



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**PETITION 615 OF 2008**

**IN THE MATTER OF SECTIONS 67 & 84 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70, 72,74,75,76 & 77 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ENFORCEMENT UNDER KENYAN LAW OF THE INTERNATIONAL BILL OF RIGHTS AS EXPRESSED IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND CHAPTER V OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE INTERPRETATION OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT, NO. 3 OF 2003**

**BETWEEN**

**PATRICK OCHIENO ABACHI.....1ST PETITIONER/RESPONDENT**  
**ROSALINE WANJIRA ABACHI.....2ND PETITIONER/RESPONDENT**  
**BENJAMIN MAKOKHA ABACHI.....3RD PETITIONER/RESPONDENT**  
**MOSES ODUORI.....4TH PETITIONER/RESPONDENT**  
**LORIAN JUMA.....5TH PETITIONER/RESPONDENT**  
**ODEAR NASEWA HOLDINGS LIMITED.....6TH PETITIONER/RESPONDENT**  
**RICKAIR TRAVEL AGENCIES LIMITED.....7TH PETITIONER/RESPONDENT**

**Versus**

**KENYA ANTI CORRUPTION COMMISSION.....RESPONDENT/APPLICANT**

**RULING**

This is a ruling determining the Notice of Preliminary Objection dated 9<sup>th</sup> October 2008 and the Notice of Motion dated 21<sup>st</sup> January 2009 both filed by the Kenya Anti-Corruption Commission in this Court’s case officially referred to as H.C. PETITION No. 615 of 2008, but also known as H.C.C.C. NO. 615 OF 2008. The said H.C. PETITION No. 615 of 2008 was dated and filed jointly by seven Petitioners above named, on 3<sup>rd</sup> October 2008 accompanied by a Chamber Summons also dated and filed the same date 3<sup>rd</sup> October 2008.

While the “Notice of Preliminary Objection” otherwise referred to as the “Preliminary Objection” is against the Petition and against the Chamber Summons aforesaid, the Notice of Motion is against the Petition.

Briefly the background to the filing of High Court PETITION No 615 of 2008 is that Petitioners are all Defendants in another suit in this court being HCCC No. 423 of 2008 (OS) sometimes referred to as H.C. Misc. Civil Application No. 423 of 2008. In that second suit No. 423 of 2008, the Plaintiff is the KENYA ANTI – CORRUPTION COMMISSION who filed the suit under Section 55 of the ANTI CORRUPTION AND ECONOMIC CRIMES ACT for forfeiture of certain properties the Defendants have. Before forfeiture was ordered the Plaintiff in that suit sought and obtained interim injunctive orders from the court restraining the Defendants variously in their relation to the suit properties as relevant investigation proceeded with a view to leading to prosecution of the suit. The interim orders were granted in a Chamber Summons dated 18<sup>th</sup> September 2008 pending interpartes hearing. It is still pending to-date because of the filing of this HC. PETITION No. 615 of 2008.

We were told Defendants in that suit HCCC No. 423 of 2008 raised some preliminary points attacking that suit.

Mr. Francis Gikonyo, Counsel for the Plaintiff in that suit and also representing the Plaintiff, NOW Respondent, in this suit told us that the said Preliminary Point or Objection raises issues similar to those raised in the Petition in this H.C. PETITION No. 615 of 2008 and that the Objection was raised against the main suit HCCC No. 423 of 2008 together with the Chamber Summons therein. Mr. Fred Ojiambo, Counsel for all the Petitioners before us did not say as much on the preliminary points said to have been raised by his clients in HCCC No. 423 of 2008.

Looking at the relevant case file HCCC No. 423 of 2008 filed on 22<sup>nd</sup> September 2008, the Defendants entered appearance on 29<sup>th</sup> September 2008 and filed their Notice of Preliminary Objection dated 30<sup>th</sup> September 2008 on that same date 30<sup>th</sup> September 2008. They said they were raising a Preliminary Objection to the hearing of the application dated 18<sup>th</sup> August 2008. They should have said dated 18<sup>th</sup> September 2008 together with the Originating Summons. In any case, they said they were raising the Preliminary Objection on the following grounds:

- “1. THAT the application intrudes into the Constitutional Rights of the Defendants and is therefore unconstitutional.**
- 2. THAT the application offends the provisions of the operative law and the same is totally defective.**
- 3. THAT the application is grounded on an Originating Summons that is a nullity.**
- 4. THAT the Applicant is guilty of misjoinder**
- 5. THAT the application as drawn by the Applicant is vexatious and meant to frustrate the ends of justice.”**

