, from which all the three fora under the Consumer Protection Act, 1986, i.e.; the District Forum, the State Commission, and the National Commission, had concluded that the vehicle was taken without notice. However, it was the case of the complainant that the vehicle was sold without his knowledge or notice.
21. The error and or discrepancy in the address was minor and there were no materials on the basis of which the State Commission concluded that the error was deliberate. The finding of the State Commission, of the error in the address being deliberate, was thus unsubstantiated. Be that as it were, it was prudent to proceed on the basis of the concurrent factual findings of the District Forum, the State Commission and the National Commission that; the financier took possession of the vehicle without notice. Thus, since the financier deemed it necessary to issue notice to the complainant, and accordingly dispatched a notice, the notice should have been sent to the correct address of the Complainant, as recorded in the hire purchase agreement. The question which arose then was whether repossession of the vehicle without proper notice, for admitted default in payment of hire instalments, warranted the order passed by the District Forum, which was subsequently affirmed by the State Commission and the National Commission.
22. By directing the financier to pay to the complainant, the entire amount paid by the complainant to the financier from the inception, including the amount paid to the dealer directly, along with interest at the rate of 10% per annum, damages of Rs.10,000/- and litigation costs, the tribunals below gave a defaulting hirer the benefit of free use of the vehicle of the value of Rs.4,21,121/- for almost twelve months, plus damages, oblivious to the depreciation in the value of the vehicle by reason of wear and tear, due to use by the hirer, including an admitted accident for which the vehicle laid seized by the police for some time.
23. The Consumer Protection Act, 1986 created fora for quick adjudication of consumer disputes. The Act protected consumers from defective goods, deficient services, unfair or restrictive trade practices, or spurious goods or services. The Act also protected consumers of goods and services from being charged a price, in excess of the price fixed by or under any law in force, the price agreed between the parties, or the price declared by the service provider or the supplier of the goods *inter alia* by display, and/or representation. The Act was not in derogation of any law in existence but in addition thereto, as provided in section 3. The Act protected consumers of services from being charged a price in excess of the price fixed for the service under any law or the price agreed between the parties and also redressal of deficiency in the services availed by the consumer and/or against restrictive or unfair trade practices, and/or spurious services. The Consumer Protection Act, 1986 did not override the Contract Act, 1872, and other enactments in force, applicable to the service availed by the consumer from the service provider.
24. The protection, to which the consumer of a service was entitled under the Consumer Protection Act, was against loss of money, by reason of being denied service, of a quality agreed upon expressly or by necessary implication, *inter alia*, in view of the applicable law, for which the consumer had paid, or had agreed to pay a consideration. The said Act also protected consumers from being overcharged for any service obtained and/or agreed to be obtained.
25. The consumer of a service could be entitled to damages for any loss suffered by the consumer, by reason of denial or deficiency in service for which the consumer had paid or agreed to pay (if the parties had agreed to deferred payment), charges or price for the service. In cases of breach of contract, liquidated damages could be imposed on the party in breach, if the agreement provided for liquidated damages that were a fixed amount by way of damages. Where the parties to an agreement had not agreed to liquidated damages, the party in breach of agreement could be

directed to pay unliquidated damages which were compensatory. Such compensatory damages were not meant to punish the party in breach, but to compensate the aggrieved party for losses suffered as a result of the breach. Where, however, the damages caused by the breach were severe and extensive, the party in breach could be required to pay to the party not in breach such damages as would restore the position of the party not in breach to the position before the breach occurred.

26. Apart from compensatory damages, an adjudicating authority could impose, on the party in breach, punitive damages or nominal damages. Punitive damages were awarded where the party in breach of agreement had behaved in a manner, which was reprehensible and called for punishment. Nominal damages were awarded where there was no real harm done, by reason of the breach of the contract.
27. Section 14 of the Consumer Protection Act, 1986 empowered the District Forum to award compensation to the party not in breach by directing the party in breach to return the price or the charges as could have been paid by the complainant. That provision also enabled the District Forum to award compensatory damages to the consumer for loss or injury suffered by the consumer due to negligence of the party in breach. The Forum could direct removal of the deficiency in service, if the deficiency could be removed and it could direct discontinuation of unfair trade practices or restrictive practices.
28. The proviso to section 14(1)(d) of the Consumer Protection Act, 1986 empowered the District Forum to grant punitive damages in such circumstances as it deemed fit. Punitive damages were not generally awarded in cases of breach of contract unless the act was so reprehensible that it called for punishment of the party in breach. Compensation which was compensatory, had to be assessed taking into account relevant factors, such as the loss incurred by the claimant, through some amount of guess work/estimation.
29. The District Forum did not even undertake the exercise of assessment of the loss/damages, if any, suffered by the complainant by reason of non-service of notice before taking possession of the vehicle. The District Forum, the State Commission and the National Commission did not consider the law relating to hire purchases as enunciated by the instant court in a plethora of past judgments. The law emerging from those precedents was that; goods were let out on hire under a hire purchase agreement, with an option to purchase, in accordance with the terms and conditions of the hire purchase agreement. The hirer simply paid for the use of the goods and for the option to purchase them.
30. The financier continued to remain the owner of a vehicle covered by a hire purchase agreement until all the hire instalments were paid and the hirer exercised the option to purchase. Thus, upon default by the hirer in payment of instalments, the financier could take re-possession of the vehicle. When the agreement between the financier and the hirer permitted the financier to take possession of a vehicle, there was no legal impediment to the financier doing so. When possession of the vehicle was taken, the financier could not be said to have committed theft. Whether the transaction between a financier and a purchaser/hirer was a hire purchase transaction or a loan transaction, could be determined from the terms of the agreement, considered in the light of surrounding circumstances. However, even a loan transaction, secured by right of seizure of a financed vehicle, conferred licence to the financier to seize the vehicle.
31. The agreement executed by and between the financier and the complainant was a hire purchase agreement as would appear from the terms and conditions thereof. In any event, the fora under the Consumer Protection Act had not arrived at any specific finding to the contrary. The agreement clearly permitted the financier to take possession of the vehicle upon default in payment of instalments.
32. Whether the service of proper notice on the hirer would be necessary for repossession of a vehicle, which was the subject matter of a hire purchase agreement, depended on the terms and conditions of the hire purchase agreement, some of which could stand modified by the course of conduct of the parties. If the hire purchase agreement provided for notice on the hirer before repossession, such notice would be mandatory. Notice could also be necessary if a requirement to give notice was implicit in the agreement from the course of conduct of the parties.
33. If the hirer committed breaches of the conditions of a hire purchase agreement which expressly provided for immediate repossession of a vehicle without further notice to the hirer in case of default in payment of hire charges and/or hire instalments, repossession would not be vitiated for want of notice. In the instant case, a duty to give notice to the complainant before repossession was implicit in the hire purchase agreement. The hire purchase agreement was a stereotype agreement in a standard form, prepared by the financier. The same kind of agreements, containing, identical terms, except for minor modifications were executed by all hirers of vehicles, equipment, machinery and other goods, who entered into hire purchase agreements with the financier. The financier, who set down the terms and conditions of the hire purchase, construed the hire purchase agreement to contain an implied term for service of notice and accordingly despatched a notice, but did not address it to the correct address of the complainant as given in the hire purchase agreement.
34. In a case where the requirement to serve notice before repossession was implicit in the hire purchase agreement, non-service of proper notice would be tantamount to deficiency of service for breach of the hire purchase agreement giving rise to a claim in damages. The complainant consumer would be entitled to compensatory damages, based on an assessment of the loss caused to the complainant by reason of the omission to give notice. Where there was no evidence of any loss to the hirer by reason of

