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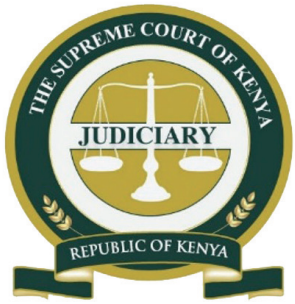
# SUPREME COURT LAW REPORTS

## 2020 & 2021






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# 2020 & 2021

**Editor**
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Nairobi

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## SCOPE OF THE SERIES

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**Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR)** ..... 15

**Burden of proof** – *shifting of the burden of proof - discharge of the initial burden of proof - burden of proof on a claim of discrimination - what level of evidence was required to discharge the initial burden of proof in discrimination claims and shift the burden of proof to the opposing party - whether the petitioners' evidence of alleged racial discrimination was sufficient to discharge the initial burden of proof and shift the burden of proof to the respondent - Evidence Act (Cap 80), sections 108 and 109.*
**Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR)** ..... 757

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**Bellevue Development Company Ltd v Gikonyo & 3 others [2020] KESC 43 (KLR)** ..... 580

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**Bellevue Development Company Ltd v Gikonyo & 3 others [2020] KESC 43 (KLR)** ..... 580

**Judicial immunity** – *rationale and purpose – judicial immunity vis-à-vis impunity – where it was claimed that judicial officers acted fraudulently and dishonestly - what was the distinction between judicial immunity and impunity - what was the nature of judicial immunity - Constitution of Kenya, 2010, article 160(5).*

**Bellevue Development Company Ltd v Gikonyo & 3 others [2020] KESC 43 (KLR)** ..... 580

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**Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others [2021] KESC 35 (KLR)** ..... 342

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**Kimani & 20 others (On behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others [2020] KESC 9 (KLR)** ..... 462

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**Mulima & 2 others (Suing as Representatives of Ex-East African Airways Staff Welfare Association) v Attorney General & 8 others [2020] KESC 39 (KLR)** ..... 560

**Jurisdiction of appellate courts** – *jurisdiction to interfere with the exercise of discretion by a trial court - what were the circumstances in which an appellate court could interfere with exercise of discretion of a trial court.*
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**Waititu v Republic [2021] KESC 11 (KLR)** ..... 55

**Jurisdiction of the Court of Appeal** – *arbitration matters - the extent to which the Court of Appeal had jurisdiction to hear and determine an appeal from a High Court decision on the setting aside of an arbitral award under section 35 of the Arbitration Act - Arbitration Act (cap 49) section 35.*
**Geo Chem Middle East v Kenya Bureau of Standards [2020] KESC 1 (KLR)** ..... 418

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**Attorney General & another v Uasin Gishu Memorial Hospital Limited & another [2021] KESC 57 (KLR)** ..... 320

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**John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)** ..... 85

**Jurisdiction of the High Court** – *jurisdiction to review prosecutorial powers of the Director of Public Prosecutions (DPP) - what were the guidelines to be considered when reviewing prosecutorial powers of the DPP - Constitution of Kenya, 2010, articles 157(11) and 165(3)(d)(ii).*
**Jirongo v Soy Developers Ltd & 9 others [2021] KESC 32 (KLR)** ..... 261

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**Attorney General & another v Uasin Gishu Memorial Hospital Limited & another [2021] KESC 57 (KLR)** ..... 320

**Jurisdiction of the Supreme Court** – *advisory opinion jurisdiction - what were the circumstances in which the Supreme Court would exercise its advisory opinion jurisdiction – Constitution of Kenya, 2010 article 163(6).*
**In the Matter of Speaker, County Assembly of Siaya County [2020] KESC 40 (KLR)** ..... 546

**Jurisdiction of the Supreme Court** – *advisory opinion jurisdiction - what were the circumstances in which the Supreme Court would exercise its advisory opinion jurisdiction – Constitution of Kenya, 2010 article 163(6).*
**In the Matter of Speakers, County Assemblies of Nandi, Kericho & Meru Counties [2020] KESC 41 (KLR)** ..... 575

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**Asanyo & 3 others v Attorney-General [2020] KESC 62 (KLR)** ..... 793

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**Jurisdiction of the Supreme Court** – *appellate jurisdiction of the Supreme Court - matters of constitutional interpretation and application - whether the Supreme Court could determine whether the Court of Appeal had jurisdiction to hear and determine an appeal from a High Court decision on the setting aside of an arbitral award under section 35 of the Arbitration Act - Constitution of Kenya, 2010, article 163(4)(a).*
**Geo Chem Middle East v Kenya Bureau of Standards [2020] KESC 1 (KLR)** ..... 418

**Jurisdiction of the Supreme Court** – *appellate jurisdiction – jurisdiction as of right in a case involving the interpretation or application of the Constitution - whether the mentioning of constitutional provisions by the Court of Appeal in a decision being appealed against automatically invoked the Supreme Court's appellate jurisdiction as of right in a case involving the interpretation or application of the Constitution - under what circumstance did the Supreme Court have jurisdiction to entertain appeals from interlocutory decisions - Constitution of Kenya, 2010, article 163(4)(a).*
**Kimani & 2 others v Kenya Airports Authority & 3 others [2021] KESC 43 (KLR)** ..... 213

**Jurisdiction of the Supreme Court** – *appellate jurisdiction – where an appellant challenged the decision of a county assembly to reject his name for appointment to the county executive*

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**Okoiti v Independent Electoral and Boundaries Commission & another; Kenyatta & 7 others (Interested Parties) [2020] KESC 68 (KLR)** ..... 684

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**Njenga v Republic & 3 others [2020] KESC 35 (KLR)** ..... 554

**Jurisdiction of the Supreme Court** – *jurisdiction to determine appeals over interlocutory decisions - what were the circumstances in which the Supreme Court could allow appeals over interlocutory decisions.*
**Waititu v Republic [2021] KESC 11 (KLR)** ..... 55

**JURISDICTION** – *jurisdiction of the Supreme Court – appellate jurisdiction of the Supreme Court - boundaries within which the Supreme Court's appellate jurisdiction could be exercised - where the issue raised before the Supreme Court was first raised in the Court of Appeal and not any other lower court - whether the Supreme Court had jurisdiction to hear, on appeal, a matter that raised an issue which was first handled at the Court of Appeal and not any other lower court - whether the Court of Appeal erred when it entertained the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the lower courts - Constitution of Kenya, 2010, article 163(4)(a).*
**Gitonga v Republic [2020] KESC 61 (KLR)** ..... 722

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*to gross misconduct could oust the statutory requirement to grant the employee the opportunity to defend him/herself or to respond to the allegations – Employment Act (cap 226) sections 41 and 45(2)(c).*
**Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR)** ..... 15

**Employment** – *dismissal – dismissal on grounds of incapacity – obligations on the employer – justification of dismissal on grounds of incapacity - duty to investigate the extent of the incapacity or the injury and all the possible alternatives short of dismissal – whether an employer had a duty to investigate the extent of incapacity or injury and the alternatives short of dismissal before dismissing an employee on grounds of incapacity.*
**Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR)** ..... 15

**Employment** – *dismissal – summary dismissal – duty on an employer to grant an employee a hearing before dismissal - whether summary dismissal gave an employer a blanket right to dismiss an employee at will without a hearing - Employment Act (cap 226) sections 41, 44(4) and 45(2)(c).*
**Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR)** ..... 15

**Employment** – *dismissal – unfair dismissal – remedies for unfair dismissal – award of damages - purpose of award of damages in a claim of discrimination against an employee– what did the court consider in awarding damages.*
**Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR)** ..... 15

**Employment** – *public appointments – procedure to be followed – where an applicant sought to be appointed as a county executive committee member - where the county assembly rejected the nominee's name for appointment to the county executive committee for lack of experience and for being related to another nominee - what were the factors to be considered in making county government appointments – whether the decision of the county assembly to reject the nominee violated the Constitution - Public Appointments (County Assemblies Approval) Act (cap 265B) sections 3, 5, 7 and 10; County Governments Act (Cap 265) section 35.*
**Langat v Kericho County Assembly Committee on Appointments & 2 others [2020] KESC 34 (KLR)** ..... 530

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**Pati Limited v Funzi Island Development Limited & 4 others [2021] KESC 29 (KLR)** ..... 240

**Compulsory acquisition** – *constructive compulsory acquisition - procedure to be followed during compulsory acquisition– whether the Government could lawfully deprive a person of part or all of its property via a grant of lease to another person - where the State had deprived a property owner of its property via granting a lease of the suit property to a third party - whether the unlawful acquisition of a portion of its land which resulted in the diminution of the value of the whole of the suit property amounted to constructive compulsory acquisition – Constitution of Kenya, 2010, article 40(3).*

**Attorney General v Zinj Limited [2021] KESC 23 (KLR)** ..... 1

**Land tenure** – *classification of land – public land – what amounted to public land – whether un-alienated Government land was public land – whether a foreshore felt within the category of public land – whether any right to a foreshore would be conferred to a private entity – whether the Government or a private entity could interfere with or limit the enjoyment of a public easement through acts of commission or omission - Constitution of Kenya, 2010, article 62; Survey Act (cap 299), section 45; Survey (Amendments) Regulations (1994) regulation 110; Government Lands Act (repealed) section 82.*

**Kiluwa Limited & another v Business Liaison Company Limited & 3 others [2021] KESC 37 (KLR)** ..... 139

**Public land** – *illegal occupation of public land - whether the illegal occupation of public land created prescriptive rights over the land.*

**Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (*Amicus Curiae*) [2021] KESC 34 (KLR)** ..... 361

**Tenancy** – *proprietorship in land - community of ownership (co-ownership) of land vis-a-vis community or communal ownership of land - what was the distinction between community of ownership (co-ownership) of land and community or communal ownership of land - what was the type of land tenure operating in a group ranch - whether the equality in undivided shares of a group ranch should be based on acreage as opposed to value of the property.*

**Getao v Mokare & 4 others [2021] KESC 36 (KLR)** ..... 304

**Tenancy** – *tenancy in common - what was the nature of tenancy in common.*

**Getao v Mokare & 4 others [2021] KESC 36 (KLR)** ..... 304

**Trust land** – *setting aside of trust land - applicable legal requirements - whether the setting aside of purported trust land while changing the size of the land to be set aside and the purpose of the setting aside without effecting legal instruments reflecting those changes meant that the land had been set aside irregularly - whether land that had been proclaimed as forest land under the Forest Ordinance Act (cap 176) under the repealed Constitution was trust land and as such was available for reallocation under the Trust Land Act and under the Constitution of Kenya, 2010 - Constitution of Kenya (repealed) sections 115 and 117(1)(c).*

**Pati Limited v Funzi Island Development Limited & 4 others [2021] KESC 29 (KLR)** ..... 240

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*the manner in which the alleged innovation was made - whether the evidence sufficiently proved violations of intellectual property rights - Evidence Act (cap 80) sections 108, 109.*
**Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR)** ..... 757

**PRECEDENT** – *doctrine of stare decisis – applicability of the doctrine of stare decisis in tribunals - doctrine of stare decisis in quasi-judicial decisions - Public Procurement Administrative Review Board (PPARB) - whether quasi-judicial tribunals, such as the PPARB, were bound by the doctrine of stare decisis - whether a tribunal was bound by its previous decision.*
**SGS Kenya Limited v Energy Regulatory Commission & 2 others [2020] KESC 64 (KLR)** ..... 778

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**Interpretation of statutes** – *interpretation of section 62 of the Kenya Ports Authority Act - where section 62 of the Kenya Ports Authority Act outlawed court action to remedy damage suffered under some provisions of the Act - whether section 62 of the Kenya Ports Authority Act violated the right to enforce property rights under the Constitution – whether section 62 of the Kenya Ports Authority Act ousted the jurisdiction of the High Court and was therefore unconstitutional - Constitution of Kenya article 40, 159(2)(c) and 165(3)(a); Kenya Ports Authority Act (Cap 391) sections 12, 14, 15, 16 and 62.*
**Modern Holdings (EA) Limited v Kenya Ports Authority [2020] KESC 53 (KLR)** ..... 702

**Interpretation of statutes** – *interpretation of the Kenya Roads Act - distinction of the roles of Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KERRA) - what was the distinction of the roles of Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KERRA) in building, maintaining and regulating Kenya's road networks.Words and Phrases – service – definition of service – a system that provides something that the public needs, organized by the government or a private company - Oxford Dictionary of English 3rd Edition 2015.*
**Base Titanium Limited v County Government of Mombasa & another [2021] KESC 33 (KLR)** ..... 197

**Interpretation of statutory provisions** – *ouster clauses – nature of – where section 62 of the Kenya Ports Authority Act outlawed court action to remedy damage suffered under some provisions of the Act - whether section 62 of the Kenya Ports Authority Act was an ouster clause – Kenya Ports Authority Act Cap 391, section 62.*
**Modern Holdings (EA) Limited v Kenya Ports Authority [2020] KESC 53 (KLR)** ..... 702

**WORDS AND PHRASES**

**Discrimination** – *definition of discrimination - failure to treat all persons equally when no reasonable distinction could be found between those favoured and those not favoured - Black's Law Dictionary, 10th Edition.*
**Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR)** ..... 15

**Good faith** – *definition of good faith - a state of mind consisting in honesty in belief or purpose, faithfulness to one's duty or obligations, observance of reasonable commercial standards of fair dealing in a given trade or business, or absence of intent to defraud or to seek unconscionable advantage - Black's Law Dictionary, Ninth Edition at page 713.*

**Bellevue Development Company Ltd v Gikonyo & 3 others [2020] KESC 43 (KLR)** ..... 580

**Miscellaneous** – *definition of miscellaneous - consisting of many different kinds of things that are not connected and do not easily form a group - Oxford Dictionary of English 3rd Edition, 2015.*

**Base Titanium Limited v County Government of Mombasa & another [2021] KESC 33 (KLR)** ..... 197

**Procedure** – *definition of procedure - a specific method or cause of action; the judicial rule or manner for carrying on a civil lawsuit or criminal prosecution also termed rules of procedure - Black's Law Dictionary, 9th Edition.*

**John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)** ..... 85

**Attorney General v Zinj Limited (Petition 1 of 2020)**
**[2021] KESC 23 (KLR) (3 December 2021) (Judgment)**

**Supreme Court of Kenya**

**MK Koome, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala & W Ouko, SCJJ**

Neutral citation: [2021] KESC 23 (KLR)

***Land Law*** *– compulsory acquisition – constructive compulsory acquisition - procedure to be followed during compulsory acquisition– whether the Government could lawfully deprive a person of part or all of its property via a grant of lease to another person - where the State had deprived a property owner of its property via granting a lease of the suit property to a third party - whether the unlawful acquisition of a portion of its land which resulted in the diminution of the value of the whole of the suit property amounted to constructive compulsory acquisition – Constitution of Kenya, 2010, article 40(3).*

**Brief facts**

The appellant challenged the decision of the Court of Appeal which partly allowed an appeal against the decision of the Environment and Land Court (the trial court) on the award of damages. The respondent was the registered owner of the suit property pursuant to a grant issued under the repealed Registration of Titles Act, (Cap 281) Laws of Kenya. The respondent claimed that in 2007, the appellant, without reference to or concurrence of the former, unilaterally issued duplicate title deeds over portions of the suit property in favour of third parties under the repealed Registered Lands Act (Cap 300) Laws of Kenya. It was the respondent's further claim that among other groups of people, the Department of Defence through the then Permanent Secretary to the Treasury, was granted a duplicate title over a parcel of land which was part of the suit property.

Aggrieved, the appellants filed a petition at the trial court and claimed that the duplicate titles were issued to trespassers who had encroached on the suit property. The appellant's case was that the respondent's act of issuing titles over the suit property was illegal and amounted to unlawful compulsory acquisition and deprivation of its property. It further claimed that the respondent's actions amounted to a violation of its rights under article 40 (1) and (3) of the Constitution, and sought two declarations to that effect, and a consequential award of damages. The trial court held that the issuance of duplicate titles over the appellant's land, in favour of third parties, amounted to unlawful compulsory acquisition, and a violation of its right to property under article 40(3) . The trial court determined that the acreage unlawfully acquired was 51.129 ha and awarded the respondent a sum total of Kshs. 413,844,248.70 as compensation for the land encroached and Kshs. 51,129,000 as general damages for breach of the respondent's right to property.

The Court of Appeal upheld the trial court's finding that the respondent's right to property was violated, and determined that the appellant's acts amounted to compulsory acquisition of portions of the suit property. Further, the appellate court held that the respondent was entitled to compensation under article 40(3) of the Constitution, on account of the compulsory acquisition. Additionally, the court faulted the trial court for failing to properly exercise its discretion in the computation of damages and determined that the respondent was entitled to compensation for

the entire suit property. It found that upon payment of the compensation, the respondent would be deemed to have relinquished its title to the suit property. Finally, the Court of Appeal awarded damages of Kshs. 449, 434, 800 for the compulsory acquisition of the suit property and Kshs. 42, 570, 000 as damages for violation of the appellant's right to property. Aggrieved, the petitioner filed the instant appeal.

**Issues**

i. Whether the Government could lawfully deprive a person of part or all of their property *via* a grant of lease to another person.
ii. What was the lawful procedure for the Government to compulsorily acquire land?
iii. What did the court consider in awarding damages for unlawful compulsory acquisition of land?
iv. Whether the unlawful acquisition of a portion of its land which resulted in the diminution of the value of the whole of the suit property amounted to constructive compulsory acquisition.

**Relevant provisions of the Law**

**Constitution of Kenya, 2010**

**Article 40 - Protection of right to property**

*(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description unless the deprivation--*

*(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or*

*(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--*

*(i) requires prompt payment in full, of just compensation to the person; and*

*(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.*

**Held**

1. During the proceedings at both the trial and appellate courts, the ownership status of the suit property was never in doubt. It remained an uncontroverted fact that the respondent acquired the suit property pursuant to a grant of lease by the government. By the time the cause of action arose, the lease in favour of the respondent was intact.
2. The only way the Government could lawfully deprive the respondent of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of article 40(3) of the Constitution, and the procedure stipulated in the repealed Land Acquisition Act which was the applicable law at the time. The Government did not acquire the portion of the suit property compulsorily. The facts on record did not point towards compulsory acquisition. Being the custodian of the land register, and the guarantor of titles emanating

there-from, the Government was acutely aware that the suit property was privately owned by the respondent.

3. Any compulsory acquisition process, ought to have commenced with a requisite notice to the respondent, and any other persons claiming an interest in the land. The public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full of a just compensation to the respondent. There was nothing on the record to show, that any of those mandatory processes was followed before a portion of the suit property was acquired. The issuance of titles over a portion of the suit property in favour of third parties was unlawful, un-procedural, and an egregious violation of the respondent's right to property. The issuance of titles to third parties over a portion of the suit property, amounted to a violation of article 40(3)(a) and (b) of the Constitution.
4. The trial court and Court of Appeal granted special and general damages. There was no reason to interfere with the findings of the two superior courts in that regard. In arriving at the quantum of special damages, the trial court placed reliance upon a valuation report by a private valuer. The main basis upon which special damages could be granted for the deprivation of property, was the market value of the suit property. In case of general damages, a court of law exercised discretion guided by the circumstances of each case. In granting special damages, the trial court was guided by the valuation report tabled by the respondent. In the absence of a contrary report on record, there was no basis upon which to interfere with the award. Even if there had been one such other report, the Supreme Court's jurisdiction to interfere would have been largely circumscribed, unless the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report.
5. The principles governing compensation for compulsorily acquired land, could not be applicable to the suit land, as the same had not been so acquired. The most appropriate remedy was an award of damages. The Supreme Court approved of the Court of Appeal's decision to award compensation in difficulty, not just with regard to a portion of the land, but for the whole of the suit property including the un-acquired portion. Nor could the Supreme Court justify an award of damages that extended to that part of the land that had neither been compulsorily, nor unlawfully acquired. The respondent's contention that the unlawful acquisition of a portion of its land had resulted in the diminution of the value of the whole of the suit property was a matter of fact, which ought to have been authoritatively established at the trial court. But even if that fact had been established at the trial court, the same would not have constituted a constructive compulsory acquisition, a legal tenet unknown to Kenyan law.

*Appeal partly allowed.*

***Orders***

i. *The Supreme Court set aside the award of special and general damages in the sum of Kshs. 492,004,800.00 by the Court of Appeal.*

ii. *Kshs. 464,973,248.70 was affirmed.*
iii. *The award of compensation relating to the un-acquired portion of the suit property by the Court of Appeal, was set aside.*
iv. *The portion of the suit property, over which no titles were issued by the Government, in favour of third parties, was to remain vested in the respondent, in accordance with the grant it held in its favour.*
v. *Each party was to bear its own costs.*

**Citations**

**Cases**

***Kenya***

*Manchester Outfitters (Suiting Division) Ltd (now known as King Wollen Mills Ltd) & another v Standard Chartered Financial Services Ltd & 2 others* Petition 6 of 2016; [2019] eKLR - (Mentioned)

**Statutes**

***Kenya***

1. Constitution of Kenya articles 23(3)(e); 40(1)(3)(a)(b); 163(4)(a) - (Interpreted)
2. Land Acquisition Act (cap 295 Repealed) sections 3, 4, 6, 7, 9, 17, 22 - (Interpreted)
3. Land Act, 2012 (Act No 6 of 2012) In general - (Cited)
4. Registered Land Act (cap 300 Repealed) In general - (Cited)
5. Registration of Titles Act (cap 281 Repealed) In general - (Cited)
6. Supreme Court Act, 2011 (cap 9B) sections 15(2); 17 - (Interpreted)
7. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 33 - (Interpreted)

**Advocates**

None mentioned

December 3, 2021, the Court delivered the following Judgment:

## A. Introduction

1. The petition before this court is dated 21st January, 2020 and lodged on 22nd January, 2020. It is brought pursuant to the provisions of article 163(4) (a) of the *Constitution*, sections 15(2) & 17 of the *Supreme Court Act* No 7 of 2011 and Rule 33 of the *Supreme Court Rules*, 2012 (repealed). The appellant challenges the decision of the Court of Appeal (Visram, Karanja & Musinga, JJA) which partly allowed an appeal against the decision of the Environment and Land Court (Olola, J) in Malindi ELC Petition No 2 of 2010 on the award of damages.

## B. Background

### (i) At the Environment and Land Court

2. The respondent is the registered owner of LR No 25528 (hereinafter referred to as "the suit property") measuring 425.7 hectares situate in the Coastal Region pursuant to a Grant issued under the *Registration of Titles Act*, cap 281 Laws of Kenya (now repealed). The respondent, being in occupation of the suit property, proceeded to carry out prawn farming, salt extraction, amongst other marine aquaculture activities.

3. The respondent claims that in 2007, the appellant, without reference to or concurrence of the former, unilaterally issued duplicate title deeds over portions of the suit property in favour of third parties under the *Registered Lands Act,* cap 300 Laws of Kenya (now repealed). It was the respondent's claim that the duplicate title deeds were issued during the 2007 election period, at the behest of the politicians in the area, with a view to winning votes in favour of the respective candidates. The respondent further claimed that the decision by the appellant to issue duplicate titles to third parties encouraged more squatters to encroach and settle on the suit property.

4. It was the respondent's further claim that among other groups of people, the Department of Defence through the then Permanent Secretary to the Treasury, was granted a duplicate title over a parcel of land LR No 24853 which was part of the suit property.

5. Aggrieved, the appellant on 28th August 2015 filed a petition before the High Court (as amended), claiming that the duplicate titles were issued to trespassers who had encroached on its suit property. The appellant's case was that the respondent's act of issuing titles over the suit property was illegal and amounted to unlawful compulsory acquisition and deprivation of its property. It further claimed that the respondent's actions amounted to a violation of its rights under article 40(1) and (3) of the Constitution, and sought two declarations to that effect, and a consequential award of damages.

6. In a judgment dated and delivered on 15th March 2018, the Environment and Land Court (Olola, J) held that the issuance of duplicate titles over the appellant's land, in favour of third parties, amounted to unlawful compulsory acquisition, and a violation of its right to property under article 40(3) of the Constitution. The learned Judge determined that the acreage unlawfully acquired was 51.129 ha and awarded the respondent a sum total of Kshs 413,844,248.70 as compensation for the land encroached and Kshs 51,129,000 as general damages for breach of the respondent's right to property under article 40 of the Constitution.

**ii. At the Court of Appeal**

7. Both the appellant and respondent were aggrieved by the Judgment of the Environment and Land Court. The respondent filed an appeal before the Court of Appeal, Civil Appeal No 56 of 2018 raising the following summarized grounds, that the learned judge erred by:

    a. Limiting the extent of compensation to the appellant as a result of compulsory acquisition of the suit property by the respondents to a portion of 51.129 hectares as opposed to the entire suit property;

    b. Applying the said limitation in computing the damages due to the appellant;

    c. Declining to grant the appellant loss of income which had been established to the required standard; and

    d. Failing to conclusively determine the fate and/or status of the suit property.

8. The appellant also filed a cross appeal claiming that the learned judge erred by:

    a. Finding the appellants liable for the alleged encroachment of the suit property by squatters and compensating the appellant for the same;

    b. Imposing punitive damages against the appellants; and

    c. Applying the provisions of the Land Acquisition Act which had since been repealed by the *Land Act*, 2012.

9. The Court of Appeal (Visram, Karanja & Musinga, JJ A) in its Judgement dated and delivered on 20th March 2019, upheld the High Court's finding that the respondent's right to property was violated, and determined that the appellant's acts amounted to compulsory acquisition of portions of the suit property. Further, the appellate court held that the respondent was entitled to compensation under article 40(3) of the Constitution, on account of the compulsory acquisition. Additionally, the court faulted the trial Judge for failing to properly exercise his discretion in the computation of damages and determined that the respondent was entitled to compensation for the entire suit property. It found that upon payment of the compensation, the respondent would be deemed to have relinquished its title to the suit property. Finally, the Court of Appeal awarded damages of Kshs 449, 434, 800/- for the compulsory acquisition of the suit property and Kshs 42, 570, 000 as damages for violation of the appellant's right to property.

**iii. At the Supreme Court**

10. The appellant has now moved to this court on grounds that the learned judges, erred in law and in fact in:

i. Finding that the respondent was entitled to compensation of the suit property though the same had not been compulsorily or otherwise acquired by the appellant;

ii. Failing to find that the respondent was entitled to only 28 hectares acquired by the government as shown in the survey report filed in court on 13th January 2012;

iii. Finding that the respondent was entitled to compensation for the entire suit property and awarding the sum of Kshs 2,996,232,000 plus 15% damages under the Land Acquisition Act in the sum of Kshs 449,434,800 and damages for Kshs 42,570,000.

iv. Misapplying the application (*sic*) of the provisions of article 40(3)(b) of the Constitution;

v. Failing to find that the respondent had not established any basis for its claim for deprivation or compensation for the whole portion of the suit property whereas the respondent had not declared any interest or taken up possession or ownership thereof;

vi. Finding that the respondent's constitutional rights to the entire suit property had been violated under the doctrine of compulsory acquisition without any basis, proof and/or justification;

vii. Compelling the Government to acquire the larger portion of the suit property and to pay the respondent an inordinate sum of Kshs 2,996,232,000 for land which the Government had no intention to acquire causing excessive loss to public funds;

viii. Relying on a valuation report that was misleading and based the value of the land on the argument that the respondent was carrying an aquaculture business despite making a finding that this had not been not proved.

11. The appellant seeks the following reliefs:

a. The Judgments of the Court of Appeal delivered at Malindi on 20th March, 2019 in Civil Appeal No 56 of 2018 Z*inj Limited v Attorney General and the Environment and Land Court* in Petition 2 of 2010 *Zinj Limted v Honourable Attorney General* be set aside with costs.

b. The decision of the Court of Appeal at Malindi on 20th March 2019 in Civil Appeal No 56 of 2018 *Zinj Limited v Attorney General* and that of the Environment and Land Court in Petition 2 of 2010 *Zinj Limited v Attorney General* be set aside

c. That this honourable court do find that the respondent is in violation of condition number 14 of the Grant issued to the respondent and do order for unconditional surrender of the suit property to the Government.

d. Alternatively, that the Government valuer be directed to proceed and value the 28.7 hectares being the portion of the suit property acquired according to the Survey Report.

**C. Parties Respective Submissions**

**i.The appellant's submissions**

12. The appellant's written submissions are dated 20th February 2020 and filed on 21st February 2020. On jurisdiction, the appellant argues that the appeal is filed as of right, and that this court has jurisdiction to hear and determine the appeal, as the petition raises questions involving the interpretation and application of article 40(3) of the Constitution. In this regard, the appellant cites this court's decision in *Manchester Outfitters (Suiting Division) Ltd (now known as King Wollen Mills Ltd) & another v Standard Chartered Financial Services Ltd & 2 others, Petition No 6 of 2016, [2019] eKLR* to support this submission.

13. On whether the issuance of duplicate titles over the suit property amounted to compulsory acquisition, the appellant argues that both the trial court and appellate court erred in the application of the doctrine, by failing to identify the public purpose for which the suit property was acquired. As such, it is contended that, the conditions precedent for compulsory acquisition as set out under article 40(3) of the Constitution were never met.

14. The appellant further submits that based on the Survey Report of 12th January 2012, which report was relied upon by the trial court, the Government only acquired 28.659 hectares of the suit property pursuant to due process as stipulated under sections 3, 4 and 6 of the Land Acquisition Act (repealed). It is the appellant's further submission that the land was so acquired to settle the squatters under the arrangement of Ngomeni Settlement Scheme.

15. It is the appellant's case that the respondent is only entitled to compensation for the portion of land (28.659 Ha) that the Government acquired through compulsory acquisition, and not the entire suit property. It contends that there is no legal basis for condemning the Government with punitive damages for the un-acquired portion of land. The award by the Court of Appeal against the Government, for the undisturbed portion of land, urges the appellant, would lead to an unjustifiable loss of public funds. The appellant urges that the respondent was actually utilizing the remaining suit property for prawn farming. In support of this argument, the appellant makes reference to the respondent's application for change

of user, from exclusive salt extraction, to an expanded user which would accommodate aquaculture farming.

16. With regard to the Judgment of the Environment and Land Court, the appellant argues that the trial court erred in finding that the respondent, was entitled to compensation for 51 hectares of the suit property, despite the Report indicating that the encroachment by the Government had only affected 28 hectares or thereabouts.

17. The appellant further submits that Condition 14 of the Grant stipulates that the land would revert to the Government unconditionally, should the proprietor fail to utilize it in line with the purpose for which the land was granted. Accordingly, the appellant submits that the portion which was not affected by the encroachment should now automatically revert to the Government since the respondent claims that it is unable to utilize it.

**v. Respondent's submissions**

18. The respondent's submissions are dated 22nd April 2021 and filed on 23rd April 2021. The respondent proposes the following issues for determination;

    i. Whether the trial court and the Court of Appeal properly interpreted and applied article 40(3) of the Constitution;

    ii. Whether the Court of Appeal properly exercised its discretion in disturbing the award of damages by the trial court.

19. On the issue as to whether its rights under article 40(3) of the Constitution were violated, the respondent submits that by its own admission, the Government not only condoned the encroachment upon its land by third parties, but proceeded to issue titles in favour of the latter. The respondent further submits that the issuance of titles was done in complete disregard of the provisions of article 40(3)(a) and (b) of the Constitution, and the mandatory procedure of acquisition set out in sections 7, 9, 17 and 22 of the Land Acquisition Act (repealed). The respondent maintains that having been unlawfully deprived of its suit property by the appellant, it was entitled to compensation under article 23(3)(e) of the Constitution, as read with the relevant provisions of the Land Acquisition Act (repealed).

20. Regarding the acreage of the unlawfully acquired portion of the suit property, the respondent submits that the appellant did not avail any evidence at the trial court, to support its claim that only 28 hectares had been encroached upon. It is the respondent's case that the illegal acquisition of parts of the land, was not a one-off event. Rather, its contends that the acquisition took place in phases and at different times. It is the respondent's case that while it agrees with the trial court's finding of fact, that the portion of the suit property that been unlawfully acquired, was 51 hectares, the award of damages ought to have extended to the entire suit property. In justification, the respondent argues that the encroachment

upon and consequent acquisition of the 51 hectares had rendered the whole suit property un-utilizable.

21. In response to the appellant's contention that the suit property should revert to it under Condition 14 of the Grant, the respondent submits that such an argument is a monumental afterthought as it was never canvassed at the trial court. In conclusion, it urges the Court to uphold the Judgment and Orders of the Court of Appeal in their entirety.

**D. Issues for Determination**

22. In our view, after considering the respective cases of the parties, and the submissions (both written and oral) in support thereof, there are three issues the determination of which disposes of this Appeal. These are:

    i. Whether the issuance of titles over a portion of the suit property in favour of third parties by the Government violated the respondent's right to property contrary to article 40(3)(a) and (b) of the Constitution.

    ii. If the answer to the above is in the affirmative, whether the respondent was entitled to an award of damages as compensation consequent upon such violation

    iii. If the answer to the above is in the affirmative, whether the compensation ought to have extended to the whole of the suit property or whether it should be limited to that portion over which titles were issued in favour of third parties.

**E. Analysis****

**i. On the violation of article 40(3)(a) and (b) of the Constitution**

23. It was the respondent's case, that the Government unlawfully, and in total disregard of the Constitution, the applicable law, and the strictures of due process, issued titles over a portion of its property in favour of third parties. This was done pursuant to a Notice published by the Ministry of Lands on 24th January 2011 in the Nation Newspapers wherein, it invited all persons claiming an in interest in what it named Ngomeni Settlement Scheme, but which was in reality, part of the suit property, to communicate their respective claims.

24. The appellant on the other hand, maintains that the issuance of titles over the said portion of the suit property, was legal and that due process was followed.

    It is the appellant's submission that through the Notice, the respondent, just like other members of the public, was given an opportunity to communicate his interest in the land but failed to do so. As such, submits the appellant, what followed was a compulsory acquisition of 28 hectares, for the purpose of settling the squatters who had encroached on the land.