Having done all that, the Defendants changed their mind. They decided to file this H.C. PETITION No. 615 of 2008 alleging, among other things, violation or contravention of their Constitutional Rights by the Plaintiff in HCCC No. 423 of 2008, the position being that the Plaintiff in that suit contravened those Constitutional Rights by filing and proceeding to prosecute HCCC No. 423 of 2008. In ground number 1 in support of their Chamber Summons dated 3<sup>rd</sup> October 2008 filed together with their Petition therefore, the Petitioners state that

**“.....the respondent has instituted HCCC No. 423 of 2008 (OS) against the PETITIONER/APPLICANTS”**

And in ground number 4 thereafter the petitioners add:

**“THAT Petitioners/Applicants Constitutional and Fundamental Rights have been and continue to be further infringed by the abuse of the justice system and the suit filed by the Respondent against the Petitioners/Applicants is in contravention to the Constitution of the Republic of Kenya.”**

That suit had therefore to be stayed for H.C. PETITION No. 615 of 2008 to proceed to conclusion first. It had been filed on 22<sup>nd</sup> September 2008 while H.C.PETITION No. 615 of 2008 was subsequently filed on 3<sup>rd</sup> October 2008.

H.C. PETITION No. 615 of 2008 is said to be filed under Sections 70,72,74,75,76 and 77 of the Constitution of Kenya in operation at the time of this ruling, and in the matter of Enforcement Under Kenyan Law of the International Bill of Rights as expressed in the Universal Declaration of Human Rights and the International Covenant on Civil, and Political Rights and the International Covenant on Economic, Social and Cultural Rights and Chapter V of the “Constitution” of the Republic of Kenya; and in the Matter of the Interpretation of the Anti Corruption And Economic Crimes Act, No. 3 of 2003.

The Petitioners included Section 84, and even Section 67 of the Constitution of Kenya, although Section 67 is only for cases where interpretation of the Constitution is required and also only where the question of that interpretation has arisen in proceedings in a subordinate court. We however observe that in this matter the tendency has been for the Petitioners to mention almost every provision of the law they could lay their hands on concerning their Constitutional and Human rights – regardless of the propriety of doing so. While we appreciate anxiety on the part of the Applicants, we should never the less point out that proper legal practice requires that a litigant singles out and mentions issues and specific provisions of the law citing legal authorities, only when each of those is relevant and useful in the litigation for the aim is to see and administer justice a task made difficult when parties handle proceedings anyhowly thereby causing confusion.

In any case, the Notice of Preliminary Objection dated 9<sup>th</sup> October 2008 was filed against the Petitioner’s Petition and Chamber Summons both dated 3<sup>rd</sup> October 2008. According to the Respondent Objecting, its Preliminary Objection is based on the following grounds:

**“1. The Petition and the application for conservatory orders is an abuse of court process for the following reasons:-**

- a) **Pending hearing before the High Court of Kenya are proceedings in HCCC No. 423/2008 (O.S.) KACC VS PATRICK OCHIENO ABACHI AND 6 OTHERS in which the present Petitioners (as Defendants) have raised issues similar to the ones raised in this petition, and the Petitioners are actively participating in those proceedings;**
- b) **The High Court is properly seized of the issues on interpretation of the Constitution in the first suit, and it may embarrass or bring ridicule to the administration of justice were the said suit and the petition allowed to proceed simultaneously.**

c) **The Petition and the application are an affront to procedural rectitude.**

2. **The High Court is one and the Petitioners ought not to attempt a second bite at the cherry by filing the present petition.”**

The Notice of Motion dated 21<sup>st</sup> January 2009 and brought under Sections 3 and 3A of the Civil Procedure Act, Order L of the Civil Procedure Rules, and all other enabling provisions of the law, prays for orders:-

**“1. THAT the petition dated 3/10/2008 and filed in court on 3/10/2008 be struck out.”**

On the grounds:-

- “1. THAT the Petition dated 3/10/2008 filed in Court on 3/10/2008 is fatally defective and incompetent for want/lack of a supporting affidavit as required by the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006.**
- 2. THAT the petition dated 3/10/2008 and filed in Court on 3/10/2008 is seeking the court to interpret non existent provisions of the Anti-Corruption and Economic Crimes Act, 2003.**
- 3. THAT the aforesaid petition is otherwise an abuse of the process of court.”**

Petitioners reacted by filing, not only a Replying Affidavit dated 19<sup>th</sup> November 2008 they call further Affidavit, but also another Notice of a Preliminary Objection. Both were filed against the Respondent’s Notice of Motion dated 21<sup>st</sup> January 2009.

We should point out that following filing of the Petition, the Respondent, through Pius Nyange Maithya an Investigator, filed what they called “Affidavit in Reply” dated 5<sup>th</sup> November 2008. That was one of the Respondent’s three responses to the filing of the Petition. The other two responses being the Respondent’s Notice of Preliminary Objection and the Respondent’s Notice of Motion we have been referring to above.