- omission to give notice, nominal damages could be awarded.
35. A forum constituted under the Consumer Protection Act had the power to award punitive damages. However, punitive damages were granted only in exceptional circumstances, where the action of the financier was so reprehensible that punishment was warranted. For instance, where a financier erroneously and/or wrongfully invoked the power to repossess without notice to the hirer, causing extensive pecuniary loss to the hirer or loss of goodwill and repute, a forum constituted under the Consumer Protection Act could award punitive damages.
  36. There was no evidence of any loss suffered by the complainant by reason of non-receipt of notice. Admittedly, several instalments remained unpaid. After repossession, the complainant contacted the financier and was informed of the reasons for the repossession. He only made an offer to pay outstanding instalments and gave an assurance to pay future instalments in time. If the financier was not agreeable to accept the offer, it was within his rights under the hire purchase agreement. That was not a case where payment had been tendered by the hirer but not accepted by the financier/lender. The complainant had not tendered payment.
  37. The financier admittedly paid Rs.3,15,000/- for acquisition of the vehicle, out of which the financier had been able to realize Rs.1,19,000/- inclusive of all charges. There was depreciation in the value of the vehicle by reason of usage by the complainant for about a year. The District Forum did not even notionally assess the depreciation in the value of the vehicle.
  38. The District Forum was not justified in directing the financier to pay the complainant Rs.2,23,335/- being the entire amount paid by the complainant to the financier from the inception as well as the payment of Rs.1,04,000/- made by the complainant to the dealer along with damage of Rs.10,000/- and litigation costs of Rs.1,000/- after the complainant had held and used the vehicle for almost a year. The complainant, admittedly a defaulter, had in effect been allowed free use of the vehicle for about a year plus damages for an error in the notice of repossession without considering the prejudice, if any, caused to the complainant by the error and consequential no receipt of the notice. Moreover, that award was made without making any assessment of the loss, if at all, to the complainant by reason of the error/omission. Thus, the impugned orders of the National Commission, the State Commission and the District Forum, could be sustained and the same ought to be set aside.

*Appeal allowed.*

#### **Order**

*The Financier was ordered to pay a composite sum of Rs.15,000/- to the complainant towards damages for 'deficiency' in service and costs for omission to give the complainant a proper notice before taking repossession of the vehicle.*

## **Relevance to Kenya's legal system**

In Kenya hire purchase transactions are governed by Hire Purchase Act, cap 507 of Laws of Kenya. Section 3(1) of the Hire Purchase Act provides that the Act applies to and in respect of all hire-purchase agreements which the hire purchase price does not exceed the sum of four million shillings. The amount may only be varied by the relevant cabinet secretary after taking into account market forces from time to time prevailing except for the case of a hire purchase agreement in which the hirer is a body corporate.

Hire purchase agreements are agreements whereby, an owner of goods allows a person, known as the hirer, to hire goods from him or her for a period of time by paying instalments. The hirer has an option to buy the goods at the end of the agreement if all instalments are being paid. However, it is not a contract of sale but contract of bailment as the hirer merely has an option to buy the goods and although the hirer has the right of using the goods, he is not the legal owner during the term of the agreement, the ownership of the goods remains with the owner.

Section 15 of the Hire Purchase Act prohibits repossession of goods under a Hire Purchase Agreement when two thirds (2/3) of the Hire Purchase price has been paid

whether in pursuance of the agreement or of a judgment or otherwise. It is specific that under such circumstances, the owner of the goods shall not enforce any right to recover possession of the goods from the hirer other than by a suit. That is the position of the law as held by the High Court in Civil Appeal No 24 of 2013 *David Karobia Kiiru v Laverage Company Ltd* [2017] eKLR. Section 15 (ii) further states if an owner retakes possession of the goods in contravention of subsection (1), the Hire Purchase agreement if not previously terminated shall terminate and the hirer shall be released from all liability under the agreement and shall be entitled to recover from the owner by suit all sums paid by the hirer under the agreement or under any security given by him in respect thereof.

Therefore, if the owner breaches provisions under section of the Hire Purchase Act, then the agreement is treated as terminated and the hirer is released from liability and can recover all payments made under the Agreement as was so found in *David Karobia Kiiru v Laverage Company Ltd* [2017] eKLR. Upon hearing the request for an order to repossess the goods, the court can either order for the specific delivery of the goods to the owner or part thereof and to the hirer title to the remaining goods or suspect

repossession on condition the hirer pays the balance.

Further to the above, the Constitution of Kenya, 2010 in article 46 (1) provides that consumers have the right to the information necessary for them to gain full benefit from goods and services and also to compensation for loss or injury arising from defects in goods or services.

