KENYA BUS SERVICE LTD.....1ST PLAINTIFF

BUSTRACK LTD.....2ND PLAINTIFF

AND

MINISTER FOR TRANSPORT.....1ST DEFENDANT

THE PERMANENT SECRETARY MINISTRY OF TRANSPORT.....2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT

RULING
Introduction

1. This ruling is in respect of a reference within the suit to determine the constitutionality of **section 13(A)** of the ***Government Proceedings Act (Chapter 50 of the Laws of Kenya)*** and **section 3(1)** of the ***Public Authorities Limitation Act (Chapter 39 of the Laws of Kenya).***

The Suit

2. This suit was commenced by a plaint dated 3rd September 2008 in which the plaintiffs complain that the Minister of Transport by executing the statutory mandate under the ***Traffic Act (Chapter 403 of the Laws of Kenya)*** by publishing ***Legal Notice No. 161 of 2003*** acted in a manner that caused it substantial loss and damages as the plaintiffs were required to re-fabricate their vehicles and install speed governors to comply with the law. In summary, the plaintiffs' claim is that the said legal notice was subsequently quashed by the High Court and that they are entitled to full indemnity for consequential loss and damage for complying with the defective legal notice.

3. The defendants filed a statement of defence on 8th October 2008 where they denied the allegations in the plaint and stated at paragraph 8 thereof that: *"the defendants shall at the earliest opportunity raise a preliminary objection on a point of law that the suit herein is bad in law as it contravenes express and mandatory provisions of both the Companies Act and the Government Proceedings Act"*. At paragraph 9, the defendants' state, *".....that the plaintiffs are not suited and in any case the suit is time barred."*

4. On 9th November 2010, the plaintiffs' advocate applied to the Court under **Article 165(4)** to refer the matter to the Chief Justice to constitute an uneven number of judges not being less than three to hear the matter. The ground for the application was that **section 13(A)** of the ***Government Proceedings Act*** contravened **Articles 48, 27(1), (2)** and **(4)** and **section 3(1)** of the ***Public Authorities Limitation Act*** was

discriminatory and contrary to the law.

5. Under the **rule 23** of the ***Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006*** where the constitutionality of an issue arises within civil proceedings the court may deal with the matter as a preliminary issue hence upon application by the plaintiffs' counsel, Hon. Justice Muga Apondi found that the matter raised substantial constitutional issues and referred the matter to the then Chief Justice, Hon. Evan Gicheru. On 18th February 2011, the Honourable Chief Justice nominated Justices Rawal and Musinga to hear the matter. Unfortunately, the matter could not be heard by the two judges due to the re-organisation of the divisions. The directions by the former Chief Justice were superseded by those issued by the Chief Justice, Dr Willy Mutunga on 20th September 2011 where he directed that matters under **Article 165(4)** should not be referred to him unless full arguments by the parties have been considered.

6. In the meantime the matter was dismissed by the court on its own motion due to the failure by the plaintiff take steps to list the matter for hearing. The matter was reinstated on application of the plaintiff and fixed for hearing and determination. The plaintiffs waived the application under **Article 165(4)** and the matter fell to me for determination.

The Defendants' position

7. The defendants' defence sets out the matters that are the subject of this reference. Apart from the statement of defence, the defendants have not filed any grounds or submissions in opposition to this reference.

8. This matter came up for directions on 24th April 2012 and was fixed for hearing on 28th May 2012. On 28th May 2012, I heard the plaintiff's submission and adjourned the matter to 9th July 2012 to enable the respondent's counsel prepare its response. Since I was not sitting on that date, the matter was adjourned to 10th July 2012 and in presence of counsel for the respondent, the matter was once again fixed for hearing on 25th July 2012. On that date counsel appearing for the respondent stated that she was not aware of the matter and sought an adjournment. I rejected the application for adjournment in view of the history of the matter and reserved the matter for judgment.

9. Despite reserving the matter for judgment, I directed counsel for the defendant to file written submissions within 21days but this was not done. This ruling is therefore prepared without the benefit of hearing the defendants' position. Despite the plaintiff's case being unopposed, it is my obligation to consider the case in light of the relevant Constitutional provisions and the law and determine whether a case has been made out entitling the plaintiff to relief.