It was in reply to Pius Nyange Maithya’s Affidavit dated 5<sup>th</sup> November 2008 that the 1<sup>st</sup> Petitioner, Patrick Ochieno Abachi, filed his “Further Affidavit” dated 19<sup>th</sup> November 2008; and that fact is made clear in paragraph 3 of that affidavit where he says:

**“That I have read and understood the Affidavit in Reply to the Petition herein sworn by Pius Nyange Maithya and wish to reply as hereunder.”**

At this stage in this ruling, we should point out that before we started hearing this matter, parties had by consent filed respective written submissions and agreed to only highlight those submissions at the hearing. They discussed a number of things – but for the purpose of this ruling, we think we only need to answer the following questions from what was discussed

- Firstly, Whether the Petition is incompetent for lack of supporting affidavit?**
- Secondly, Whether the jurisdiction of this court is being invoked improperly?**

Once those two important questions are answered, the rest of the things may be considered and decided at appropriate moments and places later and that includes the commonly touted issue of Abuse of the Process of Court. That is because presently, as a Constitutional Court, we are confining ourselves to issues constitutional.

But we should first look at the order made by the Hon. The Chief Justice, when he appointed this three judge bench, that we hear HCCC No. 423 of 2008 and H.C. PETITION No. 615 of 2008 together. His Lordship did not say that the suits are consolidated and bearing in mind the different nature of each of the two suits, hearing together must only be in terms of interpretation and/or contravention of the Petitioners Constitutional Rights thereby leaving out the rest of the issues in those suits because we are handling the matter as a Constitutional Court only.

That having been clarified, we now proceed to answer the first question: “whether the petition is incompetent for lack of supporting affidavit”

Mr. Gikonyo is saying that Petitioners in HC PETITION No. 615 of 2008 filed their joint petition without a supporting affidavit thereby contravening Rule 13 of “The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and procedure Rules, 2006”, otherwise also known as “GICHERU RULES.” The Rule states as follows:

**“13. The Petition under Rule 12 shall be supported by an affidavit”**

Rule 14 adds:

**“If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit.”**

The Petition does not disclose the Gicheru Rule under which the petition was filed but since submissions from Mr. Gikonyo and Mr. Ojiambo unanimously indicate the applicable Rule with regard to relevant affidavit is Rule 13, it suggests there is no dispute between them that the Petition was filed under Rule 12 as Rule 13 applies only where a petition has been filed under Rule 12. In turn Rule 12 applies where a complaint and application are under Rule 11 which states:

**“Where contravention of any fundamental rights and freedoms of an individual under Sections 70 to 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court.”**

Having Rules 11 to 13 together in mind therefore Mr. Gikonyo is saying the Petition in this matter was filed without supporting affidavit while Mr. Ojiambo is saying the Petition was filed supported by two affidavits. One is dated 3<sup>rd</sup> October 2008 and filed that same date with the Petition while the second one is dated 19<sup>th</sup> November 2008 and filed same date both deponed by the 1<sup>st</sup> Petitioner.

Mr. Gikonyo’s contention is that neither of those two affidavits satisfies the requirements of Rule 13 of Gicheru Rules because the Rules envisages an affidavit filed simultaneously with the petition and clearly indicated as being in support of the petition. For that reason, the learned Counsel cited (Milimani) HCCC No. 627 of 2003 Abdi Ali Noor vs Transami (Kenya) Ltd. for the principle that

**“a plaint which is not accompanied by a verifying affidavit cannot stand.”**

On the other hand, the learned Senior Counsel, Mr. Ojiambo, reduces the problem to a mere technicality pointing out the difference between the form and the substance and explaining that the Respondent in its Objection is merely attacking the form of the Petition and not the substance which is the essential quality of the Petition or the Central issue of the Petition and that is the quest of the Petitioners to assert a raft of constitutional rights. Instead, the Objection and the Motion only seek to impugn the manner in which those rights are being asserted.

He adds that it is now well established that courts are generally less concerned about defects in form than defects in substance, particularly where the core matter in issue is the alleged violation of Constitutional rights.