There is the Consumer Protection Act No. 46 of 2012 which is an Act enacted by Parliament for protection of the consumer and prevention of unfair trade practices in consumer transactions. Section 5 provides that under the quality of goods and services; the supplier is deemed to warrant that the goods or services supplied under a consumer agreement are of a reasonably merchantable quality and that the implied conditions and warranties applying to the sale of goods under the Sale of Goods Act shall apply with necessary modifications to goods that are leased, traded or otherwise supplied under a consumer agreement. Section 12 provides that it is an unfair practice for a person to make a false, misleading or deceptive representation in relation to contracted goods or services. Section 16 (1) goes ahead to provide that any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.

In *Athman Mustafá Mohammed v Ecobank Kenya Limited & 2 others* [2015] eKLR, the court held that repossession of a motor vehicle without notice was legal as the only interest which defendant had in the vehicle was that it was the security for the financial facility which the bank gave to plaintiff. Provided the plaintiff was paying the monthly instalments, and doing so within time, the defendant would have had no reason to take possession of the vehicle unless the plaintiff violated any other term of the agreement between them. It is the defendant who had taken steps to dispose of the vehicle. They had done so, according to the plaintiff, without first giving him Notice or any Demand Letter. Even assuming that Notice was not issued by the defendant to the plaintiff, that would not, on a *prima facie* basis, have rendered unlawful or irregular the proposed sale. The Chattels Mortgage expressly stipulated that the power to take possession of the vehicle and to dispose of it accrued immediately to the defendant, when there was a default; and that it accrued without any previous or further notice or concurrence on the part of the grantor.

In *Joseph Chege Gitau v CFC Bank Limited* [2008] eKLR where it was held that from the pleadings and the evidence adduced before the trial court, it was not disputed that the appellant defaulted in the repayment of the hire instalments for the motor vehicle. The appellant blamed the respondent for repossessing the motor vehicle without taking into account that the appellant was unable to pay the rental instalments because the motor vehicle had mechanical problems and the appellant could not therefore generate any income. However, the fact that the motor vehicle had mechanical problems did not absolve the appellant from his obligation to make the monthly

payments, nor did it deny the respondent its right to repossess the motor vehicle. It was evident that the agreement provided the respondent the right to repossess the motor vehicle as long as there was default in payment of the monthly instalments.

It is evident from the above two judgments that the court is willing to enforce consumer rights in hire purchase agreements and protect consumers from unfair trade practices as long as there is proof of violation when consumers have fulfilled their obligations to the agreements.

In *Simon Muiruri Wanjohi v Resma Commercial Agencies* Nakuru HCA No. 91 of 2002 the 1<sup>st</sup> respondent took the law into his own hands and unlawfully took possession of the said motor vehicle from the appellant. In the event of breach of the agreement the 1<sup>st</sup> respondent was required to seek the intervention of the law and not use the law of the jungle to take away the appellant's property; the 1<sup>st</sup> respondent robbed the appellant of his motor vehicle.

In *Pals Car Ltd v CMC Motors Ltd & 2 Others* Nakuru HCCC No.171 of 2005 the court held that if there was breach of the agreement, the defendant ought to have filed a suit to obtain and enforce the agreement, and obtain an order to repossess, and therefore repossession without a court order was unlawful.

The court is also ready to enforce the rights of the owner of the property, as long as they seek intervention of the law where there are breaches in the hire purchase agreements.

There is also the Consumer Federation of Kenya (COFEK) which was registered on March 26, 2010. COFEK is a founder Chair of the Government-run Kenya Consumer Protection Advisory Committee (Kecopac) and its mandate is to defend, promote, develop and pursue consumer rights as guided by Article 46 of the Constitution of Kenya 2010, the Consumer Protection Act, 2012 and the Competition Act, Cap 504 and make it possible for the consumers to get value for money.

The above Indian case holds that repossession of goods under hire purchaser by the financier (owner) may be done in accordance with the terms and conditions of the hire purchase. Thus, where the hire purchase agreement requires the financier to issue a presale notice to the complainant (hirer), the financier is obligated to do so. Failure to do so would render repossession illegal and the court may, after accessing the prejudice and loss, if any, caused by that failure to issue presale notice, award the complainant damages for deficiency in service. Unlike in Kenya, the financier does not need to obtain a court order in order to repossess the hired goods once the hirer has defaulted or breached the agreement.

## Inclusion of Legal Services as Essential Services during the Covid-19 Pandemic; Comparison between Kenya and India

### India

**Supreme Court of India brings to an end the extension of limitation period for legal services by including them as essential services**

**(Suo Motu Writ Petition (Civil) No.3 of 2020 (In Re: Cognizance for Extension of Limitation)**

In India, due to the onset of COVID-19 pandemic the Supreme Court took suo motu cognizance of the situation arising from difficulties that might be faced by the litigants across the country in filing petitions/applications/suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central or State).

The Supreme Court also took cognizance of the fact that the lockdown had been lifted and the country was returning to normalcy. Almost all the Courts and Tribunals were functioning either physically or by virtual mode. The Court was of the opinion that the order dated March 15, 2020 prescribing the limitation period had served its purpose and in view of the changing scenario relating to the pandemic, the extension of limitation should come to an end.

The Court through Suo Motu Writ Petition (Civil) No.3 of 2020 (In Re: Cognizance for Extension of Limitation) on March 8, 2021 then ordered the Government of India to amend the guidelines for containment zones, to state that regulated movement would be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements.

As can be seen in the Supreme Court of India's writ petition, legal services have now been considered as essential services and thus they do not have restricted movement in filing petitions/applications/suits/appeals/all other proceedings. The order when implemented will thus make it easier for litigants to access legal services in the country without difficulties.

### Kenya

In Kenya, the courts went ahead and gave an order to the on April 16, 2020 to Fred Matiangi, Cabinet Secretary for Interior and Coordination of National Government to include the Law Society of Kenya and its members in the list of services, personnel or workers exempted from the provisions of the Public Order (State Curfew) Order, 2020.

This was seen in the case of **Law Society of Kenya v Hillary Mutyambai, Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 others (Interested Parties) [2020] eKLR** where the petitioner challenged the night curfew published under the Public Order Act (POA)

(curfew order), imposed by Kenyan government as one of the measures meant to halt or slow the spread of the coronavirus (COVID-19) in Kenya. They termed it as unconstitutional and illegal, and that it did not comply with the provisions of section 8 of the POA by failing to provide the period of the curfew. One of their main prayers was that advocates of the High Court ought to be included in the list of services, personnel or workers exempted from the operation of the Public Order (State Curfew) Order, 2020.