Legal provisions in issue

10. The matters for consideration arise from the ***Government Proceedings Act*** and the ***Public Authorities Limitation Act*** and I think it would be appropriate to set out the relevant provisions.

Section 13A(1) of the ***Government Proceedings Act*** ("***GPA***") provides as follows;

13A. (1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.

(2) The notice to be served under this section shall be in the form set out in the Third Schedule and shall include the following particulars -

(a) the full names, description and place of residence of the proposed plaintiff;

(b) the date upon which the cause of action is alleged to have accrued;

(c) the name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;

(d) a concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;

(e) the relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.

(3) The provisions of this section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the court may, by virtue of proviso (i) to section 16 (1), make an order declaratory of the right of the parties in lieu of an injunction.

11. **Section 3(1)** and **(2)** of the ***Public Authorities Limitations Act*** ("***PALA***") provides as follows;

3. (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.

12. The plaintiffs' argue that **section 13(A)** of ***GPA*** and **section 3(1)** and **(2)** of ***PALA*** are contrary to **Articles 27(1), (2)** and **(4)** and **48** of the Constitution**.** The relevant parts of **Article 27** provide as follows;

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Article 48 provides as follows;

48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

<u>The Plaintiffs' Case</u>

13. The plaintiffs' argument in respect of **section 13(A)** of the ***GPA*** is two pronged. First, the 30 day period for notice only applies to suits against the government and that there is no reason why it should not be applicable to other litigants. Second, and in so far as it is mandatory, it not only perpetuates inequality but is an instrument that is used to limit access to justice.

14. The plaintiffs buttress their arguments by relying on the provision of **Article 7** of the **Universal Declaration of Human Rights** ("***UDHR***") which provides that, *"All are equal before the law and are entitled without any discrimination to equal protection of the law"* and which is part of the law of Kenya by dint of **Article 2(5)** of the Constitution. Mr Kinyanjui submitted that *"All"* cited in the provisions includes the 1st defendant, who is a public officer and therefore affording the Minister a twelve month limitation period as against an ordinary citizen who is entitled to a three year limitation period is manifestly discriminatory and contrary to the Constitution and the ***UDHR***.

15. Mr Kinyanjui argued that the ***PALA*** violated **Article 27** as it perpetuated inequality between the ordinary citizens and public authorities. The limitation period for ordinary cases is contained in the ***Limitation of Actions Act (Chapter 22 of the Laws of Kenya) ("LAA")***. Under ***PALA***, the limitation

period for proceedings founded on tort is one year from the date the cause of action accrued as opposed to the three years provided under the ***LAA***, while contractual claims against the Government must be commenced within three years from the date on which the cause of action accrued as provided as opposed to six years provided under the ***LAA***. The petitioner therefore argues that the provisions are discriminatory and hinder access to justice.

16. In support of the plaintiff's case, Mr Kinyanjui made extensive reference to Report of Mauritius Law Reform Commission titled, ***"Access to Justice and Limitation of Actions against Public Officer and the State"*** [May 2008]. Counsel also submitted that the impugned provisions could not stand scrutiny under the Constitution as there is no sound reason why government should be given preferential treatment at the expense of an ordinary citizen. Counsel cited the case of ***Rwanyarare and Others v Attorney-General*** **[2003] 2 EA 664** as authority for this proposition.

Analysis and Disposition

17. The purpose of the procedure enacted in **Article 22** of the Constitution is to enforce fundamental rights and freedoms of the individual guaranteed under the Bill of Rights set out in **Part 2** of **Chapter 4** of the Constitution.

18. Since the jurisdiction to enforce fundamental rights and freedoms in the Bill of Rights is a special jurisdiction, it follows that a party who invokes this special **Article 22** jurisdiction to enforce the bill of rights has a duty to set out clearly the sections or provisions it is claimed have been infringed or violated and show how these sections are infringed in relation to him. This principle has been established in a long line of cases since ***Anarita K Njeru v Republic (No. 1)*** **[1979] KLR 261** (See also ***Meme v R [2004]*** **1 KLR 637)** and more recently in respect of the Constitution, ***Joseph Kimani Mwai v Town Clerk Kangema*** **Nairobi Petition No. 1039 of 2007 (Unreported)**).