25. Article 40(3) of the Constitution provides that-

> " The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
>
> a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
>
> b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
>
> i. requires prompt payment in full, of just compensation to the person; and
>
> ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

26. The fact that the respondent was the registered proprietor of the suit property, has never been called into question, or challenged by the appellant.

Indeed, during the proceedings at both the trial and appellate courts, the ownership status of the suit property was never in doubt. It remains an uncontroverted fact that the respondent acquired the suit property pursuant to a Grant of Lease by the Government. By the time the cause of action arose, the lease in favour of the respondent was still intact.

27. The main controversy, revolves around the legality or otherwise, of the manner in which the Government, went about acquiring portions of the suit property, and conferring title over the same, in favour of third parties. The only way the Government could lawfully deprive the respondent of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of article 40(3) of the Constitution, and the procedure stipulated in the Land Acquisition Act (now repealed) which was the applicable law at the time. Towards this end, can it be said that the Government acquired the portion of the suit property compulsorily? The facts on record do not that way point. Being the custodian of the Land Register, and the guarantor of titles emanating there-from, the Government was acutely aware that the suit property was privately owned by the respondent.

28. It follows that any compulsory acquisition process, ought to have commenced with a requisite Notice to the respondent, and any other persons claiming an interest in the land. The public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the respondent. There is nothing on the record to show,

that any of these mandatory processes, was followed before a portion of the suit property was acquired. This being the case and despite the appellant's protestations to the contrary, we must reach the conclusion, in agreement with the trial court, that the issuance of titles over a portion of the suit property, in favour of third parties was unlawful, un-procedural, and an egregious violation of the respondent's right to property. We therefore have no doubt, that the issuance of titles to third parties over a portion of the suit property, amounted to a violation of article 40(3)(a) and (b) of the Constitution.

**ii. On the Award of Damages**

29. It is a trite principle of law, that any injury or loss suffered by a person either through a tortious act, omission or breach of contract, attracts redress in a court of law. The redress includes an award of damages to the extent possible as may be determined by the court. The question regarding the type, extent, and quantum of damages to be awarded, has long been settled through a long line of decisions from the courts. Under article 22(1) of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. Among the reliefs that a court may grant upon proof of violation of a fundamental right, is an order for compensation (article 23(3)(e)). The quantum of damages to be awarded, depends on the nature of the right that is proven to have been violated, the extent of the violation, and the gravity of the injury caused.

30. Having determined that the respondent's right to property had been violated by the Government, the trial court, and later the appellate court, made orders for compensation in favour of the respondent. Both courts granted special and general damages. As we have arrived at a similar conclusion, we see no reason to interfere with the findings of the two superior courts in this regard. We take note of the appellant's submission to the effect that in arriving at the quantum of special damages, the trial court placed reliance upon a Valuation Report by a private valuer. Such Report, in the view of the appellant, was not only unreliable, but could very likely have been tailored to support the respondent's claim. However, in answer to this court's question as to whether, the appellant had tabled in court, a Government Valuation Report to counter the contents of the impugned one, counsel for the appellant stated that no such Report was ever tabled at the trial court. The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case. In granting special damages, the trial judge was guided by the Valuation Report tabled by the respondent. In the absence of a contrary report on record, we have no basis upon which to interfere with the award. Even if there had been one such other report, our jurisdiction to interfere would still have been largely circumscribed, unless

the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report.

**iii. On the Extent of Damages**

31. It was the appellant's case, that the Court of Appeal erred in its holding that the award of damages, should extend to the whole of the suit property, and not just to the portion over which the Government had issued titles. In opposition to the appellant's submission, the respondent counters that the Government's unlawful acquisition of parts of its land, had not only deprived it of the same, but had rendered the un-acquired portion un-utilizable. The appellate court in agreement with the respondent, held that the Government, ought to be deemed to have compulsorily acquired the whole, and not just part of the land. The court then proceeded to award damages to the respondent based on the principles of compensation as stipulated in the Land Acquisition Act (now repealed). The holding and consequential orders by the Court of Appeal had the effect of increasing the quantum of damages awarded by the trial court, from Kshs 464,973,248.70 to Kshs 492,004,800.00.

32. We have already held that the Government's action of issuing titles over a portion of the respondent's land, amounted to a violation of its right to property. In addition, we have held that such action could not be regarded as "a compulsory acquisition" as it was done contrary to the Constitution and the law. The acquisition was "compulsory" only because the Government used its coercive powers to deprive the respondent of its property in disregard of the Constitution. However, such governmental action cannot be regarded as "a compulsory acquisition" as known to law. It was simply a brazen and an unlawful deprivation of the respondent's right to property, for which just recompense was awarded by the trial court.

33. Having so held, we find difficulty in vindicating the appellate court's conclusion, to the effect that, the Government had compulsorily acquired the land. Following our determination to the contrary, it becomes clear that the principles governing compensation for compulsorily acquired land, could not be applicable to the suit land, as the same had not been so acquired. The most appropriate remedy in our view, was an award of damages, as held by the trial court and partially upheld by the Court of Appeal. By the same token, we find further difficulty, in voicing our approval of the appellate court's decision to award compensation, not just with regard to a portion of the land, but for the whole of the suit property including the "un-acquired" portion. Nor can we justify, an award of damages that extends to that part of the land that had neither been compulsorily, nor unlawfully acquired. The respondent's contention that the unlawful acquisition of a portion of its land, had resulted in the diminution of the value of the whole of the suit property, is a matter of fact, which ought to have been authoritatively established at the trial court. But even if the said fact

had been established at the trial court, the same would not have constituted "a constructive compulsory acquisition", a legal tenet unknown to our law.

34. Consequent, upon the forgoing analysis, we make the following Orders:

**F. Orders**

i. The Appeal dated 21st January, 2020 partially succeeds.

ii. We set aside the award of special and general damages in the sum of Kshs 492,004,800.00 by the Court of Appeal.

iii. 464,973,248.70 is hereby affirmed.

iv. The Award of Compensation relating to the "un-acquired" portion of the suit property by the Court of Appeal, is hereby set aside.

v. That portion of the suit property, over which no titles were issued by the Government, in favour of third parties, shall remain vested in the respondent, in accordance with the Grant it holds in its favour.

**G. Costs****

Each Party shall bear its own Costs.

It is so Ordered.

**Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019)**
**[2021] KESC 12 (KLR) (22 October 2021) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2021] KESC 12 (KLR)

***Constitutional Law*** *– fundamental rights and freedoms – equality and freedom from discrimination – discrimination – types of discrimination – direct discrimination vis-à-vis indirect discrimination - what was the difference between direct discrimination and indirect discrimination - what were the elements of direct discrimination - what were the elements of indirect discrimination – Constitution of Kenya, 2010 article 27.*

***Labour Law*** *– employment - dismissal – dismissal on grounds of incapacity – obligations on the employer – justification of dismissal on grounds of incapacity - duty to investigate the extent of the incapacity or the injury and all the possible alternatives short of dismissal – whether an employer had a duty to investigate the extent of incapacity or injury and the alternatives short of dismissal before dismissing an employee on grounds of incapacity.*

***Labour Law*** *– employment – dismissal – dismissal on grounds of gross misconduct – duty by employer to grant employee opportunity to respond to allegations – where a contractual provision required no prior notice when terminating an employee on grounds of misconduct - whether the provisions in an employment contract that required no prior notice when terminating an employment contract due to gross misconduct could oust the statutory requirement to grant the employee the opportunity to defend him/herself or to respond to the allegations – Employment Act (cap 226) sections 41 and 45(2)(c).*

***Labour Law*** *– employment – dismissal – summary dismissal – duty on an employer to grant an employee a hearing before dismissal - whether summary dismissal gave an employer a blanket right to dismiss an employee at will without a hearing - Employment Act (cap 226) sections 41, 44(4) and 45(2)(c).*

***Labour Law*** *– employment – dismissal – unfair dismissal – remedies for unfair dismissal – award of damages - purpose of award of damages in a claim of discrimination against an employee– what did the court consider in awarding damages.*

***Evidence Law*** *– burden of proof – burden of proof in claims of discrimination by an employee against an employer – requirement by an employer to give reasons for the actions taken against an employee - whether the obligation set on an employer, alleged to have engaged in a discriminatory practice, to give reasons for taking certain actions against the employee shifted the burden of proof from the employee to the employer – when did the burden of proof in a claim of discrimination against an employer shift from the employee to the employer – Evidence Act (cap 80) sections 108 and109; Employment Act, No. 11 of 2017, section 5(7).*

***Words and phrases*** *– discrimination – definition of discrimination - failure to treat all persons equally when no reasonable distinction could be found between those favoured and those not favoured - Black's Law Dictionary, 10th Edition.*

**Brief facts**

The appellant was employed by the respondent on a permanent and pensionable basis as the operations manager. The appellant was diagnosed with a tumour upon which his doctor recommended that he seeks medical attention in India. The appellant proceeded to India for a spinal cord surgery where he underwent successful treatment until January 17, 2014 during which period he continued to receive his full salary.

In the course of duty, the respondent became overly concerned with the appellant's health condition while in office. They noted that the appellant was unable to move around unaided. They requested the appellant to proceed on sick leave until such time when he would be able to move around the office unaided and asked for a medical appraisal of the appellant's condition in confidence from his medical consultant. The appellant provided the medical report late. As a consequence of the belated medical report, the respondent suspended the appellant and later summarily dismissed the appellant for gross incompetence because of improprieties that arose when the respondent conducted an audit on the appellant's accounts that revealed a cover up for non-performing accounts contrary to company policy and that the appellant had failed to reconcile underwriter accounts in clear violation of his employment contract.

Aggrieved the appellant filed a suit at the Employment and Labour Relations Court (trial court) for unlawful and wrongful termination and for discrimination. The trial court held that the appellant was discriminated against and terminated without being given a chance to be heard. She was awarded Kshs. 5,000,000 as damages for discrimination, 12 months' salary as compensation for unlawful and unfair termination and one month's salary *in lieu* of notice.

Aggrieved the respondent filed an appeal at the Court of Appeal on grounds that the trial court erred in law and fact in finding that they had discriminated against the appellant and finding that they had unlawfully and unfairly terminated the appellant's employment. At the Court of Appeal, the court held that although there was no discrimination, the appellant was unfairly terminated. Aggrieved, the appellant filed the instant appeal on grounds that the Court of Appeal erred in law and fact in finding that the appellant was not discriminated against by the respondent.

**Issues**

i. Whether the obligation set on an employer, alleged to have engaged in a discriminatory practice, to give reasons for taking certain actions against the employee shifted the burden of proof from the employee to the employer.

ii. When did the burden of proof in a claim of discrimination against an employer shift from the employee to the employer?

iii. What was the difference between direct discrimination and indirect indiscrimination?
    1. What were the elements of direct discrimination?
    2. What were the elements of indirect discrimination?

iv. What requirements was an employer to fulfill to justify dismissal on grounds of incapacity?

v. Whether an employer had a duty to investigate the extent of the incapacity or the injury and the alternatives short of dismissal before dismissing an employee on grounds of incapacity.

vi. Whether the provisions in an employment contract that required no prior notice when terminating an employee due to gross misconduct could oust the statutory requirement to grant the employee an opportunity to defend himself/herself or to respond to the allegations.

vii. Whether summary dismissal as contemplated under section 44(4) of the Employment Act gave an employer a blanket right to dismiss an employee at will without a hearing.

viii. What was the purpose of the remedy of an award of damages in a claim of discrimination against an employer?

**Relevant provisions of the Law**

**Employment Act (cap 226)**

**Section 5 - Discrimination in employment**

*(7)In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.*

**Section 41 - Notification and hearing before termination on grounds of misconduct**

*(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2)Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.*

**Section 44 - Summary dismissal**

*Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—*

*(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*

*(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;*

*(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*

*(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;*

*(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;*

*(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or*

*(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.*

**Section 45 - Unfair termination**

*(2) A termination of employment by an employer is unfair if the employer fails to prove—*

*(c) that the employment was terminated in accordance with fair procedure.*

**Evidence Act (cap 80)**

**Section 108 - Incidence of burden**

*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

**Section 109 - Proof of particular fact**

*The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

**Held**

1. Discrimination against any employee was provided for under article 27 of the Constitution as well as section 5 and 47 of the Employment Act. No person should directly or indirectly discriminate against another person on account of health status or disability.
2. The protection of employees against any form of discrimination at the work place was a significant matter and the burden placed upon an employer to disprove the allegations of discrimination was enormous. The employer had to prove that discrimination did not take place as alleged and that where there was discrimination, it was not with regard to any of the specified grounds in section 5(3) of the Employment Act. That however did not automatically shift the burden of proof in cases of discrimination against an employee to the employer.
3. According to section 5(7) of the Employment Act, an employer alleged to have engaged in a discriminatory practice had to give reasons for taking certain actions against the employee. Where such actions were shown not to have any justification against the protected group, then discrimination against such an employee had to be addressed. The appellant had

discharged the burden of proof and it shifted to the respondent who failed to discharge it on their part.

4. Section 108 of the Evidence Act provided that the burden of proof in a suit or procedure lay on the person who would fail if no evidence at all were given on either side. Section 109 of the Act declared that, the burden of proof as to any particular fact lay on the person who wished the court to believe in its existence, unless it was provided by any law that the proof of that fact would lie on any particular person. The petitioners bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden.

5. Discrimination was failure to treat all persons equally when no reasonable distinction could be found between those favoured and those not favoured. Not all cases of distinction amounted to discrimination. Discrimination could be said to have occurred where a person was treated differently from other persons who were in similar positions on the basis of one of the prohibited grounds like race, sex disability or due to unfair practice and without any objective and reasonable justification.

6. Direct discrimination involved treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involved setting a condition or requirement which was a smaller proportion of those with the attribute were able to comply with, without a reasonable justification.

7. In considering claims of indirect discrimination, courts were:
    1. to identify the relevant provision, criterion or purpose, which was applicable;
    2. to determine the issue of disparate impacts, which entailed identifying a pool for the purpose of making a comparison of the relevant disadvantage;
    3. to ascertain whether the provision, criterion or practice also disadvantaged the claimant personally; and
    4. to consider whether the policy was objectively justified by a legitimate aim; and to consider (if the above requirements were satisfied) whether that was a proportionate means of achieving such a legitimate aim.

8. The salient features of indirect discrimination were that:
    1. in none of the various definitions of indirect discrimination was there any express requirement for an explanation of the reasons why a particular provision, criterion or practice put one group at a disadvantage when compared with others.
    2. The contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly required a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination did not. Instead it required a causal link between the provision criterion or practice and the particular disadvantage suffered by the group and the individual.
    3. The reasons why one group could find it harder to comply with the provision, criterion or practice than others were many and various.

4. There was no requirement that the provision, criterion or practice in question should put every member of the group sharing the particular protected characteristic at a disadvantage.
5. It was commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence.
6. It was always open to the respondent to show that the provision, criterion or practice was justified.

9. The respondent's actions to terminate the appellant bordered on outright victimisation. The appellant's medical report was not inconclusive. The appellant was not uncooperative in furnishing the report. Though the report was availed, albeit late, no prejudice would have been suffered by the respondent in considering the recommendations. It was the doctor's recommendation that the appellant should resume duty in two months' time subject to periodic review of the appellant's condition. Furthermore, in the respondent's letter of April 14, 2014, no specific timeline was given to the appellant to avail the report. It only stated, "as soon as possible". In that regard, the respondent's action was drastic, harsh and unwarranted in the circumstances.
10. The respondent ought to have considered the report or even in the least conducted its own investigation as to the appellant's medical condition. The onus was on the respondent to investigate the extent of the incapacity or the injury and all the possible alternatives short of dismissal. The respondent was hell-bent in wanting to get rid of the appellant from employment to an extent that they had to circumvent the due process in a bid to find fault by conducting extraneous investigations when in fact prior to that they had given him a salary raise due to his hard work. In addition, there was no evidence that investigations were conducted on all other employees during that period and hence he was subjected to different treatment which emanated from his disability. The respondent also failed to demonstrate that they tried to accommodate the appellant in his current state. The actions by the respondent amounted to indirect discrimination due to differential treatment.
11. The burden of proving that the appellant was medically unfit to continue serving shifted to the respondent to prove the same using an expert opinion. The respondent never produced any medical assessment to demonstrate that the appellant was not capable of performing his duties any more so by virtue of his physical incapacity. The respondent disregarded the appellant's medical report and proceeded to not only suspend him on medical grounds but eventually terminate him on grounds of gross incompetence and that was unjust and discriminatory.
12. The respondent was compassionate to the appellant by facilitating the appellant's treatment and even increasing his salary a month after he resumed work. The salary increase could not be said to have been a sympathetic act by the respondent as that was done on the basis of his great performance at work. The duty to accommodate ought to have been demonstrated after the fact of his physical incapacity. Seemingly, only when it was clear that

he needed assistance to move around that the respondent proceeded to suspend the appellant which eventually led to his dismissal. The respondent had an obligation to consider the medical report and to further accommodate the appellant by devising ways that could ease his movements unless they proved that accommodating the appellant would cause undue hardship to the company.

13. Section 2 of the Persons with Disabilities Act No. 14 of 2003 defined disability as a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacted adversely on social, economic or environmental participation. The Act was silent on what constituted a temporary or permanent disability. As long as the impairment impacted adversely on social, economic, or environmental participation of an individual, it was deemed to be a disability. A perusal of the record of appeal indicated that the appellant accepted his condition and took steps to register with the National Council for Persons with Disabilities as Persons with Disabilities (PWD) and was issued with a disability card.

14. Section 15 of the Persons with Disabilities Act No. 14 of 2003 expressly prohibited discrimination by employers. The Act went further to require employers to put in place special facilities in order to accommodate its employees with disabilities. The respondent failed to demonstrate that there would have been any undue hardship they would have incurred if they chose to reasonably accommodate the needs of the employee by providing amenities such as a ramp to ease the appellant's movement or even providing flexible working hours.

15. The respondent expressly admitted that they did not have the facilities to accommodate the appellant in the office. The fact that the respondent expected the appellant to continue working in the same conditions as the rest of the employees was outrightly unreasonable. The respondent arbitrarily resolved that the appellant was no longer productive by virtue of his inability to walk unaided when in fact they failed to demonstrate what steps they took to accommodate him in his state.

16. The respondent catered for the medical expenses of the appellant through the medical cover and even continued to pay his salary for the period he was away for treatment. The respondent exhibited indirect discrimination towards the appellant.

17. The issue of gross incompetence was an afterthought. The respondent's action of dismissing the appellant was extremely harsh and they had not reasonably demonstrated what measures they took to accommodate the appellant's condition.

18. The procedure followed to terminate the contract was in breach of sections 41 and 45 2(c) of the Employment Act for the reason that the appellant was not accorded a chance to defend himself or respond to the allegations against him. Although the letter of appointment provided for no prior notice when terminating the employment due to gross misconduct, that stipulation of the contract could not be used to oust a mandatory and express statutory provision in section 41 of the Employment Act. The failure to follow fair procedure

rendered the termination of the appellant's employment unfair within the meaning of section 45 of the Act.

19. Although the Court of Appeal found that the summary dismissal was unfair, the court attributed the dismissal to the appellant's conduct. They held that the appellant's transgressions contributed to his dismissal when in fact the respondent had been lenient and compassionate to him throughout his sickness. They only took issue with the fact that he was never afforded an opportunity to be heard. Under the Employment Act, there was no express provision for dismissal on medical grounds. However, the employer was required to demonstrate that medical assessments were conducted which rendered the employee incapable of performing. In regard to dismissal in cases of incapacity, the respondent was required to have a hearing under section 41 of the Employment Act.

20. No hearing was demonstrated to have been conducted. The dismissal was unfair and unlawful for failing to accord the appellant a fair hearing. The respondent was required to facilitate the termination in accordance with section 41(1) of the Employment Act in order to come within the ambit of fairness. The allegations that the appellant faced would have well been explained if an opportunity to respond was granted so as to avoid the harsh sanction of a summary dismissal as contemplated under section 41 of the Employment Act. Moreover, section 44(4) of the Employment Act did not give an employer a blanket right to dismiss an employee at will. However grave the circumstances of the employee's misconduct, the employee was entitled to be heard before he was dismissed.

21. The right to be heard was the cornerstone of fair labour practices. Where the circumstances did not allow a hearing before summary dismissal, the duty was upon the employer to set such out. The appellant's summary dismissal was unfair, unjust and unlawful for want of due process.

22. An award of damages should not be punitive to one party but at the same time it should act as a deterrent to employers who engaged in discriminatory acts. Employment laws in Kenya had made great strides in ensuring that employees were protected from discriminatory acts by the employer and the onus was therefore on employers to ensure that they set out proper policies to govern their engagement with employees, to avoid falling into dangers of workplace discrimination. The award of Kshs 5,000,000 was inordinately high and disproportionate. The award of 12 months' salary in compensation as awarded by the trial court was sufficient.

23. An award of damages was discretionary in nature. The Supreme Court could invoke its inherent powers to ensure that justice should not only be done but should be seen to be done to all litigants.

*Appeal partly allowed.*

***Orders***

i. *The petition of appeal dated September 2, 2019 partially succeeded.*

ii. *The judgment of the Court of Appeal dated July 19, 2019 was set aside.*

iii. *Judgement was entered in the following terms:*
   1. *Damages for discrimination - Kshs. 2,000,000*
   2. *12 months' salary in compensation - Kshs 2, 384,100*
   3. *1 Months' salary in lieu of notice - Kshs 198,675*
   4. *Salary for July 2014 - Kshs 198,675*
   5. *Total - Kshs 4,781,450*

iv. *Costs awarded to the appellant.*

v. *The amounts awarded would attract interest at court rates from the date of the trial court's judgment until payment in full.*

**Citations**

**Cases**

***Kenya***

1. *Dida, Mohammed Abduba v Debate Media Limited & another* Civil Appeal No 238 of 2017; [2018] eKLR - (Explained)
2. *DK Njagi Marete v Teachers Service Commission* Cause 379 [N] of 2009; [2013] KEELRC 575 (KLR) - (Mentioned)
3. *Duncan Otieno Waga v Attorney General* Cause 89 of 2013; [2014] KEELRC 753 - (Mentioned)
4. *Gwer, Samson & 5 others v Kenya Medical Research Institute & 3 others* Petition No 12 of 2019; [2020] eKLR - (Followed)
5. *Management of Motor Vehicles v Presiding Officer, ILR* [1987] KAR 507
6. *Mulinge, James v Freight Wings Limited* Cause No 1359 of 2014; [2016] eKLR - (Explained)
7. *Nyarangi & 3 others v Attorney General* [2008] KLR 688 - (Followed)
8. *Ol Pejeta Ranching Limited v David Wanjau Muhoro* Civil Appeal No 42 of 2015; [2017] eKLR - (Explained)
9. *Outa, Fredrick Otieno v Jared Odoyo Okello & 3 others* Petition No 6 of 2014; [2017] eKLR - (Followed)
10. *Pandya Memorial Hospital v Geeta Joshi* Civil Appeal No 62 of 2019; [2020] eKLR - (Followed)
11. *VMK v Catholic University of East Africa* Cause No 1161 of 2010; [2013] eKLR - (Interpreted)
12. *Waweru, Peter K v Republic* Miscellaneous Civil Application No 118 of 2004; [2006] eKLR - (Followed)

***South Africa***

*Standard Bank of South Africa v Commission for Conciliation, Mediation & Arbitration and others* (2007) ZALC 94; 4 BLLR 356 ; (2008) 29 ILJ 1239 - (Followed)

***United Kingdom***

1. *Alexander v Home Office* (1988) 2 All ER 118 - (Mentioned)
2. *Essop & others v Home Office; Naeem v Secretary of State for Justice* [2017] UKSC 27 - (Followed)
3. *Marshall v Harland and Wolff Ltd:* NIRC 1972 - (Mentioned)
4. *Sarka Angel Walkins Singh v the Governing Body of Aberdare Girls High School, & Another* [2008] EWHC 1865 - (Followed)

***India***

*Kedar Nath v State of WB* (1953) SCR 835 (843) - (Mentioned)

***Canada***

*MacNeill v Canada (Attorney General)* 1994 CanLII 3496; (1993) 64 FTR 41 - (Followed)

**Texts**

1. Fullinwider, RK., (Ed) (1980), *The Reverse Discrimination Controversy: A Moral and Legal Analysis* Maryland: Rowman & Littlefield Publishers p 11-12
2. Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul Minessota: Thomson West 10th Edn

**Statutes**

***Kenya***

1. Constitution of Kenya - (Interpreted) articles 27(4)&(5); 163(4)(a)
2. Employment Act, 2007 (cap 226) - (Interpreted) sections 5(7)(8); 12; 41(1); 42(1); 43(1); 44(4); 45(2)(c); 47(5)
3. Evidence Act (cap 80) - (Interpreted) section 108
4. National Cohesion and Integration Act, 2008 (cap 7N) - (Interpreted) section 7(4)
5. Persons with Disabilities (cap 133) - (Interpreted) section 2,15

**Instruments**

Discrimination (Employment and Occupation) Convention, 1958 (No 111)

October 22, 2021, the Court delivered the following Judgment:

## A. Introduction

1. The petition of appeal before this court is dated 2nd September 2019 and filed on even date. The appellant has appealed under article 163(4)(a) of the Constitution, challenging the decision of the Court of Appeal (Waki, Makhandia & Sichale, JJA) delivered on 19th July 2019, in Civil Appeal No 307 of 2018. The appellant seeks this court's interpretation and application of article 27(5) of the *Constitution*.

**B. Background**

2. The appellant was employed by the respondent on a permanent and pensionable basis as the Operations Manager on a salary of Kshs 129,675/= per month effective 1st January 2010. Sometime in November 2013, the appellant was diagnosed with a tumor upon which his doctor recommended that he seeks medical attention in India. On 16th November 2013, the appellant proceeded to India for a spinal cord surgery where he underwent successful treatment until 17th January 2014 during which period he continued to receive his full salary. Subsequently, he resumed duty on 10th February 2014. On 18th February 2014, the respondent graciously increased his salary to Kshs 138,675 with a further Kshs 60,000 amounting to Kshs 198,675 per month. During the subsistence of his employment, he also managed to acquire two motor vehicles Registration KBJ 278P and KAN 429N through a loan facility granted by the respondent.

3. In the course of duty, the respondent became overly concerned with the appellant's health condition while in office. They noted that the appellant was unable to move around unaided. This prompted them to write a letter to the appellant on 14th April 2014 requesting him to proceed on sick leave until such time when he would be able to move around the office unaided. In the same vein, the respondent also asked for a medical appraisal of the appellant's condition in confidence from his medical consultant. The contents of the letter were as follows:

> " Dear Simon,
>
> RE: Appraising Your Medical Condition
>
> We take this opportunity to appreciate the progress you have made in normalizing your health after the delicate spinal surgery you underwent last year. Indeed, we can only be very grateful to the Almighty God for his great mercies and his healing hand on you.Having said the above, the way forward is very important to both you and the company. We are convinced that both you and company have a role to play for your healing to be complete. In this regard, the company would like to play its role in the most effective way and therefore it has been decided that: -
>
> 1. The company does not improve your healing process by having you in the office in your current physical condition. In the circumstances and until you are able to move around the office unaided, and while you continue to attend the physiotherapy clinics, we ask that you rest at home as the office does not have suitable facilities and conditions for your easements. (sic)

2. You will appreciate that we have not been informed by any medical report or advice on the nature of your sickness to date. We therefore ask for a medical appraisal of your current condition from your medical consultant for our information and guidance. You will please ask him to release the information to us in confidence as soon as possible. A letter addressed to the consultant is attached.

We continue interceding our Lord with prayers for your quick and complete recovery.

Yours Sincerely,

Mrs SN Mwangi

Director."

4. On 22nd May 2014, the respondent wrote a further letter raising their concern that the appellant had failed to avail the medical report from his doctor as well as expressing an intention to suspend his employment. The letter stated:

"Dear Simon,

Re: Appraising Your Health Condition

Following our letter to you dated 14th April 2014 and your text message (sms) of 14th May, 2014, we regret to note that this company is not any better in terms of information regarding your health. Lack of a professional advice on your condition as requested in our said letter has really inhibited our decision making.

Needlessly to state, this company has continued to pay your dues for the last 7 months despite your being off duty. In view of our lack of information about your condition, we may not predict of your condition (sic) and the future. You will appreciate that this is not normal anywhere else.

Notwithstanding the above circumstances, this company is in need of productivity. We therefore give notice that we shall have no alternative but to suspend your employment together with all accruing benefits 30 days from the date of this letter. Please be guided accordingly.

We continue to intercede our Lord with prayers for your recovery.

Yours Sincerely,

Mrs SN Mwangi

Director"

5. On 27th May 2014, Dr Kiboi Julius Githinji released the medical report upon which the appellant availed to the respondent on 28th May 2014. The said report recommended that the appellant resume duty in two months' time. The handwritten report read as follows:

> "Re: Simon Gitau Gichuru
>
> The above named (sic) has spinal cord tumor operated in India, 19th November 2013 and subsequently physiotherapy performed. He postoperatively developed paraplegia. He currently is improving remarkably with progressive physiotherapy and is now able to walk with a walking frame and with assistance. However, he still has lower limb weakness which after current review looks like will have progressive motor power improvement in two to six months. After 2 months we shall review and advice on outcome of our prognosis. I recommend that after two months he resumes his duties and work.
>
> Kindly assist.
>
> Dr Kiboi."

6. As a consequence of the belated medical report, the respondent, through its Managing Director, resolved to suspend the appellant from employment on medical grounds via its letter dated 23rd June 2014. This letter is reproduced herein:

> " Dear Simon,
>
> Re: Suspension of Employment
>
> Further to our letter of 22nd May 2014, we regret to advise that your employment with this company has been suspended with effect from the date of this letter on health grounds as earlier advised in our above quoted letter. All benefits arising out of your employment have therefore ceased from today.
>
> In the circumstances, we attach a cheque No. 001218 for Kshs 72,530/= (Seventy-Two Thousand Five Hundred and Thirty Shillings only) being your June 2014 emoluments, less your loan reductions which kindly acknowledge. In the meantime, we advise that you have outstanding liabilities with us as follows: -
>
> 1. Personal car loan Shs 212, 344.00
> 2. Commercial Vehicle Shs 883, 067.00
>
> Total Shs 1,095,411.00

> In terms of repayments thereof, we ask that you provide a repayment plan for the debt within the next 14 days. We advise that if we do not receive an acceptable plan within the said 14 days, we shall proceed to demand and enforce our rights under the conditions of the advances accordingly.
>
> We ask that you return to the CEO, any company property in your possession.
>
> We thank you for the dedicated service you have given this company in the past and wish you the very best in your future endeavours.
>
> Yours Sincerely,
>
> Mrs SN Mwangi
>
> Director."

7. Ostensibly, this did not augur well with the appellant as he perceived that the respondent's arbitrary suspension was in blatant disregard of his doctor's recommendation as delineated in the medical report which, according to him, amounted to constructive dismissal. Consequently, on 7th July 2014, the appellant, through his advocate, M/s Mbuthia Kinyanjui & Company Advocates wrote to the respondent challenging the suspension terming it as a termination disguised as a suspension which was unjustified, unfair and discriminatory. A notice of intention to sue was also conveyed if the respondent failed to accept liability of its actions.

8. By a letter dated 11th July 2014, the respondent denied the allegations that the appellant's suspension amounted to constructive termination. Following the series of events that ensued, the respondent, on 1st August 2014, officially summarily dismissed the appellant for gross incompetence. It emerged that the respondent had carried out in-depth investigations which led to the discovery that the appellant had invited brokers who had pending issues to renew their policies. He also allegedly covered up for non-performing accounts contrary to company policy and that he had failed to reconcile underwriter accounts in clear violation of his employment contract. The termination letter reads as follows:

> " Dear Simon,
>
> RE: Termination of Contract of Employment
>
> Following a review of your performance while in employment and our clients' complaints, we have carried out an in-depth investigation of customer's (sic) accounts, you did not act in the company's interests. As a result, the company has lost money with some of the customers alleging that they paid their debts albeit through yourself. We are further satisfied that in your supervisory role, you continuously asked the brokers in charge of the accounts to renew policies that

you knew very well had (sic) issues which you personally were aware of (sic) and indeed it was your responsibility to resolve or account for. We are satisfied that you continuously covered up for the non-performance of the accounts contrary to the company policy.

Some of the accounts cited inter alia are:

1. Abdirizik Hussein Farah Shs 28,318

2. Jane Muthoni Shs 20,000

3. Kamau Nyoike Shs 22,947

4. Charles Mungai Gakuo Shs 22 385

5. Stabket Gatonye Kagimbi Shs 12,194

6. Francis Nganga Shs 16,052

In addition, over your employment period, you have miserably failed to reconcile the underwriter accounts which was one of the key responsibilities, indeed the main reason for your employment, details of which are well known to you. You have continuously misled the Board of Directors to cover up for your underperformance. This is tantamount to gross incompetence.

In the circumstances, we are satisfied that you acted in breach of clause 11 of your employment contract dated 1st December, 2009 and accordingly dismiss your employment summarily.

Your pension to date stands at Shs 636,063.00 which is payable immediately.

Purely on humanitarian grounds, the company will allow the existing medical cover to run until expiry next March. Should it not be required, kindly let us know as soon as possible.

Please let us have your proposal in the next 7 days to repay the existing loans owed to the company. Should we fail to receive a suitable proposal within the period, we reserve the right to take appropriate action.

Without further reference to you, please also return the following company properties: laptop, iPad, keys to the main door, keys to your desk drawers and the Operations office door.

Kindly acknowledge receipt of this letter by signing and returning a copy to us.

We thank you for the period you served in this company and wish you well in your future endeavours.

Yours Sincerely,

Mrs SN Mwangi

Director."