The High Court held that the government could not be faulted for enforcing precautionary and restrictive measures in order to slow the spread of a novel disease in line with the precautionary principle. The use of a curfew order to restrict the contact between persons as advised by the Ministry of Health was a legitimate action. The 2<sup>nd</sup> respondent had ameliorated the effects of the curfew by changing the working hours in order to make it possible for the workers to comply with the curfew.

The court also held that although the curfew order met the constitutional and statutory parameters, there was a strong case for the retooling and remodeling of the legal instrument so that it could achieve its objectives with reduced impacts on the rights and fundamental freedoms of Kenyans.

Further, the High Court found that curfew order had not closed courts. The curfew did not affect the right to fair hearing under article 50 of the Constitution. However, the work of advocates was not limited to court work. They also attended to persons arrested by the police. Therefore, petitioner's members ought to have been exempted from the operations of the curfew order so that they could assist in the protection of the rights guaranteed by article 49 of the Constitution whenever called upon to do so. The petitioner's concern became more important when the manner in which the curfew had been enforced was taken into account.

The High Court finally gave the order compelling the 2<sup>nd</sup> respondent (Fred Matiangi, Cabinet Secretary for Interior and Coordination of National Government) to amend, within five days from the date of the judgment, the Schedule to the Public Order (State Curfew) Order, 2020 so as to include the 3<sup>rd</sup> Interested Party (IPOA) and the members of the petitioner in the list of "services, personnel or workers" exempted from the provisions of the Public Order (State Curfew) Order, 2020.

### The Current Status in Kenya

The current status in Kenya shows that action has been

taken to include legal services as essential services. This is after issuance of **Legal Notice No. 46 on The Public Order (State Curfew) Order, No. 2 of 2021** by Fred Matiangi, Cabinet Secretary for Interior and Coordination of National Government. The Legal Notice applies to the entire territory of the Republic of Kenya except Nairobi City, Kajiado, Machakos, Kiambu and Nakuru counties. The legal notice adds advocates of the High Court of Kenya to the list of essential services with effect from March 29, 2021 and will remain in effect for a period of 60 days thereof.

There is also **Legal Notice No. 47 on The Public Order (Nairobi City, Kajiado, Machakos, Kiambu and Nakuru Counties Curfew) Order, 2021** issued by Fred Matiangi, Cabinet Secretary for Interior and Coordination of National Government. The Legal Notice applies to Nairobi City, Kajiado, Machakos, Kiambu and Nakuru counties. The legal notice adds advocates of the High Court of Kenya in the 5 counties to the list of essential services with effect from March 29, 2021 and

will remain in effect for a period of 60 days thereof.

## Conclusion

As can be seen in both countries, India and Kenya, their courts issued compelling orders to their respective Executive organs to include legal services as essential services to ease the difficulties litigants are faced with in filing all types of matters and proceedings. Kenya has now seen the importance and effected its court orders showing the respect to the Judiciary by the Executive. It is therefore clear that judicial organs of various countries have realized and seen the need of having legal services as essential services operating beyond the restrictions in place during the COVID-19 Pandemic as justice delayed is justice denied. Litigants in countries where these orders are implemented will thus have a reprieve and it can only be hoped that more Executive organs will see the need to also be a driving force during the COVID-19 Pandemic of ensuring justice is continually served by implementing those orders.

## East African Court of Justice awards \$25000 USD in damages for violation of the right to access to justice by the Kenyan Supreme Court.

Martha Wangari Karua v The Attorney General of the Republic of Kenya and Hon. Anne Mumbi Waiguru & Hon. Peter Ndambiri (Intervenors)

Reference No 20 of 2019

The East African Court of Justice First Instance Division

**M Mugenyi, C Nyawello, C Nyachae, JJ**

November 27, 2020

*Reported by Faith Wanjiku & Ian Otenyo*

**International Law** – regional integration – East African Community – organs of the East African Community – the East African Court of Justice – suit challenging the acts and omissions of the Kenyan judicial system at the East African Court of Justice – claim challenging Kenya’s commitments to the fundamental and operational principles of the Treaty for the Establishment of the East African Community, especially the right to access to justice and a fair trial - whether the Kenyan Supreme Court violated the applicant’s right to access to justice as provided by the Kenyan Constitution by dismissing her petition - Treaty for the Establishment of the East African Community, articles 6(d) and 7(2), Constitution of Kenya, article 50, 159 and 259.

**Constitutional law** – interpretation of provisions of the Constitution of Kenya, 2010 – articles 50, 159 and 259 of the Constitution of Kenya, 2010 – interpreting the Kenyan Constitution in a manner that promoted the purpose and principles therein – where no time was explicitly allotted for the hearing of matters that were remitted – Whether the Kenyan Supreme Court violated the applicant’s right to access to justice as provided by the Kenyan Constitution by dismissing her petition – Constitution of Kenya, article 50, 159 and 259

**Constitutional Law** – fundamental rights and freedoms – right to fair trial – right of access to justice - claim alleging that the actions of the Supreme Court of Kenya in dismissing the applicant’s electoral petition violated her rights to access to justice and a fair hearing & thereby violating the fundamental principles encapsulated in articles 6(d) and

7(2) of the Treaty for the Establishment of the East African Community (the Treaty) - Whether the Kenyan Supreme Court violated the applicant’s right to access to justice as provided by the Kenyan Constitution by dismissing her petition – Constitution of Kenya, article 50, 159 and 259; Treaty for the Establishment of the East African Community, articles 6(d) and 7(2), Constitution of Kenya, article 50, 159 and 259.

### Brief facts

The applicant participated in the respondent’s general elections as a gubernatorial candidate for Kirinyaga County, and lost to the first Intervener. Dissatisfied with the outcome, the applicant petitioned against the election results at the high court. The petition was dismissed and the applicant successfully appealed to the court of appeal. The appellate court ordered the case to be remitted back to the High Court for determination on merits. The High Court then dismissed the applicant’s petition which the applicant appealed to the Court of Appeal. The Court of Appeal held that the High Court lacked the jurisdiction to entertain the petition after the lapse of the six months period for hearing petitions as prescribed by statute. The applicant approached the respondent’s Supreme Court which upheld the Court of Appeal’s decision.