With regard to the affidavit dated 19<sup>th</sup> November 2008 which was filed more than a month after the Petition had been filed, Mr. Ojiambo submitted that under Rule 13, the affidavit does not have to accompany the Petition as is the case under Order VII Rule 1 (2) of the Civil Procedure Rules which mandates a plaint to be accompanied by its verifying affidavit. In other words, under rule 13 of Gicheru Rules, it is not mandatory that a petition and its supporting affidavit be filed contemporaneously. The affidavit dated and filed 19<sup>th</sup> November 2008 was therefore a valid supporting affidavit to the Petition. The learned Senior Counsel referred to Cases: **James Kariuki & Another vs United Insurance Co. Ltd. HCCC No. 1450 of 2000**; and **Abdi Ali Noor vs Transami (Kenya) Limited, HCCC No. 627 of 2003** (Milimani). Both cases concerned a verifying affidavit and it was emphasized that the verifying affidavit must accompany the Plaint as that requirement was mandatory. Another case is **Barrell v Fordree (1932) AC 676** per Lord Warrington of Clyffe at page 682 where it was said that,

**“The safer and more correct Course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning, without, in the first instance, reference to cases.”**

The Senior Counsel concluded:

**“Accordingly, to arrive at the meaning of Rule 13 of the Gicheru Rules the Court must consider the actual words used.”**

In our view such an affidavit ought to have been dated either earlier than the Petition or same date as the Petition the affidavit supports. Not later, and it ought to have been filed and served contemporaneously with the Petition. We hold that notwithstanding different words used in Order VII Rule 1(2) of the Civil Procedure Rules and Rule 13 of Gicheru Rules, the two rules are saying the same thing with same legal effect thereby leaving no room for the kind of transferred affidavits Petitioners in this matter are trying to establish or use.

Moreover, looking at both affidavits, each was deponed by the 1<sup>st</sup> Petitioner alone. He was not showing he also deponed it on behalf of his Co-Petitioners. He did not say he had their authority to swear the affidavit. In that respect, even if we accept what Mr. Ojiambo has said, we would still hold that the Petition lacks supporting affidavits from six of the seven Petitioners.

More closely on the affidavit dated 19<sup>th</sup> November 2008, we said earlier in this ruling that it is an affidavit by

the 1<sup>st</sup> Petitioner in reply to Pius Nyange Maithya's affidavit dated 5<sup>th</sup> November 2008. We quoted paragraph 3 of the 1<sup>st</sup> Petitioner's affidavit he describes as "**further Affidavit**". Contents of paragraph 3 of the affidavit dated 19<sup>th</sup> November 2008 are clear that the 1<sup>st</sup> Petitioner was merely replying the Respondent's affidavit attacking the Petition. Such an affidavit by the 1<sup>st</sup> Petitioner cannot, in our view, be described as a supporting affidavit in terms of Rule 13 because a supporting affidavit is one which supports an application, petition or other pleading at the time that application, petition or other pleading is filed and therefore before the said application, petition or other pleading is lawfully attacked by the respondent or anyone else; and in terms of Rule 13 as read with Rule 14, the supporting affidavit, constitutes evidence in support of the Petition before any opposition gets the opportunity to oppose and question the petition.

Concerning the affidavit dated 3<sup>rd</sup> October 2008, Mr. Ojiambo did not specifically say it, but we hope the petitioners are not telling us that the affidavit dated 3<sup>rd</sup> October 2008 and filed together with the Chamber summons and the Petition, supported both the Chamber summons and the Petition. According to Mr. Ojiambo, that affidavit supports the Petition. It would mean the Chamber Summons remains without a supporting affidavit. If the other way round, it would mean the petition has no supporting affidavit. But the Affidavit itself tells us which one of the two documents it is supporting. This is what prayer number 5 in the Chamber summons is saying:

**"5. THAT the money and the various documents as per the schedule annexed herewith marked P.O A 1 be returned to the applicants forth with or in the alternative deposited with the court pending the hearing and determination of this reference."**

For one to find the schedule marked POA 1, one has to go to the "**Supporting Affidavit**" also dated and filed 3<sup>rd</sup> October 2008 where paragraph 5 states as follows:

**"5. That I was not given an opportunity to be heard and the said officers proceeded to carry away a variety of items (Annexed and marked POA 1 is a list of the items carried away.)"**

Further, in paragraph 47 of the affidavit, the 1<sup>st</sup> petitioner concludes stating:

**"That I swear this affidavit in support of the application herein."** (Emphasis supplied)

Clearly those statements mean that the affidavit dated 3<sup>rd</sup> October 2008 is supporting the Chamber Summons which is the Application and not the Petition. We reject submissions to the contrary.

It means the Petition in this matter dated 3<sup>rd</sup> October 2008 and filed on that date does not have a supporting affidavit and that is contrary to Rule 13 of Gicheru Rules and that is a fatal technicality as it determines the substance, namely the competence of the petition. It follows that in terms of Rule 14, that petition contains allegations without the affidavit evidence intended to accompany the petition to support allegations in the Petition and that makes the Petition incompetent.

But assuming that the petition is competent, we go further to look at the second question: **Whether the**

**jurisdiction of this court is being invoked improperly?** Here again while Mr. Gikonyo submitted that the jurisdiction is not being properly invoked, Mr. Ojiambo submitted that the jurisdiction is being properly invoked. The two were this time focusing upon Rule 23 of Gicheru Rules which state as follows:

**“Where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same.”**

According to Mr. Gikonyo, the Petitioners should not have left HCCC No. 423 of 2008 to come and file this H.C. PETITION No. 615 of 2008 because all they seek to get in the second case is obtainable in HCCC No. 423 of 2008 – where, as defendants, they had properly started the process when they filed their Notice of preliminary objection which they are not prosecuting.