**a. At the Employment and Labour Relations Court**

9] Aggrieved by the respondent's action, the appellant instituted a suit before the Employment and Labour Relations Court (ELRC) vide ELRC No 1375 of 2014 for unlawful and wrongful termination. In his claim dated 18th August 2014 and filed in court on even date, it was the appellant's case that the summary dismissal was in contravention of article 27 of the Constitution; that it was discriminatory, wrongful, malicious and unfair; that it was an afterthought and a feeble attempt by the respondent to justify constructive termination. It was also his assertion that he was not given an opportunity to be heard. More specifically, the appellant sought:

a) A declaration that the respondent's conduct towards him was discriminatory;

b) Damages for discrimination and mental anguish;

c) A declaration that the termination of his employment was wrongful, malicious and unfair;

d) An award of Ksh 198,675 being unpaid salary for the month of July 2014;

e) An award of Ksh 198,675 being 1 month's salary in lieu of notice;

f) An award of Ksh 1,639,068.75 being unpaid house allowance for 55 months;

g) An award of Ksh 447,318.75 being gratuity/service pay for 4 years and 6 months;

h) An award of Ksh 2,384,100 being 12 months' salary as damages for wrongful termination;

i) Certificate of Service.

10. In opposing that claim, the respondent's contention was that in the first instance, the appellant had used forged certificates to secure employment. That in fact, it was all along sympathetic to the appellant's situation and did everything within its power to support him and facilitate his treatment evident in their paying his full salary from November 2013 until June 2014. In addition, that prior to the dismissal, the respondent carried out investigations into some accounts and established that the appellant had collected company money on behalf of his employer, which he failed to account for. Further, the respondent contended that the decision to suspend the appellant was difficult as it was also informed by the fact that

the he could only move around with the aid of a walker and had great difficulty accessing the office via the stairs. The respondent added that this state of affairs not only compromised his capacity to work but also dented the respondent's image, by appearing to retain in the office, an employee who was evidently ill.

11. It was also the respondent's argument that it was only upon receipt of the letter of the intended suspension of services, that the appellant availed a belated medical report. As a consequence, the respondent suspended the appellant on medical grounds pointing out that although it had been sympathetic to the appellant's situation, it needed to take into account the company's business interests in handling the matter. The respondent disproved the appellant's claim of discrimination against him.

12. The trial court framed three issues for determination as follows: - whether the respondent violated the appellant's right under article 27 of the Constitution; whether the respondent's dismissal was lawful and fair; and whether the appellant was entitled to the reliefs sought?

13. On the issue of the appellant's right under article 27, the trial judge found that the respondent not only failed in discharging its duty but also exhibited discrimination against the appellant on account of his illness which had a disabling effect. The court was unable to find any backing for this form of suspension, either in law or in the respondent's internal rules and procedures, thus declaring the procedure adopted by the respondent, unlawful and discriminatory. It was the trial Judge's view that while the employer is entitled to consider retirement of an employee suffering from a prolonged illness on medical grounds, it can only do so subject to due procedure, including a notification to the employee that a medical report may be relied upon to retire them on medical respondent decided to 'suspend the appellant's employment together with all accruing benefits.'

14. As regards the issue of whether the dismissal was lawful and fair, the learned Judge opined that the reasons given for the summary dismissal bordered on poor performance and misconduct which could only be ascertained pursuant to due process at the work place, in the absence of which they remained mere allegations which did not meet the threshold of reasons set out in section 43 of the *Employment Act*. Further, that there was no evidence that in reaching the decision to terminate the appellant's employment, the respondent considered either the medical report submitted by Dr Kiboi Julius Githinji or by any other medical officer.

15. By a judgment dated 19th October 2017, Ndolo J, entered judgment in favour of the appellant and awarded him a consolidated sum of Kshs 7,781,450/= plus costs and interest distributed as follows; An award of Kshs 5,000,000/= as damages for discrimination; an award of 12 months' salary in compensation for unlawful and unfair termination of

employment at Kshs 2,384,100/=; one (1) month's salary in lieu of notice at Kshs 198,675/= as well as salary for the month of July 2014 at Kshs.198,675/=.

**b. At the Court of Appeal**

16. Being aggrieved by the decision of the trial court, the respondent filed Civil Appeal No 307 of 2018 at the Court of Appeal premised on 12 grounds that the learned judge erred in law and in fact in:

    (i) finding that the appellant discriminated against the respondent;

    (ii) awarding the respondent Kshs 5 million in damages for discrimination;

    (iii) finding that the appellant had unlawfully and unfairly terminated the respondent's employment;

    (iv) awarding the respondent damages for unlawful termination;

    (v) finding that the appellant had terminated the respondent's employment without notice;

    (vi) awarding the respondent one month's salary in lieu of notice;

    (vii) disregarding the principles governing redress of violations of fundamental rights and freedoms;

    (viii) failing to observe the doctrine of stare decisis in determining the suit before the court;

    (ix) finding for the respondent against the weight of evidence and submissions;

    (x) considering extraneous matters which were not supported by evidence;

    (xi) allowing a multiplicity of awards claimed by the respondent;

    (xii) awarding Kshs 7,781,450/= without considering the appellant's mitigating actions.

17. In its determination, the Court of Appeal noted that it was not in dispute that the appellant suffered an ailment that occasioned him to be out of office whilst seeking treatment outside the country; that his productivity was not optimal as he still needed to seek medical assistance by way of physiotherapy. He was also unable to move around unaided, and that on account of ill-health, the appellant could not perform like other employees. It was also pointed out that not all employees were sick such that the appellant was singled out for dismissal vis-à-vis another sick employee. Based on the above reasoning, the appellate court therefore concluded that there was no discrimination. If anything, the learned judges considered the fact that the respondent actually supported the appellant in the course of his treatment. The

court also cited excerpts from the trial court's judgment which was deemed to demonstrate that the trial court was mindful that ill-health could lead to termination.

18. However, the Judges of Appeal predicated upon the fact that although the appellant was blamed for financial misappropriation and various transgressions, he was neither afforded an opportunity to defend himself nor was he subjected to any disciplinary process as provided under sections 43(1) and 45(2) of the *Employment Act*. Nevertheless, the appellate court found the award of 12 months' salary in compensation to be excessive as the circumstances that led to his dismissal were progressive in nature with the belief that the appellant significantly contributed to his predicament.

19. The Court of Appeal agreed with the trial court that as per the contract of employment, the appellant was entitled to one (1) month's salary in lieu of notice upon dismissal. Consequently, the appeal was partially allowed, the court set aside the award of Kshs 5,000,000/= being damages for discrimination and substituted the 12 months' award in salary by an award of 8 months' salary totaling to a sum of Kshs 1,589,400. One (1) month's salary in lieu of notice and the salary for the month of July, 2014 was also awarded.

**c. At the Supreme Court.**

20. Dissatisfied by the findings of the Court of Appeal, the appellant has sought redress to this court through a Petition of Appeal dated 2nd September 2019 and filed on even date.

21. It is noteworthy that on 1st October 2019, the appellant filed a notice of motion, seeking extension of time to file a supplementary Record of Appeal to produce a certified court order and typed proceedings of the Court of Appeal. By a ruling dated 3rd September 2020, the court granted the application whereby the appellant was directed to file and serve the supplementary record of appeal within thirty (30) days.

22. Subsequently, on 13th November 2019, the respondent filed an Application dated 8th November 2019, seeking orders to strike out the Appeal herein on the grounds that the appellant did not have an automatic right of appeal before this court; that the issues in the Appeal did not involve interpretation or application of the Constitution; that the subject matter of the suit revolved around an employer-employee relationship governed by the *Employment Act* and that the mere allegation of a Constitutional violation does not in itself clothe the Appeal with the attributes of Constitutional interpretation or violation under article 163(4)(a) of the Constitution.

23. By a ruling delivered on 4th September 2020, the application was dismissed by this court. This court found that the Petition of Appeal was rightly before it as it involved the interpretation and application of article 27(5) of the Constitution as stipulated under article 163(4)(a) of the Constitution.

24. The present petition is premised on the following grounds: that the Court of Appeal erred in law;

    i. By failing to analyse the evidence on record before reaching its decision on the issue of discrimination;

    ii. By introducing new and extraneous facts that were not before the trial court in determining the issue of discrimination;

    iii. In its interpretation of article 27(5) of the Constitution;

    iv. By interfering with the discretion of the trial judge in awarding 12 months' salary for unlawful termination.

**C. Parties' Submissions**

**(i) The appellant**

25. The matter came up before us for highlighting of submissions where learned counsel, Miss Cuna was present for the appellant while Mr Omotii appeared for the respondent. The appellant's submissions are dated 9th November 2020 and filed on 12th January 2021. On the first issue, learned counsel for the appellant submits that the Court of Appeal not only failed to re-evaluate the evidence on record holistically but also introduced extraneous evidence in determining the matter before it.

26. The appellant faults the appellate court for finding that not all employees were sick such that he was singled out for dismissal vis-à-vis other sick employee, a fact he says was raised by the trial judge. He argues that neither at the trial court nor at the appellate court was it pleaded or any evidence led that the respondent had other employees with impaired mobility. According to him, it was erroneous for the appellate court to use this as a ground to exonerate the respondent's actions against the appellant.

27. Referring to the Convention concerning Discrimination in Respect of Employment and Occupation, 1958 (No 111) which defines discrimination as any distinction, exclusion or preference, the appellant argues that the conduct of the respondent after he resumed duty was nothing short of discriminatory and that he was subjected to undignified treatment solely attributable to his disability. He further argues that in spite of the fact that the Respondent acknowledged that the appellant had difficulties in using the stairs at work, no reasonable effort was made to accommodate him to ease his movements within the work place.

28. It is the appellant's submission that the delay in submitting the medical report was an error. As such, the Court of Appeal failed to factor in that the delay was not occasioned by the

appellant, but as explained before the trial court, by the fact that the doctor was out of the country and therefore unreachable at the time. Nevertheless, he states that the report was delivered on 28th May 2014, which was still within the 30 days' notice given as the time frame to submit the report in the letter dated 22nd May 2014.

29. The appellant therefore posits that the decision to terminate him by disregarding the recommendation by his doctor was not only discriminatory, but was also not backed by any law or any of the respondent's employment policies. He argues that sick, injured or disabled employees do not lose their right to equality as provided under article 27 of the Constitution as read with section 5 of the *Employment Act* 2007. He reiterates that the suspension was actually a termination disguised as a suspension as the letter asked him to hand over company property as well as offset any outstanding loans.

30. The appellant also criticizes the Court of Appeal for failing to re-evaluate the entire evidence on record as required as a first appellate court. That it limited itself to the issue of non-production of the medical appraisal report and even then, erroneously captured the issues surrounding the report. He maintains that the court had a duty to re-assess the evidence on record holistically more so the treatment that the appellant was subjected to from the time he lost his mobility.

31. The appellant maintains that the respondent had a duty to reasonably accommodate him or if, in their opinion, he was no longer tenable to continue with employment, they ought to have terminated the employment in a dignified manner as the deprivation of employment opportunity coupled by his new condition of disability would greatly inhibit his chances of gaining new employment. To support this position, the following authorities were cited. *VMK v CUEA* [2013] eKLR; *Management of Motor Vehicles v Presiding Officer, ILR* 1987 KAR 507; *Marshall v Harland and Wolff Ltd:* NIRC 1972)

32. The appellant implores this court to give effect to the full meaning of article 27 (5) especially in relation to his case, whereby his circumstances changed due to an illness that affects his mobility. It is urged that this court affirms the findings of the Employment and Labour Relations Court in ELRC No 1375 of 2014 and award damages of Ksh 5,000,000. To this end, reliance is placed on the case of *James Mulinge v Freight Wings Limited [2016. eKLR*; *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017. eKLR; and *VMK v CUEA [2013] eKLR*. On the issue of costs, it is submitted that costs should follow the events.

**(ii)The respondent**

33. In response, Mr Omotii, learned counsel for the respondent opted to rely on their replying affidavit filed on 13th November, 2019 together with their submissions filed on 14th December, 2020. The respondent does not dispute the fact that the doctor's report dated 27th May 2014 recommended that the appellant could resume work in 2 months' time.

However, the respondent argues, that in considering 2 months from 27th May 2014, the earliest the appellant ought to have resumed work would have been 27th July 2014. Therefore, it is contended that the upshot of the doctor's report was that it was wrong ab initio for the appellant to have resumed work in February 2014 and that the appellant's continued stay at the office was detrimental to his quick recovery. This, the respondent submits, informed their decision to recommend that the appellant continue resting at home to aid in his quick recuperation.

34. The respondent is adamant that at no certain point did it subject the appellant to differential treatment because of his health condition. If anything, the Respondent posits that its actions were justified as the same was meant to aid the appellant's quick recovery. That no evidence was adduced at the trial Court as well as the Court of Appeal that the respondent subjected the appellant to undignified treatment because of his disability.

35. The respondent further refutes the claim that the appellate court introduced extraneous facts. That all the court did was to analyse the circumstances of the matter and determine whether a case for discrimination was established. The respondent maintains that there was no new material that was introduced at the appellate court. Further, it is the respondent's assertion that failure to furnish the medical appraisal in good time was solely attributable to the appellant since the appraisal was to emanate from his personal doctor who was only known to him. They concurred with the Court of Appeal's finding that the appellant failed to cooperate in procuring the medical report.

36. The respondent submits that the appellant has failed to make out a case for discrimination and urges this court to uphold the Court of Appeal's finding that there was no discrimination. Furthermore, that even if this court were to find a case for discrimination, which is vehemently denied, the award of Kshs 5,000,000 as damages for discrimination is inordinately high and unjustifiable in the circumstances and ought to be reviewed. It further submits that it is important that any court award ought to be considered reasonably fair by the society at large and not meant to put a litigant out of business. (See *Alexander v Home Office* (1988) 2 All ER 118; *DK Njagi Marete v Teachers Service Commission* [2013] eKLR)

37. It is the respondent's view that there exist unique circumstances in this case which will go a long way to mitigate the quantum of damages. They urge that these circumstances are evident in various forms, first, by playing a significant role in ensuring the appellant received his pension and secondly, by paying off the appellant's salary for over 7 months even though the appellant did not work. In addition, that throughout the appellant's sickness, the Respondent was compassionate and greatly facilitated his travel to India for treatment; voluntarily surrendered the two motor vehicle registration numbers KAN 429N and KBJ 278P despite the appellant being indebted to it. The respondent also contends that they increased the appellant's salary even though he had been out of work for some time, and, that

the appellant was also awarded damages for unlawful termination of employment and one month's salary in lieu of notice. (See *Duncan Otieno Waga v Attorney General* [2014] eKLR)

38. Counsel for the respondent reiterated that the law recognizes that illness can be a reason for termination of employment. As such, termination on the basis of illness per se does not connote discrimination and this was properly appreciated and analyzed at page 42 of the Judgment. They invite this court to agree with the Court of Appeal on the finding on the issue of discrimination. In regard to quantum of damages, they maintain that no discrimination was proved and therefore the issue of quantum of damages is not germane but even so, that this court should consider all relevant factors and find that the award of damages for Kshs 5 Million by the trial court was quite excessive. In conclusion, the respondent urges this court to dismiss the Petition in its entirety for lack of merit with costs.

39. In brief reply, Ms Cuna cocourt or at the appellate court. As such, this was an issue that was introduced at the appellate court. Secondly, that the suspension was in itself a termination guised as a suspension. Therefore, as at 23rd June 2014, the appellant's employment had been terminated on the basis of medical grounds, counsel submits.

**D. Issues for Determination**

40. Flowing from the above submissions, the following issues arise for consideration and determination:

    i. Whether the appellant was treated by the respondent in a discriminatory manner on account of physical incapacity contrary to article 27(5) of the Constitution.

    ii. Whether the procedure for termination of employment was unlawful and unfair.

    iii. Whether the damages granted were excessive in the circumstances?

    iv. Who should bear the costs of the appeal?

**E. Analysis and Determination**

41. On the issue of discrimination contrary to article 27(5) of the Constitution, the appellant complained that he was subjected to undignified treatment that he received from the time he resumed duty in February 2014. That the conduct of the respondent from the time he resumed duty was nothing short of discriminatory and the undignified treatment was solely attributable to his disability. It was also his submission that no reasonable steps were taken to accommodate his ease of movement. As such, this disadvantaged the appellant as he was still being subjected to the same conditions that he had been working with prior to falling ill and losing his mobility.

42. The High Court was categorical that the appellant was discriminated upon based on his disability while the Court of Appeal held that no discrimination was proved. Discrimination against any employee is specifically provided for under article 27 of the Constitution as well as section 5 read together with section 47 of the *Employment Act*. Article 27 of the Constitution at clause 4 and 5 provides that:

> "(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.
>
> (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4) (Emphasis)."

43. Therefore, no person should directly or indirectly discriminate against another person on any of the grounds specified or contemplated in clause (4) more particularly on account of health status or disability. Section 5 of the *Employment Act* (cap 226) provides that:

> "(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee —
>
> (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status."

44. The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds. Sub-section 7 thus provides:

> "(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section."

45. Section 47 (5) of the *Employment Act* further requires that:

> "(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

46. This however does not automatically shift the burden of proof in cases of discrimination against an employee to the employer. According to section 5(7) of the Act, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the protected group, then there exists discrimination against such an employee and must therefore be addressed. In this instance, the appellant had discharged the burden as to shift it to the respondent who failed to discharge on their part.

47. This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR where the Supreme Court applied section 108 of the *Evidence Act* in requiring the claimant to prove his claim in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:

> "49. Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> 50. This court in Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:
>
> > "...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

> 51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent."

48. *Black's Law Dictionary,* 10th Edition defines discrimination as "failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." However, it must be appreciated that not all cases of distinction amount to discrimination. Learned author Robert K Fullinwider; in *The Reverse Discrimination Controversy* 11-12 (1980) states;

> " The dictionary sense of discrimination is neutral while the current political use of the term is frequently non-neutral, pejorative. With both a neutral and a non-neutral use of the word having currently, the opportunity for confusion in arguments about racial discrimination is enormously multiplied. For some, it may be enough that a practice is called discriminatory for them to judge it wrong. others may be mystified that the first group condemns the practice without further argument or inquiry. Many may be led to the false sense that they have actually made a moral argument by showing that the practice discriminates (distinguishes in favor of or against). The temptation is to move from X distinguishes in favor of or against to X discriminates to X is wrong without being aware of the equivocation involved."

49. Discrimination is also defined in the *International Labour Organisation Discrimination (Employment and Occupation)* Convention, 1958 (No 111) as follows: -

> " For the purpose of this convention the term discrimination includes –
>
> any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
>
> such other distinction exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with

representative employers' and workers' organizations where such exist, and with other appropriate bodies –

Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

50. In equal measure, we adopt the definition of discrimination in the High Court case of *Peter K Waweru v Republic* [2006] eKLR as follows:

> "Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
>
> Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex .... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."

51. From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification. Section 7(4) of the Kenyan *National Cohesion and Integration Act* (No 12) of 2008 provides that:

> "It is unlawful for a person, in the case of a person employed by him at an establishment to discriminate against that employee—
>
> (a) in the terms of employment in which he affords him;
>
> (b) in the way he affords him access to opportunities for promotion, transfer or training or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or (c) by dismissing him, or subjecting him to any other detriment.

52. At this point, it is thus important to distinguish between direct and indirect discrimination. The distinction was clearly outlined in the High Court case of *Nyarangi & others v Attorney General* [2008] KLR 688 as follows:

> "Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of Griggs v Duke Power Company 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in a job application was found "to disqualify negros at a substantially higher rate than white applicants".

53. The Court of Appeal in *Mohammed Abduba Dida v Debate Media Limited & anot*her [2018] eKLR quotes the case of *Kedar Nath v State of WB* (1953) SCR 835 (843) where the Supreme Court of India stated that:

> "Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view."

54. In considering indirect discrimination, Justice Silber in the UK High Court case of Queen, on the Application of *Sarka Angel Walkins Singh v the Governing Body of Aberdare Girls High School, & another* [2008] EWHC 1865, (paragraph 38), considered the claimants' case on the grounds of indirect discrimination, prescribing several steps to guide the proof:

(a) to identify the relevant 'provision, criterion or purpose', which is applicable;

(b) to determine the issue of disparate impacts, which entails identifying a pool for the purpose of making a comparison of the relevant disadvantage;

(c) to ascertain whether the provision, criterion or practice also disadvantages the claimant personally; and

(d) to consider whether the policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving such a legitimate aim.

55. The Supreme Court of United Kingdom in *Essop & ors v Home Office; Naeem v Secretary of State for Justice* [2017] UKSC 27 explained six key features of indirect discrimination as follows:

> "24. The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others.
>
> 25. A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual.
>
> 26. A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various (Mr. Sean Jones QC for Mr Naeem called them "context factors").
>
> 27. A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage.
>
> 28. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence.
>
> 29. A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test."

56. We are persuaded by the reasoning in the comparative jurisprudence as set above as it properly illustrates and expounds on the salient features of indirect discrimination. In the premises, the respondent claimed that the suspension of the appellant vide its letter dated 22nd May 2014 was purely premised on the fact that the appellant was visibly unwell and that he failed to avail a professional opinion on his health. That even though the doctor's report was availed, the said report was too confusing and inconclusive. The respondent is emphatic that at no point did it subject the appellant to undignified treatment.

57. It is common ground that on 14th April 2014, the respondent wrote a letter asking the appellant to stay at home until he could walk unaided. He was also requested to produce a medical report from his doctor. On 22nd May 2014, the respondent wrote a follow up letter to the appellant complaining that he had not availed the medical report and expressed their intent to suspend him. On 28th May 2014, the appellant furnished the respondent with the medical report from Dr. Kiboi Julius. On 23rd June 2014, the respondent suspended the appellant on health grounds. On 7th July 2014, the appellant through his Advocates wrote to the respondent challenging the suspension terming it as constructive dismissal. On 11th July 2014, the respondent replied to the same letter denying the allegations for constructive dismissal. Eventually, the respondent summarily dismissed the appellant for gross incompetence.

58. A cursory glance at the chronology of events inclines us to think that the respondent's actions to terminate the appellant bordered on outright victimization. It appears that the respondent did not take lightly the contents of the appellant's letter of 7th July 2014 and the demands made therein. In their response, the Respondent clearly expressed:

> " ...Our client did not terminate your client's employment as alleged in your letter aforesaid but only suspended him as he has been unable to carry out his duties due to his medical condition."

59. The respondent submitted that the suspension on medical grounds was justified and not discriminatory as the only conclusion that could be drawn from the doctor's report was that the appellant was unwell and therefore he could not resume work in his then state. With respect, we are unable to agree with the respondent's submissions that the report was inconclusive, and that he was uncooperative in furnishing the report. Granted that the report was availed, albeit late, it is our considered view that no prejudice would have occasioned the Respondent in considering the recommendations therein. It was the doctor's recommendation that the appellant resumes duty in two months' time subject to periodic review of the appellant's condition. Furthermore, in the said respondent's letter of 14th April 2014, no specific timeline was given to the appellant to avail the report. It only stated "as soon as possible". In that regard, the Respondent's action was drastic and harsh which in our considered view was unwarranted in the circumstances.

60. The respondent ought to have considered the report or even in the least conducted its own investigation as to the appellant's medical condition. We find justification in the South African decision in *Standard Bank of South Africa v Commission for Conciliation,*

*Mediation & Arbitration and others* (JR 662/06) (2007) ZALC 94; 4 BLLR 356 (LC); (2008) 29 ILJ 1239 (LC) held in part:

> "An enquiry to justify an incapacity dismissal may take a few days or years, depending mainly on the prognosis for the employee's recovery, whether any adjustments work and whether accommodating the employee becomes an unjustified hardship for the employer. To justify incapacity, the employer has to "investigate the extent of the incapacity or the injury... (and).... all the possible alternatives short of dismissal."

61. Similarly, the onus was on the respondent to investigate the extent of the incapacity or the injury and all the possible alternatives short of dismissal. We think that the respondent was hell bent in wanting to get rid of the appellant from employment to an extent that they had to circumvent due process in a bid to find fault by conducting extraneous investigations when in fact prior to that they had given him a salary raise due to his hard work. In addition, there was no evidence that investigations were conducted on all other employees during that period and hence he was subjected to different treatment which emanated from his disability. The respondent also failed to demonstrate that they tried to accommodate the Appellant in his current state. As such, these actions by the respondent amounted to indirect discrimination due to differential treatment.

62. In view of the circumstances, the burden of proving that the appellant was medically unfit to continue serving shifted to the respondent to prove the same using an expert opinion. The respondent never produced any medical assessment to demonstrate that the appellant was not capable of performing his duties any more by virtue of his physical incapacity. We reiterate the fact that the respondent disregarded the medical report by Dr Kiboi and proceeded to not only suspend him on medical grounds but eventually terminate him on grounds of gross incompetence was unjust and discriminatory.

63. The South African decision in *Standard Bank of South Africa v Commission for Conciliation, Mediation & Arbitration and Other*s (supra) which has an uncanny resemblance to the facts in this instant case, held that:

> "18. Ferreira could not get medical reports that declared her unfit for work because she was not unfit to work. Dr Meyer reported on 5 November 2003 that Ferreira was fit for half day work and on 27 October 2004 he reported that she was unfit for normal work. Orthobond, a panel of Orthopedic surgeons, declared her to be 40% disabled in her work situation. In an email dated 17 May 2004 Rene van Eck of the Bank's Corporate Health department informed Jordaan that pain itself is not sufficient to render a person disabled,

> that most patients with fibromyalgia are capable of working, often with job modifications and that only a few patients are eventually unable to work.
>
> 19. The Principal Officer of the Bank's Group Retirement Fund, G P Stapley, informed Ferreira and Jordaan on 12 November 2004 that according to the Fund's specialist physician and cardiologist, Ferreira was not permanently incapacitated and that it would be in her best interests for her "ultimate health" to "make a special effort to continue working even though this may mean absences on some days". 29 On that basis, the Fund declined Ferreira's application for early retirement. 20. Despite these reports, and notwithstanding her obvious disability which the Bank acknowledged, and the resultant absenteeism, the Bank evaluated Ferreira's performance as if she were a person of full capacity.30 It assessed her performance as poor, even though it did not know her to be a poor performer.31 It arrived at this assessment after Ferreira was unable to produce medical reports to prove that she was unfit for work."

64. We are cognizant of the fact that the respondent was compassionate to the appellant by facilitating the appellant's treatment and even increasing his salary a month after him resuming work. In our view, the salary increase could not be said to have been a sympathetic act by the respondent as this was done on the basis of his great performance at work. The duty to accommodate ought to have been demonstrated after the fact of his now evident physical incapacity. Seemingly, only when it was clear that he needed assistance to move around that the respondent proceeded to suspend the appellant which eventually led to his dismissal. We reiterate that the respondent had an obligation to consider the medical report and to further accommodate the appellant by devising ways that could ease his movements unless they proved that accommodating the appellant would cause undue hardship to the company.

65. Section 2 of the *Persons with Disabilities Act* No 14 of 2003 defines"disability" as a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation. The Act is therefore silent on what constitutes a temporary or permanent disability. As long as the impairment impacts adversely on social, economic, or environmental participation of an individual, it is deemed to be a disability. A perusal of the Record of Appeal indicates that the appellant accepted his condition and took steps to register with the National Council for Persons with Disabilities as Persons with Disabilities (PWD) and was issued with a disability card No XXX on XXX January 2015.

66. Section 15 of the *Persons with Disabilities Act* No 14 of 2003 expressly prohibits discrimination by employers. The Act goes further to require employers to put in place special facilities in order to accommodate its employees with disabilities. It provides:

> " 15. Discrimination by employers prohibited
>
> (2) Notwithstanding subsection (1), an employer shall be deemed not to have discriminated against a person with a disability if —
>
> (a) the act or omission alleged to constitute the discrimination was not wholly or mainly attributable to the disability of the said person;
>
> (b) the disability in question was a relevant consideration in relation to the particular requirements of the type of employment concerned; or
>
> (c) special facilities or modifications, whether physical, administrative or otherwise, are required at the work place to accommodate the person with a disability, which the employer cannot reasonably be expected to provide.
>
> .....
>
> (5) An employer shall provide such facilities and effect such modifications, whether physical, administrative or otherwise, in the workplace as may reasonably be required to accommodate persons with disabilities." (emphasis ours)

67. The duty to accommodate was aptly elaborated in the *Canadian case of MacNeill v Canada (Attorney General*) (CA) 1994 CanLII 3496 (FCA) as follows:

> " Thus, Ms MacNeill's admission that she is incapable of performing the duties of her position does not prevent her from being a victim of a discriminatory refusal to continue to employ her. The question under the CHRA169 is not whether she is incapable but whether she is losing her employment by reason of her disability, and if so, whether the employer has fulfilled its duty to attempt to accommodate her. The law does not require that employers hire or continue to employ persons who are or have become disabled; it does, however, oblige them to

examine whether an appropriate and not unduly burdensome change in the work environment would allow such persons to do, or to continue doing their job."

68. Similarly, the duty to accommodate was also expressed in Standard Bank of South Africa v Commission for Conciliation, Mediation & Arbitration and others (supra) thus:

> "The Bank's duty to accommodate stems from its overriding obligation not to discriminate. Quite simply, the Bank had a legal obligation to accommodate Ferreira to ensure that she could continue to work.180 It also bore a reverse onus of ensuring that it did not compel Ferreira or encourage her to terminate her employment.181 From the following it emerges that the Bank did encourage her to leave...
>
> A bald refusal to allow a half day work demonstrates such a high degree of inflexibility about a frequent form of accommodation that the court is fortified in its conclusion that the Bank had no intention of retaining her in its employ from the outset. The Bank was preoccupied with its own needs rather than investigating how Ferreira could be accommodated. If it seriously wished to persuade the court that a half day job was unjustified, it should have motivated fully. 188 Guibord v Canada (TD), 1996 CanLII 3880 (FC) ...
>
> > " The Bank also dismissed Ferreira in bad faith. Keays v Honda Canada Inc 220 is similar on the facts to this case. In that case, Honda dismissed a dedicated employee for insubordination for disregarding an instruction to see Honda's doctor. The court found that the instruction was merely a "set up for failure" because the doctor had already made up his mind that the employee's condition, Chronic Fatigue Syndrome ("CFS"), was bogus. 142. Similarly, Ferreira was set up for failure but through an incapacity dismissal process. Cochraine and Jordaan deliberately disregarded the advice of the doctors given on four occasions to procure an OT report. Furthermore, they were less than forthright about their reasons for not supplying Ferreira with a headset and computer. 143. Contrary to the Bank's stated221 intention of placing her in a sympathetic environment, Ferreira found Cochraine's attitude "negative and morale-breaking".222 Cochraine removed Ferreira from computer related jobs that were intellectually stimulating to shred paper, distribute faxes and clean cupboards, jobs that were physically more demanding and intellectually debilitating. 220 Keays v Honda Canada Inc 2005 CanLII 8730 (ON SC) para 40-44 221 L 14, p 316 of bundle 222 Para 61, p 438-9 of bundle 51

> 144. The Bank's altruism was more apparent than real. In making this finding the court is in respectful disagreement with the arbitrator who found that the Bank went to "great lengths" 223 to assist Ferreira."

69. In light of the above, we find that the respondent failed to demonstrate that there would have been any undue hardship they would have incurred if they chose to reasonably accommodate the needs of the employee by providing amenities such as a ramp to ease the appellant's movement, or even providing flexible working hours. In fact, the respondent in their letter dated 14thApril 2014 expressly admitted that they did not have the facilities to accommodate the appellant in the office when they stated that:

> "In the circumstances and until you are able to move around the office unaided, and while you continue to attend the physiotherapy clinics, we ask that you rest at home as the office does not have suitable facilities and conditions for your easements." (sic)

70. The fact that the respondent expected the appellant to continue working in the same conditions as the rest of employees was outrightly unreasonable. The respondent arbitrarily resolved that the appellant was no longer productive by virtue of his inability to walk unaided when in fact they failed to demonstrate what steps they took to accommodate him in his state.

71. It is not disputed that the respondent catered for the medical expenses of the appellant through the medical cover and even continued to pay his salary for the period he was away for treatment. However, in the circumstances, we are inclined to respectfully agree with the trial court's finding that the Respondent exhibited indirect discrimination towards the appellant. The issue of gross incompetence was an afterthought. As such, we reiterate that the respondent's action to dismiss the appellant was extremely harsh when in fact they had not reasonably demonstrated what measures they took to accommodate the appellant's condition.

72. On the issue of whether the procedure for termination of employment was unlawful and unfair, there is no dispute that the appellant was employed by the respondent as its operation manager until 1st August 2014 when he was relieved of his duties by the respondent for gross incompetence. The termination letter expressly stated:

> "You have continuously misled the board of directors to cover up for your underperformance. This is tantamount to gross incompetence.

> In the circumstances, we are satisfied that you acted in breach of clause 11 of your employment contract dated 1st December, 2009 and accordingly dismiss your employment summarily."

73. Under section 45(2) of the *Employment Act*, termination of an employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the respondent initially suspended the appellant on "health grounds" on the basis that he had failed to avail the medical report in which the respondent needed to appraise his medical condition. However, the medical report was eventually produced, albeit late.

74. After some time, a termination letter was issued on the basis of gross incompetence after the respondent allegedly investigated the appellants' accounts. It is noted that the termination letter did not mention anything to do with the health condition of the appellant but was purely based on his performance at work. After careful consideration of the appellant's letter of appointment, clause 11 on notice of termination, provided that appellant's employment was terminable without prior notice if found guilty of unsatisfactory conduct.

75. However, the procedure followed to terminate the contract was in breach of section 41 and 45 2(c) of the *Employment Act* for the reason that the appellant was not accorded a chance to defend himself or respond to the allegations against him. Although the letter of appointment provided for no prior notice when terminating the employment due to gross misconduct, that stipulation of the contract cannot be used to oust a mandatory and express statutory provision in section 41 of the said Act. Consequently, the failure to follow fair procedure rendered the termination of the appellant's employment unfair within the meaning of Section 45 of the Act.

76. Although the Court of Appeal found that the summary dismissal was unfair, the learned Judges of Appeal attributed the dismissal to the appellant's conduct.