It is from that background that the applicant contended that the respondent’s judicial organs through its acts and or omissions failed to abide by the fundamental principles encapsulated in articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community

(the Treaty). The applicant faulted the decision of the Supreme Court of Kenya for its failure to uphold the rule of law and violating her right to access to justice and a fair hearing.

#### Issues

- i. Whether the reference was time barred due to the two month limit set under article 30 of the East African Community Treaty.
- ii. Whether the reference raised a cause of action against the respondent.
- iii. Whether the Kenyan Supreme Court violated the applicant's right to access to justice as provided by the Kenyan Constitution by dismissing her petition.
- iv. Whether the respondent state through the acts and/ or omissions of its judicial organs violated its commitments to the fundamental and operational principles of the EAC Treaty, especially the right to access to justice and a fair trial.

#### Relevant provisions of the law

##### Treaty for the Establishment of the East African Community, 2000

##### Article 6 – Fundamental Principles of the Community

*The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:*

- a) *good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;*

##### Article 7 (2) – Operational Principles of the Community

*The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.*

##### Constitution of Kenya, 2010

##### Article 50 – Fair hearing

- 1) *Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*

##### Article 159 – Judicial authority

- 2) *In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*
  - b) *justice shall not be delayed;*
  - c) *justice shall be administered without undue regard to procedural technicalities; and*
  - d) *the purpose and principles of this Constitution shall be protected and promoted.*

##### Article 259 - Construing this Constitution (1) and (8)

1. *This Constitution shall be interpreted in a manner that—*

- a) *promotes its purposes, values and principles.*
- b) *advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.*
- c) *permits the development of the law.*
- d) *contributes to good governance.*

2. *If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay.*

#### Held

1. The instant court had to consider whether to compute time from the date the Kenyan High Court passed its judgement or the time when the Supreme Court passed its judgement. Article 30(2) of the Treaty prescribed a two-month limitation period within which a reference may be instituted in the instant court. The instant court would compute time from the starting date of an act complained of and not the day the act ended which was when the Supreme Court rendered its judgement. As such, the reference was not time barred.
2. The reference raised the question of access to justice which the applicant contended was denied by the Supreme Court. The right of access to justice was enshrined under article 30 of the East African Community Treaty and bound all member states of the East African Community. As such, the court affirmed that the reference raised a cause of action against the respondent.
3. The respondent's judicial branch was obliged to interpret the Kenyan Constitution, 2010, in a manner that promoted the purpose and principles of the respondent's Constitution. Where the respondent's actions were inconsistent with the local law and a breach of its obligation under the Treaty to observe the principle of the rule of law, it was the instant court's inescapable duty to consider the internal laws of such partner state in determining whether the conduct complained of amounted to a violation or contravention of the Treaty.
4. Section 75(1) of the respondent's Elections Act granted parties the right to contest alleged electoral malpractices in the High Court of Kenya. It was not in dispute that section 85A of the same Act conferred a right of appeal to the Court of Appeal. On the other hand, article 163(4)(a) of the Constitution of Kenya, 2010, though not conferring a typical second appeal from the Court of Appeal in respect of electoral matters, provided for an appeal to the Supreme Court on matters of constitutional interpretation.
5. Whereas section 75(2) of the Elections Act fixed the hearing and determination of election petitions in the High Court to six months from the date of filing, it was silent on whether that time frame included the time spent on appeals from High Court decisions (interlocutory or otherwise), or the time within which cases on remission by an appellate court could be determined. Ordinarily, an election petition brought under section 75(1) should be heard and determined within the six-month period stipulated under section 75(2), and should it go

on appeal, it would be determined within the six months delineated in section 85A(1)(b). It should be settled on how local courts ought to approach a matter where the appellate court determined an appeal by remitting it back to the trial court.

6. Access to justice meant that citizens were able to use justice institutions to obtain solutions to their common justice problems. For access to justice to exist, justice institutions had to function effectively to provide fair solutions to citizens' justice problems.
7. It was extremely troubling that the Supreme Court held that the Court of Appeal should have decided to terminate the matter before remitting it since it was well aware that any substantive determination of the petition by the High Court would have been an exercise in futility. The apex court clearly suggested that the applicant's right to be heard and access to justice, including exhausting her right of appeal, were unimportant. It alluded to a recommendation for a court to disregard its duty to administer justice purely because in its estimation, to do so would have been an exercise in futility.
8. The matter before the Supreme Court was no longer an electoral matter but a search for a constitutional solution to a legal problem. The Supreme Court would be the judicial organ mandated to provide a fair solution to the identified procedural debacle, where no time was explicitly allotted for the hearing of matters on remission. The Kenyan Constitution,

2010 provided an appropriate legal framework for the solution to the unjust situation the applicant found herself.

9. In the promotion of access to justice, human dignity, equity and social justice, any court sitting in interpretation of the Kenyan Constitution, 2010 where a particular time frame was not prescribed by the Constitution, was urged to construe and remedy the *lacuna* in such a manner as would ensure that justice should be done without unreasonable delay. There was a duty upon the Supreme Court to redress the identified *lacuna* in the law so as to engender equity and social justice in the adjudication process. That would not have been tantamount to usurping the legislative role of parliament, but rather might be approached on a case by case basis to ensure that Kenyan law was never silent but always speaking.
10. The impugned Supreme Court decision fell short on the said judicial organ's constitutional duty and curtailed the applicant's right to access to justice. It contravened the rule of law principle enshrined in articles 6(d) and 7(2) of the Treaty.

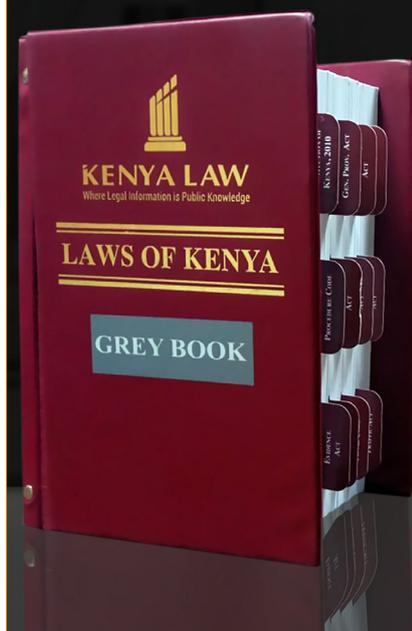
*Application allowed.*

#### Orders

- i. An award of USD \$ 25,000 to the applicant.
- ii. Simple interest on damages awarded at 6% per annum from the date of the instant judgment until full payment.
- iii. Costs awarded to the applicant.