He argues that the Petition should be struck out because it is inappropriate, unnecessary and a duplication of the Petitioner’s claim in reply in HCCC No. 423 of 2008, by which they have raised the same or similar constitutional issues. In the circumstances, the appropriate procedure to be adopted is for HCCC No. 423 of 2008 to proceed and be concluded without this H.C. PETITION No. 615 of 2008 being in existence and that would be the correct approach in view of Rule 23 of Gicheru Rules which allows a single judge to determine a constitutional point, without having to put it before a three judge bench. To act otherwise would in fact introduce difficult issues of jurisdiction, putting the three judge bench against a single judge bench, all of concurrent jurisdiction thereby raising questions as to whether the decision of the former could bind the latter.

Mr. Ojiambo’s reply to that is rather elaborate and we will try to reproduce it for its full appreciation as under:

The learned Senior Counsel states that to postulate that since the Petitioners raised constitutional issues in HCCC No. 423 of 2008 they are, or ought to be precluded from filing a separate constitutional reference has no substance. The subject matter of the petition is not also substantially or directly before the single judge in HCCC No. 423 of 2008, even though a similar point of law may have been contained in a replying affidavit filed by the first petitioner in answer to the claim made by the Respondent in those proceedings. This is because of the nature and effect of Rule 23 of the Gicheru Rules.

For a constitutional issue to be truly before a single judge under Rule 23 it is not sufficient that it has arisen in the proceedings before the judge, in the sense that it has been averred or alleged by a party to the proceedings. Equally, the issue is not before the court simply because the court is seized of the matter. It only becomes directly and substantially before the court *when the court treats such an issue as a preliminary point*, then proceeds to hear and determine it.

Rule 23 is merely directory. A directory provision is a statutory or contractual sentence or paragraph in which a directory requirement appears. And a ‘directory requirement’ is a statutory or contractual instruction to act in a way that

is advisable, but not absolutely essential – in contrast to a mandatory requirement (**Black’s Law Dictionary, 8<sup>th</sup> Edition**). It is instructive that, pursuant to Rule 23, where a constitutional issue arises in a matter before the High Court,

**“....the court seized of the matter may treat such issue as a preliminary point.....”**

He submits that the rule has studiously avoided the mandatory term “shall”, with regard to the court treating the matter as a preliminary point. Under Rule 23 the court has unfettered discretion whether or not it should itself deal with the issue before it or move it elsewhere. It is only upon deciding to confront the question, by treating it as a preliminary point that the court

**“.....shall hear and determine the issue.”**

It is the act of treating the issue as a preliminary point which precipitates the matter, and puts it substantially and directly before the court, and not before, notwithstanding that the court may be seized of the matter in which the parties may have raised a constitutional issue.

The distinction between the directory nature of rule 23 and the mandatory terms of rule 11 of the Gicheru Rule is palpable. Rule 11 provides that where contravention of any fundamental rights and freedoms of an individual under Sections 70 and 83 (inclusive) of the Constitution is alleged or is apprehended an application

**“.....Shallbe made directly to the High Court.”**

Thus, the Petitioners had no choice but to make the application in this case to the High Court as they have done, in light of their allegation of a contravention of constitutional rights. And, in accordance with Rule 12

**“An application under rule 11 shall be made by way of a petition....”**

thus making it mandatory for this petition to have been filed. Accordingly the Petitioners have proceeded properly. In this petition they allege a contravention of fundamental rights and freedoms. In contrast, in HCCC No. 423 of 2008 they are simply replying to an application by the Respondent.

Mr. Ojiambo continued to submit that from what he had said, the authorities cited in support of the Respondent’s objection based on the foregoing grounds clearly do not apply. The ratio decidendi in **Re Hastings No. 3 [1959] 1 All ER 698** was that,

**“.....once the proper court according to the rules ..... whose order was the order of one High Court of justice, had decided the application, the matter was ended, therefore the Divisional Court of the Chancery Division had no jurisdiction to entertain the application.”** (Emphasis supplied).

The court in HCCC No. 423 of 2008 has neither, as it could have, dealt with the constitutional question as a preliminary point of law, nor expressed itself on it. Accordingly, the circumstances of **Re Hastings** have not occurred.