    They held that the appellant's transgressions contributed to his dismissal when in fact the respondent had been lenient and compassionate to him throughout his sickness. They only took issue with the fact that he was never afforded an opportunity to be heard.

77. It is important to note that under the *Employment Act*, there is no express provision for dismissal on medical grounds. However, the employer is required to demonstrate that medical assessments were conducted which rendered the employee incapable of performing. In regard to the dismissal in cases of incapacity, the respondent is required to have a hearing under section 41 of the *Employment Act* which provides as follows: -

> "41(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct,

> poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."

78. It is evident that no hearing was demonstrated to have been conducted and the only inference one can draw is that the dismissal was unfair and unlawful for failing to accord the appellant a fair hearing. The respondent was required to facilitate the termination in accordance with Section 41(1) of the *Employment Act* in order to come within the ambit of fairness. The allegations that the appellant faced would have well been explained if granted the opportunity so as to avoid the harsh sanction of a summary dismissal as contemplated under section 41 of the *Employment Act*.

79. Moreover, section 44(4) of the *Employment Act* does not give an employer a blanket right to dismiss an employee at will. However, grave the circumstances of the employee's misconduct, he was entitled to be heard before he was dismissed.

Section 41(2) of the *Employment Act* provides that:

> " (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make."

80. The right to be heard is the cornerstone of fair labour practices. Where the circumstances do not allow a hearing before summary dismissal, the duty is upon the employer to set such out. Section 5(8) of the *Employment Act* read together with section 12 thus provides:

> " 12. A statement under section 10 shall—
>
> (1) (a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules."

In light of the above, we find that the appellant's summary dismissal was unfair, unjust and unlawful for want of due process.

81. Was the award of damages for discrimination inordinately excessive in the circumstances? The respondent contends that even if this court were to find a case for discrimination which is vehemently denied, the award of Kshs 5,000,000/= for discrimination was too high and unjustified. They urge that should this court find a case for discrimination, then they should reduce the trial court's award for discrimination from Kshs 5,000,000/= to Kshs 1,000,000/=. According to the Respondent, any court award ought to be considered reasonably fair by the society at large and not meant to put a litigant out business.

82. Having established that the appellant's summary dismissal was unlawful and therefore wrongful, the trial court awarded the appellant 12 months' salary compensation, Kshs 5,000,000 for discrimination, one month's salary in lieu of notice and salary for one month. In awarding the said reliefs, the trial Judge considered the chances of the appellant who was now confined in a wheel chair securing alternative employment and the Respondent's callous conduct in the way they handled the appellant.

83. The Court of Appeal however was of a different view. Having found that there was no discrimination, they set aside the award for discrimination and further substituted the 12 months' salary for 8 months. We have found that the appellant was prematurely and unlawfully constructively dismissed on account of his disability which was a form of indirect discrimination. Therefore, he was rightfully entitled to the reliefs sought. The question then is, did the trial court excessively award the damages, more specifically for discrimination?

84. To answer, we are guided by the Court of Appeal' s pronouncement in the case of Ol Pejeta Ranching Limited v. David Wanjau Muhoro [2017] eKLR, in which the court held as follows;

> " 52. Turning to the amount awarded on account of discrimination, this was an exercise of judicial discretion. It is trite law that an appellate court will not disturb an award of damages by a trial court unless it is shown that the award is inordinately low or high, or where the court took into account irrelevant factors or failed to consider relevant factors and thereby arrived at an erroneous estimate of damages."

85. In Ol Pejeta Ranching Limited (Supra), the trial court (Rika, J) had awarded the Respondent 12 months' gross pay in compensation for unfair termination of employment, amounting to Kshs 3,489,484/= and Kshs 18,256,947/= in cumulative pay disparity on account of discrimination on the basis of his colour. However, the Court of Appeal having affirmed that there was violation on account of discrimination, set aside the trial court's award and substituted thereof a sum of Kshs 7,500,000/=. The Court also reduced the sum awarded for unfair termination of employment to 6 months' Kshs 1,744,542/=. The appellate court

however clarified that the sum of Kshs 7,500,000/= was to compensate the employee for the discriminatory underpayments made to him over the years he was in the appellant's employment.

86. We also resonate with the Court of Appeal's finding in *Pandya Memorial Hospital v Geeta Joshi* [2020] eKLR in which it held:

> " 48. Whichever way one looks at it, either as breach of a constitutional or statutory right, the net effect was the same. We respectfully endorse Justice Rika's holding in GMV v Bank of Africa Limited (supra): -
>
> > " This court does not encourage employees to claim multiple remedies arising from the same wrongdoing on the part of the employer, whether these violations are claimed to infringe the Constitution, the Statute or the Contract." ...
>
> 54. In this appeal, if the appellant was not discriminatory in its retirement policy, the respondent would have worked for a maximum of 5 years before attaining the age of 60 years. If her monthly salary was Kshs 43,450, over a period of 5 years she would have earned Kshs 2,607,000.
>
> Had the learned judge taken that into consideration, we think she would have reduced the award on account of discrimination. In our view, the judge failed to take into account an important consideration and thereby arrived at a figure which we think was excessive in the circumstances. We hereby set aside the award of Kshs 5,000,000 and substitute therefor an award of Kshs 3,000,000 for discrimination and unfair labour practice."

87. Similarly, we are of the opinion that an award of damages should not be punitive to one party but at the same time it should act a deterrent to employers who engage in discriminatory acts. Employment laws in Kenya have made great strides in ensuring that employees are protected from discriminatory acts by the employer and the onus is therefore on employers to ensure that they set out proper policies to govern their engagement with employees, to avoid falling into dangers of workplace discrimination.

88. In the circumstances, it is our considered view that the award of Kshs 5,000,000 was inordinately high and disproportionate in this instance. We have also considered the trial court's reasoning in awarding the 12 month's salary in compensation for unlawful and

unfair termination and affirm that decision. We find that the award of 12 months' salary in compensation as awarded by the trial court was sufficient given the circumstances in the case.

89. Having found that, to what extent then can the Supreme Court interfere with assessment of damages? It is trite that an award of damages is discretionary in nature. We reiterate our holding in *Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others,* Petition No 6 of 2014; [2017] eKLR where we observed that:

> " The [Supreme] Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. The Constitution from which this Court, and indeed all Courts in the land, derive their legitimacy decrees that we must do justice to all."

90. In light of the foregoing, this court can invoke its inherent powers to ensure that justice should not only be done but should manifestly and undoubtedly be seen to be done to all litigants. In conclusion, we partially allow this Appeal to the extent that we reduce the award of damages for discrimination from Ksh 5,000,000/= to Kshs 2,000,000/= and reinstate the trial court's award of 12 months' salary for unfair dismissal. It is so ordered.

**F. Orders**

(a) The Petition of Appeal dated 2nd September 2019 partially succeeds.

(b) The Judgment of the Court of Appeal dated 19th July 2019 is hereby set aside.

(c) Judgment be and is hereby entered in the following terms;

i. Damages for discrimination .....Kshs 2,000,000

ii. 12 months' salary in compensation...Kshs 2, 384,100

iii. 1 Months' salary in lieu of notice..... Kshs 198,675

iv. Salary for July 2014.....Kshs 198,675

Total.....Kshs 4,781,450

(d) Costs be awarded to the appellant.

(e) The amounts awarded shall attract interest at court rates from the date of the trial court's judgment until payment in full.

**Waititu v Republic (Petition 2 of 2020)**
**[2021] KESC 11 (KLR) (22 October 2021) (Judgment)**

**Supreme Court of Kenya**

**MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ**

Neutral citation: [2021] KESC 11 (KLR)

***Devolution Law*** *– governors – removal of governors from office – claim that barring of governors from accessing their offices pending their prosecution for corruption offences amounted to removal from office - whether the barring of a governor from accessing his/her office pending his prosecution for corruption offences amounted to his removal from office - Constitution of Kenya, 2010, article 181; County Governments Act, 2012, section 33; Anti-Corruption and Economic Crimes Act, 2003 section 62(6).*

***Civil Practice and Procedure*** *– appeals – appeals to the Supreme Court – appeals as of right in matters involving the interpretation or application of the Constitution - what were the requirements to be met for one to appeal to the Supreme Court as a matter involving the interpretation or application of the Constitution - Constitution of Kenya, 2010, article 163(4)(a).*

***Jurisdiction*** *– jurisdiction of the Supreme Court – jurisdiction to determine appeals over interlocutory decisions - what were the circumstances in which the Supreme Court could allow appeals over interlocutory decisions.*

***Constitutional Law*** *– fundamental rights and freedoms – rights of arrested persons – right to bail - what were the factors courts considered in exercising discretion whether or not to grant bail pending trial - Constitution of Kenya, 2010, article 49(1)(h).*

***Jurisdiction*** *– jurisdiction of appellate courts – jurisdiction to interfere with the exercise of discretion by trial courts - when could an appellate court interfere with the exercise of discretion by a trial court.*

**Brief facts**

The appellant was arrested and charged with three counts of alleged dealing with suspect property and a charge of conflict of interest. The appellant denied the charges and applied for admission to bail and/or bond. The trial court granted bail by ordering that the appellant could either pay a cash bail of Kshs.15,000,000 or a bond of Kshs.30,000,000 with surety of a similar amount. Further, the trial court went on to attach conditions to the grant of the bail terms by stating that the appellant could not access his public office until the hearing and determination of his case and; that the appellant and all his co-accused were also to deposit their travel documents with the court and were not to contact witnesses either directly or indirectly or in any other way tampering with the exhibits or any evidence.

Aggrieved by the orders made by the trial court, the appellant filed a revision of the trial court's order relating to the bail and bond terms. In the revision application, the appellant, *inter alia*, stated that the bail and bond terms were excessive, issued *per incuriam* and the terms amounted to a constructive denial of bail and bond without compelling reasons. The appellant further claimed that the bail terms estopped him from attending to his constitutional office and that the trial court's orders constituted constructive removal from office.

The High Court found that it had supervisory and revisionary jurisdiction over interlocutory issues sought to be determined in the course of trial, such as the one that was before the court. The High Court further found that attaching conditions to the grant of bail was not tantamount to removal of the appellant from office. Aggrieved further by the decision of the High Court, the appellant moved to the Court of Appeal. Upon considering the appeal, the Court of Appeal upheld the High Court's decision and dismissed the appeal. Aggrieved, the appellant filed the instant appeal.

**Issues**

i. Whether the barring of a governor from accessing his/her office pending his/her prosecution for corruption offences amounted to his removal from office.
ii. What were the requirements to be met for one to appeal to the Supreme Court as a matter involving the interpretation or application of the Constitution?
iii. What were the circumstances in which the Supreme Court could allow appeals over interlocutory decisions?
iv. What were the factors courts considered in exercising discretion whether or not to grant bail pending trial?
v. When could an appellate court interfere with the exercise of discretion by a trial court?

**Relevant provisions of the Law**

**Constitution of Kenya, 2010**

**Article 181 - Removal of a county governor**

*1. A county governor may be removed from office on any of the following grounds–*

*a. gross violation of this Constitution or any other law;*

*b. where there are serious reasons for believing that the county governor has committed a crime under national or international law;*

*c. abuse of office or gross misconduct; or*

*d. physical or mental incapacity to perform the functions of office of county governor.*

*2. Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1).*

**Held**

1. Article 163(4)(a) of the Constitution of Kenya, 2010, (Constitution) had to be seen to be laying down the principle that not all intended appeals lay from the Court of Appeal to the Supreme Court. Only those appeals that arose from cases involving the interpretation or application of the Constitution could be entertained by the Supreme Court. It was not the mere allegation in pleadings by a party that clothed an appeal with the attributes of constitutional interpretation or application.
2. The appeal had to originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant had to be challenging the interpretation or application of the Constitution that the

Court of Appeal used to dispose of the matter in that forum. Such a party had to be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it could not support a further appeal to the Supreme Court under article 163(4)(a) of the Constitution.

3. The substantive matter as originally filed was pending before the trial court and what was before the instant court was the subject of an interlocutory appeal. The court generally lacked jurisdiction to entertain appeals from interlocutory decisions. The right of appeal against interlocutory decisions was available to a party in a criminal trial but should be deferred, and await the final determination by the trial court. A person seeking to appeal against an interlocutory decision had to file their intended notice of appeal within 14 days of the trial court's judgment. However, exceptional circumstances could exist where an appeal on an interlocutory decision could be sparingly allowed. They included;
   a. where the decision concerned the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;
   b. when the decision was of sufficient importance to the trial to justify it being determined on an interlocutory appeal; and
   c. where the decision entailed the recusal of the trial court to hear the cause.
4. Although what had triggered the appeal was a question on the exercise of judicial discretion in issuing bail terms during the pendency of the trial, the court assumed jurisdiction as the question of whether judicial exercise of discretion had been done in accordance with established principles of law was one which was of sufficient importance in a trial and if not well exercised, provided justification for it to be determined in an interlocutory appeal. In addition, it was possible for bail terms imposed to be final in nature and an accused person, invoking article 49(i)(h) of the Constitution had to ventilate the issue before the close of his trial.
5. The constitutional right to bail as guaranteed under the Constitution was subject to being granted on reasonable conditions pending trial or unless there were compelling reasons not to do so and did not mean that the right was absolute. The discretion to grant bail and determine the conditions rested with the court. In exercising that discretion, the court however had to seek to strike a balance between protecting the liberty of the accused person and safeguarding the proper administration of justice.
6. The trial court, at the point of consideration of the application of bail, was not called upon to make a determination on the interpretation of the provisions of section 62(6) of the Anti-Corruption and Economic Crimes Act. Section 62(6) prohibited the suspension of a public officer charged with corruption or economic crime where the Constitution already provided a method for removal, which in the case of a governor, was provided for under article 181 of the Constitution.
7. Imposing conditions subject to the release of an accused person (in the instant case, the appellant), barring him from accessing his office pending his prosecution for the corruption

offences, did not equate to his removal from office, since he remained Governor. There was therefore no need for the application of section 62(6) of the Anti-Corruption and Economic Crimes Act. In addition, the constitutionality or otherwise of section 62(6) could not have been addressed in a bail/bond ruling nor in a revision ruling. Neither could it be properly invoked at both stages of the proceedings.

8. Article 49(1)(h) of the Constitution provided that an arrested person could be released on bond or bail on reasonable conditions and it entrenched the right of the arrested person to be released on bail subject to the imposition of reasonable conditions. The right to bail was an inalienable right and could only be restricted by the court if there were compelling reasons for an accused not to be released. In granting bail or bond, the trial court was called upon to exercise its discretion and if there were no compelling reasons to deny an accused person bail or bond, the trial court should exercise its discretion in favour of the accused.

9. When it came to the issue of whether to grant or refuse bail pending the trial of an accused by the trial court, the law had set out some criteria which the trial court should consider in the exercise of its judicial discretion to arrive at a decision. The criteria included among others, the following; -

   a. the nature of the charges;
   b. the strength of the evidence which supported the charge;
   c. the gravity of the punishment in the event of conviction;
   d. the previous criminal record of the accused, if any;
   e. the probability that the accused would not surrender himself for trial;
   f. the likelihood of the accused interfering with witnesses or suppressing any evidence that could incriminate him;
   g. the likelihood of further charges being brought against the accused;
   h. the probability of guilt;
   i. detention for the protection of the accused; and
   j. the necessity to procure medical or social reports pending final disposal of the case.

10. Limiting the appellant's access to the county offices of Kiambu County pending the determination of trial did not equate to his removal from office as contemplated under article 181 of the Constitution. Barring a governor from accessing his office pending his trial for corruption charges could not be equated to removal from office. The trial court merely attached a condition to the bail granted for the appellant not to access his office and did not order his removal from office. Removal from office had to be undertaken by the procedure set out in section 33 of the County Governments Act. The procedure was only invoked, not through the ruling of the trial court but by notice to the Speaker of the Kiambu County Assembly which led to the eventual removal of the appellant as Governor.

11. Discretion by a trial court could be exercised to limit the enjoyment of bail if the accused was likely to interfere with witnesses or suppress the evidence against him. There was no reason to fault the trial court in exercise of that discretion noting the specific circumstances of the

case facing the appellant and where his office could be the source of incriminating evidence and staff under him being witnesses. If the appellant was dissatisfied by any condition in the bail ruling, the proper procedure was to seek a review at any stage of his trial and show that the condition was no longer efficacious and ought to be lifted.

12. The appellant clutched onto the misguided notion of constructive removal, a mirage, when all he had to do was focus on bail terms and conditions and use lawful means to challenge the same. Removal was later conducted, and he was no longer in office. The trial court's ruling could not therefore be said to be the basis for his eventual removal, and as a basis for challenging the bail ruling.
13. The trial court considered the nature of the corruption charges and considered the possibility of the appellant interfering with witnesses, who were his subordinates at the time. The need to preserve the integrity of the evidence of the witnesses by finding that it would not be right if the witnesses were to be intimidated by them being suppressed was therefore a valid consideration. The trial court in the event properly considered the usual criteria a court took into account while imposing bail terms. The bail terms imposed were sufficient.
14. An appellate court should not interfere with the exercise of the discretion of a trial court unless it was satisfied that the trial court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it was manifest from the case as a whole that the trial court was clearly wrong in the exercise of its discretion and that as a result there had been misjustice.
15. The appellant had not demonstrated how the exercise of discretion was not judicious and how the High Court and the Court of Appeal erred in failing to interfere with the exercise of the trial court's discretion. There was no reason to interfere with the Court of Appeal's findings.

*Appeal dismissed.*

***Orders***

*Appellant to bear the costs of the appeal.*

**Citations**

**Cases**

**Kenya**

1. *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* Application 10 of 2017, [2018] eKLR - (Explained)
2. *Bush, George & another v Republic; John Wamagata (Interested Party)* Judicial Review Application No 31 of 2019; [2020] eKLR - (Explained)
3. *Deynes Muriithi & 4 others v Law Society of Kenya & another* Civil Application 12 of 2015, [2016] eKLR - (Explained)
4. *In the Matter of Kenya National Commission on Human Rights* [2014] 2 KLR 356 - (Mentioned)

5. *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* Petition Nos 552, 554, 573 & 579 of 2012; [2013] eKLR (Consolidated) - (Explained)
6. *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* Advisory Opinion Reference No 1 of 2017; [2020] eKLR - (Mentioned)
7. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012; [2013] eKLR - (Explained)
8. *Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] 2 KLR 804 - (Explained)
9. *Republic v Peter Muia Mawia* Criminal Case No 48 of 2015; [2016] eKLR - (Explained)
10. *Republic v Ahmad Abolfathi Mohammed & another* Petition No 39 of 2018; [2019] eKLR - (Explained)
11. *Republic v Danfornd Kabage Mwangi* Criminal Case No 8 of 2016; [2016] eKLR - (Explained)
12. *Republic v Danson Mgunya & another* Criminal Case No 26 of 2008; [2010] eKLR - (Explained)
13. *Republic v Fredrick Ole Leliman & 4 others* Criminal Case No 57 of 2016; [2019] eKLR - (Explained)
14. *Republic v Joshua Mueke Mutunga & 3 others* Criminal Case No 17 of 2019; [2020] eKLR - (Explained)
15. *Republic v Pascal Ochieng Lawrence* Criminal Case Murder No 129 of 2013; [2014] eKLR - (Explained)
16. *Swazuri, Muhammed Abdalla & 16 others v Republic* Criminal Revision No 13 of 2018; [2018] eKLR - (Explained)
17. *Waswa, Joseph Lendrix v Republic* Petition No 23 of 2019; [2020] eKLR - (Explained)

**South Africa**

1. S v Coetzee and others [1997] ZACC 2; 1997 (4) BCLR 437; 1997 (3) SA 52 - (Explained)

**Nigeria**

1. *Alhaji Muiahid Dukubo – Asari v Federal Republic of Nigeria* SC 20AI /2006 - (Explained)

***Regional Courts***

*Mbogo & another v Shah* [1968] EA 93 - (Explained)

**Texts**

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn

**Statutes**

**Kenya**

1. Anti-Corruption and Economic Crimes Act, 2003 (Act No No 3 of 2003) section 47(1)(2); 48; 62(1)(2)(6) - (Interpreted)
2. Constitution of Kenya articles 1, 10, 38(3)(c); 49(1)(h); ; );159(2)(d); 163 (4)(a)(b); 165(6)(7); 174(c), 175(a); 181(1); 182(1) - (Interpreted)

3. County Governments Act, 2012 (Act No 17 of 2012) section 32 & 33 - (Interpreted)
4. Criminal Procedure Code (cap 75) sections 362 & 364 - (Interpreted)
5. Supreme Court Act, 2011 (cap 9B) section 15(2) - (Interpreted)
6. Supreme Court Rules,2011 (cap 9B Sub-Leg) rules 9 & 33 - (Interpreted)

**Advocates**

None mentioned

October 22, 2021, the Court delivered the following Judgment:

A. Introduction

1. The petition of appeal dated 3rd February 2020 and lodged on 4th February 2020 is brought pursuant to the provisions of article 163(4)(a) of the Constitution read together with section 15(2) of the *Supreme Court Act* and rules 9 and 33 of the *Supreme Court Rules*, 2012 (repealed). The petitioner seeks orders setting aside the Judgment of the Court of Appeal (Musinga, Gatembu & Murgor, JJA), delivered on 20th December 2019. The Court of Appeal upheld the High Court' (Ngenye-Macharia, J) Ruling in *Ferdinand Ndungu Waititu Babayao & 12 others v Republic* Anti-Corruption Revision No 30 of 2019 delivered on 8th August 2019 where the High Court, in upholding the trial Court's Ruling found that attaching conditions to the grant of bail in a criminal case is not tantamount to removal of a Governor from office.

**B. Background**

**Proceedings before the Trial Court**

2. The appellant was arrested alongside twelve others not before us and charged with three counts of alleged dealing with suspect property and a charge of conflict of interest. He was arraigned before the Chief Magistrates Court on 29th July 2019 in Anti-Corruption Case No 22 of 2019 *R v Ferdinand Waititu & 12 others*. The charges were as follows:

    a. The first count was conflict of interest contrary to section 42(3) as read with section 48 of the *Anti-Corruption and Economic Crimes Act*, 2003. The particulars of the offence were that between 2nd July, 2018 and 13th March, 2019 at Kiambu County, the Appellant, knowingly, acquired an indirect private interest, to wit, receipt of Kshs 25,624,500/= in respect of payments made to Testimony Enterprises Limited for contracts awarded to the said company by the Kiambu County Government.

    b. The second count was dealing with suspect property contrary to section 47(1) as read with sections 47(2)(A) and 48 of the *Anti-Corruption and Economic Crimes*

*Act*, No 3 of 2003. The particulars of the offence were that between 2nd July, 2018 and 13th March, 2019 in Nairobi, the Appellant and Saika Two Estate Developers Limited (a company associated with the Appellant ), received Kshs 18,410,500 from Testimony Enterprises Limited, having reason to believe that the said amount was acquired from Kiambu County Government through corrupt conduct.

c. The third count against the appellant and his wife, Susan Wangari Ndung'u trading as Bienvenne Delta Hotel, was; dealing with suspect property contrary to section 47(1) as read with section 47(2)(A) and 48 of the *Anti-Corruption and Economic Crimes Act*, No 3 of 2008. The two were alleged to have received Kshs 7,214,000 from Testimony Enterprises Limited, while having reason to believe that the said amount was acquired from Kiambu County Government through corrupt conduct.

3. The appellant denied the charges and applied for admission to bail and/or bond. The Respondent did not oppose the application, although the Respondent urged the trial court to impose conditions for the Appellant's release on bail. The trial court agreed to grant bail by ordering that the appellant could either pay a cash bail of Kshs 15,000,000 or a bond of Kshs 30,000,000 with surety of a similar amount. Further, the trial court went on to attach conditions to the grant of the bail terms by stating that the Appellant could not access his public office until the hearing and determination of his case and; that the appellant and all his co-accused were also to deposit their travel documents with the court and were not to contact witnesses either directly or indirectly or in any other way tampering with the exhibits or any evidence.

**ii. Proceedings at the High Court**

4. Aggrieved by the orders made by the trial court, the appellant filed a revision of the trial Court's order relating to the bail and bond terms being *Ferdinand Ndungu Waititu Babayao & 12 others v Republic Anti-Corruption* Revision No 30 of 2019 consolidated with Revision Application No 29 & 31 of 2019; [2019] eKLR. In the Revision application, the appellant, *inter alia*, stated that the bail and bond terms are excessive, issued *per incuriam* and the terms amount to a constructive denial of bail and bond without compelling reasons. Of particular relevance in the revision was the order that he court to exercise its supervisory jurisdiction under article 165(6) of the Constitution, as read with section 362 of the *Criminal Procedure Code*, the appellant argued that there were violations of his rights under articles 49(1)(h), 181 and 182 of the Constitution, section 62(6) of the *Anti-Corruption and Economic Crimes Act* as read with section 33 of the *County Governments Act*. The appellant further claimed that the bail terms estopped him from attending to his constitutional office and that the learned Magistrate's orders constituted constructive removal from office.

5. The High Court, while determining the Revision application framed three issues for determination; Whether the court had jurisdiction to entertain the application; Whether the learned trial magistrate erred in imposing a condition to the bail terms that the appellant does not set foot in his office pending the hearing and determination of the trial and Whether the bail terms imposed on the appellant and his co-accused were harsh and excessive.

6. In its ruling delivered on 8th August 2019, the High Court (Ngenye-Macharia, J) in addressing the issue of jurisdiction, found that it had supervisory and revisionary jurisdiction over interlocutory issues sought to be determined in the course of trial, such as the one that was before the court, as the appellant and his co-accused were yet to be convicted and that the supervisory jurisdiction was conferred by sections 362 and 364 of the *Criminal Procedure Code* and buttressed by article 165(6) & (7) of the *Constitution*.

7. The High Court went on to note that the contested issue was whether the learned magistrate erred in imposing bail conditions and found that attaching conditions to the grant of bail is not tantamount to removal of the appellant from office. The learned Judge further went on to find that the constitutionality of section 62(6) of the *Anti-Corruption and Economic Crimes Act* was not an issue before the trial court and went on to find that the trial court did not make a conflicting interpretation of the provision as alleged by the appellant and that since the Constitution provides for mechanisms for removal or vacating of such offices, then no other law would supersede it. The learned Judge in that regard held that the procedure for removal is as provided for under articles 181 and 182 of the Constitution as read with section 33 of the *County Government Act* and no other law could be invoked to do so.

8. The court also held that the trial Magistrate did not err in barring the appellant from accessing his office since the charges against the appellant were grave owing to his position, the weight of the offence and the public interest and there was therefore need for stringent bail terms to be attached. To this end, the learned Judge upheld the decision on the bail and bond terms by the trial Magistrate noting that the setting of bond or bail amounts is an exercise of discretion and that an appellate court should be slow and cautious to interfere with. The High Court thus upheld the trial court's decision.

**iii. At the Court of Appeal**

9. Aggrieved further by the decision of the High Court, the Appellant moved to the Court of Appeal in Nairobi Civil Appeal No 416 of 2019. Upon considering the appeal, the Court of Appeal framed the following three issues for determination; whether the court had the jurisdiction to entertain the appeal as instituted; whether the denial of access to the appellant's office amounted to his removal from office; and whether bail terms of cash bail of Kshs 15,000,000/= or bond of Kshs 30,000,000/= with a surety of a similar amount

was harsh and excessive for charges of amounts totaling to a sum of Kshs 51,249,000/= was correct.

10. On the issue of jurisdiction, the Court of Appeal strived to answer the question of how the case metamorphosized from a criminal one to a civil one by noting that the appellant filed his notice of appeal under rule 75 of the *Court of Appeal Rules* which falls under Part IV of the rules that deals with civil appeals. The court went on to note that the appropriate procedure was to file the appeal in conformity with rule 59 of the *Court of Appeal Rules* which falls under part III of the rules which deals with criminal appeals. The court further noted that ordinarily in criminal matters, there are no interlocutory appeals, as appeals are filed only after the final determination of a case. Nevertheless, the court while addressing this issue relied on the Supreme Court's decision in *Dynes Muriithi & another v Law Society of Kenya & another* Sup Ct Application No 12 of 2015; [2016] eKLR where the Court held that appeals dealing with constitutional issues may in substance be civil in nature. Further, the court went on to hold that to strike out the appeal on grounds that it was not instituted as a criminal appeal would be tantamount to rejection of the appeal on form rather than substance which would be contrary to the spirit and intent of article 159(2)(d) of the Constitution. The Court of Appeal thus embraced jurisdiction.

11. With regard to the second issue of whether the appellant's denial of access to his office amounted to removal of office, the Court of Appeal held that in determining this issue, the learned judge of the High Court had in mind that it involved the interpretation of articles 49(1)(h), 181 and 182 of the Constitution, as well as sections 62(1) and (6) of the *Anti-Corruption and Economic Crimes Act*.

    That neither the learned judge's nor the trial magistrate's holding purported to remove or suspend the appellant from office and that the provisions of section 62(6) of *Anti-Corruption and Economic Crimes Act* had no application before the matter before her as the procedure for removal of a Governor is as provided for under articles 181 and 182 of the Constitution on removal of a County Governor and the vacancy arising thereof. It was therefore the Court of Appeal's finding that the issue of constitutionality or otherwise of section 62 of the *Anti-Corruption and Economic Crimes Act* was not before the court for determination in the appeal and that the court could therefore not express any opinion on the same.

12. Further, it was the court's holding that bearing in mind the nature of the charges preferred against the appellant, the circumstances under which the alleged offences were committed and that some of the prosecution witnesses were County staff who are answerable to the appellant, it was not far-fetched for the Prosecution to contend that the appellant would most likely interfere with witnesses or conduct himself in a manner likely to compromise the case if he was not barred from accessing his office during the pendency of the trial.

13. On the third issue on whether the bail terms were harsh, the Court of Appeal held, that there was no basis for faulting the learned judge's exercise of discretionary powers in upholding the bail terms and upheld the High Court's finding that the discretionary powers of the court should not be interfered with unless it was shown that the decision was plainly wrong, or granted without consideration of relevant factors. The appellate court thus upheld the High Court's finding and dismissed the appeal.

**iv. Proceedings before the Supreme Court**

14. Aggrieved by the decision of the Court of Appeal, the appellant filed the instant petition arguing that the learned judges of the Court of Appeal erred in law and in fact in;

    i. Failing to fully appreciate the legal implications of a temporary deprivation of a County Governor's powers/privilege to access office.

    ii. By holding that section 62(6) of the *Anti-Corruption and Economic Crimes Act* had no application in the matter and by failing to appreciate the indispensable role of a County Governor in running the affairs of a County Government.

    iii. Failing to employ the principle of harmonization as a principle of interpretation while considering the tension between the imperative to impose bail terms and conditions under article 49(1)(h) of the Constitution while issuing bail and respecting the constitutionally underpinned process for removal of a Governor from office under article 181(2) of the Constitution.

    iv. Sanctioning bail terms and conditions that violated key objects and principles of devolved Government under article 174(c) and article 175(a) of the Constitution, respectively.

    v. Upholding bail conditions that limited/unjustifiably violated the petitioner's right to hold office as an elected leader under article 38(3)(c) of the Constitution.

    vii. Failing to interfere with the finding of the learned judge of the High Court (Ngenye-Macharia) that the trial Court had exercised its discretion lawfully and reasonably while setting the bail terms and amounts of the appellant.

    viii. Failing to disturb the finding by the High Court that the Appellant had breached the Public trust of the people of Kiambu County and violated article 73(1) and (2) of the Constitution of Kenya.

15. The appellant thus seeks the following reliefs:

    a. The petition of appeal herein be allowed as prayed.

b. The Judgment dated 20th December 2019 and subsequent Orders of the Court of Appeal be set aside.

c. A declaration do issue that the Order of the Learned Trial Magistrate L N Mugambi in ACC No 22 of 2019, R*epublic v Ferdinand Ndungu Waititu Babayao & 12 Others* issued on 30th July 2019, and as affirmed by both the High Court in ACC Revision No 30 of 2019, F*erdinand Ndungu Waititu Babayao & 12 Others v Republic* and the Court of Appeal in Civil Appeal No 416 of 2019, *Ferdinand Ndungu Babayao v Republic* that the Appellant shall not access his office until his criminal case is heard and determined was unlawful, illegal and amounted to a constructive removal and/or suspension of the petitioner from office.

d. The bail amounts of cash, Kshs 15,000,000.00 or bond of Kshs 30,000,000.00 granted to the appellant by the trial Court be reduced to a cash bail of Kshs 2,000,000.00 or bond of Kshs 5,000,000.00;

e. The costs of this petition of appeal be borne by the respondents.

f. The costs of the proceedings at the Court of Appeal, at the High Court and the bail proceedings at the trial Court be awarded to the appellant herein.

g. Such further Orders as may seem just to be made.

16. The respondent filed Grounds of Objection dated 28th August 2020 in response to the appeal contesting this court's jurisdiction to hear the appeal claiming that the appellant ought to have first obtained certification for leave to appeal under article 163(4)(b) of the Constitution thus the appellant has no *locus standi* to prosecute the appeal. The respondent contends in that regard that the petition of appeal does not raise any constitutional issue meriting interpretation or application of the Constitution.

**C. Parties' Submissions**

**i. The appellant's**

17. The appellant's written submissions are dated 9th October 2020. Therein, the appellant has addressed us under the following heads; that this court has Jurisdiction under article 163(4)(a) of the Constitution; that conditions attached to the bail terms on the Appellant amounted to constructive removal from office; that section 62(6) of the *Anti-Corruption and Economic Crimes Act* is applicable; constructive removal of the appellant challenges the constitutional protection on presumption of innocence and; the integrity question and whether it should be determined when criminal charges have been preferred.

18. On the issue of jurisdiction, the appellant submits that this court is vested with the requisite jurisdiction to hear and determine the instant petition pursuant to article 163(4)(a) of the Constitution as the appeal involves the interpretation and application of the Constitution. He submits that the appeal has met the threshold set out by this court in *Lawrence Nduttu & 6000 other v Kenya Breweries Ltd & Another* Sup Ct Petition No 3 of 2012; [2012] eKLR (*Nduttu* case) where the court noted that the intent of article 163(4)(a) of the Constitution was to lay down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. That only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court.