## THE GREY BOOK

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- Law of Succession Act
- Limitation of Actions Act
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- Penal Code
- Sexual Offences Act
- Supreme Court
- Traffic Act

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## LAW REFORM ISSUES

Compiled by Faith Wanjiku

LAW REFORM ISSUE	BRIEF FACTS & METADATA OF JUDGMENT	HOLDINGS PERTINENT TO LAW REFORM
<p><b>A</b></p> <p>The multiple publication rule in defamation is not applicable in Kenya as a bar to the limitation period set in section 4(2) of the Limitation of Actions Act and thus policy makers through the legislative arm of the Government need to take appropriate steps to mitigate the deficiencies.</p>	<p><b>Royal Media Services Ltd v Valentine Mugure Maina and another</b>  <b>Civil Appeal No.19 of 2018</b>  <b>High Court at Nyeri</b>  <b>October 18, 2019</b>  <b>Ngaah J, J</b></p> <p><b>Brief facts</b></p> <p>The instant matter was an appeal from the ruling and order in Nyeri Chief Magistrates Court that held that every visit to the site where defamatory words was published constituted a fresh cause of action notwithstanding the date the words were first published. That as long as the offensive words remained on the appellant's website and were accessible to all and sundry, there was a continued publication constituting a cause of action.</p> <p>The appellant's grounds for appeal were that: the trial court erred in not holding that the suit before it concerned an action for libel which could not be brought after the end of 12 months from such date which the cause of action accrued as provided for by section 4(2) of the Limitation of Actions Act; that each individual publication gave rise to a separate cause of action subject to its own limitation period.</p>	<ol style="list-style-type: none"> <li>1. The multiple-publication rule, as its name suggested, allowed for a new and separate cause of action each time a defamatory statement was published. In the off-line world, that meant that each copy of a book or a newspaper was a separate, actionable case of defamation with its own limitation period. It did not necessarily follow that the same litigant could take multiple actions arising from the same defamatory statement; it only meant that in the case where the rule applied, any limitation period would run from the date of the last publication as opposed to the first.</li> <li>2. The 1st respondent had not demonstrated that the multiple publication rule was applicable to Kenya. The English court decisions cited by the 1st respondent were of persuasive authority and not binding on Kenyan courts; but more importantly, the English themselves had abandoned the multiple publication rule upon which those decisions were based. It would be foolhardy for Kenya to follow those decisions when their very basis had been found wanting to such an extent that a legislative intervention in the form of section 8 of the English Defamation Act 2013 had been found necessary.</li> <li>3. There were technological achievements in media communication the prominent of which was, invariably, the internet, and which by their very nature had some bearing on such torts as slander and libel in a way that could not have been foreseen. No doubt it was necessary that the law should be equally dynamic and keep pace with those advancements as need arose. It was the policy makers that needed to take the initiative and act accordingly; the most courts could do was to point out the deficiencies in the law hoping that the legislative arm of the Government would rise to occasion and take appropriate steps to mitigate those deficiencies. In the absence of legislative acts, courts could do nothing more than apply the law as it was.</li> <li>4. Section 4(2) was couched in such terms that the trial court was left with discretion to extend the time within which a claimant could file suit for damages in defamation claims. It could be that the claimant was under disability of some sort and therefore he could not, for that reason, file the claim within the statutory period. It could also be equitable that the action should be allowed to proceed if the statutory time limit prejudiced the plaintiff. Either way, the court had also to be cautious that the defendant was not prejudiced by its order.</li> </ol>

## B

Initiation of murder trials at the High Court instead of at the Magistrates' Courts limits an accused person's right to fair trial

**Charles Henry Nyaoke v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 4 others [2020] eKLR**  
**Petition No. 7 of 2018**  
**High Court at Kisumu**

**J C Lesiit, L K Kimaru & K Kimondo, JJ**

**November 27, 2020**

**Brief facts**

The petitioner and two other persons were charged at Kisumu High Court for murder contrary to section 203 as read with section 204 of the Penal Code. The petitioner challenged various laws, including sections 3 and 5 and the first schedule of the Criminal Procedure Code and sections 211 and 212 of the Penal Code (impugned provisions), to the extent that they provided for trial of offences set out in the Penal Code to commence before the High Court. The petitioner contended that persons charged with the offence of murder suffered discrimination and unequal treatment before the law, which violated their right to equal protection and equal benefit of the law, as well as freedom from discrimination. That origination of murder trial at the High Court denied a convicted person one level of appeal. That the delay occasioned by the time taken to try cases before the High Court compared to trials held before Magistrates' Courts amounted to denial of access to justice.

The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents opposed the petition arguing that the commencement of murder trials before the High Court was not discriminatory. They urged that the impugned provisions which gave a differentiation in the courts handling criminal cases, did not offend the provisions of article 27 of the Constitution for providing for murder and treason to be tried before the High Court and that only unfair discrimination was disallowed by the law. They submitted that the petition was *res judicata* and was subject to judgment *in rem*. That the issues raised were determined and finally settled in *Peter Kariuki Muibau & 11 others vs the Attorney General & another, [2018] eKLR (Muibau case)* where the court held that the organization of courts to hear different types of cases was necessary to ensure specialization of court personnel at each level, and to ensure each court understood the specific needs of the parties coming before it.

The 3<sup>rd</sup> respondent on its part opposed the petition arguing that it purported to question the validity of the Constitution on unlimited jurisdiction of the High Court in criminal matters, and more particularly murder cases, contrary to the provision of article 2 (3) of the Constitution which prohibited the challenging of the validity and or legality of the Constitution.

1. Other than the statutory requirements under the CPC, majority having been repealed, it was apparent that the trial of murder charges before the High Court was a historical accident. The necessity of trying murder charges before the High Court was imposed by colonial expediency which spilled over to post independence Kenya. Despite trials by jury being abolished in 1963, trial of those charged with murder continued to be at the High Court with the aid of assessors. The fact that those charged with murder were still being tried in the High Court was a historical accident without any legal justification or logic.