19. The plaintiffs have invoked the provisions of **Articles 27** and **48** of the Constitution and it is on this basis that the provisions of **GPA** and **PALA** which are impugned will be determined.

Discrimination

20. The provisions of ***GLA*** and ***PALA*** are attacked on the basis that they are discriminatory. A**rticle 27** protects the right to equality and prohibits discrimination. I do not read the State or Government to be a person within the meaning of **Article 27** hence an argument cannot be made on the basis that the plaintiffs are discriminated against vis-à-vis the government as provided by the law. The argument that person referred to is the Minister is also not tenable for the reason that the Minister is an agent of the State or Government.

21. The ***GPA*** and ***PALA*** apply to all equally with claims against the government. The two impugned provisions do not make any exception or distinction on the ground prohibited by **Article 27(4)**. Furthermore the plaintiff did not demonstrate how these provisions violate the provisions of **Article 27(4)**.

22. The case of ***Rwanyarare and Others v Attorney-General*** **(Supra)** dealt with whether an injunction could be issued against the Government in proceedings for enforcement of fundamental rights and freedoms. The Court concluded that the statutory prohibition against the issuing of an injunction against the government was contrary to the Constitution. The expression of the notion of inequality between the state and the citizen was based on an application for interim relief pending hearing and determination of the petition rather than the interpretation of the equality provisions of the Uganda Constitution. The case is therefore distinguishable and does not assist in interpreting the provisions of **Article 27**.

23. The provisions of the ***UDHR*** cited by counsel for the plaintiffs are also not of assistance to the plaintiffs. As I stated in the case of ***Beatrice Wanjiku and Another v Attorney General and Another*** **Nairobi Petition No. 190 of 2011 (Unreported)** where the law provides a complete and express provision, it is not necessary to import provisions of the treaties and conventions independently but to

have recourse to them as interpretative aids to buttress and expand the rights. In my view our **Article 27** is much wider than the similar provision of the ***UDHR*** and as such it is of no assistance to the plaintiffs in the circumstances.

24. The fact that the State is treated differently in law is not of itself discriminatory as contemplated under **Article 27** and therefore the arguments based on this ground lack merit. I shall therefore proceed to consider the matter wholly under the provisions of **Article 48**.

Historical, International and Comparative Perspectives

25. The provisions of notice and limitations as protections to government are deeply rooted in commonwealth countries which inherited the system of proceedings against the "Crown". ***PALA*** draws its pedigree from a similar English statute, the ***Public Authorities Protection Act, 1893*** under which action against public authorities had to be brought within six months. As far back as 1936 the Law Revision Committee in its Fifth Interim Report titled ***"Statutes of Limitation"*** (1936, Cmd 5334) stated, *"We have carefully considered how far it is advisable to interfere with the policy of the Public Authorities Protection Act. That policy is quite clear, namely, to protect absolutely the acts of public officials, after a very short lapse of time, from challenge in the courts. It may well be that such a policy is justifiable in the case of important administrative acts, and that serious consequences might ensue if such acts could be impugned after a long lapse of time. But the vast majority of cases in which the Act has been relied upon are cases of negligence of municipal tram drivers or medical officers and the like, and there seems no very good reason why such cases should be given special treatment merely because the wrong doer is paid from public funds."*

26. **The Report of the Committee on the Limitation of Actions** in 1949 chaired by Lord Justice Tucker (Cmd 7740) recommended that the ***Public Authorities Limitation Act*** should be repealed and this report was indeed implemented by the enactment of the ***Law Reform (Limitation of Actions, Etc) Act*** in 1954. Since then the position in England has been that the limitation periods applicable against public authorities are exactly the same as those applying to any other defendant causing Lord Bridge to remark in ***Arnold v Central Electricity Generation Board*** **(1988) AC 228,269**, *"The philosophy which was once thought to justify the distinction between public and private defendants in this regard had fallen wholly into disrepute when the distinction was swept away in 1954, and, so far as I am aware, has never subsequently regained any reputable currency."*