19. The appellant further submits that the Court of Appeal, in its Judgment addressed the issue whether "denial of access to his office amounts to removal of the appellant from office" and then went on to note affirmatively that "the determination of this issue involved interpretation of articles 49(1)(h), 181 and 182 of the Constitution as well as section 62(6) of the *Anti-Corruption and Economic Crimes Act*". The appellant thus argues that his Petition of Appeal meets the jurisdictional threshold set by this court since constitutional interpretation issues raised in the petition were the subject of determination from the trial court to the High Court and the Court of Appeal. In support of this, he also relies on this court's decision in the case of *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 Others* [2018] eKLR.

20. The appellant, in addition, contends that, while before the High Court, he had submitted that the bail terms that ostensibly removed him from office were made in violation of articles 181 and 182(1) of the Constitution as read together with section 62(6) of the *Anti-Corruption and Economic Crimes Act* and were therefore unconstitutional. Further, he submits that the constitutional questions raised in this appeal cannot be downplayed, as it seeks to institute a balance in constitutional interpretation which should be adopted for future disputes regarding the removal of a public officer from office, and in particular removal of a sitting Governor other than by the direct provisions of articles 181 & 182(1) of the Constitution and section 33 of the *County Governments Act*.

21. The appellant further argues that the sanctity of the Constitution and its assurance on the presumption of innocence is also on trial in the appeal and calls upon this court to make a resounding interpretation in favour of the sanctity of the criminal justice system which, he contends, must be kept sacrosanct bearing in mind the authoritarian hurdles of Kenya's historical past. The appellant thus urges the court to find that the appeal raises constitutional questions whose time has come for determination by the court.

22. On the issue of whether the conditions attached to the bail terms amounted to constructive removal, the appellant submits that the provisions on removal of a Governor from office are

as provided under articles 181 and 182 of the Constitution and section 33 of the *County Governments Act*. It is however the appellant's submission that the bail conditions imposed against him violated his right to a fair trial, as they resulted in him being removed from office by making it impossible for him to perform his functions, without due regard to due process established by law.

23. Further to the above, the appellant submits that he was constructively removed from office and points out that by being prohibited from setting foot in his office, some time bound functions of a Governor such as submitting county plans and policies to the County Assembly for approval and consideration, approving and assenting to bills passed by the County Assembly could not be performed. The appellant maintains that he was kicked out of office following the orders by the trial Court and he could therefore not fulfill his mandate as a Governor. The appellant relies on the case of *Muhammed Abdalla Swazuri & 16 others v Republic* [2018] eKLR where the High Court (Ongudi, J) frowned upon conditions attached to bail terms preventing a constitutional office holder from accessing his office. While relying on this decision, the appellant submits that the impracticability of him undertaking his functions without accessing the office amounts to constructive removal from office. The appellant further relies on the definition of constructive dismissal found in the *Black's law Dictionary (9th Edition)* as follows 'a termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave.' He thus urges the court to prevent the attempt to slide in a new procedure of removing Governors other than by the manner provided for in the Constitution.

24. Also, in the above context, it is the appellant's contention that the Constitution and the *County Governments Act* do not envisage the constitutionally delineated functions of Governor being taken up by a Deputy Governor while the Governor is still in office. In support of this position, he relies on the provisions of section 32 of the *County Governments Act* which provides that the Deputy Governor's function is to deputize the Governor in execution of his duties. That section 32(4) specifically provides that "when acting in office as contemplated in article 179(5) of the Constitution, the deputy governor shall not exercise any powers of the governors, to nominate, appoint or dismiss, that are assigned to the Governor under the Constitution or other written law". That the only scenario envisioned for the Deputy Governor to assume constitutional duties designated to the Governor is when there is a vacancy in the office of the Governor pursuant to article 182(1) of the Constitution. The appellant thus took issue with how his then Deputy Governor, the Hon James K Nyoro, 'sprang into action' once the appellant was barred from accessing his office despite the Governor's office not being declared vacant as contemplated under article 181(1) of the Constitution.

25. Furthermore, the appellant submits that the imposed bail terms amounted to constructive removal and the Court of Appeal, by upholding the decisions of the High Court and trial court on bail terms that were disproportionate, unbalanced and incommensurate to the object that the court achieved acted in error. That the court also negated the provisions of article 1 of the Constitution, which was invoked when the appellant was elected as a Governor. The appellant urges us to therefore find that the court of Appeal erred in failing to fully appreciate the legal implications of temporary deprivation of the powers of a Governor's access to office, which resulted in bad precedent, which the appellant submits should not be upheld.

26. With regard to whether section 62(6) of the *Anti-Corruption and Economic Crimes Act* is applicable, the appellant submits that it is applicable as it touches on the core of this dispute. He submits that he was a public officer at the time, within the meaning of section 2 of the *Anti-Corruption and Economic Crimes Act* and that section 62(6) of the Act was meant to prevent, with certainty, situations such as the one the appellant has found himself in by stating that "This section shall not apply with respect to an office if the Constitution limits or provides for the grounds upon which the holder of the office may be removed or the circumstances in which the office must be vacated." The appellant thus submits that based on this provision, the court should adopt a purposive interpretation of the Statute as read together with the relevant provisions and that, in realizing the supremacy of the Constitution and in seeking to jealously protect the gains made by the Constitution, the drafters inserted section 62(6) of the *Anti-Corruption and Economic Crimes Act*.

27. The appellant further submits that the Court of Appeal erred in stating that the provisions of section 62(6) were not applicable in the present matter. The appellant instead submits that being a public officer within the meaning of section 62(1) of *Anti-Corruption and Economic Crimes Act*, he may not be removed from office other than in the manner or circumstances in which the office was created, and that the orders issued by the trial court effectively led to the temporary deprivation of the appellant's powers and privileges such as access to his office and inevitably, a constructive removal from office, in contravention of the provisions of the said section 62(6) of the *Anti-Corruption and Economic Crimes Act*.

28. On whether the alleged constructive removal of the appellant challenges the constitutional protection on presumption of office, the appellant submits that the constructive removal from office was against the constitutional presumption of innocence, in that, the appellant was impeached as a result of the indictments that are yet to be determined in court, which was further aggravated by the orders issues by the court. This, he submits, went against the decision of this court in *Republic v Ahmad Abolfathi Mohammed & another* Sup Ct Petition No 39 of 2018 [2019] eKLR, wherein it was stated that the courts are required to strike a balance between the public's interest on one hand, and constitutional principles applicable

within the criminal justice system, on the other, with the most fundamental principles being the presumption of innocence until proven guilty. He also relied on the decision of the Constitutional Court of South Africa in *S v Coetzee and others* (CCT50/95) [1997] ZACC 2 to buttress this submission.

29. In addition to the above, the appellant submits that the Court of Appeal essentially found in its decision, that public interest is not served by breach of fundamental guarantees for an accused person in a criminal trial, and that most importantly, public interest is not served when a Governor is denied access to office on account of committing a grievous offence in the eyes of the public. Further, the appellant contends that, should this court uphold the Court of Appeal's finding, then there shall a emerge a practice where the proper procedure for removal of a Governor will be downplayed by creating an easier channel for their removal in the pretext of criminal charges in the form of what the Appellant is charged with, forming the basis of impeachment together with unconstitutional bail terms preventing access to office to discharge official duties.

30. On whether the question of integrity should be determined when criminal charges have been preferred, the appellant submits that the courts are un- procedurally finding holders of public office who are facing charges for various offences as having breached integrity provisions in chapter 6, as read with article 10 of the Constitution as unfit to hold office due to being morally unfit or of moral turpitude. The appellant submits that this is unprocedural, and against the tenets pronounced in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. He submits, relying on *Mumo Matemu*, that the finding of unfitness must have been specifically proven. He further submits that there must be a distinction between the process of finding out whether or not an individual is fit to hold public office, from the process of a criminal trial where the burden of proof lies on the Prosecution and the accused is protected under the presumption of innocence principle. The appellant further relies on the High Court case of *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* [2013] eKLR in making this submission.

31. In conclusion, the appellant urges the court to find that it has jurisdiction to hear this appeal, and to give a final interpretation in this matter by forbidding constructive removal of Governors from office by virtue of indictment on corruption charges as is provided in section 62(6) of *Anti-Corruption and Economic Crimes Act* and prays that this court finds that the decisions by the trial Courts and superior courts amounted to removal of the appellant from office, in a manner other than what is provided in the Constitution.

**ii. Respondent's**

32. In the submissions dated 23rd October 2020 and filed on 26th October 2020, the respondent submits on two issues; (a) that the appeal is incurably defective and (b) whether barring from access to an office amounts to removal.

33. On the issue of the appeal being incurably defective, the respondent submits that the Petition has been filed without leave of the court as is required by article 163(4)(b) of the Constitution. The respondent further argues that the issues for determination have been framed as issues affecting public interest and security of tenure of public officers holding constitutional and independent offices whereas the subject of appeal as was argued before the High Court and the Court of Appeal was on the bail terms and conditions which affected a single person, the appellant.

34. In the above context, the respondent submits that the appellant is attempting to convert an appeal against bail and bond terms into a constitutional petition seeking interpretation and declaration of legal provisions that were not canvassed during the hearings at the subordinate and superior courts. For this reason, they contend that the Petition does not meet the threshold on jurisdiction as set out in the case of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* (*supra*). The respondent further argues that, if the appellant felt aggrieved, then he should have filed a constitutional petition before the High Court, which under article 165 of the Constitution, has the jurisdiction to interpret the Constitution and grant redress to a successful litigant and for interpretation of section 62(6) of *Anti-Corruption and Economic Crimes Act vis-à-vis* section 33 of the *County Governments Act* as well as articles 181 and 182 of the Constitution.

35. The respondent also submits that on 2nd October 2020, the Council of Governors filed Petition No HCCHR Pet E312 of 2020 before the High Court at Nairobi seeking declarations on the same issues the appellant is raising in his appeal and submits that should this court proceed to hear and determine the constitutional issues in this appeal, then the High Court, as the court with the primary and original jurisdiction under article 165 of the Constitution to determine the petition, shall be unable to interpret the Constitution with regard to those issues. That doing so may result in an absurdity and varying declaratory judgments on the same subject matter and will deny the parties in the petition by the Council of Governors a chance to appeal. This court's decisions in the cases of *In the Matter of the Kenya National Commission on Human Rights* Sup Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR and *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* Sup Ct Advisory Opinion Reference No 1 of 2017; [2020] eKLR were relied on to buttress this submission.

36. On the issue as to whether barring access to office amounts to removal, the respondent submits that the appellant was only barred from accessing his office pending the hearing and determination of his criminal case to preserve the integrity and credibility of the case in light of public interest. It is thus urged that the appellant's argument that the bail terms barring him access to his office amounts to constructive removal from office and contravenes the provisions of section 62(6) of *Anti-Corruption and Economic Crimes Act* is erroneous and misleading as the appellant was not removed from office, as alleged.

37. The respondent furthermore contends that section 62(1) of the *Anti-Corruption and Economic Crimes Act* provides for suspension from office of public or state officers charged with economic and corruption offences, which section they claim, contravenes the provisions of the Constitution by being discriminatory as it seeks to favor the appellant by unconstitutionally elevating him to a higher pedestal at the expense of common public officers. The respondent in addition, argues that the learned Judges of both the High Court and Court of Appeal confirmed that the issue of constitutional interpretation of section 62(6) of *Anti-Corruption and Economic Crimes Act* was not argued before the High Court, hence the reason the Court of Appeal failed to make a determination on it.

38. The respondent further submits that the appellant was not removed from office, or that the bail terms barring him from access to his office were tantamount to removal from office, and that the provisions of section 62(1) of *Anti-Corruption and Economic Crimes Act* provides for suspension from office of public or state officers charged with economic and corruption offences. Further, it is submitted that the appellant is seeking refuge under section 62(6) of *Anti-Corruption and Economic Crimes Act*, which interpretation thereof was not in issue at the superior courts. It is thus submitted that the phrase "constructive removal from office" as submitted by the appellant does not exist since no such procedure is provided for under the Constitution or the *County Governments Act*.

39. The respondent, in addition, submits that there is a distinction between suspension and removal of an office holder, arguing that articles 181 and 182 of the Constitution provide for the process of removal of a Governor from office. That the provisions of article 182 of the Constitution never arose in the present case resulting in the position of Kiambu Governor being declared vacant. It is the respondent's submission therefore that the appellant was only charged before the trial court and granted bail terms, of which none of the terms included his removal from office. The respondent also contends that the appellant's eventual removal from office was done by the members of the Kiambu County Assembly. It is therefore their submission that this matter has been overtaken by events and is a mere academic exercise aimed at wasting judicial time. The High Court case of *George Bush & another v Republic; John Wamagata (Interested Party)* [2020] eKLR was relied on to buttress the submission

that there is no cause of action for this court to grant redress to the appellant and that the court is only engaging in an unwarranted academic exercise.

40. Further to the above, the respondent submits that since the office of the Governor was not declared vacant, no prejudice was occasioned to the ordinary members of Kiambu County or the appellant since services at the County never ground to a halt as the Governor's office is not individualistic in nature.

41. The respondent furthermore submits that in granting bail, the trial court had to delicately weight the scales of justice and was fully aware of the need to balance the interest of administration of justice in protecting witnesses and evidence from interference on one hand, and the duties of a Governor in the performance of his functions, to which the court tilted the scales in favour of the administration of justice. Also, it is argued that the bail terms and conditions set by the subordinate and superior courts were to ensure that there was no interference with the witnesses, given the position of authority of the appellant, and to safeguard the integrity of the trial since the witnesses were employees of the County Government and subordinate to the appellant. The High Court cases of *Republic v Peter Muia Mawia* [2016] eKLR and *Republic v Fredrick Ole Leliman & 4 others* [2018] eKLR were submitted in support of this position.

42. In conclusion, the respondent submits that the appellant should be subjected to the same treatment and processes as any other accused person would be subjected in a criminal trial. That the appellant should not be given preferential treatment on account of his social status or the position he holds. The respondent therefore prays that the appeal be dismissed.

**D. Analysis and Determination**

43. Having considered the respective parties' pleadings and submissions in the instant appeal, this court is of the considered view that the issues arising for determination are;

    a. Whether this court has jurisdiction to entertain this appeal;

    b. Whether the bail conditions imposed by the trial court were reasonable, and if the answer is in the affirmative;

    c. Whether they resulted in the removal of the appellant from office;

    d. What reliefs are available to the parties?

**a. Whether this court has jurisdiction to entertain this appeal**

44. While this court has on numerous occasions defined the extent of its jurisdiction under article 163(4)(a) of the Constitution as regards appeals filed as of right, it is the one issue that this court has to address, before proceeding to determine a matter. The Respondent urges

us in that regard that there is nothing of constitutional interpretation and/or application in this appeal to warrant invocation of this court's jurisdiction under article 163(4)(a) of the Constitution. They contend that the appellant is seeking to concourt into an appeal that involves interpretation and declaration of legal provisions that were not considered by the three courts below. In response, the appellant is emphatic that this court has jurisdiction and that he has properly invoked it, as the constitutional interpretation issues raised in the Petition were the subject of determination before the trial court, the High Court and the Court of Appeal.

45. The appellant further submits that the issue that is presently before this court involves the interpretation of article 49 (1)(h) of the Constitution and an answer as to the question whether the learned Magistrate properly exercised his discretion in his decision to impose bail and bond terms and conditions subject to the release of the appellant, following his arrest. The appellant, in that regard, contends that the decision by the trial Court to impose stringent bail and bond terms that denied him access to his office as the Governor of Kiambu (as he was at the time) resulted in his constructive removal from office and seeks to have this court, while determining that issue, interpret the provisions of articles 181 and 182 of the Constitution.

46. On our part, and on the question whether the present appeal is properly before us, in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* (Tunoi and Wanjala SCJJ) Sup Ct Petition No 3 of 2012; (2012) eKLR, this court was categorical that;

> "Article 163 (4) (a) must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court.....Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application."

47. The court expounded upon this principle at paragraph 28 of that decision where it pronounced itself thus:

> "The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing

> or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a)."

48. We are, in applying the above principles, cognizant of the fact that the substantive matter as originally filed is still pending before the trial court and what is before us is the subject of an interlocutory appeal. Do we have the jurisdiction to determine such an appeal as of right under article 163(4)(a) of the Constitution? The position of this court on interlocutory appeals is that it generally lacks jurisdiction to entertain appeals from interlocutory decisions. So then, what happens, as it did in this case, when a party is aggrieved by a decision of the trial court during the trial on a legal or constitutional issue that arises within a criminal trial? This question was well answered by this court in the case of *Joseph Lendrix Waswa v Republic* Sup Ct Petition No 23 of 2019; [2020] eKLR where we stated thus on interlocutory appeals arising from criminal trials:

> " 94. Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred, and await the final determination by the trial court. A person seeking to appeal against an interlocutory decision must file their intended notice of appeal within 14 days of the trial court's judgment. However, exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly allowed. These include:
>
> a. Where the decision concerns the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;
>
> b. When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal;
>
> c. Where the decision entails the recusal of the trial court to hear the cause." [Emphasis ours]

49. In the circumstances, although what has triggered the present appeal is a question on the exercise of judicial discretion in issuing bail terms during pendency of the trial, we deem it fit to assume jurisdiction as the question of whether judicial exercise of discretion has been done in accordance with established principles of law is one which we deem, in our view, to be of sufficient importance in a trial and if not well exercised, justifiable for it to be determined in an interlocutory appeal. In addition, it is possible for bail terms imposed to be final in nature

and an accused person, invoking article 49(i)(h), of the Constitution must ventilate the issue before the close of his trial.

Consequently, we hold that we have jurisdiction to entertain this appeal.

**b. Whether the bail conditions were reasonable and if not, whether they amounted to removal of the Appellant from office**

50. Both counsel for the appellant argued before us that by granting bail to the appellant upon the condition that he should not access his office until the hearing and determination of the trial, the trial court's orders resulted in the appellant's removal and/or suspension from office in violation of section 62(6) of the *Anti-Corruption and Economic Crimes Act*, article 181 and 182 of the Constitution of Kenya, 2010 as read together with section 33 of the *County Governments Act*, 2012.

51. Counsel for the respondent, by contrast, urged us to find that the bail terms did not amount to removal of office as the appellant was only barred from accessing his office pending the hearing and determination of the case to preserve the integrity and credibility of the trial in light of public interest.

52. For us to determine whether the bail terms amounted to 'constructive removal of office' as the appellant has so strongly argued before us, we need to determine the question whether the trial court properly exercised its discretion while considering the appellant's application for bail and whether the High Court and Court of Appeal erred in failing to interfere with that exercise of discretion.

53. In that regard, article 49(1)(h) of the Constitution provides that:-

> " An accused person has the right ...
>
> ....
>
> h. to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released".

54. The constitutional right to bail as guaranteed under the Constitution is therefore subject to being granted "on reasonable conditions" pending trial or unless there are compelling reasons" not to do so and does not mean that the right is absolute. In the end, the discretion to grant bail and determine the conditions rests with the court. In exercising this discretion, the court however must seek to strike a balance between protecting the liberty of the accused person and safeguarding the proper administration of justice. This was well explained by

Mativo J who persuasively stated in *Republic v Danfornd Kabage Mwangi* [2016] eKLR that:

> " Granting bail entails the striking of a balance of proportionality in considering the rights to the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarcerations before trial, when the outcome of the case is yet to be determined, cuts against this principal. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and positive..."

55. The appellant's claim in the above context was that the bail terms and conditions imposed against him, preventing him from directly accessing his office, resulted in him being 'constructively removed' from office. He decries that by being temporarily deprived of his powers and privileges, he could not fulfill his mandate as a Governor and therefore, the bail terms were disproportionate, unbalanced and incommensurate to the objective the court intended to achieve.

56. Before we delve into this issue, it is prudent that we first address the question of whether the provisions of section 62(6) of the *Anti-Corruption and Economic Crimes Act* are applicable in this case. This is because the appellant claims that the two superior courts erred in upholding the trial court's finding that the provisions of section 62(6) of the Act were not applicable in the present matter.

57. The appellant in stating so, was calling upon the High Court and Court of Appeal to interpret the provisions of section 62(6) of the *Anti-Corruption and Economic Crimes Act* claiming that the bail terms contravened this provision. Further, the appellant claims that the provisions on removal of a Governor are as provided for under section 33 of the *County Governments Act* and anchored on articles 181 and 182 of the Constitution. The appellant's justification for that position is that as a holder of a constitutional office, he can only be removed and/or suspended from office in accordance with the procedure stipulated in the Constitution.

58. It should be noted in answering his plea, that section 62 of the Act deals with suspension of public or state officers charged with corruption or economic crimes. Section 62(6) more specifically provides that the provisions on suspension shall not apply if the Constitution

limits or provides the grounds on which an office holder may be removed. The said section 62(6) of the Act provides that;

> "(6) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated."

59. The trial court while deciding on the applicability of the said section found that the trial court could not rely on it in determining bail terms. The learned magistrate thus held as follows;

> "On the issue of section 62[6] of ACECA, I would say that following the decision of the learned Judge in Criminal Revision No 25/2019 *Moses Kasaine Lenokulal vs DPP*-the said section has now been rendered nugatory. The judge found in no uncertain terms that the said section offends the principle of equality before the law under article 27 of the Constitution and further violates, article 10 on integrity hence this court cannot therefore be urged to rely on it"

60. Upon the High Court being called to make a determination on this issue, the learned judge in her rendition on its interpretation, held, *inter alia*:

> "27. Suffice it to state, subsection (6) of section 62 was not in issue and the Court cannot therefore be said to have made a conflicting interpretation of the provision. This is buttressed by my understanding that the court did not make any determination on the provision and any assertion that the learned Judge later contradicted her earlier decision in the Lenolkulal case are baseless and moot."

61. The learned judge of the High Court further held that the issue of interpretation of section 62(6) of the *Anti-Corruption and Economic Crimes Act* was not before the trial Court. Similarly, the Court of Appeal also found that section 62(6) of the Act had no application in the matter and while considering the provision held as follows:

> "44. In our view, to the extent that neither the trial magistrate nor the learned judge's holding purported to remove or suspend the appellant from office of Governor, Kiambu County, section 62(6) of ACECA had no application in the matter that was before her. The appellant has not been suspended from his office, he is still

> the Governor of Kiambu County; he is still entitled to his full pay, not half. In the circumstances, the learned judge cannot be accused of having failed to apply the "omitted case" cannon of statutory interpretation in affirming the terms of the appellant's grant of bail. The issue of constitutionality or otherwise of section 62(6) of ACECA is not before us for determination in this appeal and therefore we cannot express any opinion on the same."

62. To our minds, the trial court, at the point of consideration of the application of bail, was not called upon to make a determination on the interpretation of the provisions of section 62(6) of the Act, as the learned magistrate, quite rightly found. Section 62(6) prohibits the suspension of a public officer charged with a corruption or economic crime where the Constitution already provides a method for removal, which in the case of a Governor, is provided for under article 181 of the Constitution.

63. On the other hand, imposing conditions subject to the release of an accused person, in this case, the appellant, barring him from accessing his office pending his prosecution of the corruption offences, did not equate to his removal from office, since he still remained Governor. There was therefore no need for the application of section 62(6) of the Act, as was rightly held by the trial court and upheld by both the High Court and the Court of Appeal. On our part, we see no reason to hold otherwise, and we therefore uphold the position of the trial court and the two Superior Courts on the same. In addition, the constitutionality or otherwise of section 62(6) could not have been addressed in a bail/bond ruling nor in a Revision ruling. Neither could it be properly invoked at both stages of the proceedings for reasons we shall shortly address.

64. Having so stated, what ought to be determined is the question of whether the bail terms that barred the appellant from office were reasonable and as was stated above, article 49(1)(h) of the Constitution provides that an arrested person may be released on bond or bail on reasonable condition and entrenches the right of the arrested person to be released on bail subject to the imposition of reasonable conditions. Ibrahim, J (as he then was) in *Republic v Danson Mgunya & another* [2010] eKLR described the right to bail as an "inalienable right" by holding that; "The result of the foregoing is that a murder suspect has a

> Constitutional Right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released."

65. Therefore, in granting bail or bond, the trial court is called upon to exercise its discretion and if there are no compelling reasons to deny an accused person bail or bond, the trial court should exercise its discretion in favour of the accused. The High Court persuasively

addressed in the case of *Republic v Pascal Ochieng Lawrence* [2014] eKLR the parameters guiding a court in exercising that discretion by holding thus:

> " It is to be noted that unlike in the past when an accused person had to demonstrate why he should be released on bail/bond, that duty now properly belongs to the State. The court in exercising its discretion as to whether or not to grant bond is however to be guided by the following parameters:-the seriousness of the offence although this carried greater weight under the old constitutional dispensation;the weight of the evidence so far adduced if the case is partly heard;the possibility of the accused interfering with witnesses;the safety and protection of the accused once he/she is released on bail/bond;whether the accused will turn up for trial;Whether the release of the accused will jeopardize the security of the community."

66. Similarly, the High Court in the case of *Republic v Joshua Mueke Mutunga & 3 others* [2020] eKLR in determining the criteria to be applied on whether to grant bail or not relied on the decision by the Supreme Court of Nigeria in *Alhaji Muiahid Dukubo – Asari v Federal Republic of Nigeria*, SC 20AI /2006 which set out a similar criteria on the granting of bail by holding as follows:

> " ...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-
>
> i. The nature of the charges;
>
> ii. The strength of the evidence which supports the charge;
>
> iii. The gravity of the punishment in the event of conviction;
>
> iv. The previous criminal record of the accused, if any;
>
> v. The probability that the accused may not surrender himself for trial;
>
> vi. The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;
>
> vii. The likelihood of further charges being brought against the accused;
>
> viii. The probability of guilty;
>
> ix. Detention for the protection of the accused;

x. The necessity to procure medical or social report pending final disposal of the case". [Emphasis added]

67. The bail condition that has attracted the appellant's wrath is condition No 1 where the trial court stated: "The 1st accused shall not access his office until this Criminal case is heard and determined."

68. Does this condition amount to removal of office? As we earlier held, the grounds on which a County Governor may be removed from office are as set out under article 181 of the Constitution which provides:

> " 1. A county governor may be removed from office on any of the following grounds–
>
> a. gross violation of this Constitution or any other law;
>
> b. where there are serious reasons for believing that the county governor has committed a crime under national or international law;
>
> c. abuse of office or gross misconduct; or
>
> d. physical or mental incapacity to perform the functions of office of county governor.
>
> e. Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1)".

69. Article 182 states the circumstances under which the office of the County Government shall be declared vacant by providing that;

> " 182. (1) The office of the county governor shall become vacant if the holder of the office—
>
> a. dies;
>
> b. resigns, in writing, addressed to the speaker of the county assembly;
>
> c. ceases to be eligible to be elected county governor under article 180 (2);

d. is convicted of an offence punishable by imprisonment for at least twelve months; or

e. is removed from office under this Constitution".

70. Did limiting the appellant's access to the County offices of Kiambu pending the determination of trial equate to his removal from office as contemplated under article 181 of the Constitution? The answer to this is in the negative. Barring a Governor from accessing his office pending his trial on corruption charges cannot be equated to a removal from office. The trial court merely attached a condition to the bail granted for the appellant not to access his office and did not order his removal from office. Removal from office has to be undertaken by the procedure set out in section 33 of the *County Governments Act*. It is agreed that the said procedure was only invoked, not through the Ruling of the trial court but by notice to the Speaker of the Kiambu County Assembly which led to the eventual removal of the appellant as Governor.

71. What of the argument that the appellant was subjected to constructive removal? In his submission, the appellant relied on *Black's Law Dictionary* (9th Edition) to argue that the bail terms made his working conditions so intolerable that he felt as if he was being compelled to leave office. That was a curious submission because the reason for the order not to access his office was made to safeguard the integrity of the criminal trial during its pendency and no more.

72. Furthermore, as was stated in *Alhaj Muiahid Dukub*, discretion by a trial court may be exercised to limit the enjoyment of bail if the accused was likely to interfere with witnesses or suppress the evidence against him. We see no reason to fault the trial court in exercise of that discretion noting the specific circumstances of the case facing the appellant and where his office may be the source of incriminating evidence and staff under him being witnesses. If the appellant was dissatisfied by any condition in the bail Ruling, the proper procedure was to seek a review at any stage of his trial and show that the condition was no longer efficacious and ought to be lifted.

73. In conclusion on this issue, it is our opinion that the appellant clutched onto the misguided notion of constructive removal, a mirage, when all he had to do was focus on bail terms and conditions and use lawful means to challenge the same. Removal was later conducted, and he is no longer in office. The trial court's Ruling cannot therefore be said to be the basis for his eventual removal, and as a basis for challenging the bail Ruling.

74. Having found that the bail terms did not amount to removal of office, the appellant has not advanced other reasons to show that the bail conditions imposed were unconstitutional, unreasonable or unattainable. The trial court, while considering the application for bail, was

very conscious of the nature of the offence, the gravity of the punishment in the event of conviction and the likelihood of the accused interfering with witnesses or suppressing any evidence that may incriminate him. The trial court held as follows in that regard:

> "Imposing conditions that guarantee the integrity and credibility of the trial cannot be an illegality. In the present case, the court was urged to take Judicial Notice of the fact the charges accused persons are facing relates to activities that took place within their offices. Consequently, it is logical to expect that witnesses who will testify are people who work in the said County Government. Where the 1st accused holds the highest Executive Office that is the County Governor where the Executive authority is vested; officers working in the county are at his back (sic) and call.
>
> In my view, restricting access to the office is a reasonable condition under article 49[1][h] in the circumstances of this case."

75. It is thus evident to us that the trial court considered the nature of the corruption charges and considered the possibility of the appellant interfering with witnesses, who were his subordinates at the time. The need to preserve the integrity of the evidence of the witnesses by finding that it would not be right if the witnesses were to be intimidated by them being suppressed was therefore a valid consideration. The trial court in the event properly considered the usual criteria a court takes into account while imposing bail terms. The Court of Appeal while agreeing with the trial court held that as follows:

> 48. In the case of the appellant, bearing in mind the nature of the charges preferred against him; the circumstances under which the alleged offences were committed; that some of the prosecution witnesses are county staff who are answerable to the appellant, it was not far-fetched for the prosecution to contend that the appellant would most likely interfere with their witnesses or conduct himself in a manner likely to compromise their case if he was not barred from accessing his office during the pendency of the case. There are documented incidents of loss and/or disappearance of vital documents from certain offices where public or state officers, charged with corruption or economic crimes related to their work, have been allowed unrestricted access to their offices during the pendency of the cases.

76. The Court of Appeal, in our view, correctly observed that the bail terms imposed were sufficient and concluded that no error or misdirection had been made by the trial court or the High Court in upholding the trial court's findings.

It was therefore its finding that discretion was exercised judiciously and the High Court deemed it right not to interfere with the same unless it is convinced that doing so would be in

furtherance of the administration of justice in line with the holding in *Mbogo v Shah* [1968] EA 93 where it was held thus:-

> " A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

77. The appellant has not demonstrated how the exercise of discretion was not judicious and how the learned judges of the High Court and the Court of Appeal erred in failing to interfere with the exercise of the trial court's discretion. Consequently, we do not find any reason to interfere with the Court of Appeal's findings.

78. For the above reasons, the appeal therefore fails and the only relief that attracts our mind is that the same is hereby dismissed. Costs follow the event and so the appellant shall bear the costs of the appeal.

**E. Orders**

79. Consequent upon our findings above, the final orders are that:

    1. The petition of appeal dated 3rd February 2020 and filed on 4th February 2020 be and is hereby dismissed.

    2. The appellant shall bear the costs of the appeal.

80. Orders accordingly.

**John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2021] KESC 39 (KLR)

***Civil Practice and Procedure*** *– res judicata – purpose – scope and applicability – exemptions - what was the purpose of the doctrine of res judicata - elements to be proven for the doctrine of res judicata to be applicable in a civil matter - parameters to be considered by courts before deciding on whether to exempt a matter from the doctrine of res judicata - whether the doctrine of res judicata was applicable in constitutional petitions – Civil Procedure Act (cap 21) section 7.*

***Jurisdiction*** *– jurisdiction of the High Court – jurisdiction to determine constitutional petitions vis-à-vis the jurisdiction to determine judicial review applications - what was the difference in the High Court's jurisdiction in determining constitutional petitions vis-à-vis the High Court's jurisdiction in determining judicial review applications – Constitution of Kenya, 2010 articles 23, 24, 47 and 165; Fair Administrative Action Act (Act No. 4 of 2015) section 11(1)(e) and (h).*

***Words and Phrases*** *– procedure - definition of procedure - a specific method or cause of action; the judicial rule or manner for carrying on a civil lawsuit or criminal prosecution also termed rules of procedure - Black's Law Dictionary, 9th Edition.*

**Brief facts**

A bilateral agreement on maritime freight management entered into on May 30, 2000, between the Democratic Republic of Congo (DRC) Government and the Kenyan Government, provided for the Kenyan Government through the 1st to 3rd respondents, to collect taxes on freight charges of goods imported to and on transit to the DRC through the port of Mombasa. DRC entered into the agreement through its Ministry of Information, Transport and Communication, acting through the 4th respondent, a body known as Office De Gestion Du Freit Maritime (OGEFREM) while Kenya entered into the agreement through its Ministry of Information, Transport and Communication. The agreement provided for the assessment, levying and collection of a commission to the tune of 1.8% of the gross freight charges on the imports on behalf of Office De Gestion Du Freit Maritime (OGEFREM).

The parties' agreement was to remain in force for a three-year period subject to a one-off renewal for a further period of three years. It was alleged that the agreement expired on May 29, 2003 and was renewed on December 18, 2003, after the lapse of seven months outside the agreement renewal period.