By the same token, as the manner of moving the court in these proceedings is properly by way of petition, the case of **O’Reilly & Others vs Mackonan & Others [1983] 2 A.C 237** is inapplicable. Nor does the petition in this case flout the view of the Court of Appeal in **Muiruri vs Credit Bank Ltd. & Others** The court there did not hold that a

constitutional matter cannot be put before a bench of three. Indeed, the court there acknowledged that:

**“Power has been vested in the High Court to interpret the constitution and any single or a bench of three in certain designated situations as provided under Section 67 of the Constitution has or have jurisdiction and power to deal with any constitutional issue.”**

Mr. Ojiambo went on to submit that in light of the failure or reticence by the single judge in HCCC No. 423 of 2008 to deal with the constitutional point which was apparent in these proceedings, and in the meantime the division of a three judge bench has been moved rightly by way of petition to decide the point, the matter is properly before this bench and does (as it cannot) amount to an abuse of the process. That ends Mr. Ojiambo’s reply aforesaid.

Like on the first question, we have also carefully considered what was brought to our attention in relation to the second question,

**Whether the jurisdiction of this court is being invoked improperly**

Our approach is to begin by looking at the format in which Gicheru Rules are arranged. They are divided into three parts as follows:

- PART I - SUPERVISORY JURISDICTION
- PART II - INTERPRETATIVE JURISDICTION
- PART III - ENFORCEMENT JURISDICTION

Under PART I are Rules 2 to 6 and they only concern the Supervisory Jurisdiction of the High Court under Section 65 of the Constitution of Kenya so that Rule 2 which, in our view, is the most important Rule in that Part I states as follows:

**“Unless a matter is specifically provided for under Section 67 or Section 84 of the Constitution or any other law, a party who wishes to invoke the jurisdiction of the High Court under Section 65 of the Constitution, shall do so by way of Originating Notice of Motion (hereinafter referred to as “the motion”).”**

With regard to the High Court, Section 65 provides for the supervisory jurisdiction of the High Court over subordinate Courts or Court Martial and petitioners before us in this matter are not invoking and cannot invoke that jurisdiction.

Under PART II are Rules 7 to 10 and they only concern the Interpretative Jurisdiction of the High Court specifically according to Rules 7 and 8:-

- “7. Where a question as to the interpretation of the constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may refer the question to the High Court in Form B set out in the schedule to these rules.**
- 8. Where a party to proceedings in a subordinate court alleges there is a question as to the interpretation of the constitution and the court is of the opinion that it involves a substantial question of law, the party shall informally request the presiding officer of that court to refer the question to the High Court and the Court shall do so in Form C in the schedule to these Rules.”**

In effect Rules under PART II are facilitating use of Section 67(1) of the Constitution by everybody as that

Section states as follows:

**“67(1) Where a question as to the interpretation of this constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if a party to the proceedings so requests, refer the question to the High Court.”**

Petitioners before us are not invoking and cannot invoke that jurisdiction of this court under Section 67(1) of the Constitution because they were not in proceedings in a subordinate court before they came before us in the High Court concerning this matter. Moreover, they have petitioned us under Sections 70, 72, 74, 75, 76 and 77 of the Constitution only.

We have referred to Section 65 and Section 67 of the constitution of Kenya. Those are not found in Chapter V of the Constitution where Sections 70 to 84 (inclusive) are found concerning PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL which Petitioners are seeking. For Sections 70 to 84 (inclusive), relevant rules are in PART III of Gicheru Rules, and those are Rules 11 to 30 strictly concerning the Enforcement Jurisdiction of the High Court, with Rule 23 standing among them in a special position which we shall shortly show.

The remaining rules 31 to 36 are of general application in all the three jurisdictions: namely, supervisory: Interpretative and Enforcement Jurisdictions by the High Court, and should therefore raise no concern in this matter.

That being the position, we remain with Rules 11 to 30 under PART III and in our view, those Rules 11 to 30 can be sub-divided into three sub-divisions.

First Sub-division consists

of rules governing a situation where “Contravention of fundamental rights and freedoms is alleged or apprehended” Outside Court. Relevant Rules are 11 to 22.

Second sub-division consists of

Rules governing a situation where “Contravention of fundamental rights and freedoms is alleged” in proceedings in a subordinate court Relevant Rules are 24 to 30.

Third sub-division is the Rule governing a situation

where “a Constitutional issue arises in a matter already before the High Court”. It means though the issue is arising in court, this time the issue is in the High Court and NOT in a subordinate Court. The relevant Rule is 23.

Having set out that position, the question now is: Which one, out of those three sub-divisions, have the Petitioners before us used to reach us in this matter?

As we said earlier in connection with Constitutional Interpretation under Section 67 of the Constitution and Rules 7 and 8 of Gicheru Rules, the Petitioners have not come and COULD NOT come before us under the Second sub-division of the Rules i.e. 24 to 30, because they were not from proceedings in a subordinate court.

We therefore remain with the First sub-division and the Third sub-division.