27. The reforms introduced in England had a dramatic effect in other parts of the Commonwealth. The Law Reform Commission of Western Australia, ***Report on Notice and Limitation of Action*** noted that the rules and notice and Limitation were, ***"It was considered these rules (1) are anachronistic; (2) are unfair and discriminatory; (3) cannot be rationally justified since private corporations are in exactly the same position as public authorities; especially those which conduct commercial enterprises; (4) are productive of fine distinctions as to whether something is done "in pursuance of execution or intended execution of any Act, of or any public duty or authority"; (5) are a trap for the unwary; (6) operate harshly on the plaintiff (7) often force the commencement of an action, because there is insufficient time to pursue other alternatives; (8) make litigation unnecessarily complex; (9) increase costs; and (10) frustrate just claims."***

28. The rules on notice and limitation were abolished in most states in Australia and in New Zealand. Similarly Canadian states have either abolished or taken steps to abolish these rules.

29. The Law Commission of India in its 100th Report titled ***"Litigation By and Against the Government***" recommended that **section 80** of the ***Code of Civil Procedure***, which requires prior notice and intention to sue the Government or a public officer for an act done by the latter in this official capacity, should be repealed.

30. Closer to home, the Mauritius Law Reform Commission in its report on ***"Access to Justice and Limitation of Actions against Public officer and the State"*** (Supra) considered the issue from a Constitutional and Human Rights perspective. The Commission noted, *"An underlying principle of our*

Constitution is the rule of law. The rule of law requires that the Government should not enjoy unnecessary privileges or exemptions from ordinary law. The short period of limitation available to protect public officers as distinct from other persons against whom litigation can be taken puts the State and other authorities served by such officers in a privileged position in comparison with other litigants. And there is, in our opinion, no pressing social need which would justify this privileged position. We consider that, save in exceptional circumstances; an individual in his dealings with the State should stand on the same footing as that on which he stands in dealings with his neighbour. These are the requirements of the rule of law, an entrenched constitutional principle to which other norms and any government action must conform with."

31. Consequently the Commission recommended that no special protection should be given to public officers or public authorities by way of shorter limitation periods for actions brought against them.

32. The South Africa Law Commission in its report titled, ***"Investigation into Time Limits for the Institution of Action against the State."***(Project 42, October 1985) considered the requirements of notice and time limits against the state. The Commission recommended that the special requirements should be scrapped and that the general and ordinary provisions for prescription should apply to all litigation against the government. As regards the issue of notice prior to action, the Commission recommended that the court should be entitled to condone non-compliance.

Position in Kenya

33. All over the world, as I have demonstrated, the issues of notice of action and limitation of actions have been taken up as a law reform issues and most legislatures have implemented the recommendations of their respective law reform bodies. In Kenya though, law reform efforts have assumed a rather glacial pace particularly where technical and non-political matters are concerned. The courts are now required to address these matters through litigation founded on enforcement of fundamental rights and freedoms. The issues raised in case must dealt with in accordance with the Constitution which provides that all law existing prior to the promulgation of the Constitution must, according to **section 7** of the **Sixth Schedule** to the Constitution, ***"be construed with the alterations, adaptations, qualification and exceptions necessary to bring it in conformity with the Constitution."***

34. The rigid application of the provisions of **section 13A** of the **GPA** can be illustrated by the case of ***Hudson Laise Walumbwa v Attorney General*** **HCCC No. 2714 of 1987 (Unreported)** in which Justice Ringera stated; ***"Section 13 of the Government Proceedings Act is in clear and mandatory terms that do not permit any excuses or exceptions. Its plain meaning, to my mind, is that no proceedings against the Government, under the Government Proceedings Act, can be or be instituted before the Statutory Notice has been given and expired. The dictionary meaning of the word lie in this context is, according to The Concise Oxford Dictionary, 8th edition, "be admissible or sustainable." A suit which does not lie cannot be tried by a Court of Law. This Section (S.13) is not in the nature of statutory period of limitation which must be pleaded and which could be waived by the defendant expressly or by conduct. It is in the nature of a substitutive peremptory bar to institution and the trial of a suit filed in disregard of its requirements. The Attorney General cannot waive it. Neither can the Court. And it matters not why it was not complied with. As a port of substantive law, the defendant may or may not plead it."***