On October 26, 2012, the 4th respondent issued circulars to shippers, forwarders and agents stating that effective October 29, 2012, payments for Fiche Electronique de Renseigment Certificate (FERI) as well as Certificate of Destination (COD) were to be made to its account in US Dollars subject to

all documents being submitted and validated at its offices. The requirements introduced new charges at a rate of USD 100.

The appellants stated that the requirements were in breach of the bilateral agreement. They stated that the payments could only be collected by the 1st respondent on behalf of the DRC Government but not by payment to a private individual's bank account in Italy, as the receipts issued did not bear the Coat of Arms of the DRC Government or the address of the recipient.

The dispute was entertained by the High Court. The High Court made the finding that the petition was *res judicata* because of a previous decision by the High Court in Judicial Review No 130 of 2011 (JR No 130 of 2011). In Judicial Review No 130 of 2011, the court held that the imposition of FERI and COD had a legal basis. The High Court held that the judgment issued was a judgment *in rem* as opposed to one that was *in personam* or *inter parties* and it operated against the parties to the petition. On appeal, the Court of Appeal dismissed the appeal and found that the High Court was justified in holding that the suit was *res judicata*. Aggrieved, the appellant filed the instnt appeal t the Supreme Court.

**Issues**

i. What was the purpose of the doctrine of *res judicata*?
ii. What elements was a litigant to prove for the doctrine of *res judicata* to be applicable in a civil matter?
iii. Whether the doctrine of *res judicata* was applicable in constitutional petitions.
iv. What parameters did courts consider before deciding on whether to exempt a matter from the doctrine of *res judicata*?
v. What was the difference in the High Court's jurisdiction in determining constitutional petitions *vis-à-vis* the High Court's jurisdiction in determining judicial review applications?

**Held**

1. The appellants were aware of the defences and opposition raised against their application and petition including the plea of *res judicata*. The plea of *res judicata* was raised but not as a preliminary objection. A preliminary objection consisted of a point of law which had been pleaded, or which arose by clear implication out of pleadings, and which if argued as a preliminary point could dispose of the suit. The plea of *res judicata* was raised through both grounds of opposition and replying affidavits in response to the appellants' application.
2. The appellants were not condemned unheard or shut out from the proceedings. The court accorded the appellants the two justiciable elements of fair hearing; an opportunity of hearing was given, and the opportunity was reasonable.

3. For *res judicata* to be invoked in a civil matter the following elements had to be demonstrated:
    1. there was a former judgment or order which was final;
    2. the judgment or order was on merit;
    3. the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
    4. there had to be between the first and the second action identical parties, subject matter and cause of action.
4. The doctrine of *res judicata* was based on the principle of finality which was a matter of public policy. The principle of finality was one of the pillars upon which the judicial system was founded and the doctrine of *res judicata* prevented a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensured that litigation came to an end, and the verdict duly translated into fruit for one party, and liability for another party, conclusively.
5. If the Supreme Court were to find that the doctrine did not apply to constitutional litigation, the doctrine could lose much of its legitimacy and validity. Constitutional tenets permeated all litigation starting with the application of article 159 of the Constitution in both civil and criminal litigation, and its application embedded in all procedural statutes. Further article 50 of the Constitution on right to fair hearing and article 48 of the Constitution on access to justice were fundamental rights to which every litigant was entitled to. Such a holding could lead to parties, that whenever they needed to circumscribe the doctrine of *res judicata*, they only needed to invoke some constitutional provision or other.
6. Though the doctrine of *res judicata* lent itself to promote the orderly administration of justice, it was not to be at the cost of real injustice. Rights kept on evolving, mutating, and assuming multifaceted dimensions it could be difficult to specify what was rarest and clearest.
7. In granting exemptions to the applicability of *res judicata*, courts would consider whether there was potential for substantial injustice if a court did not hear a constitutional matter or issue on its merits. Before a court could arrive at such a conclusion, it had to examine the entirety of the circumstances as well as address the factors for and against the exercise of such discretionary power. In the alternative, a litigant had to demonstrate special circumstances warranting the court to make an exception.
8. The applicants in JR No 130 of 2011 were not the same as in the parties in the instant suit. The only common denominators were the Kenya Maritime Authority and the *Office De Gestion Du Fret Multimodal* (OGEFREM) named as 3rd and 4th respondents.
9. The commonality between appellants in the instant case and the applicants in JR 130 of 2011 were persons, juridical and natural, engaged in the business of clearing and forwarding goods for various importers of goods destined to the DRC. They had the same interests and raised complaints regarding the two certificates, *FicheElectronique de Renseigment Certificate* (FERI) and the Certificate of Destination (COD)

10. From the face of it, it would appear that the issues in the instant suit and JR 130 of 2011 were directly and substantially the same. However, the appellants predicated their petition on *inter alia* grounds that the bilateral agreement should have been approved by Parliament in order to form part of Kenyan law and in failing to do so; that the respondents usurped the role of Parliament and that the FERI and COD certificates threatened to infringe their right to property. The court sitting in the determination of a judicial review application did not have jurisdiction to render itself on those issues. The principle of *res judicata* was wrongly invoked on the instant ground.
11. Article 47 of the Constitution and the Fair Administrative Actions Act allowed the courts to consider certain aspects of merit when considering an application for judicial review. The purpose of the remedy of judicial review was concerned with reviewing not the merits of the decision in respect of which the application for judicial review was made, but the decision–making process itself. Though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but had to remit the same to the body or office with the power to make that decision.
12. The court, when determining a constitutional petition, was empowered to look beyond the process and not only examine but delve into the merits of a matter or a decision. The essence of merit review was the power to substitute a decision which the court could do when determining a constitutional petition. The court was further empowered to grant not just judicial review orders but any other relief deemed fit to remedy any denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
13. The High Court in determining a judicial review application, exercised only a fraction of the jurisdiction it had to determine a constitutional petition. A determination of a judicial review application could not be termed as a final determination of issues under a constitutional petition. The considerations were different, the orders the court could grant were more expanded under a constitutional petition and therefore the outcomes were different.
14. The court in hearing a constitutional petition could arrive at the same conclusion as the court hearing a judicial review application. However, the considerations right from the outset were different, the procedures were different, and the reliefs that the court could grant were different. The court would be playing fairly different roles.
15. The Court of Appeal erred in holding that the doctrine of *res judicata* applied to the instant case. The Court of Appeal should have at that point found that the High Court was wrong in its conclusion.

*Petition of appeal partly allowed.*

***Orders***

i. *The judgment and order of the Court of Appeal dated July 31, 2015 was quashed and set aside.*
ii. *The ruling and order of the High Court dated July 31, 2014 was quashed and set aside.*

iii. *The ruling of the High Court was null and void.*

iv. *The matter was remitted to the High Court for determination on its merits.*

v. *Each party was to bear its own costs.*

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4. *Kidero, Evans Odhiambo & 4 others v Ferdinand Ndungu Waititu & 4 others* Petitions 18 & 20 of 2014; [2014] eKLR (Consolidated) - (Explained)
5. *Kingoo, Mercy Munee & another v Safaricom Limited & another* Constitutional Petiton 5 of 2016; [2016] eKLR - (Explained)
6. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) - (Followed)
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**Uganda**

*Kamunye & others v Pioneer General Assurance Society Ltd* [1971] EA 263 - (Followed)

**United Kingdom**

1. *Chief Constable of North Wales Police v Evans* [1982] 3 AII E R 141; [1982] UKHL 10; [1982] 1 WLR 1155 - (Followed)
2. *Henderson v Henderson* (1843) 67 ER 313 - (Followed)
3. *Re: Hasting No 2* [1958] 3 All ER 625; [1958] 3 WLR 768 - (Explained)

**India**

1. *Ashwini Kumar Upadhyay v Union of India & another* Writ Petition (Civil) No 95 of 2018 - (Followed)
2. *Daryao & others v State of Uttar Pradesh* [1961] AIR 1457; [1962] SCR (1) 574 - (Explained)
3. *State of Haryana & others v M P Mohla* [2007] 1 SCC 457 - (Followed)

**Canada**

1. *Angle v Canada (Minister of National Revenue–MNR)* [1974] CanLII 168 (SCC); [1975] 2 SCR 248; [1974] SCJ No 95 (QL) - (Followed)
2. *Danyluk v Ainsworth Technologies Inc* [2001] SCC 44 (CanLII); [2001] 2 SCR 460 - (Followed)
3. *Iron v Saskatchewan (Minister of the Environment & Public Safety)* [1993] 6 WWR 1; [1993] CanLII 6744 (BS SC); [1993] CarswellSask 323 - (Followed)
4. *Kanthasamy v Canada (Citizenship and Immigration)* 2015 SCC 61; [2015] 3 SCR 909 - (Followed)

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*Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* [1969] EA 696 - (Explained)

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4. Constitution of Kenya articles 2(5)(6); 22(1); 23(1); 24; 25; 40; 48; 50; 51; 95(5)(6); 159; 163(4)(a); 165 - (Interpreted)
5. Supreme Court Act, 2011 (cap 9B) section 15 - (Interpreted)
6. Supreme Court Rules, 2012 (cap 9B Sub Leg) rules 9, 33, 42- (Interpreted)

**Advocates**

None mentioned

August 6, 2021, the Court delivered the following Judgment:

**Introduction**

1. The appellants moved this court under article 163(4)(a) of the *Constitution*, section 15 of the *Supreme Court Act* and rules 9, 33 and 42 of the *Supreme Court Rules 2012* vide their petition of appeal dated 9th September, 2015 and lodged on September 10, 2015. The petition is supported by affidavits sworn by Mr Gilbert Ojwang and Mr Joseph Gacheru who are Directors of the 1st petitioner. They seek the following orders:

    a) An order does issue restraining the 1st, 2nd and 3rd respondents from levying any fees that are not provided for under the Bilateral Agreement dated May 30, 2000, thereafter gazetted on August 30, 2002, and more specifically restraining them from demanding for the payment of any monies, taxes or levies in addition to the collection of the commission specified of only 1.8% of the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo, and then only on the condition that all such payments must and shall be made or effected and receipted only to, and by the Merchant Shipping Office.

    b) A declaration be made that any provision(s) not having the force of Law in Kenya and which require the payment of anything over and above the sum of 1.8% of the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo are in contravention of the petitioners' fundamental rights and freedoms under article 95 of the Constitutionand are therefore null and void *ab initio*.

    c) A declaration that the Bilateral Agreement entered into on May 30, 2000 and known as the "Agreement On Maritime Freight Management" is null and void and that its continued enforcement by any person as part of the Laws of Kenya contravenes the petitioners' fundamental rights and freedoms under articles 2, 40, and 95 of the *Constitution* and are therefore null and void ab initio.

d) A declaration be made that any and all provisos not having the force of law in Kenya and that contravene the petitioners' fundamental rights and freedoms under article 95 of the *Constitution* be held to be null and void ab initio.

e) A declaration be made that any provisions of law that contravene the petitioners' fundamental rights and freedoms under article 40 of the *Constitution* be held to be null and void *ab initio*.

f) A declaration be made that any provisions of the Agreement that (sic) contravenes the terms of article 2 of the *Kenyan Constitution* be held to be null and void ab initio.

g) Such further and or other orders, directions or writs as the court may deem fit, just and appropriate to grant.

h) Costs of and incidental to the petition.

2. The grounds of the appeal are that the Court of Appeal erred in holding that the doctrine of *res judicata* applied to constitutional litigation just as in other civil litigation as a doctrine of general application albeit with the rider that it should be invoked in constitutional litigation only in the rarest and clearest of cases; that having held as such, the appellate court erred in holding that the doctrine applied to the current case; that the appellate court erred in holding that the matter, High Court Petition No 64 of 2013, was *res judicata* by virtue of the previous proceedings known as Mombasa High Court Miscellaneous Application No 130 of 2011 (JR).

3. That the learned Judges of appeal disregarded the provisions of sections 107, 108, 109, and 112 of the *Evidence Act* by relieving the respondents of their duty thereunder and shifting the burden of proof onto the appellants; and that the Judges erred in not finding that an objection premised on allegations of *res judicata*, which is a matter of both fact and law, cannot form the basis for a preliminary objection which is always a matter of pure law; That they also erred in failing to find that Judicial Review was concerned with procedures; issuable orders being those of *mandamus, certiorari* and prohibition and not merits of the case, whereas their case was a constitutional Petition seeking issuance of specific declarations to remedy fundamental rights and freedoms breaches.

**B. Background**

4. The appellants' claim is that they are Kenyan Registered Companies carrying on the business of clearing and forwarding of imported goods within the port of Mombasa. It is their claim that they encountered problems with the 4th respondent, an agent of the Democratic Republic of Congo (DRC) Government, in respect to all imported cargo destined for DRC.

5. The basis of the case is a Bilateral Agreement on Maritime Freight Management entered into on May 30, 2000. The parties to the Agreement were Democratic Republic of Congo (DRC) Government, through the Ministry of Information, Transport and Communication, acting through the 4th respondent, a body known as Office De Gestion Du Freit Maritime (OGEFREM) on one part and Kenyan Government through the Ministry of Information, Transport and Communication on the other part. Under the Agreement, the Kenyan Government, through the 1st to 3rd respondents, was tasked with collection of taxes on freight charges of goods imported to and on transit to the DRC through the port of Mombasa.

6. The agreement provided for the assessment, levying and collection of a commission to the tune of 1.8% of the gross freight charges on the imports on behalf of OGEFREM. The Agreement was gazetted in the Kenya gazette on the 30th of August 2002 and was to remain in force for a three-year period subject to a one-off renewal for a further period of three years. It is alleged that the said Agreement expired on 29th May 2003 and was renewed on 18th December 2003, which was seven months outside the agreement renewal period.

7. On October 26, 2012 the 4th respondent issued circulars to Shippers, Forwarders and Agents stating that effective October 29, 2012, all payments for Fiche Electronique de Renseigment Certificate ("FERI") as well as Certificate of Destination ("COD") would be made to its account and that such payments were to be made in US Dollars subject to all documents submitted and validated at its offices. These requirements introduced new charges at a rate of USD 100.00.

8. The appellants were aggrieved by these new requirements alleging that they were onerous and in blatant breach of the Bilateral Agreement. According to them, payments could only be collected by the 1st respondent on behalf of the DRC Government but not by payment to a private individual's bank account in Italy, as the receipts issued did not bear the Coat of Arms of the DRC government or the address of the recipient. They also contended that the Bilateral Agreement should have been subjected to Parliamentary approval and deposited with the Registrar of Treaties so as to form part of the laws of Kenya, which was not the case. They alleged that its enforcement amounted to constitutional violations to their detriment.

**(i) Proceedings at the High Court**

9. Being so aggrieved, the appellants filed High Court Mombasa, Constitutional Petition No 64 of 2013 on November 5, 2013 seeking a number of reliefs. Alongside the petition, the appellants also sought conservatory orders through an interlocutory application in the same terms as prayer (a) of the petition. The prayers sought were as here below:

a) A conservatory order does issue restraining the 1st, 2nd and 3rd respondents from levying any fees that are not provided for under the Bilateral Agreement dated May 30, 2000, thereafter Gazetted on the 30th of August 2002 and more specifically restraining them from demanding for the payment of any monies, taxes or levies in addition to the collection of the commission specified of only 1.8% on the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo, and then only on the condition that all such payments must and shall be made or effected and receipted only to and by the Merchant Shipping Office.

b) A declaration that any provision(s) not having the force of law in Kenya and which require the payment of anything above the sum of 1.8% of the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo are in contravention of the petitioners' fundamental rights and freedoms under article 95 of the Constitution and are null and void ab initio.

c) A declaration that the Bilateral Agreement entered into on the 30thday of May, 2000 and known as the "Agreement On Maritime Freight Management" is null and void and that its continued enforcement by anybody or person as part of the Laws of Kenya contravenes the petitioners' fundamental rights and freedoms under articles 2, 40 and 95 of the *Constitution* and is therefore null and void *ab initio*.

d) A declaration be made that any and all provisos not having the force of law in Kenya and that contravene the petitioners' fundamental rights and freedoms under article 40 of the *Constitution* be held to be null and void ab initio.

e) A declaration be made that any provisions of the agreement that contravene the terms of article 2 of the Kenyan Constitution be held to be null and void *ab initio*.

f) General damages

g) Punitive damages.

10. The 3rd respondent herein, Kenya Maritime Authority, filed Grounds of Opposition to the interlocutory application urging that the matter directly in issue in the petition before the court was a matter that had been determined by the same court in Mombasa High Court Misc Application (JR) No 130 of 2011 hence the court lacked jurisdiction to entertain the matter. The 2nd respondent, the Attorney General, equally filed grounds of opposition, raising the same ground, that those issues had been determined already.

11. In a ruling delivered on July 31, 2014 the High Court first determined the question of *res judicata* since, as it observed, *res judicata* was a matter affecting the jurisdiction of the court.

The court was of the opinion that it was thus prudent that it be determined *in limine* before delving into the merits of the case. The High Court found the petition to be *res judicata* because of the previous decision of the court in Judicial Review Case No 130 of 2011. The court therefore held that the petition and the Notice of Motion filed there-under were thus barred by section 7 of the *Civil Procedure Act*. Citing the case of *Owners of the Motor Vessel Lilian SS v Caltex Oil (Kenya) Ltd* (1989) KLR 1 the court found that it had no jurisdiction in the matter.It downed its tools and struck out the notice of motion for conservatory orders together with the petition both dated 5th November 2013 with costs to the respondents.

12. The court also held that since in JR No 130 of 2011, the imposition of "FERI" and "COD" was found to have a legal basis, the court conferred status upon the two certificates which is protected by the provision of law on estoppel by record by way of a Judgment *in rem* against the whole world, as opposed to Judgment in *personam* or *inter partes* which operates against the parties to the suit. The court observed that the decision in JR 130 of 2011 was on appeal in Mombasa Court of Appeal Civil Appeal No 254 of 2012 and the appellants could have participated in the appeal as persons affected by the decision of the High Court.

**(ii) Proceedings at the Court of Appeal**

13. Dissatisfied with the decision of the High Court, the appellants moved to the Court of Appeal *vide* Civil Appeal No 42 of 2014. They preferred seven grounds to wit that, the High Court erred:

a) In considering and ruling on matters in respect of which no application was filed and prosecuted before it;

b) In arriving at a decision regarding *res judicata* without any evidence having been tendered before it;

c) In failing to avail the appellants the opportunity to respond and produce evidence in opposition to the allegations that the matter was *res judicata*;

d) In failing to consider the application before him and matters that were relevant which he was seized of and instead considered matters that were irrelevant thereby arriving at a decision without any basis or evidence being laid;

e) In holding that the matters raised in the petition were res judicata, whilst the appellants and the respondents were different with the exception of 3rd respondent;

f) In holding that the matters raised in the petition were res judicata, whilst the reliefs sought in the Judicial Review and petition were different; and,

g) In holding that the petition and the notice of motion filed by the appellants were barred by section 7 of the *Civil Procedure Act* whilst the parties in the petition were not the same parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit nor did they authorize anyone to litigate on their behalf in JR nor were they making a claim on behalf of the other people.

14. In a Judgment dated July 31, 2015, the Court of Appeal upheld *inter alia*, that the doctrine of *res judicata* was applicable to constitutional litigation just as in other civil litigation, as it is a doctrine of general application. The court however cautioned that the doctrine should be invoked in constitutional litigation in the rarest and in the clearest of cases. It also found that the appellants were granted an opportunity to be heard and that the High Court was justified in holding the suit before it to be *res judicata.* The appeal was therefore dismissed with costs. Aggrieved by that Court of Appeal decision, the appellants have now preferred the appeal before this court.

**(iii) Proceedings before the Supreme Court**

15. The respondents' application to strike out the appeal was unsuccessful. The Supreme Court affirmed its jurisdiction vide a ruling delivered on October 25, 2019. This court however framed the issue for determination as follows; Did the High Court procedurally consider the plea of *res judicata* or did it infringe on the appellant's right to fair hearing in the *res judicata* proceedings hence condemning them unheard? The parties were directed to file submissions on the said issue.

16. The 1st and 2nd appellants, 3rd and 4th respondents filed their written submissions. The 1st and 2nd respondents did not file their written submissions. When the matter came up for hearing, parties sought to highlight their written submissions. The appellants were represented by Mr Taib Ali Taib, the 1st and 2nd respondents were represented by Ms Anne Mwangi, Mr Brian Ondego appeared for the 3rd respondent, while Ms Jacqueline Waihenya appeared for the 4th respondent.

**C. Parties' Submissions**

**(a) Appellants' submissions**

17. The appellants filed lengthy written submissions on June 5, 2020. At the hearing they argued two points; *res judicata* and how it led to denial of the right to be heard as directed by the court. They argue that there was no issue of *res judicata* at all. There was no evidence adduced to justify the allegation of *res judicata* as *res judicata* is a matter of fact first before it becomes

a matter of law. Their response to the question framed by the Supreme Court was in the negative.

18. They submit that that the High Court did not procedurally consider their plea of *res judicata*. As a result, it infringed on their right to fair hearing as provided for under article 51 of the Constitution by condemning them unheard. They oppose the manner in which *res judicata* was brought up then argued and how it was later used to shut them out of the proceedings depriving them the right to a fair hearing under the public hearing requirement. This contention, they allege, is supported by their pleadings and written submissions.

19. They also argue that *res judicata* cannot be raised as a preliminary objection within the jurisprudence of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* [1969] EA 696 as was done by the High Court. A preliminary objection must be a matter of pure law. It cannot be a matter of fact. They urge that it is a matter of fact before it becomes a matter of law. That the law demands that applications of that nature be made by way of a notice of motion under order 51 of the *Civil Procedure Rules 2010.* They further submit that evidence must be placed before the court before determination and not determined by way of a preliminary objection.

20. Further, the appellants submit that a party relying on *res judicata* must not only plead, frame and argue the issue of *res judicata* but they must also discharge the burden of proof to establish *res judicata* to the standard required by law. They contend that while the Court of Appeal held that *res judicata* is applicable in the rarest of constitutional matters, there was no evidence led to qualify their case to the category where exceptions would apply.

21. The appellants submit, based on other jurisdictions, that the doctrine of *res judicata* does not apply to constitutional litigation and specifically under the following petitions: habeas corpus petitions, matters affecting bill of rights, constitutional matters, in matters dismissed *in limine*, taxation matters, judicial review matters and matters collaterally incidental. They urge this court to find that *res judicata* was not applicable in constitutional matters the way other jurisdictions have found, so that pre-2010 restrictions are not placed, by providing few exceptions only to be enlarged with time.

22. The appellants assert that they never participated in any other suit before any court relating to the same parties in respect of the same subject matter and their case is factually incapable of being classified as *res judicata*. They submit that they had no opportunity to respond to any application or any opportunity to be heard. According to them, *res judicata* was used to extinguish their hope of ever being heard when it was not properly raised in a way they could respond to. They assert that being present in court did not amount to fair hearing. They maintain that this opportunity to be heard was the only surest way of achieving justice

for the parties, without which there is no granting of right to fair trial under article 50 of the Constitution. They urge that the appeal be granted as prayed.

**(b) Respondents' submissions**

23. Despite the 1st and 2nd respondents not filing their submissions, their counsel, Ms Anne Mwangi, from the office of the Attorney General, at the hearing indicated that they were in total agreement with the submissions of the 3rd and 4th respondents.

**(c) 3rd Respondent's submissions**

24. The 3rd respondent opposed the appeal through their submissions filed on July 14, 2020. Its position is that the High Court procedurally considered the plea of *res judicata* and found it did not infringe on the appellants' right to fair hearing. It contends that the issue of *res judicata* was raised formally and not as contended by counsel for the appellants. That it was pleaded in their defence and in the affidavit of Odira Omingo in Misc Application No 130 of 2011, with all material for *res judicata* placed before the court. Furthermore, parties who appeared in the High Court were all granted an opportunity to be heard on the issue of *res judicata* before a ruling was delivered. That the appellants had ample time to refute the claims of *res judicata*.

25. It is the 3rd respondent's view that the appellants never at any time pleaded that they were ambushed by the plea of *res judicata* that was being advanced by the respondents. That they had ample opportunity to file any further affidavits or to bring any further evidence to refute *res judicata* yet they never did. That the issue of whether they were denied opportunity to be heard was never raised in the High Court but was raised in the Court of Appeal. That the Court of Appeal inquired on the same and found out that the appellants were accorded an opportunity to be heard in the High Court.

26. The respondent submits that the superior courts agreed with the appellants' counsel that the doctrine of *res judicata* applies in the rarest of constitutional cases. That, however, the superior courts below inquired about the facts and did a very thorough analysis referring to the facts, before arriving at a finding that *res judicata* applied in this case as evidenced by the conclusions in their Judgments.

27. As regards the contention that the plea of *res judicata* can only be raised by way of formal application, counsel for the 3rd respondent urges the court to find that this is not the correct position of the law. That the Court of Appeal was very clear that there is no legal provision that required that the plea of *res judicata* be raised by way of an application. All that is needed is for the facts to be placed before the court for the court to inquire from the facts of that particular case; whether the doctrine of *res judicata* applies; whether the parties are the same; whether the issues are the same and the prayers sought. That this was done when

the respondents filed their affidavits, placing on records all the facts and the Judgment in *JR 130 of 2011*. With this, counsel urges this court to dismiss this Petition and award costs to the respondents.

**(d) 4th Respondent's Submissions**

28. The 4th respondent filed grounds of opposition, a replying affidavit sworn by Michel Kaninda Mukuna, its representative of the Director in Mombasa and submissions on June 23, 2020. It argues that the appellants had ample notice of the plea of *res judicata*. that order 51 specifically rule 14(1) entitles a respondent to oppose an application by filing a notice of preliminary objection, a replying affidavit or grounds of opposition. That the respondents chose to oppose by filing grounds of opposition and replying affidavit. It is contended that the appellants in this case participated in those proceedings, they were heard and gave oral submissions. That the question of not having a fair hearing did not arise as the appellants were procedurally and substantially heard within the ambit of *res judicata*.

29. They submit that the proceedings in the Judicial Review and the subsequent High Court case reveals that they are in *pari material* consisting of the same parties and specifically Mr Paluku Lusenge and Mr Paluku Riabana, and the same subject matter thus properly falling within the doctrine of *res judicata* articulated in section 7 of the *Civil Procedure Act*. That both proceedings sought to nullify the Bilateral Agreement entered between the two states herein so as to prevent the collection and/or imposition of the requirement for the FERI Certificate and COD and that the taxes imposed thereunder as unconstitutional. Orders of *mandamus* were sought on both cases. The case of *Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another* Motion No 42 of 2014 [2016] eKLR was cited in support of these arguments.

30. It is urged that the finding of the Court of Appeal be deemed as proper that *res judicata* is applicable in the rarest of cases. It is also submitted that the doctrine of *res judicata* is applicable in constitutional matters as per the Supreme Court of India decision in *Daryao & others v State of Uttar Pradesh* that the plea of *res judicata* does apply to constitutional references because the considerations are substantially the same. This decision it was submitted to have relied on the English case of *Re: Hasting No 2 (*1958) 3 All ER QBD 625 on *habeas corpus*.

31. The respondent argues that the intention of the doctrine, is to curb the mischief of appellants who move from one court of concurrent jurisdiction to the other seeking the same orders in alternative decisions which amounts to forum shopping. They urge this court to consider the doctrine of *res judicata* as a sober one as provided for in our laws. They contend that it is applicable to all matters including constitutional matters. In conclusion, the submit that the appropriate remedy for the appellants was the linear extension of the original law suit

on appeal which they chose not to pursue for undisclosed reasons. Further, they maintain that the petition cannot stand and should be dismissed with costs.

32. On costs it is submitted that the 4th respondent has suffered unduly because of conservatory orders issued on 11th December, 2015 and as a result the cargo that has been going through the port of Mombasa destined to the Republic of Congo, has not attracted the revenue that it should have under the Agreement. According to them, there is also a loss of USD 248,900/- arising out of HC Misc Applic No 130 of 2011 in which the 4th respondent was compelled to suspend collection of levies and taxes for 10 months. It is urged that this court exercises discretion to award costs in its favour for loss of earnings in addition to legal costs.

**D. Issues for Determination**

33. From the pleadings and submissions of the parties, and as guided by the issue set for the parties to address the court on during certification, the following questions for determination arise:

a) Did the High Court procedurally consider the plea of *res judicata*?

b) Did the finding by the High Court on *res judicata* infringe on the Petitioner's right to fair hearing condemning them unheard?

c) Were the learned Judges of the Court of Appeal justified in holding that the doctrine of *res judicata* applied to the current case; was the *Paluku* case the same as the appellants' herein?

d) Is this doctrine of *res judicata* applicable to constitutional litigation and interpretation, just as in other criminal and civil litigation?

e) If the doctrine of *res judicata* is applicable to constitutional matters with the rider that it should be invoked in constitutional litigation only in the rarest and clearest of cases, on whom lies the burden of proving such rarest and clearest of cases?

f) What constitutes such "rarest and clearest" of cases?

g) Who bears the costs of the suit.

**E. Analysis**

**(a) Did the High Court procedurally consider the plea of *res judicata*?**

34. On the first issue of whether the High Court procedurally considered the plea of *res judicata*, we look at the definition of procedure according to *Black's Law Dictionary*, 9th Edition which provides as follows:

1. A specific method or cause of action.

2. The judicial rule or manner for carrying on a civil lawsuit or criminal prosecution also termed rules of procedure.

35. The procedure on how the court should determine an application is governed by order 51 of the *Civil Procedure Rules,* 2010. It provides as follows:

> "1. Procedure [order 51, rule 1.]
>
> All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide."

36. The appellants have relied on article 51. Article 51 is on the rights of persons detained, held in custody or imprisoned. The precise provision on right to fair hearing is article 50 which at sub-article 1 provides as follows:

> 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."

37. The right to fair trial is a fundamental non-derogable under article 25 of the Constitutionwhich provides as follows:

> Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –
>
> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
>
> (b) freedom from slavery or servitude;
>
> (c) the right to a fair trial;
>
> (d) the right to an order of habeas corpus."

38. The African Commission on Human and People's Rights established general principles to all legal proceedings applicable by Member States, of which Kenya is one. Therefore, the principles are binding under article 2(5) and (6) of the Constitution, and include the following:

> "General principles applicable to all legal proceedings:
>
> 1. Fair and Public Hearing

> In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.
>
> 2. Fair Hearing
>
> The essential elements of a fair hearing include:
>
> ...
>
> (e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
>
> (f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;
>
> ...
>
> (i) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and
>
> (j) an entitlement to an appeal to a higher judicial body."

39. In a concurring opinion, Njoki Ndungu, SCJ in the decision of *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*Petition No 18 of 2014 as consolidated with Petition No 20 of 2014 [2014] eKLR elaborated on the right to fair hearing as follows:

> (257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem(hear the other side or no one is to be condemned unheard) and *nemo judex in causa sua* (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, *Judicial Review: Law, Procedure and Practice* 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that "although the necessity of hearing is well established, its scope and contents remain unsettled."

(258) What then are the norms or components of a fair hearing? The Supreme Court of India, in *Indru Ramchand Bharvani & others v Union of India & others,* 1988 SCR Supl (1) 544, 555 found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v Collector of Customs Calcutta & others* AIR 1962 Cal 460).

(259) That court in *Union of India v JN Sinha & another,* 1971 SCR (1) 791 and *CB Boarding & Lodging v State of Mysore,* 1970 SCR (2) 600 held that with regards to fair hearing, each case has to be decided on its own merits. In *Mineral Development Ltd v State of Bihar,* 1960 AIR 468, 160 SCR (2) 909 the court further observed that the concept of fair hearing is an elastic one and "is not susceptible of easy and precise definition."

(260) The Court of Appeal at Kampala in Uganda in *Obiga v Electoral Commission & anor*, Election Petition Appeal No 4 of 2011 [2012] UGCA 29 (Obiga) held that in order to determine whether a party received a fair hearing, the court has to look to the statutes, case laws, and regulations that govern the decisions that the court made.

(261) It is important to restate that a literal reading of the provisions of the Constitutionshow that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: "it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court." (See *Steel and Morris v United Kingdom,* [2005] ECHR 103, paragraph 59).

40. This court in its decision in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* Petition 7 of 2018 consolidated with Petition 9 of 2018 [2018] eKLR determined what constitutes a right to fair hearing. We held as follows:

(86) We are also minded that the interests of justice dictate that this court ensures that all parties to a dispute are accorded a fair hearing so as to resolve the dispute judiciously. This is particularly so because what is at stake is the appellant's right to a fair election as well as the right of the voters to non-interference with their already cast votes, the will of the people, so to speak. It is on this breath that we must consider whether the appellant's right to a fair hearing and trial will be infringed upon by the denial of admission of new evidence.

(87) In the circumstances, was there a reasonable opportunity of hearing given to the appellant? In this regard, what then are the norms or components of a fair hearing? *In the matter of Indru Ramchand Bharvani & others v Union of India & others,* 1988 SCR Supl (1) 544, 555, the Supreme Court of India, found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v Collector of Customs, Calcutta & others,* AIR 1962 Cal 460). It is important to restate that a literal reading of the provisions of the Constitution of Kenya show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: "it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court." (See *Steel and Morris v United Kingdom,* [2005] ECHR 103, paragraph 59)."

41. In considering whether the High Court procedurally considered the plea of *res judicata*, we are asked to determine whether the court accorded the appellants an opportunity of hearing; and whether that opportunity was be reasonable. In order to do that we must look at the court record of the proceedings before the High Court.

42. On November 5, 2013, the appellants filed, alongside the main Petition, an application under certificate of urgency seeking *inter alia* conservatory orders to restrain the respondents from levying the disputed fees.

43. The application dated and filed November 5, 2013was placed before the duty court (Odero J) on the same day and counsel for the appellant was given an opportunity to address the court on the same. The court certified the matter as urgent and directed that counsel for the appellant serve the application on the respondents for hearing on November 14, 2013.

44. Order 51 rule 14 of the *Civil Procedure Rules, 2010* makes provision on how a matter who wishes to oppose an application may respond. It provides as follows;

14. Grounds of opposition to application in High Court [order 51, rule 14.]

(1) Any respondent who wishes to oppose any application may file t any one or a combination of the following documents —

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

(2) the said documents in sub rule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.