Starting with the First sub-division where **“CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS IS ALLEGED OR APPREHENDED”** outside Court and therefore the relevant Rules are 11 to 22, Rule 11 is very important and it states as follows:

**“Where contravention of any fundamental rights and freedoms of an individual under Sections 70 to 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court”**

That rule does not say the allegation or apprehension is in proceedings in a court either subordinate or High Court like it is said concerning Rules 7,8,23,24 and 25. We have already quoted Rules 7 and 8 as well as Rule 23 and need not do the same to rules 24 and 25 which substantially are a reproduction of rules 7 and 8 respectively. That being the position, clearly in our view Rule 11 is about allegations and apprehensions outside any court proceedings.

Rule 11 is the provision under which such persons, alleging contravention of any provisions of Sections 70 to 83 (inclusive) or being apprehensive about such contravention, can move the court and they are allowed to go directly to the High Court, by way of a Petition under Rule 12 supported by an affidavit under Rule 13 with annexures under Rule 14.

That is where the Petition we have been discussing in this matter should have belonged had the Petitioners not been from another suit in the High Court. Rule 11 is not standing on its own. It is merely facilitating the application of Section 84 (1) of the constitution of Kenya which, in relevant material, states as follows:

**“84. (1) Subject to Subsection (6), if a person alleges that any of the provisions of Sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him.....then, without prejudice to any other action with respect to the same matter which is lawfully available, that person .....may apply to the High Court for redress.”**

Subsection (6) is merely the one giving the Chief Justice power to make the kind of rules we are discussing in this ruling.

From the evidence before us the Petitioners have not used that method to come before us. They have not come directly from outside the court. Instead they have come from a court in another case, HCCC No. 423 of 2008, in the High Court, to us in this H.C. PETITION No. 615 of 2008 also in the High Court.

That being the position we have to go back to Rule 23 thereby moving from the first sub-division to the Third sub-division aforesaid.

Rule 23 is clear that where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point, and if it does so, it shall hear and determine the same issue.

Rule 23 does not therefore provide for petition or any other form of FORMAL application under “GICHERU RULES”. The Rule leaves it open, so we think, to the aggrieved party to move the court informally or for the court to act on its own motion. When the court seized of the matter is so moved or acts on its own motion, that court

**“....may treat such issue as a preliminary point and shall hear and determine the same”**

as a preliminary point, or, in our view, **“may”** not treat such issue as a preliminary point so that that **“Constitutional issue”** is heard and determined together with other issues in the suit to determine all issues in the suit finally and all at once. That is our understanding of use of the word **“may”** in Rule 23 and it could as well be re-stated as follows:

**“23 Where a Constitutional issue arises in a matter before the High Court, the court seized of the matter may, upon informal application by a party in the matter or upon the court’s own motion, “treat such issue as a preliminary point and shall hear and determine the same.”**

Emphasis supplied.

It should be noted that Rule 23 is not using terms like **“interpretation of the Constitution”** or **“Contravention”** of the constitution. Instead the Rule is using the term **“a Constitutional issue”** and we think that term is studiously used to include **“interpretation of the constitution”** as well as **“contravention of the constitution”** so that a High Court seized of a suit is able to hear and determine all those issues. They are all “Constitutional issues”. They may also be called “Constitutional questions.” or “Constitutional points.”

We should add that the absence of provisions in the constitution itself for reference from one High Court to another High Court, like the provisions we see for reference from Subordinate Court to the High Court, is clear indication that no reference from one High Court to another High Court was to be there. It was not needed, the High Court itself being the Court of the “current constitution”. As it was said by the **Court of Appeal in CIVIL APPEAL NO. 203 OF 2006 PETER NG’ANG’A MUIRURI VS CREDIT BANK LTD AND 3 OTHERS**, **“Any single judge of the High Court in this country has the jurisdiction and power to handle a constitutional question”**. The Court of Appeal said that that power emanates from the constitution and we add that the said power is the foundation of Rule 23 of Gicheru Rules.

In **CHOLMONDELY VS REPUBLIC CR. APPEAL No. 116 of 2007 (unreported)** the Court of Appeal added:

**“Each High Court judge is a Constitutional judge and where an application is made before him touching on a section of the constitution they can deal with it without necessarily insisting on a formal application.”**

That being the position, we do add that the High Court in HCCC No. 423 of 2008 is properly seized of the issues relative to the interpretation and contravention of the Constitution and the petition before us in H.C. PETITION No. 615 of 2008 is a duplication based on the same constitutional issues.