35. The courts have not flinched from this position and any suit that is filed in breach of the mandatory provisions of **section 13A** of the ***GPA*** will be halted in its tracks. In ***Barrack Omudho Aliwa and Another v Salome Arodi and Another Mombasa HC Succession Cause No 38 of 2008 (unreported)*** Justice Njagi held that, ***"Section 13A of the [Government Proceedings Act] requires that no proceedings should be commenced against the Government until after the expiry of thirty day notice in writing upon the government in relation to those proceedings. In the instant case, no such notice was given and in the absence of such notice, any intended proceedings against the government cannot stand***. In ***Samson Lereya & Others v Attorney General & Others*** **Nairobi HCCC No. 115 of 2006 (Unreported),** the Court stated that***, "failure to serve the mandatory notice is fatal to proceedings against the Government ....."***

36. The strictures imposed by these provisions must be considered in light of the right of access to justice. The right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the courts. In ***Dry Associates v Capital Markets Authority and Another*** **Nairobi Petition No. 328 of 2011 (Unreported),** the court stated, "*[110] Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay."*

37. By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism. (See ***"Law and Practical Programme for Reforms" (1992) 109 SALJ 22***)**Article 48** must be located within the Constitutional imperative that recognises as the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realised for it is within the legal processes that the rights and fundamental freedoms are realised. **Article 48** therefore invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law.

38. The provisions for demanding prior notice before suing the government is justified on the basis that the government is a large organisation with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objectives are laudable, the effect of mandatory notice provisions cause hardship to ordinary claimants. I am of course aware that pre-litigation protocols, for example **Order 3 rule 2** of the ***Civil Procedure Rules***, require that notice be given before action is commenced but the penalty for non –compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action.

39. The purpose and object of statutes of limitation has been the subject of numerous judicial pronouncements. In ***Rawal v Rawal*** **[1990] KLR 275** Bosire J., states, *"The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, on the other hand to protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims."* (See also ***Dhanesevar Mehta v Manilal M Shah*** **[1959] EA 321** and ***Francis Mugo Ndegwa v Amboseli Court Limited*** **HCCC Misc. Civil App. No. 376 of 2012 (Unreported)** per Odunga J.). The words of Didcott J. in ***Mohlomi v Minister of Defence*** **[1996] ZACC 20, 1997 (1) SA 124**, **129** are apposite in this regard, *"Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over rights and obligations sought to be enforced, prolong the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of those whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken."*

40. The law of limitation therefore attempts to strike a balance between two contending parties, one to enforce an action and the other not be vexed by an action that is stale. The balance is struck by the legislature which provides specific limitation period depending on the subject matter taking into account various policy considerations. How then can these requirements be considered an impediment to the right of access to justice protected under **Article 48**?

41. The Constitutional Court of South Africa had the opportunity to consider the constitutionality of the dual requirement of notice and special limitation period for a government department in ***Leach Mokeli Mohlomi v Minister of Defence*** **(Supra).** The Court held that the provision of the ***Defence Act, 1957*** which required that action be brought within six months when the cause of action arose and by issuing a

notice of action one month before the commencement of the action contravened **section 22** of the Interim Constitution which provided that, *"Every person shall have a right to have justiciable disputes settled by a court of law or, where appropriate another independent forum."*

42. The Constitutional Court held that the provision read as a whole must be construed, ***"against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences in culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to professional advice and assistance that they need so sorely is often difficult for financial and geographical reasons."*** The court concluded that the severity of the provisions resulted in a situation where claimants were not afforded an adequate and fair opportunity to seek judicial redress for wrongs and therefore **section 22** was violated. In coming to the conclusion the court considered the rather strict provisions of the applicable statute which in effect provided for a window of five months in which to give notice and file suit.

43. The general worldwide consensus is that a shorter limitation period for the state cannot be justified. The reach of the Government is far and wide and in an era of accountability or transparency ushered in by the Constitution, the State must abide by the same standards required of mere mortals. Mandatory notice requirements and short limitation periods would tend to undermine social justice and in a country like ours where illiteracy is rife, communication systems and links are few and far between and access to legal services wanting, their effect would be to provide a cover for impunity and create de-facto state immunity.