(3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under sub-rule (1) may, with the leave of the court, file a supplementary affidavit.

(4) If a respondent fails to file to comply with sub-rule (1) and (2), the application may be heard *ex parte*.

45. Upon service, the respondents entered various responses. The 3rd respondent entered appearance on November 11, 2013 and on even date filed Grounds of Opposition dated October 11, 2013 to oppose the appellant's application raising the plea of *res judicata* due to the Judgment in JR No 130 of 2011 by the High Court. On November 14, 2013, the 3rd respondent filed a replying affidavit sworn by John Dira Omingo, the 3rd respondent's Head of Commercial Shipping, on November 13, 2013. The 3rd respondent annexed a copy of the Judgment in Mombasa HC Misc Application No 130 of 2011.

46. The Attorney General on November 18, 2013 also filed Grounds of Opposition dated November 14, 2013 raising the same objection. While the 4th respondent, on 3rd December 2013 filed a replying affidavit sworn by Berthe Morisho Mwamvua, the 4th respondent's appointed representative in Kenya, on 2nd December 2013 opposing both the petition and the application. The 1st respondent on 21st February 2014 filed a replying affidavit sworn by Nduva Muli, the Principal Secretary in opposition to the petition.

47. All the parties appeared before court (Kasango, J) on November 14, 2013 where counsel for the 1st and 2nd respondents sought an adjournment on account of not properly on record consequently not ready to proceed. Counsel for the 4th respondent also sought for more time on account of not having been properly instructed. Counsel for the appellants vehemently opposed the application for adjournment. The court however allowed the adjournment and directed that the same proceed for hearing on December 4, 2013.

48. It is important to note that at this point, the appellants were aware of the defences and opposition raised against their application and petition including the plea of *res judicata*. They were also aware of the Judgment in JR 130 of 2011 as it one of the annexures in the affidavit sworn by John Dira Omingo, the 3rd respondent's Head of Commercial Shipping, on November 13, 2013.

49. On December 4, 2013 all parties appeared before court (Muriithi, J)where they were each granted opportunity to address the court on the merits and demerits of the application by the appellants. It was at this point that if the appellants had felt that the time to reply to the plea of *res judicata* was too short that they should have raised the same before the court. Parties were unable to conclude their oral submissions and the matter was stood over to January 21, 2014 where parties were able to finalise their oral submissions. Counsel for the appellants was granted opportunity for a rebuttal to counter the submissions by the respondents.

50. The court then rendered its ruling on July 31, 2014 where it found the petition to be *res judicata*.

51. It is evident that the plea of *res judicata* was raised and not as a preliminary objection as argued by the appellants. The definition of a preliminary objection was well set out in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 as follows:

> "So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

52. This was followed up by the Judgment of Sir Charles Newbold in the same case:

> "The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

53. Instead, and contrary to the appellants submissions, the plea of *res judicata* was raised through both grounds of opposition and replying affidavits in response to the appellants application. It is also evident that through the replying affidavits of the 3rd and 4th respondents, evidence by way of the Judgment of JR No 130 of 2011 was introduced through an affidavit to bolster the plea of *res judicata*.

54. It is further evident that the appellants were not condemned unheard or shut out from the proceedings. The proceedings demonstrate that the court accorded the appellants the two

justiciable elements of fair hearing: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable.

55. This ground of appeal must therefore fail.

**Is this doctrine of *res judicata* applicable to constitutional litigation and interpretation, just as in other criminal and civil litigation?**

56. The doctrine of *"res judicata"* is provided for under section 7 of the *Civil Procedure Act* in that: -

> No court shall, try, any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."

57. The *Civil Procedure Act* has also provided explanations with respect to the application of the *res judicata* rule. Explanation 1-6 are in the following terms:

> Explanation (1) —The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
>
> Explanation (2) —For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
>
> Explanation (3) —The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
>
> Explanation (4) — Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
>
> Explanation (5) — Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
>
> Explanation (6) — Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

58. This court in the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another*Motion No 42 of 2014 [2016] eKLR *(Muiri Coffee case)* held as follows regarding the doctrine of *res judicata:*

> 52 Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of *Hon Norbert Mao v Attorney-General,* Constitutional Petition No 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under article 137 of the Uganda Constitution, and for redress under article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under article 50, seeking similar relief; and Judgment had been given in *Hon Ronald Reagan Okumu v Attorney-General,* Misc Application No0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of *res judicata,* declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.
>
> 53. In *Silas Make Otuke v Attorney-General & 3 others,* [2014] eKLR, the High Court of Kenya agreed with the Privy Council decision in *Thomas v The AG of Trinidad and Tobago* (1991) LRC (Const) 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of *res judicata*".
>
> 54. The doctrine of *res judicata,* in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that

litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

55. It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of *res judicata* is not affected by the substantial-justice principle of article 159 of the Constitution, intended to override technicalities of procedure. *Res judicata* entails more than procedural technicality, and lies on the plane of a substantive legal concept.

56. The learned authors of *Mulla, Code of Civil Procedure,* 18th Ed 2012 have observed that the principle of *res judicata*, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):

> The principle of finality or *res judicata* is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

57. The essence of the *res judicata* doctrine is further explicated by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313, as follows:

> ... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court

> was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" [emphasis supplied].

58. Hence, whenever the question of *res judicata* is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others,* (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the *res judicata* principle was judicially remarked in *ET v Attorney-General & another,* (2012) eKLR, thus:

> The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others,* (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J, in the case of *Njangu v Wambugu and another* Nairobi HCCC No 2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to

court, then I do not see the use of the doctrine of *res judicata*....."

59. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

a) There is a former Judgment or order which was final;

b) The Judgment or order was on merit;

c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d) There must be between the first and the second action identical parties, subject matter and cause of action.

(See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011* (2013) eKLR)

60. However, the courts have differed on whether the doctrine of *res judicata* is applicable to constitutional matters. Some of the decisions include In *Okiya Omtatah Okoiti & another v Attorney General and Another* Petition No 593 of 2013 [2014] eKLR where Lenaola J. (as he then was) held as follows:

> For *res judicata* to be invoked in a civil matter therefore, the issue in a current suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (See the case of *Karia & another v Attorney General & others* (2005) 1EA 83). It therefore follows that the essence of the doctrine of *res judicata* is to bring an end to litigation and a party should not be vexed twice over the same cause. This was what was held with approval in *Omondi v National Bank of Kenya Ltd and others* (2001) EA 177.
>
> Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application,

> therefore it must be sparingly invoked in rights-based litigation and the reason is obvious." [Emphasis added]

61. In *Wycliffe Gisebe Nyakina v Attorney General & another [*2014] eKLR, Gikonyo, held as follows:

> "I reiterate the sentiments above and I must also state that while the courts in constitutional litigation must apply the principle of *res judicata* sparingly, they must also be vigilant to guard against litigants who are clearly evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the same court. That being my finding and looking at the petition before me, I do not think that it is *res judicata* and I will say why shortly."

62. In *William Kabogo Gitau v Ferdinand Ndung'u Waititu* [2016] eKLR Onguto, J held as follows:

> 59. In the cases of *Aggrey Chiteri v Republic* [2016] eKLR and *Edward Okongo Oyugi & 2 others v Attorney General* [2016] eKLR, this court held that the doctrine of *res judicata* applied with even force to constitutional litigation though it was important that caution is exercised lest a person whose rights were being violated a fresh was unjustly locked out from the wheels and seat of justice. So said the court in *Edward Okongo Oyugi & 2 others v The Attorney General* [supra]:
>
> > 11 The application of the principle of *res judicata* has the potential of locking out a person from the doors of justice or even reaching the out-stretched arms of justice if the claim is disposed off without venturing into the merits. Consequently, the factors and circumstances ought always be nit-picked and caution exercised. The court ought to be in no doubt that the principle is applicable to the facts and circumstances of each case."

63. Chitembwe J in *Mercy Munee Kingoo & another v Safaricom Limited & another* [2016] eKLR held as follows:

> In the case of *Zurich Insurance Company PLC v Colin Richard* [2011] EWCA CIV 641, the court explained the principal of *res judicata* in the following terms:
>
> > "Estoppel by *res judicata,* or estoppel by record, is a manifestation of the principle that judicial decisions once made must be accepted as final and are not open to challenge. Ultimately, it rests on a rule of policy that it is in the public interest for there to be finality in

> litigation, but it also sustains an important principle that decisions of competent tribunals must be accepted as providing a stable basis for future conduct. The Latin word *"res judicata"* mean simply "a thing judicially determined." They may apply to the claim as a whole (usually referred to as "cause of action estoppel"), or may refer to one or more specific issues which the court was required to decide in the course of reaching its decision on the matter before it (what is generally referred to as "issue estoppel".... The fact that an order is made by consent does not in my view prevent it from giving rise to an estoppel by record, provided that the nature of the order is such that it would otherwise have that effect."

My view on the issue of estoppel is that where the dispute involves interpretation of a statutory provision which is alleged to be in contravention of the Constitution, similar cases can be brought to court but based on a different dimension. A petitioner can say that a certain provision of a statute is unconstitutional as it violates a certain article of the Constitution. That dispute can be determined but another party is not barred from asking the same court to declare the same statutory provisions as unconstitutional as it was passed without public participation or that it violates another article of the Constitution. In other words, *res judicata* cannot be applied generally in relation to interpretation of the Constitution or a statute. There is also the simple fact that one Judge can declare a certain statutory provision as unconstitutional while another Judge declares the same provision as constitutional. In such a case, res judicata cannot apply. A good example is the issue relating to section 40(3) of the County Governments Act, 2012. In the case of *Stephen Nendela v Count Assembly of Bungoma & 4 others* [2014] eKLR Justice Mabeya declared that section as unconstitutional. Justice Byram Ongoya dealt with the same issue in two case namely *George Maina Kamau v County Assembly of Muranga & 2 others* [2016] eKLR and *Richard Bwogo Birir v Narok County Government & 2 others* [2014] eKLR. The judge did not declare section 40(3) of the County Governments Act as unconstitutional. I also dealt with the same issue in the case of *Amina Rashid Masoud v The Governor, Laumu County & others* Malindi Constitution Petition No 10 of 2016 and I held that section 40(3) was not unconstitutional. All these cases were based on similar facts and involved the constitutionality of section 40(3) of the County Governments Act. The *Richard Bwogo Birir* Case ended in the Court of Appeal (Nyeri Civil Appeal No 74 of 2014)."

64. The Court of Appeal, its impugned decision herein (Civil Appeal 42 of 2014), sought to settle the issue and made a determination as follows:

> *"Res judicata* is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of *Henderson v Henderson* [1843] 67 ER 313:
>
> > ".....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....."

65. See also *Kamunye & others v Pioneer General Assurance Society Ltd* [1971] EA 263. Simply put *res judicata* is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

> The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law

may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that *res judicata* being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of *res judicata*. However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality? If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

66. The Court of Appeal went on to make the following findings:

i) The doctrine of res judicata is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.

ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.

iii) The ingredients of *res judicata* must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous

case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.

67. The Court of Appeal reiterated its findings in its later decision in, *Accredo AG & 3 others v Steffano Ucceli & another* Civil Appeal 43 of 2018 [2019] eKLR.

68. The Court of Appeal however did not attempt to define what 'rarest and clearest' cases were. The court only stated as follows as justification:

> "On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions."

69. We may draw from the comparative lesson. From the Law of England and Wales, *Halsbury's Laws of England*, Volume 12A, 5th Edition, 2015 provides as follows:

> (2) *Res judicata*
>
> (i) The Doctrine of *Res Judicata*
>
> 1603. Basis for doctrine of *res judicata*
>
> The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot reopened by parties bound by the decision, save on appeal. It is most closely associated with the legal principle of 'cause of action estoppel', which operates to prevent a cause of actions being raised or challenged by either party in subsequent proceedings where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or privies), and having involved the same subject matter.

> However, *res judicata* also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue. For this reason, res judicata has been described as a portmanteau term which is used to describe a number of different legal principles with different juridical origins upon which the courts have endeavoured to impose some coherent scheme only in relatively recent times.
>
> .....
>
> The purpose of the principle of res judicata is to support the good administration of justice in the interests of the public and the parties by preventing abuse and duplicative litigation and its twin principles are often expressed as being the public interest that the courts courts should not be clogged by re-determinations of the same disputes; and the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter.
>
> .....

1626. Extent to which issue estoppel applies in public law proceedings.

> Issue estoppel is a doctrine appropriate to proceedings in private law. While in certain circumstances it would be an abuse of process to permit a public

authority which had acted in disregard of a declaration or order made in judicial review proceedings to seek to re-open debate about whether its actions were justified, in judicial review there is always a third party who is present: the wider public or private interest. The wider public or private interest should not be prejudiced by the failure of a public authority to place all the relevant material and arguments before the court on the first occasion, or if that authority reconsiders in the light of the previous decision but arrives at conclusions which do not in every respect mirror the court's conclusions on the first occasion. The extent to which the doctrine of issue estoppel is applicable in judicial review proceedings is therefore doubtful. It has however been held that issue estoppel may apply in habeas corpus proceedings. In planning appeals, although the doctrines of cause of action estoppel and issue estoppel do not apply to decisions of inspectors, a previous inspector's decision on a matter is material consideration which an inspector is obliged to take into account. It has also been said that courts should not be used as a means to attempting to reargue points that have already been fully considered at a planning inquiry.

Issue estoppel does not apply in child care cases, because it is outweighed by public policy considerations relating to the protections of children."

70. In the well-known decision of Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 at page 115, he held as follows:

> ...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable, diligence, might have brought forward at the time. [Emphasis added]

71. Hon Mr Justice Vivian Lavan in the case of *Foley v Smith* [2004] IEHC 299 (16 July 2004) discussed a party's constitutional right to access court *vis-à-vis* the doctrine of res judicata as follows:

> " The doctrine of res judicata is based upon the principle that a party should not be allowed to re-litigate a matter that he has already had an opportunity to litigate. It is based on the principle of public interest that requires finality in litigation and the private right of an individual to be protected from a vexatious multiplication of suits.
>
> The situation in the present case is such that the High Court proceedings were in being prior to the initiation of the proceedings, on the part of the defendant, in the District Court. Furthermore, it is clear that the plaintiff had the intention of defending the District Court proceedings, but due to an omission on the part of his insurers, was unable to do so. The dicta of Hardiman J in *Ahmed v The Medical Council* [2004] 1 ILRM 372 at p.386 is of assistance:
>
> > "Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the courts for the determination of his civil rights or liabilities."
> >
> > <u>The operation of the principle of res judicata requires the court to look at the competing interests of the parties, namely the constitutional</u>

> right of the plaintiff to access the courts and the opposing right of the defendant to be protected from a multiplicity of suits from an opponent. This is the principle as set down by Keane J in *McCauley v McDermott* [1997] 2 ILRM 486 at p 498:
>
> > "In cases of this nature, the courts are concerned with achieving a balance between two principles. A party should not be deprived of his or her constitutional right of access to the courts by the doctrine of *res judica* where injustice might result, as by treating a party as bound by a determination against his or her interests in proceedings over which he or she had no control. *Res judicata* must be applied in all its severity, however, where to do otherwise would be to permit a party bound by an earlier Judgement to seek to escape from it, in defiance of the principles that there should ultimately be an end to all litigation and that the citizen must not be troubled gain by a law suit which has already been decided." [Emphasis added]

72. The courts in India have had occasion to grapple with the question. The Supreme Court of India in the case of *Daryao and others v The State of U P and others* 1962 SCR (1) 574 rejected a submission that the principle of *res judicata* could not apply to a petition for redress in respect of an infringement of fundamental right under the Constitution. The court held as follows:

> "That is why we must proceed to deal with the question of *res judicata* on the basis that a fundamental right has been guaranteed to the citizen to move this court by an original petition wherever his grievance is that his fundamental rights have been illegally contravened. There can be no doubt that the fundamental right guaranteed by art 32(1) is a very important safeguard for the protection of the fundamental rights of the citizen, and as a result of the said guarantee this court has been entrusted with the solemn task of upholding the fundamental rights of the citizens of this country. The fundamental rights are intended not only to protect individual's rights but they are based on high public policy. Liberty of the individual and the protection of his fundamental rights are the very essence of the democratic way of life adopted by the Constitution, and it is the privilege and the duty of this court to uphold those rights. This court would naturally refuse to circumscribe them or to curtail them except as provided by the Constitution itself. It is because of this aspect of the matter that in Romesh Thappar v The State of Madras (1), in the very first year after the Constitution came into force,

this court rejected a preliminary objection raised against the competence of a petition filed under art 32 on the ground that as a matter of orderly procedure the petitioner should first have resorted to the High Court under art 226, and observed that "this court in thus constituted the protector and guarantor of the fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of Ruch rights". Thus the right given to the citizen to move this court by a petition under art 32 and claim an appropriate writ against the unconstitutional infringement of his fundamental rights itself is a matter of fundamental right, and in dealing with the objection based on the application of the rule of *res judicata* this aspect of the matter had no doubt to be borne in mind.

But, is the rule of *res judicata* merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity.

Now, the rule of *res judicata* as indicated in s 11 of the Code of Civil Procedure has no doubt, some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts' of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *res judicata* they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under art. 32.

.....

Therefore, the argument that *res judicata* is a technical rule and as such is irrelevant in dealing with petitions under art 32 cannot be accepted.

.....

In our opinion therefore, the plea that the general rule of *res judicata* should not be allowed to be invoked cannot be sustained."

73. Supreme Court of India in the case of *State of Haryana & rs v MP Mohla* (2007) 1 SCC 457 held as follows:

"The dispute between the parties has to be decided in accordance with law. What, however, cannot be denied or disputed that a dispute between the parties once

> adjudicated must reach its logical conclusion. If a specific question which was not raised and which had not been decided by the High Court the same would not debar a party to agitate the same at an appropriate stage, subject, of course, to the applicability of principles of *res judicata* or constructive *res judicata*.
>
> It is also trite that if a subsequent cause of action had arisen in the matter of implementation of a Judgment a fresh writ petition may be filed, as a fresh cause of action has arisen."

74. The Court of Appeal in Trinidad and Tobago in the case of *Endell Thomas v The Attorney General* Privy Council Appeal No 20 of 1989 1990 (UKPC) 49 agreed with the reasoning and conclusion with the decision from India in Daryao and others v The State of U P (*supra*). The court held as follows:

> "Their Lordships are satisfied that the existence of a constitutional remedy such as that upon which the appellant relies does not affect the application of the principle of *res judicata."*

75. The court however made an exception to the application of the principle of *res judicata* to where the applicant can demonstrate special circumstances warranting exemption. They held as follows:

> "The classic statement on the subject is contained in the following passage from the Judgment of Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 at page 115:
>
> > .....where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable, diligence, might have brought forward at the time.
> >
> > The principles enunciated in that *dictum* have been restated on numerous occasions.

> .....
>
> It is clear from these authorities that when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules."

76. The Supreme Court of Canada in *Angle v Canada (Minister of National Revenue–MNR),* 1974 CanLII 168 (SCC), [1975] 2 SCR 248 establishes the following three-part test for the application of issue estoppel:

    a. The same question has been decided;

    b. The decision said to create the estoppel was final;

    c. The parties to the previous decision or their privies are the same as the parties to the proceeding in which the estoppel is raised.

77. The Honourable Mr Justice Russell in the Federal Court of Canada in the case *Sami v Canada (Citizenship and Immigration)*, 2012 FC 539 (CanLII) held as follows:

    (65) The preconditions for *res judicata*, as set out by the Supreme Court of Canada in *Angle*, above, are as follows:

        a. The same question was decided in earlier proceedings;

        b. The judicial decision which is said to create the estoppel was final; and

        c. The parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel was raised.

    (66) In the present case, the IAD determined that these preconditions were all met. The question to be determined, the genuineness of the applicant's marriage, and the parties to the decision were the same as those in the previous IAD decision. The IAD is a court of competent jurisdiction with the authority to dispose of sponsorship appeals. Therefore, the previous decision was final, and the IAD was correct in finding that the preconditions for res judicata were met.

    (67) The case law has established that, where the preconditions are met, issue estoppel must apply unless special circumstances exist which would warrant hearing the case on its merits. The Supreme Court of Canada has determined that an evaluation of the special circumstances requires the decision-maker to ask whether, taking into account all of the circumstances, the application of issue estoppel would result in an injustice. See Danyluk, above, at paragraphs 64 to 67."

78. The Supreme Court of Canada in the case of *Danyluk v Ainsworth Technologies Inc,* 2001 SCC 44 (CanLII), [2001] 2 SCR 460 elaborated the special circumstances which may permit a court to make an exception to the doctrine of *res judicata* as follows:

> 64. Courts elsewhere in the Commonwealth apply similar principles. In *Arnold v National Westminster Bank plc,* [1991] 3 All ER 41, the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, per Lord Keith of Kinkel, at p 50:
>
> > "One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result . . . ."
>
> 65. In the present case Rosenberg JA noted in passing at pp 248-49 the possible existence of a potential discretion but, with respect, he gave it short shrift. There was no discussion or analysis of the merits of its exercise. He simply concluded, at p 256:
>
> > " In summary, Ms Burke did not accord this appellant natural justice.
> >
> > The appellant's recourse was to seek review of Ms Burke's decision. She failed to do so. That decision is binding upon her and her employer."
>
> 66. In my view it was an error of principle not to address the factors for and against the exercise of the discretion which the court clearly possessed. This is not a situation where this court is being asked by an appellant to substitute its opinion for that of the motions Judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.
>
> 67. The list of factors is open. They include many of the same factors listed in Maybrun in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin JA in Minott, *supra*. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case."

79. The court listed the seven factors to include the following;

(a) The Wording of the Statute from which the Power to Issue the Administrative Order Derives

(b) The Purpose of the Legislation

(c) The Availability of an Appeal

(d) The Safeguards Available to the Parties in the Administrative Procedure

(e) The Expertise of the Administrative Decision Maker

(f) The Circumstances Giving Rise to the Prior Administrative Proceedings

(g) The potential Injustice

80. Of particular interest the Supreme Court of Canada in the *Danyluk* case, on the factor of potential injustice, stated as follows:

> (g) The Potential Injustice
>
> 80. As a final and most important factor, the court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg JA concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the problem identified by Jackson JA, dissenting, in *Iron v Saskatchewan (Minister of the Environment & Public Safety),* 1993 CanLII 6744 (SK CA), [1993] 6 WWR 1 (Sask C A), at p 21:
>
> > "The doctrine of *res judicata,* being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard."

81. We reaffirm our position as in the *Muiri Coffee* case that the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of *res judicata* prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively. To further bolster our position we borrow from the decision from India in *Karam Chand another v Union Of India and others* on 24 April, 2014 where it was restated the principles upon which the doctrine of //res judicata// is founded as follows:

> 29. .....it is clear that the rule of *res judicata* is mandatory in its application and should be invoked in the interest of public policy and finality. The matter which have actually been decided would also apply to the matters which have been impliedly and

> constructively decided by the court. These principles are to be applied to preserve the doctrine of finality rather than frustrate the same. The doctrine of *res judicata* is the combined result of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims:
>
> (1) nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.
>
> (2) interest republicae ut sit finis litium: it is in the interest of the State that there should be an end to a litigation; and
>
> (3) res judicata pro veritate occipitur: a judicial decision must be accepted as correct.
>
> .....The doctrine of *res judicata* is conceived not only in the larger public interest which requires that all litigation must sooner than later come to an end but is also founded on equity, justice and good conscience."

82. If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of article 159 of the Constitutionin both civil and criminal litigation, and its application now embedded in all procedural statutes. Further article 50 on right to fair hearing and article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res *judicata*, they only need to invoke some constitutional provision or other.

83. However, though the doctrine of *res judicata* lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the *Danyluk Case* from Canada the court cited the dissenting opinion of Jackson JA, in *Iron v Saskatchewan (Minister of the Environment & Public Safety)*, 1993 CanLII 6744 (SK CA), [1993] 6 WWR 1 (Sask C A), at p 21 where he stated:

> The doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard."

84. Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest

and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.

85. In the alternative a litigant must demonstrate special circumstances warranting the court to make an exception.

**Were the learned Judges of the Court of Appeal justified in holding that the doctrine of *res judicata* applied to the current case; was Paluku the same as the Appellants herein?**

86. We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *res judicata*. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

a) There is a former Judgment or order which was final;

b) The Judgment or order was on merit;

c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d) There must be between the first and the second action identical parties, subject matter and cause of action

87. The first hurdle to resolve is that of parties. The *ex-parte* applicants in JR No 130 of 2011 were twenty three in number and included Rosmik Trading Co Limited, Athanase Kiro M Muhavirwa, Kambale Valeveka Kdephonse, Abdullatif Ibrahim, Kataliko Kaniki, Kasereka Mbayahi, Paluku Jean-Bosco, A Bagha, Kambale Kazingufu, Claude Mahengera, Kahindi Nzoka, Kambale Mahama, Paluku Maliyabwana, Katembo Mahembe, Kamate Maranzi, Lwanzo Mutumishi, Kakule Vikwirahangi, Kalume Kabunga Francois, Muhindo Kyavere Roger, Kasereka Vahwere Izron, Paluku Lusenge, Kambale Charles and Kambale Katsongo. The respondent in that matter was the Kenya Maritime Authority and the Office De Gestion Du Fret Multimodal (OGEFREM) was named as the Interested party.

88. The applicants in JR No 130 of 2011 are clearly not the same as in the present suit. The only common denominator are the Kenya Maritime Authority and the Office De Gestion Du Fret Multimodal (OGEFREM) named as 3rd and 4th respondents herein respectively.

89. The High Court did however note that the appellants herein and the applicants in JR No 130 of 2011 were similar in character and in the nature of the business engaged in. The court noted as follows:

> The petitioners in the present petition are described at paragraph 1 of the petition as "limited liability companies duly registered with the Companies Registry under the Companies Act, chapter 486 of the laws of Kenya and carry on the business of importers, exporters, agency, clearing and forwarding of goods within the region with offices at Mombasa in the Republic of Kenya..."

The ex parte applicants in the Judicial Review Application No 130 of 2011 were described in the ruling and Judgment of the court, respectively, as "a company, a firm and individuals engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo" and "[Many of the imports into Democratic republic of Congo pass through the Port of Mombasa.] The applicants are involved in the clearing and forwarding some of those transit goods at that Port."

90. Does the similarity qualify to determine that the appellants herein and the applicants in JR 130 of were litigating under the same title?

91. The Court of Appeal in their determination of the matters in question herein noted as follows:

> The appellants argue that the two are different parties altogether. Not much evidence was placed on record in this regard, although it is noteworthy that both institutions were represented in the respective suits by one, Bertha Morisho Mwamvua. The two names appear to have been used inter-changeably in various documents on record, and they played the same function in both instances. Further, the applicants in the JR came to court as representing those who, just as the appellants, plied the business of clearing and forwarding. Therein lies the nexus of the two suits and the issue of res judicata. The appellants were aware of the JR proceedings but were content to just stand by and see the battle waged by their colleagues in the trade without intervention much as they were entitled to. They must suffer the consequences. They cannot be allowed to reopen the same case now on constitutional grounds."

92. The answer may be found in explanation no 6 of section 7 of the *Civil Procedure Act* which provides as follows:

> Explanation (*6*)? Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, <u>all persons</u>

interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating

93. The commonality is that the appellants herein and the applicants in JR 130 of 2011 were persons, juridical and natural, engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo. They have the same interests and therefore the raise the complaints regarding the two certificates, FERI & COD. The answer is in the affirmative and we find we cannot fault the High Court or the Court of Appeal for concluding as such.

94. On whether the issues were directly and substantially in issue in the two suits, we compare the issues raised. In JR 130 of 2011 and in the present suit the courts noted that the parties were challenging the validity, scope and legality of the agreement which was the basis for the requirement of the two certificates (FERI & COD), as well as the authority of the respondents to continue levying freight charges.

95. The High Court in the present suit made two findings that since in JR No 130 of 2011 the imposition of "FERI" and "COD" was found to have a legal basis, the court conferred status upon the two certificates which is protected by the provision of law on estoppel by record by way of a Judgment *in rem* against the whole world, as opposed to Judgment *in personam* or *inter partes* which operates against the parties to the suit. The court observed that the decision in JR 130 of 2011 was on appeal in Mombasa Court of Appeal Civil Appeal No 254 of 2012 and the appellants could have participated in the appeal as persons affected by the decision of the High Court.

96. The court in JR 130 of 2011, summarized the grounds upon which the Judicial Review application was predicated on as follows:

> The interested party has no valid or lawful role to play in the process of importation of goods through Kenya.
>
> The respondents' insistence on the Certificate of Destination and FERI Certificate is therefore unlawful and discriminatory. The respondents' actions aforesaid are unfair, irregular, unprocedural, unlawful and unjust.
>
> The *ex-parte* applicants have not been given any valid legal basis or grounds entitling the Respondents to carry out the aforesaid acts.
>
> The *ex-parte* applicants have neither been heard nor given an opportunity to be heard prior to the said acts.
>
> The respondents' said acts are *ultra vires* the powers and statutory functions of the respondents.

> The respondents' acts complained are an abuse of power, unfair and perverse within the Wednesbury principle.
>
> The respondents' acts complained of are unreasonable, irrational and a breach of the rules of natural justice."

97. From the face of it, it would appear that the issues in the present suit and JR 130 of 2011 are directly and substantially the same. However the appellants herein predicated their petition on *inter alia* grounds that the bilateral agreement should have been approved by Parliament in order to form party of Kenyan law and in failing to do so, the respondents contravened article 2. They further alleged that the respondents herein purported to usurp to the role of Parliament and in doing so contravened articles 94(5) and (6) of the Constitution. They further alleged that the FERI and COD certificates threatened to infringe their right to property under articles 40(1)(a) and (2)(a) when the respondents threatened to arbitrarily deprive them of their property. The court sitting in determination of a judicial review application did not have jurisdiction to render itself on these issues. We therefore find that the principle of *res judicata* was wrongly invoked on this ground.

98. The next issue to address is regarding whether the issues in a current suit must have been decided by a competent court. Whether the issue in a current suit has been decided by a competent court and whether the matter in dispute in the former suit between the parties was directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar are closely related. There is a Judgment rendered in JR 130 of 2011 delivered on 27th September 2012 by a competent court (Tuiyott, J(as he then was)). However, the court was resolving an application for Judicial Review order seeking:

> (a) Prohibition restraining the respondents from demanding from the *ex-parte* applicants or any other persons FERI Certificate or Certificate of Destination issued by the interested party prior to release of any goods imported through the port of Mombasa or through any other Kenyan Port.
>
> (b) Mandamus compelling the respondents to release all goods that have complied with all lawful customs procedures other than the requirement for the aforesaid FERI Certificate and Certificate of Destination."

99. What is in issue here is constitutional petition where the appellants were seeking the following orders from the High Court:

> (a) A conservatory order does issue restraining the 1st, 2nd and 3rd respondents from levying any fees that are not provided for under the Bilateral Agreement dated May 30, 2000, thereafter Gazetted on the 30th of August 2002 and more specifically restraining them from demanding for the payment of any monies, taxes or levies

in addition to the collection of the commission specified of only 1.8% on the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo, and then only on the condition that all such payments must and shall be made or effected and receipted only to and by the Merchant Shipping Office.

(b) A declaration that any provision(s) not having the force of law in Kenya and which require the payment of anything above the sum of 1.8% of the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo are in contravention of the petitioners' fundamental rights and freedoms under article 95 of the Constitutionand are null and void *ab initio*.

(c) A declaration that the Bilateral Agreement entered into on the 30thday of May, 2000 and known as the "Agreement On Maritime Freight Management" is null and void and that its continued enforcement by anybody or person as part of the Laws of Kenya contravenes the petitioners' fundamental rights and freedoms under articles 2, 40 and 95 of the Constitutionand is therefore null and void ab initio.

(d) A declaration be made that any and all provisos not having the force of law in Kenya and that contravene the petitioners' fundamental rights and freedoms under article 40 of the Constitutionbe held to be null and void *ab initio*.

(e) A declaration be made that any provisions of the agreement that contravene the terms of article 2 of the Kenyan Constitution be held to be null and void *ab initio*.

(f) General damages

(g) Punitive damages

100. The considerations for judicial review were aptly captured by G V Odunga, J in the case of *Republic v Chesang (Ms) Resident Magistrate & 2 others ex parte Paul Karanja Kamunge t/a Davisco Agencies & 2 others* [2017] eKLR where he held as follows:

> 25. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the Judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the court through proceedings brought

nominally by the Republic. See *R v Traffic Commissioner for North Western Traffic Area ex parte Brake* [1996] COD 248.

> 26. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See *Reid v Secretary of State for Scotland* [1999] 2 AC 512."

101. Article 47 of the Constitutionof Kenya, 2010 and subsequent enactment of the Fair Administrative Action Act No 4 of 2015 have sought to allow the courts to consider certain aspects of merit when considering an application for judicial review. The Court of Appeal in the case of *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] KLR attempted to reconcile this expanded context as follows:

> 54. The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of article 47 of Constitution as read with the Fair Administrative Action Actof 2015. The Act establishes statutory judicial review with jurisdictional error in section 2(a) as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent

and accountable decision making process in articles 47 and 10(2)(c) of the Constitution. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the Fair Administrative Action Act and the Constitution. As correctly stated by the High Court in *Martin Nyaga Wambora v Speaker of the Senate* [2014] eKLR it is clear that they - articles 47 and 50(1) - have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases.

An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, section 7(2)(l) of the Fair Administrative Action Actprovides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in *R v Home Secretary; Ex parte Daly* [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in article 24(1)(b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

Analysis of article 47 of the Constitutionas read with the Fair Admini strative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7(2)(f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; section 7(2)(j) identifies abuse of discretion as a ground for review while section 7(2)(k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7(2) (k) subsumes the *dicta* and principles in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7(2)(i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in section 7(2)(i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in section 7(2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

In *Mbogo & another v Shah* (1968) EA 93 at 96, this court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the Judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The *dictum* in *Mbogo v Shah* (*supra*) and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the

> implicit shift to merit review of administrative decisions in judicial review.
>
> The essence of merit review is the power to substitute a decision. Under the Fair Administrative Action Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11(1)(e) and (h) of the akn/kFair Administrative Action Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11(1)e/act/2015/4 Fair Administrative Action Act}} permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts."