2. There were 125 Magistrates' Courts stations which were decentralized and devolved throughout the counties. There were 447 magistrates compared to only 82 judges of the High Court. Initiating murder trials at the Magistrates' Courts would significantly lower the costs of the trial, reduce the distance to court and expedite delivery of justice. That would result in better realization of access to justice which was a fundamental right guaranteed by articles 48, 50 and 159(2)(a) and (b) of the Constitution.

3. Origination of murder trial at the High Court discriminated or deprived accused persons their rights to equal protection of the law as enshrined under article 27 of the Constitution. It also deprived persons convicted in the Magistrates' Court the right to approach the High Court for a re-trial under article 50 (6) of the Constitution.

4. The mere origination of the murder trial at the High Court, however, was not unlawful. Under article 165 of the Constitution, the High Court had original and appellate jurisdiction in both civil and criminal matters, even though appeals could be limited by law. Initiating a murder trial in the High Court compromised an essential element of the right to a fair trial. Thus, under the hierarchy of courts provided by articles 162 and 169 of the Constitution, a murder convict was denied a vital step in the appellate chain.

C

There is a lacuna in the law as to what happens to a legal process for the nomination of a Deputy Governor which is in situ by the time the Governor leaves office.

**Law Society of Kenya v Anne Kananu Mwenda & 5 others; I.E.B.C. (Interested Party) [2021] eKLR**

**Petition No. E019 of 2021 (Consolidated with Petition Nos. E433 of 2020, E005 of 2021, E009 of 2021, E011 of 2021, E012 of 2021, E13 of 2021, E015 of 2021 and E021 of 2021)**

**High Court at Nairobi**

**AC Mrima, J**

**February 9, 2021**

**Brief facts**

The instant petition was filed challenging, *inter alia*, the 1<sup>st</sup> respondent's ascension to the office of the Governor of Nairobi City County. The Nairobi City County Governor was impeached by the Senate and by that time the Governor did not have a deputy governor. Therefore, the Speaker of the Nairobi City County Assembly assumed the position of Acting Governor by operation of law. Prior to the impeachment, the then Governor had nominated the 1<sup>st</sup> respondent for the position of deputy governor and the process towards the vetting of the nominee had been initiated. The County Assembly then took steps towards the vetting of the nominee. It was at that point that the consolidated petitions challenging the nomination of the 1<sup>st</sup> respondent as the Deputy Governor and her ascension into the office of Governor were filed.

Upon hearing the two applications in the consolidated petitions the court disallowed them. As a result, the 1<sup>st</sup> respondent was vetted, approved and eventually sworn in as the Deputy Governor. The instant petition was filed challenging, *inter alia*, the 1<sup>st</sup> respondent's ascension to the office of the Governor of Nairobi City County. The petitioner sought among others the suspension of the decision of the County Assembly approving the nomination of the 1<sup>st</sup> respondent as the deputy governor.

1. The effect of not holding the by-election within the 60 days' window in the unique circumstances of the instant matter meant that the tenure of the Speaker acting as a Governor under article 182(5) of the Constitution was constitutionally hinged to only 60 days. In other words, the Speaker could not continue acting as the Governor past the 60<sup>th</sup> day. In the event the Speaker left office after the 60 days and without an acting governor, a governor or a deputy governor in office, then what would follow would be a constitutional crisis. That was because after 60 days from the day the Speaker took over as the acting Governor and there being no by-election held (since the parties were not for the by-election), Nairobi County would not have had any person acting as a governor, it would have no substantive governor and no deputy governor, as well.
2. In the absence of an acting governor, a governor or a deputy governor in office, many questions calling for answers arose. They included;
  - a. how the County Government of Nairobi and by extension the County Assembly would run;
  - b. how the thousands of workers, who had families and some who would be servicing loans, would be paid;
  - c. how the health department would, in particular, endeavour to fight the dreaded *corona* virus in the county; and
  - d. the length of time Nairobi County would be held in such a limbo;
  - e. how such a constitutional crisis would be undone given that constitutional timelines could not be extended among other questions.
3. A court had to, as a primary duty and in public interest, uphold the Constitution. A court should not in any manner whatsoever create a constitutional crisis. It remained the cardinal duty of a court to foresee such a crisis and take steps to avoid it. As the parties were not for the holding of the by-election and given that the 60 days' period was running out, the court had only one option in upholding public interest and to avoid a constitutional crisis: to allow the vetting process to proceed, at least to see whether the County could have a deputy governor, if the nominee was approved. The court, therefore, in allowing the vetting process to continue acted in the best interest of the Nairobi City County and of Kenya at large and in public interest.
4. Article 182 of the Constitution dealt with vacancy in the office of county governor and mainly focused on the absence of a governor and the deputy governor and that a by-election followed thereafter. The law was silent on what happened to a legal process for the nomination of a deputy governor which was *in situ* by the time the Governor left office. The Constitution did not contemplate such a situation and as a result there was no provision on the way forward. That was a constitutional *lacuna*.
5. Whereas the law was silent on what happened to a legal process for the nomination of a Deputy Governor which was in situ by the time the Governor left office, and acting in public interest, the court asserted its inherent jurisdiction in finding a way forward. The only way to deal with the lacuna and in public interest was to allow the nomination process which had been legally initiated to proceed.

**D**

There is a *lacuna* in law in Section 44 of Tax Procedures Act and Section 15 of Excise Duty Act 2015 which provides that activities requiring a licence do not apply to transporters.

Regulations 32 and 33 of Excisable Goods Management System Regulations, 2017, which allowed the seizure of a person's vehicle without being given a chance to be heard are unconstitutional for infringing on the right to be heard.

**John Mbaabu & another v Kenya Revenue Authority [2020] eKLR  
Petition No. 6 of 2019  
High Court at Chuka  
RK Limo, J  
June 17, 2020**

**Brief facts**

The petitioners claimed that their vehicles were seized by the respondent in June 2019 and that despite repeated demands for the release of the detained motor vehicles, the respondent had ignored, refused and/or neglected to release the motor vehicles and that as a result of the seizures, they had suffered and continued to suffer loss of use of the vehicles. The petitioners claimed that at the time of the seizure of the motor vehicles, the offices/agents of the respondent failed to serve them with any notice and that no reason had been given by the respondent for the seizures and detention of the motor vehicles.