Reference is made from a Subordinate Court to the High Court because the Subordinate Court has no jurisdiction; has no power, to handle constitutional interpretation and contravention. In the High Court where every judge has jurisdiction to handle all constitutional issues, no reference is called for, no filing of another suit was therefore called for once HCCC No. 423 of 2008 had been filed. All issues concerning that suit whether constitutional, non constitutional or otherwise are all in that suit determinable to be determined in that suit by the single judge seized of the

suit. Issues active, dormant or otherwise all included and it is up to the parties to raise therein that suit, all the issues they wish to raise or else the issues are deemed decided when that suit is determined. It is up to the parties in that suit to raise or not to raise issues for determination therein.

We do not therefore, with all due respect, agree that the subject matter of the Petition is not also substantially or directly before the single judge in H.C.C.C. No. 423 of 2008. Contrary to what the Petitioners are alleging, we do not find any evidence of **“failure or reticence”** by the single judge in H.C.C.C. No. 423 of 2008 to deal with “Constitutional Issues” in that suit. Instead what we do find is that the single judge seized of that suit has never been given opportunity, by the Petitioners before us, to deal with “Constitutional issues” in H.C.C.C. 423 of 2008. The allegation of **“failure or reticence”** against that single judge in that suit cannot, in our view, be founded and we do roundly reject that allegation.

Otherwise we think Mr. Gikonyo raises pertinent questions when he asks: How will the judgment herein H.C. PETITION NO. 615 OF 2008, be transported and adopted as being final judgment in Case No. 423 of 2008 on constitutional issues raised therein by the Petitioners under Rule 23? Will the judgment of this bench in this petition bind the trial court in H.C.C.C. 423 of 2008 which is of the same jurisdiction as this bench? What will stop the Petitioners from prosecuting the Preliminary Objection in H.C.C.C. 423 of 2008? Does this constitutional bench have supervisory power over the High Court? Can this constitutional bench direct a judge of the High Court to dispose of matters before such a judge in a particular manner or in accordance with the decision of this bench? We do not intend to answer those questions bearing in mind that under Rule 23, a single High Court Judge or a bench of two High Court judges or a bench of three High Court judges or any bench of more than three High Court judges all have concurrent jurisdiction. Each bench is equal to the other in terms of lawful jurisdiction and none can supervise or check the other under the present law in Kenya.

To conclude this ruling, we are saying we have found that Petitioners before us came to us using a combination of the First Sub-Division and the Third Sub-Division in PART III of Gicheru Rules, a combination which constitutes inconsistency apart from the fact that the combination is not provided for in law. That combination is therefore improper. To apply Rules 11 to 22 together with Rule 23 to have a bench such as this one of ours to handle a new case H.C. PETITION No. 615 of 2008 when already there is another bench of concurrent jurisdiction handling an earlier case H.C.C.C. No. 423 of 2008 consisting same subject matter between same parties, is in our view, a serious misconception and misdirection which should not be condoned by a court of law. The number of judges on each bench does not matter as what matters is the jurisdiction of the court.

Accordingly, we do hold the view that Petitioners before us in H.C. PETITION. No. 615 of 2008 are invoking the jurisdiction of this court improperly.

There could be more to say, but we think we have already said enough to determine the questions before us and conclude this ruling at this stage.

Firstly, we have found that the petition before us dated 3<sup>rd</sup> October 2008 and filed by the Petitioners herein is incompetent for lack of supporting affidavit. Secondly, we have found that same Petitioners are improperly before us in the said petition, because they lack, and there are no, enabling legal provisions to invoke the jurisdiction of this court in the manner the Petitioners are doing in the circumstances of this matter.

For those reasons we do hereby allow the Respondents' Preliminary Objection dated 9<sup>th</sup> October 2008 and Notice of Motion dated 21<sup>st</sup> January 2009 and proceed to strike out the Petitioner's petition dated 3<sup>rd</sup> October 2008 and Chamber Summons dated 3<sup>rd</sup> October 2008 and order the Petitioners before us to go back to H.C.C.C. No. 423 of 2008 for the prosecution of that suit to proceed. The said Petitioners to pay costs of this suit to the Respondent.

Dated at Nairobi this 19<sup>th</sup> day of February 2010.

**J. M. KHAMONI**  
**JUDGE**

**R.P.V. WENDOH**  
**JUDGE**

**G. M. DULU**  
**JUDGE**

In the presence of

Mr. Ojiambo and M/s Ndiho for Ms Kaplan & Stratton, Advocates for the Petitioner

Mr. N'gaa for Francis Gikonyo Muthuku, Esq Advocate for the Respondent

Court Clerks: Kabiru/Muturi

**FURTHER ORDER**

Upon oral application by Mr. Ojiambo and in order to remove any doubt, leave to appeal against this ruling is hereby granted this 19<sup>th</sup> day of February, 2010.

**J. M. KHAMONI**  
**JUDGE**

**R. P. V. WENDOH**  
**JUDGE**

**G. M. DULU**  
**JUDGE**