44. In my view, the provisions of ***PALA*** are somewhat ameliorated by the provisions of section **section 6** which provide;

6. *Notwithstanding the provisions of section 31 of the Limitation of Actions Act, section 22 of that Act shall not apply in respect of the provisions of this Act; and in section 27 of the Limitation of Actions Act the reference to section 4 (2) of that Act shall be read and construed as a reference to section 3 (1) of this Act; but subject thereto and notwithstanding section 42 of the Limitation of Actions Act, Part III of that Act shall apply to this Act.*

45. **Section 31** of the ***LAA*** is to the effect that where a period of limitation is prescribed for any action by any other written law which include ***PALA***, **Part III** of the ***LAA***, should be incorporated into such written law. **Part III** deals with extension of limited periods of time by methods or procedures and upon grounds provided in the said part of the Act. The grounds for extension of time include disability, acknowledgement and part-payment, fraud, mistake and ignorance of material facts (See ***Alberta Mae Gracie v Attorney General and Others*** **Mombasa HCCC No. 522 of 2000 (Unreported)** and ***Leah Wambui Githuthu v Attorney General*** **Nairobi HCCC No. 1915 of 1997 (Unreported)**).

46. The application of the provisions of the ***LAA*** for extension to time for limitation under ***PALA*** mitigates the rigours of a strict limitation period by providing a window for extension of time and it is my finding that in so far as ***PALA*** provides for a period for extension of time it does not run afoul of **Article 48**. This is not to say that the one month limitation is not harsh, the general consensus worldwide is that such limitations are no longer tenable and I would recommend that the legislature takes an opportunity to review this aspect of the law as other countries have done.

47. Viewed against the prism of the Constitution, it also becomes evident that ***section 13A*** of the ***GPA*** provides on impediment to access to justice. Where the state is at the front, left and centre of the citizen's life, the law should not impose hurdles on accountability of the Government through the courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that **section 13A** of the ***Government Proceedings Act*** as a mandatory requirement violates the provisions of the **Article 48**.

48. As I stated earlier, the State was given an opportunity to address the Court on whether the impugned provisions of the ***GPA*** and ***Public Authorities Limitations Act*** are an accepted limitation within the framework of limitations to fundamental rights and freedoms provided under **Article 24**. It is the burden of the state to show or provide evidence that the limitation is justifiable in a democratic society. (See the recent case of ***Randy Nzai Ruwa & Others v Internal Security Minister and Attorney General.*** **Mombasa HC Misc Appl. 468 of 2010 (Unreported)**) the state did not attempt to discharge its burden.

49. Before I sign off this judgment I must deprecate the conduct of the office of the Attorney General which I have alluded to at paragraph 8 and 9 of this judgment. The Office of Attorney General is a constitutional office with special responsibilities under **Article 156(4)** particularly representing the national government in court. By virtue of **Article 156(6),** the Attorney General is required to promote, protect and uphold the rule of law and public interest. It is imperative that in proceedings such these that the voice of the Attorney General is asserted in order to assist the court. Failure to take this responsibility seriously by that office and its officers is a dereliction of duty. I shall say no more.

Conclusion

50. Having considered the matter I now make the following declarations;

a) **Section 13A** of the ***Government Proceedings Act*** and **section 3** of the ***Public Authorities Limitation Act*** do not violate the provisions of **Article 27** of the Constitution.

b) **Section 13A** of the ***Government Proceedings Act*** as a mandatory requirement for the institution of suit against the government violates the provisions of the **Article 48** of the Constitution.

c) **Section 3** of the ***Public Authorities Limitation Act*** does not violate the provisions of **Article 48** of the Constitution.

d) The defendant shall pay the plaintiff half the costs of this reference.

DATED and **DELIVERED** at **NAIROBI** this 21st September 2012

D.S. MAJANJA
JUDGE

Mr H. Kinyanjui instructed by J. Harrison Kinyanjui and Company Advocates for the plaintiff.