The petitioners submitted that the seizure and detention of their motor vehicles was an infringement and violation of their right to acquire and own property. They further contended that their rights for a fair trial were infringed stating that they had a right to be informed of any charge against them with sufficient detail to answer. The petitioners prayed for among others orders that; a declaration be issued that their constitutional rights of having their property not arbitrary seized had been violated and infringed by the respondent; and a declaration that the petitioners' constitutional right to acquire and own property had been infringed and or violated by the respondents.

1. Under sections 44 of the Tax Procedure Act, 2015, the Commissioner General of the Kenya Revenue Authority (Commissioner) was allowed and mandated by law to seize any goods for which excise duty had not been paid. The respondent had an obligation to the seizure of excisable goods (liquor) transported by the petitioners. The owner of the goods had not gone to the respondent's premise to claim the goods or dispute the tax obligations to the tax collector. Section 44 however applied only to excisable goods not the vessels ferrying the goods.
2. Section 2 of Excise Duty Act, 2015, gave what constituted excisable goods and the list provided under the First Schedule of that Act included alcoholic drinks. From regulation 32 of Excise Duty (Excisable Goods Management System) Regulations 2017, the respondent had some legal backing to justify the seizures of the petitioner's motor vehicle.
3. The petitioners' motor vehicles were seized and they were not given a chance to be heard courtesy of regulations 32 and 33 of Excisable Goods Management System Regulations, 2017, that did not provide for a chance to be heard. Any provisions of law that allowed or gave power to an entity, a State officer or any public officer to take adverse action or steps without according the concerned/affected person a chance/opportunity to be heard was draconian and unconstitutional. Such a provision flew in the face of the tenets of natural justice which were entrenched in the Constitution.
4. A right to a fair trial under article 25 of the Constitution could not be limited by the impugned regulations 32 and 33 of Excisable Goods Management System Regulations and to the extent that the provisions breached the right to be heard, it was inconsistent with articles 25, 47 and 50 of the Constitution and to that extent the provisions were a nullity and void.
5. The dispute raised had nothing to do with tax obligation by the Respondents in respect to transportation of goods. Section 44 of Tax Procedures Act did not apply to transporters. Furthermore, section 15 of Excise Duty Act, 2015, which dealt with activities requiring a licence did not include transportation of excisable goods. That lacuna in law needed to be addressed through legislative interventions before the respondent contemplated future actions.

E

The Attorney General should forward proposals to the National Assembly to consider amendments to section 19 of the Prohibition of Female Genital Mutilation Act (No. 32 of 2011) with a view to prohibiting all harmful practices of FGM

**Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) [2021] eKLR Constitutional Petition No. 244 of 2019**

**High Court at Nairobi  
LA Achode, K Kimondo & MW Muigai JJ  
March 17, 2021**

#### **Brief facts**

The petitioner challenged the constitutionality of the Prohibition of Female Genital Mutilation Act (No. 32 of 2011) and the Anti-Female Genital Mutilation Board formed thereunder (the impugned Act and the Board respectively). The petitioner pleaded that sections 2, 5, 19, 20 and 21 of the impugned Act contravened articles 19, 27, 32 and 44 of the Constitution of Kenya, 2010, (Constitution) by limiting women's choice and right to uphold and respect their culture; ethnic identity; religion; beliefs; and, by discriminating between men and women.

The petitioner contended that section 19(1) of the impugned Act expressly forbade a qualified medical practitioner from performing female circumcision, thereby denying adult women access to the highest attainable standard of health, including the right to healthcare. The petition sought among others orders that a declaration be issued that sections 5, 19, 20, 21 and 24 of the impugned Act were unconstitutional and thus invalid.

1. FGM, female circumcision and female cut referred to all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs or any harmful procedure to the female genitalia for non-medical reasons. The Act defined FGM to comprise all procedures involving partial or total removal of the female genitalia or other injury to the female genital organs, or any harmful procedure to the female genitalia, for non-medical reasons.
2. The WHO included FGM Type IV which was unclassified or any other procedure involving, genital pricking, piercing (and to adorn with jewelry or other decorations), scraping, cauterizing, incising and stretching of the clitoris or labia (with tongs or scissors including razor blades).
3. The Penal Code defined harm as bodily hurt, disease or disorder whether permanent or temporary, while grievous harm meant any harm which amounted to a maim or dangerous harm, or seriously or permanently injured health, or which was likely so to injure health, or which extended to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense. It also defined dangerous harm as harm endangering life.
4. FGM/C was harmful to girls and women due to the removal of healthy genital parts. The FGM/C caused immediate, short term and long term physical and psychological adverse effects. The purposes of FGM/C were community culture-centered and not individual benefit centered. The culture custodians in communities were clan/elders who determined when, where, how and for what FGM/C was conducted within the specific community.
5. The preamble to the Constitution recognized the culture and customs of the Kenyan people. Articles 21 and 27(6) of the Constitution directed the State to take legislative measures to redress the disadvantages suffered by individuals or groups due to past discrimination. Articles 27, 28, 43, 53 and 55 of the Constitution protected all persons from all forms of discrimination and shielded the youth and children from harmful cultural practices. They also guaranteed the right to dignity and the right to the highest attainable standard of health and reproductive health.
6. Section 2 of the impugned Act defined FGM/C Type I, II and III but excluded Type IV which the WHO included as unclassified. The latter included any other procedure involving, genital pricking, piercing with tongs or scissors including razor blades, incising and stretching of the clitoris/labia.
7. Section 19 of the impugned Act criminalized FGM/C except where it was a surgical operation for a person's physical and mental health or at any stage of labour or birth. It further provided that culture, religion, custom or practice or consent would not be a defence.
8. From the stand point of criminal law there was a lacuna created that hampered the effective enforcement of the impugned Act. The criminalization of the three types of FGM/C and not Type IV, which was unclassified, made it difficult to effectively enforce the Act. There seemed to be no objective or professional process to distinguish between the various types of FGM/C during investigation or prosecution.



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*L Jerer*

**Editor/CEO**

May, 2019

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