102. Despite the shift from common law to codification in the Constitution and the Fair Administrative Action Act, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision–making process itself. This finding is further reinforced by the fact that though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or office with the power to make that decision. In this regard we cite the decision of Lord Hailsham LC in *Chief Constable of North Wales Police v Evans* (1982) 3 All ER at pg 141 said of the remedy of judicial review as follows:

> It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual Judges for that of the authority constituted by law to decide the matters in question. The court will not, however, on a judicial review application act as a "Court of Appeal" from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise

> of preventing the abuse of power be guilty itself of usurping power." [Emphasis added]

103 The High Court in exercising its mandate to hear Constitutional Petitions, it does so pursuant to articles 22, 23 and 165 of the Constitution. Article 22(1) provides as follows:

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

104. Article 23(1) provides as follows:

> 23.(1) The High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights".

105. Article 23(3) provides the remedies that the court may grant and in addition to judicial review orders they include a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24; and an order for compensation.

106. Article 165(3) provides as follows regarding the High Court's jurisdiction:

> (3) Subject to clause (5), the High Court shall have—
>
> (a) unlimited original jurisdiction in criminal and civil matters;
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144;
>
> (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
>
> (i) the question whether any law is inconsistent with or in contravention of this Constitution;
>
> (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

107. The court when determining a constitutional petition is empowered to look beyond the process and not only examine but delve into the merits of a matter or a decision. The essence of merit review is the power to substitute a decision which the court can do when determining a constitutional petition. Further the court is further empowered to grant not just judicial review orders but any other relief is deems fit to remedy any denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This court in its decision in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR went ahead to reaffirm use of structural interdicts and supervisory orders to redress the violation of a fundamental right in order to allow the development of court-sanctioned enforcement of human rights as envisaged in the Bill of Rights.

108. We arrive at the inescapable conclusion that the High Court in determining a judicial review application, exercises only a fraction the jurisdiction it has to determine a constitutional petition. It therefore follows that a determination of a judicial review application cannot be termed as final determination of issues under a constitutional petition. The considerations are different, the orders the court may grant are more expanded under a constitutional petition and therefore the outcomes are different.

109. The court in hearing a constitutional petition may very well arrive at the same conclusion as the court hearing a judicial review application. However, the considerations right from the outset are different, the procedures are different, the reliefs that the court may grant are different, the court will be playing fairly different roles.

110. We consequently arrive at the conclusion that the Court of Appeal erred in holding that the doctrine of res judicata applied to the current case. The Court of Appeal should have at that point found that the High Court was wrong in its conclusion.

**F. Costs**

111. As to the questions of costs in this matter, this court has previously settled the law on award of costs: that costs follow the event, and that the court has the discretion in awarding costs. This was our decision in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition No 4 of 2012: [2014] eKLR. Considering our findings above, that the

High Court that erred in its findings on the matter before it and further that the Court of Appeal's findings were in part correct and partly erroneous, and further that we are sending the matter back to the High Court for determination on its merits, we find that there should be no order as to costs.

**G. Orders**

112. The petition of appeal dated September 9, 2015 and filed on September 10, 2015 date is allowed in the following specific terms:

(i) The judgment and order of the Court of Appeal dated July 31, 2015 be and is hereby quashed and set aside.

(ii) The ruling and order of the High Court dated July 31, 2014 be and is hereby quashed and set aside.

(iii) For the avoidance of doubt, the ruling of the High Court is null and void.

(iv) The matter is remitted to the High Court for determination on its merits.

(v) Each party is to bear its own costs.

Orders accordingly.

**Kiluwa Limited & another v Business Liaison Company Limited & 3 others (Petition 14 of 2017) [2021] KESC 37 (KLR) (6 August 2021) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2021] KESC 37 (KLR)

***Constitutional Law*** *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to fair administrative action – applicability of the right to fair administrative action – retrospective application of the right to fair administrative action - whether the provisions of article 47 of the Constitution could require the further input of the Legislature so as to attain prescriptive force – where a trial court relied on the provision of article 47 before the enactment of legislation to give effect to the right to fair administrative action as envisaged in article 47(3) – whether in the absence of legislation, the High Court was divested of jurisdiction to review administrative action - whether the provisions of article 47 of the Constitution could be applied retrospectively – Constitution of Kenya, 2010, articles 20(3) and 47.*

***Land Law*** *– land tenure – classification of land – public land – what amounted to public land – whether un-alienated Government land was public land – whether a foreshore felt within the category of public land – whether any right to a foreshore would be conferred to a private entity – whether the Government or a private entity could interfere with or limit the enjoyment of a public easement through acts of commission or omission - Constitution of Kenya, 2010, article 62; Survey Act (cap 299), section 45; Survey (Amendments) Regulations (1994) regulation 110; Government Lands Act (repealed) section 82.*

**Brief facts**

The dispute revolved around three first-row beach adjoining pieces of land (the suit properties). At the High Court, the appellants sought numerous declaratory, judicial review and injunctive orders against the respondents. It was the appellants' claim, among others, that initially between the first-row beach plots and the Indian Ocean's high-water mark, there was a strip of land that was reserved for public use (reserve land). The appellant further claimed that the 3rd respondent illegally demarcated from the reserve land and granted title to the 1st respondent as a first allottee for a term of 99 years. In the process of consolidating various parcels of land owned by the 2nd respondent, the boundary of the consolidated plot was extended from its original location which resulted in the encroachment of a portion of the reserve land. The appellants claimed that such actions were unlawful and a violation of their right to property and unrestricted access to the Indian Ocean sandy beach through the reserve land. By a decision delivered on October 13, 2015, the High Court allowed the petition.

Aggrieved, the 1st and 2nd respondents appealed to the Court of Appeal arguing, among others, that all the transfers affecting suit properties were commenced and concluded between 1989 – 1992 while the petition was filed over 20 years later, and the High Court erred in applying article 47(1) and (3) of the Constitution of Kenya, 2010 (the Constitution) while failing to appreciate that the same was

forward-looking and not retrospective in nature. In a judgment delivered on November 11, 2016, the Court of Appeal allowed the appeal with costs and set aside the High Court's decision and orders.

Aggrieved, the appellants lodged the instant appeal. The appellants challenged, among others, the appellate court's finding that article 47 of the Constitution could not be applied retrospectively. They also urged that the appellate court failed to appreciate that there was sufficient evidence adduced showing that the reserve land was public land which was incapable of alienation. The respondents opposed the appeal and argued that the High Court lacked jurisdiction to determine a dispute that predated the promulgation of the Constitution and that the Supreme Court had no jurisdiction to entertain matters that had been finalized by the Court of Appeal before the commencement of the Constitution. They also submitted that the suit properties were unalienated Government land pursuant to which they were allocated and accused the appellants of unreasonable delay in bringing a claim against them.

**Issues**

i. Whether the provisions of article 47 of the Constitution on the right to fair administrative action could be applied retrospectively.
ii. Whether in the absence of legislation giving effect to the right to fair administrative action, the High Court was divested of jurisdiction to review administrative action.
iii. What amounted to public land?
iv. Whether un-alienated Government land was public land.
v. Whether a foreshore felt within the category of public land.
vi. Whether any right to a foreshore would be conferred to a private entity.
vii. Whether the Government or a private entity could interfere with or limit the enjoyment of a public easement through acts of commission or omission.

**Held**

1. The jurisdiction of the High Court was never challenged at the Court of Appeal, nor was the issue raised in any manner at the two superior courts. The basis upon which the jurisdiction of the Supreme Court was being impugned was not borne out of fact, in that, the dispute before the court had never been finalized by the Court of Appeal before the commencement of the Constitution. The judgment of the Court of Appeal which gave rise to the appeal was delivered on November 11, 2016. The Supreme Court was properly seized with jurisdiction to entertain and determine the appeal.
2. Although the respondents relied on the Supreme Court's decision in the case of *Samuel Kamau Macharia v. Kenya Commercial Bank* [2012] eKLR (*Macharia case*) to argue that the Constitution did not apply retrospectively, a clear reading of the court's pronouncement left no doubt that the Supreme Court did not out-rightly rule out the retrospective application of the Constitution. The Supreme Court, however, cautioned that where the language of a particular provision in the Constitution did not contain even a whiff of retrospectivity, then such provision could not apply retroactively. The court in other cases

had gone ahead to identify a number of provisions in the Constitution which it considered relevant to the dispute before it, notwithstanding the fact that the questions before it had arisen out of a set of circumstances that had long crystallized before the promulgation of the Constitution. Such provisions were considered to be both backward and forward-looking.

3. Article 47 of the Constitution was a Bill of Rights provision which was stated in deliberate and clear normative terms. It set out clear and unambiguous entitlements within the language of the Bill of Rights. They were expressed in normative terms as opposed to general principles that would require the further input of the Legislature so as to attain prescriptive force. They were substantive entitlements whose enjoyment was not intended to be suspended by article 47(3) of the Constitution.
4. The legislation contemplated was not meant to create any other norms apart from the ones provided for by the Constitution. The Constitution required that such legislation provided for review of administrative action by either a court or independent tribunal. The legislation was also to provide for efficient administration. The basis for review of administrative action was already provided for in article 47(1) of the Constitution, being expedition, efficiency, lawfulness, reasonableness and procedural fairness. The effect of article 47(3) was therefore to perfect the enjoyment of those rights, as opposed to suspending such entitlement by divesting the High Court of jurisdiction to review administrative action.
5. The absence of legislation did not render a court helpless given the interpretative refuge afforded by article 20(3) of the Constitution. The High Court correctly applied article 47 of the Constitution in addressing the original claim.
6. The assertions by both parties regarding the dates of completion of the transfer of the suit properties and the commencement of the erection of the wall had not been factually controverted. For a party to be time-barred from litigating its claim, such limitation of time had to be stated in the Constitution, statute or as a principle of common law. To be successfully raised against a litigant, a court had to determine when the time started running.
7. The question as to when the cause of action arose had to be settled so as to shut out a litigant on grounds of passage of time. Those principles/conditions were never at play in the appeal, nor were they evident on the face of the appellate court's conclusions. The gravamen of the appellants' grievance was the allocation of the disputed land by the 3rd respondent to the 1st and 2nd respondents and the consequent erection of the wall by the latter. Therefore, the cause of action arose, not at the time of the completion of the transfers, but at the commencement of the erection of the wall. There was no basis upon which the appellants could be said to have slept on their rights.
8. The status of the suit properties could only be determined by an examination of the relevant provisions of the Constitution and applicable statutes. The relevant provisions consisted of aricle 62 (1) (a) and (i) of the Constitution, Regulation 110 of the Survey (Amendments) Regulation, 1994 that was enacted pursuant to section 45 of the Survey Act and section 82 of the repealed Government Lands Act. Therefore, unalienated Government land was public

land within the context of article 62 of the Constitution and the repealed Government Lands Act. That was notwithstanding the fact that the expression public land only came to the fore with the promulgation of the Constitution.

9. Article 62 of the Constitution delimited the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of public tenure. The repealed Constitution used the term Government instead of public to define such lands. It was incorrect for the respondents to assert that the lands in question were unalienated Government land but not public land. It was even more inaccurate to argue that the said parcels had never been public land. Unalienated Government land remained public until it was privatized through allocation to individuals or other private entities.

10. To the extent that the assertion by the appellants remained un-controverted, the additional portion of land which was allocated to the 1st and 2nd respondents was hived off the coastal foreshore by the 3rd respondent. Such foreshore consisted of land lying between the low-water mark and the high-water mark plus an additional 60 metres above the high-water mark within the meaning of regulation 110(1) of the Survey Regulations of 1994. Such land was reserved for Government/public use.

11. Article 62(1)(l) of the Constitution made no reference to the 60 metres above the high-water mark, only limiting itself to the language of the high and low water mark. However, article 62(1)(n) provided for another category of public land as being any other land declared to be public land by an Act of Parliament in force at the effective date or enacted after the effective date, hence the relevance of regulation 110(1) of the Survey Regulations of 1994 which was enacted before the effective date pursuant to section 45 of the Survey Act. Further, section 82 of the repealed Government Lands Act which predated the Survey Act, and under which the suit properties fell as un-alienated Government land, out-rightly forbade the conferment of any right to the foreshore by a conveyance, lease or license.

12. The right of access to the ocean through the foreshore by members of the public or any other owner of land along the coast, being the appellants, whether for economic, recreational or aesthetic reasons, was a public right secured by a public easement. Such right was not acquired through a private treaty. It followed that a person or private entity who had encroached on the foreshore could not interfere with or limit the enjoyment of a public easement through acts of commission or omission. On the other hand, the Government would interfere with or limit such easement only in promotion or protection of the public interest as guaranteed by the Constitution and the law.

*Appeal allowed.*

***Orders***

i. *Declaration issued that the 3rd respondent acted illegally by allocating land parcel No. MN/1/5901 to the 2nd respondent, which land he had partly curved out of the foreshore contrary*

*to section 82 of the Government Lands Act (repealed) and regulation 110(1) of the Survey Regulations of 1994.*

ii. *Declaration issued that the 3rd respondent acted illegally by allocating land parcel No. MN/1/5902 to the 1st respondent, which land he had curved out of the foreshore contrary to section 82 of the Government Lands Act (repealed) and regulation 110(1) of the Survey Regulations of 1994.*

iii. *Declaration issued that the actions of the 3rd respondent violated the appellants' right to fair administrative action as guaranteed by article 47 of the Constitution.*

iv. *Judgment of the Court of Appeal dated November 11, 2016 was set aside.*

v. *Judgment of the High Court dated October 13, 2015 was affirmed only to the extent consistent with and limited to the court's declarations.*

vi. *The 1st and 2nd respondents ordered to take immediate action to remove the offending wall and any other structures that they would have caused to be erected on land parcels No. MN/1/5901 and MN/1/5902.*

vii. *Costs to be borne by the 1st and 2nd respondents.*

**Citations**

**Cases**

***Kenya***

1. *Arap Ngok, Joseph NK v Moijo Ole Keuwa and 5 others* Civil Application 60 of 1997; [1997] eKLR - (Explained)
2. *BA & another v Standard Group Limited & another* Constitutional Petition 48 of 2011; [2012] eKLR - (Mentioned)
3. *Kiarie, Charles Karathe & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* Civil Application 12 of 2013; [2013] eKLR - (Explained)
4. *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] 3 KLR 199 - (Mentioned)
5. *Maina, Jane Wanjiku & 185 others v Attorney General & another* Petition 209 of 2011; [2012] eKLR - (Explained)
6. *Narok County Government v Livingstone Kunini Ntutu & 2 others* Petition 3 of 2015; [2018] eKLR - (Explained)
7. *Town Council of Awendo v Nelson O Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties)* Petition 37 of 2014; [2019] eKLR - (Explained)
8. *Town Council of Ol'Kalou v Ng'ang'a General Hardware* Civil Application 269 of 1997 - (Applied)

**Statutes**

***Kenya***

1. Constitution of Kenya - (Interpreted) articles 10, 22, 23(3); 40(1)(3); 42; 47; 62; 163(4)(a); 165(3)(b); 263

2. Fair Administrative Action Act (cap 7L) - (Interpreted) section 12
3. Government Lands Act (Repealed) (cap 280) - (Interpreted) section 9, 82
4. Land Registration Act, 2012 (cap 300) - (Cited) In general
5. Law Reform Act (cap 26) - (Interpreted) section 8, 9
6. Registered Land Act (Repealed) (cap 300) - (Interpreted) section 23
7. Registration of Titles Act (Repealed) (cap 281) - (Interpreted) section 23, 24
8. Survey Act (cap 299) - (Interpreted) section 45
9. Survey Regulations, 1994 (cap 299 Sub Leg) - (Interpreted) regulation 110 (1)

**Instruments**

1. African Charter on Human and Peoples Right (ACHPR), 1986
   article 13(3)

**Advocates**

None mentioned

August 6, 2021, the Court delivered the following Judgment:

## A. Introduction

1. Before the court is a Petition of Appeal dated July 27, 2017, and filed on August 3, 2017. It is brought pursuant to article 163(4)(a) of the *Constitution*, challenging the entire judgment and orders of the Court of Appeal (Makhandia, Ouko & M'inoti, JJ.A) delivered in Civil Appeal No 89 of 2015. The Court of Appeal overturned the High Court (Emukule J.) in Constitutional Petition No. 8 of 2012.

## B. Litigation Background

### i. At the High Court

2. The dispute in question revolves around three first-row beach adjoining pieces of land, MN/I/5901 and MN/I/5902 (hereinafter the Suit Properties) and LR No MN/1/18888 situated at Shanzu, Mombasa. By a Constitutional Petition No 8 of 2012 premised on articles 10, 22, 23(3), 40(1) and (3), 42 and 47 of *the Constitution* of Kenya, 2010, and articles 13 and 14 of the *African Charter on Human and Peoples Rights*, the appellants sought numerous declaratory, judicial review and injunctive orders against the respondents. It was the appellants' claim that initially, between the first-row beach plots, and the Indian Ocean's high-water mark, there was a strip of land that was reserved for public use (hereinafter the Reserve Land).

3. It was claimed that the Commissioner of Lands in contravention of Survey Regulations made under section 45 of the *Survey of Kenya Act*, cap 299, had on the 14th April 1992, demarcated from the reserve land MN/I/5902 and granted title to the 1st respondent as a first allottee for a term of ninety-nine years (99) years. The appellants further alleged that in 2011, a survey was carried out by the Commissioner of Lands for the purpose of consolidating various parcels of land owned by the 2nd respondent, and that in the process, the boundary of the consolidated plot was extended from its original location which resulted in the encroachment of a portion of the reserve land and its inclusion as part of the new parcel of land known as LR No MN/I/5901.

4. The appellants also claimed that property LR No MN/1/18888, which adjoins the suit properties, was initially owned by the 2nd appellant who acquired it on the 30th June 2009 and later transferred it to the 1st appellant, a company in which the 2nd appellant had majority shareholding. This property was described as a first-row beach plot next to the Indian Ocean separated from the ocean's high watermark by the reserved land. The appellants further contended that the 1st respondents had erected a stone wall along the boundary of the remaining reserve land completely blocking their access to the Indian Ocean. They urged that they had purchased the property for the purpose of erecting a multi-million modern apartment hotel giving the residents of the apartments a view of the beautiful scenery of the Indian Ocean waters, beach and the coastline from their rooms.

5. It was therefore the appellants' case that the grant of MN/I/5902 to the 1st respondent and the extension of the boundaries into the reserved land to create LR No MN/I/5901, was unlawful and a violation of their right to property and unrestricted access to the Indian Ocean sandy beach through the reserve land.

   They further submitted that the Commissioner of Land's actions were in violation of their littoral rights to access, use and view the Indian Ocean waters and beach. The appellants also submitted that the actions by the Commissioner of Lands had violated their right to equal access to public property guaranteed under article 13(3) of the *African Charter on Human and Peoples Right*.

6. By a decision delivered on October 13, 2015, the High Court (Emukule, J.) allowed the petition. On preliminary issues, the Learned Judge found that article 22 of *the Constitution* grants to every person the right to commence proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. It was also the court's finding that article 23(3) sets out the remedies which a court may grant pursuant to court proceedings brought under article 22, and that the judicial review remedy was not subject to limitation under sections 8 and 9 of the *Law Reform Act* (cap 26, Laws of Kenya).

7. On the merits of the petition, the Learned Judge found that the issuance of a new grant known as Number LR 52344 and subsequent LR. No MN/I/5902 and interference with the appellants' right of access to the oceanic view from its property LR No. MN/1/18888, was a grave violation by the Commissioner of Lands of the national values and principles of governance, integrity, transparency and accountability as set out in article 10 of *the Constitution*, and the rules of natural justice under article 47 which guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

8. On the question of littoral rights, the court found that section 45 of the *Survey Act* as read together with regulation 110(2) of the Survey Regulations clearly require the Commissioner of Lands to maintain a reserve land of at least sixty (60) meters between the high-water mark and the littoral lands. The Judge stated that the 60 meters reserve land was for Government purposes which could only be alienated under the direction of the Minister responsible for Survey of Kenya and in the absence of such direction, the grant and encroachment onto the reserve land was patently unlawful, and hence null and void. The judge noted that the 60 meters high water mark is held by the State in public trust as a buffer zone before the baseline from which the country's territorial sea is measured and it was therefore unlawful for the 3rd respondent to allot to the 1st and 2nd respondents the reserve land. The court consequently granted the following declarations and orders:

    a. A declaration that the 3rd respondent abused its office and acted illegally and unconstitutionally in alienating LR No MN/I/5902, Mombasa which was curved out of a reserve land to the Third respondent;

    b. A declaration that the 3rd respondent abused its office and acted illegally and unconstitutionally in extending the boundary of LR No MN/I/5901 to cover a portion of the reserve land;

    c. A declaration that the alienation by the 3rd respondent to the 1st respondent of LR No MN/I/5902, Mombasa which is the appellants' access to the Indian Ocean beach violated the petitioners' right to own property and equal access to public property;

    d. A declaration that the extension by the 3rd respondent of the boundary of LR No MN/I/5901 to cover a portion of the reserve land which is the appellants' access to the Indian Ocean beach was a violation of the appellants' right to own property and equal access to public property;

e. A declaration that the alienation of a reserve land by the 3rd respondent to the 1st and 2nd respondents for private use was a violation of the appellants' right to clean and healthy environment and equal access to public property;

f. A declaration that the alienation of LR No MN/I/5902, Mombasa by the 3rd respondent to the 1st respondent and a portion of LR No MN/I/5901 that encroaches on the reserve land to the 2nd respondent was done in breach of the rules of natural justice, procedural and administrative fairness and national values and principles of governance;

g. An order of injunction to restrain the 1st respondent, its officers, servants and/or agents from selling, transferring, mortgaging, charging, leasing, developing, putting up a wall or fence or blockage of any nature on and from having any other or further dealing with all that parcel of land known as LR No MN/I/5902, Mombasa;

h. A permanent injunction to restrain the 1st and 2nd respondents, their officers, servants and/or agents from blocking the petitioners' access to and view of the Indian Ocean through LR No MN/I/5902 and LR No MN/I/5901 in any manner whatsoever;

i. A mandatory injunction compelling the 1st and 2nd respondents to demolish a stone wall that they have constructed on LR No MN/I/5902 and LR No MN/I/5901, Mombasa;

j. An order of Judicial Review in the nature of certiorari to bring into this court and quash the decision of the first respondent to alienate LR No MN/I/5902, Mombasa to the 1st respondent;

k. An order to Judicial Review in the nature of certiorari to bring into this honourable court and quash the decision of the 3rd respondent to extend the boundary of LR No MN/I/5901 to cover a portion of the reserve land;

l. An order of Judicial Review in the nature of *mandamus* to compel the 3rd respondent and/or its successors in title to cancel Grant No CR 22652 dated 4th April, 1992 for LR No. MN/I/5902, Mombasa;

m. An order of Judicial Review in the nature of a *mandamus* to compel the 3rd respondent and/or its successors in title to amend Grant No CR 52344 dated 10th June, 2011 for LR No MN/I/5901 and remove therefrom the portion thereof that extends to the reserve land;

**ii. At the Court of Appeal**

9. Aggrieved, the 1st and 2nd respondents filed Mombasa Civil Appeal No 89 of 2015, citing the following summarized grounds: that all the transfers affecting both parcels of land were commenced and concluded between 1989 – 1992 while the petition was filed over 20 years later, and the learned High Court Judge therefore erred in applying article 47(1) and (3) of *the Constitution* which guarantees the right to fair administrative action while failing to appreciate that the same is forward looking and not retrospective in nature; that the learned Judge erred by failing to appreciate that the law applicable to the dispute was the *Law Reform Act* and that under that law, the claim for certiorari was time barred having been made outside the prescribed period of six months from the date of the impugned decision; that the learned judge failed to appreciate the concept of indefeasibility of title under the Registration of Titles Act; that the High Court erred in ignoring the fact that prayers 1(a), (c), (e), (f), (h), (i), (j) and (l) in the Petition were predicated on a retrospective application of article 47 of *the Constitution*; and that the trial court erred in failing to conduct a site visit to ascertain whether there was indeed encroachment on the 1st and 2nd respondent land and failing to hold that any complaint by the respondents ought to be determined by the National Land Commission and not the High Court.

10. In a Judgment delivered on November 11, 2016, the Court of Appeal allowed the appeal with costs and set aside the trial court's decision and orders. Regarding the issue of the correct forum for dispute resolution available to the appellants, the Learned Judges held that the appellants' petition before the High Court alleged violation of *the Constitution* and that even if the appellants could have applied for judicial review orders under the *Law Reform Act*, this did not preclude them from applying for enforcement of their constitutional rights by way of a constitutional petition. The Judges also held that a party must exhaust all remedies available before moving the courts. They however noted that the appellants could not have found recourse in the National Land Commission as at the time of filing the petition, that Commission was not in existence.

11. On whether the trial court erred in applying the provisions of the *the Constitution, 2010* and by implication the *Fair Administrative Action Act, 2015*, the appellate court found that article 47 could not be applied retrospectively. The Judges opined that *the Constitution* required parliament to enact legislation to give effect to the right to fair administrative action, which act came into force on the 17th June 2015 long after the cause of action had arisen. The Judges therefore held that by dint of article 263, *the Constitution* came into effect on the day it was promulgated and the appellants could not invoke article 47 of *the Constitution* and by implication the Fair Administration Act to divest the 1st and 2nd respondents of their property that had vested more than twenty years before the promulgation of *the Constitution*, 2010.

12. On whether the appellants were deserving of the orders from the High Court, the Judges, while noting that judicial review and injunctive orders are discretionary, were of the view that the appellants were undeserving of the orders sought and granted. The Judges attributed this to the unexplained 20 years delay in lodging of the claim despite the fact that the appellants were aware of the allotment of the adjoining parcels and the surrounding circumstances. It was the appellate court's further finding that the appellants could not protest or purport to rely on the construction of the wall to challenge the 1st and 2nd respondents' titles while the 2nd appellant purchased the property from the 1st appellant, perfectly aware of the allocation of the adjacent properties to the 1st and 2nd respondent and existence of a zigzag wall that was later replaced with the wall that was the subject of contention.

13. On indefeasibility of title, the Court of Appeal found that under the *Land Registration Act 2012*, a proprietor of land had an indefeasible title which could not be defeated unless it was acquired by fraud. The Judges noted that as fraud was not pleaded or proved on the part of the respondents, even if the allotment was irregular, the only available recourse to the appellants was damages. It was thus held that nullification of the respondents' title by the High Court, disregarding the provisions of the *Land Registration Act 2012* was in error.

**iii. At the Supreme Court**

14. Dissatisfied by the Court of Appeal Judgment, the appellants moved this court, citing ten (10) grounds of appeal summarized as follows, that the learned Judges erred in law and fact in:

    i. In finding that the titles to the suit properties were indefeasible and, in any case, the only available recourse to the appellants was damages;

    ii. In exercising their discretion without a legal basis in making the finding that the appellants were not entitled to the orders granted by the High Court;

    iii. In misconstruing and misapplying crucial material facts and evidence before them thus arriving at a wrong conclusion in law and fact;

    iv. In misinterpreting article 47 of *the Constitution of Kenya 2010* by failing to give any proper or due consideration to the fact that article 47 of *the Constitution* also had retrospective applicability wherein it provided for the right of every individual to administrative action that is just, fair and expedient and in failing to appreciate that right was inherent, inalienable and fundamental constitutional right which had always been in existent prior to the promulgation of *the Constitution* on the 27th of August 2010;

v. In concluding that the orders of certiorari, injunction and declaration were hinged on the 3rd respondent's actions and erred in making the finding that all the orders granted by the High Court through its retrospective approach [were] automatically vacated;

vi. In relying on section 23 and 24 of the *Registration of titles Act (repealed)* which sections were neither relevant to nor applicable to the suit property MN/I/5902 which was not transferred but alienated by way of allotment by the 3rd respondent to the 1st respondent;

vii. In determining an issue that was not before them on appeal; as to "whether the petitioners were deserving of the orders they obtained from the High Court", being issue which had no legal basis since the issue did not arise from any of the grounds of appeal in the Memorandum of Appeal and as argued by the parties in the Appeal;

viii. In disregarding the surveyor's report dated November 30, 2011 which was produced as evidence and which was clearly demonstrated that the 'reserve land' was indisputably public land and was incapable of alienation by the 3rd respondent;

ix. In falling to appreciate that there was sufficient evidence adduced by the petitioner to show that the 'reserve land' was public land which was incapable of alienation and by allotting the same to the 1st and 2nd respondent, the 3rd respondent had unconstitutionally and illegally conspired to defeat the public interest of all persons including Kenyans and tourists who have a right to access the ocean, was nullity ab initio; and

x. failing to exercise their discretion judiciously thereby misdirecting themselves in fact and in law by failing to consider relevant factors and matters which ought to have been considered and thereby came to a wrong decision resulting in a gross miscarriage of justice and the defeat of the Petitioner's interest and the public interest.

15. The appeal seeks the following reliefs:

i. The Appeal herein be allowed with costs;

ii. The judgment and orders of the Court of Appeal sitting at Mombasa delivered on the 11th November 2016 in Civil Appeal No 89 of 2015 be set aside and the decision, orders and declarations granted by the High Court be upheld;

iii. The costs of the proceedings before the Court of Appeal be awarded to the appellants;

iv. Any other orders that this honourable court may deem fit in the circumstances.

**C. Parties' Respective Cases**

**i. The appellants**

16. The appellants' written submissions are dated December 20, 2019 and filed on December 24, 2019. Their supplementary submissions are dated September 24, 2020 and filed on September 28, 2020. It is the appellants' case that the appellate court erred in misconstruing and misapplying crucial and material facts and evidence. They urge that first, the Judges erroneously held that MN/1/5901 was also known as LR MN/1/18888, and that it was owned by the appellants, while the former, they urge, is registered in the name of the 2nd respondent and the latter registered in the name of the 1st appellant. It is their further submission that the learned Judges erroneously adjudicated over only one property namely, MN/1/5902, while the claim concerned the two suit properties namely, MN/1/5901 and MN/1/5902.

17. Secondly, the appellants urge that the Court of Appeal Judges made several erroneous findings which conflicted with the evidence tendered before the High Court. They specifically refer to the finding by the appellate court that the wall, the subject of contention, existed at the time of purchase of LR MN/1/18888 by the 1st appellant and that they could not lodge a complaint over the same when they were aware of its existence at the time of the purchase.

18. They urge that on the contrary, and as averred in the 2nd appellant's further affidavit sworn on March 16, 2017, the zigzag was a low-lying decorative wall which blended with the landscape and didn't restrict access and view of the Indian ocean from the appellants' property. They add that the wall subsequently constructed by the 1st respondent, which is the subject of contention, blocked their view and denied them access to the Indian Ocean.

19. The appellants also submit that there was no unreasonable delay in bringing a claim against the respondents. They contend that the stone wall was erected in August 2011, while they filed the petition before the High Court on February 17, 2012, approximately 7 months after the construction. It is their submission that, in view of these facts, they were deserving of the orders granted by the High Court and that there was no legal basis for the Court of Appeal to arrive at a contrary finding.

20. The appellants' case with regard to fair administrative action is directed at the 3rd respondent. They urge that the 3rd respondent failed to consult their predecessors in title, the area residents and all other interested parties and shareholders, before alienating the reserve land. It is also the appellants' case that the land comprised in MN/1/5902 and

part of MN/1/5901 was public land as set out in the Land Act, 2012 and article 62 of *the Constitution*. As such, they submit, the 3rd respondent had no rights to alienate the same. They therefore urge that the alienation and allotment was illegal, unconstitutional and contrary to section 45 of the *Survey of Kenya Act*, cap 299, Laws of Kenya and regulation 110 (1) of *The Survey Regulations 1994*and sections 9 and 82 of the *Government Lands Act* cap 280 (repealed).

21. On the issue of the applicability of article 47 of *the Constitution*, it is the appellants' submission that article 47 is both forward and backward looking. It is their argument that this being the case, the article applies retrospectively to every person who is entitled to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, they urge that the rights under article 47 of *the Constitution* are inherent, inalienable and fundamental, meaning, they cannot be limited by the passage of time.

22. Additionally, they submit that the right to administrative action is co-terminus with similar rights under common law and natural justice, which rights are expressly protected under article 22(1) of *the Constitution*. They add that section 12 of the *Fair Administration Act, 2015* was intended to apply retrospectively as it encapsulates the general principles of common law and natural justice which applied prior to the promulgation of *the Constitution*. Moreover, they submit that under article 165 (3) (b) of *the Constitution*, the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

23. It is the appellants' further case that in any event, the Court of Appeal had confined itself only to article 47 of *the Constitution*, thereby ignoring or failing to consider the enforcement of the appellants' other fundamental rights claimed under articles 10, 22, 23 (3), 40 (1) & (3), 42 and 47 of *the Constitution*. They add that the High Court having decided on these other fundamental rights and freedoms, the same were properly before the appellate court for consideration.

24. Second, they urge that the Supreme Court has jurisdiction to determine a dispute that predates the promulgation of *the Constitution*. They rely on this court's decision in *Narok County Government v Livingstone Kunini Ntutu & 2 others*; SC Petition No 3 of 2015, [2018] eKLR, to urge that this court's jurisdiction is an enlarged one, clothing it with the authority to settle disputes to ensure certainty and stability of judicial decisions.

25. On the issue of indefeasibility of title under section 23 of the *Registered Land Act* (repealed), the appellants submit that the alienation of the suit properties was a nullity *ab initio* and that the issue of indefeasibility of title cannot be pleaded successfully. It is their submission that in any case, section 23 of the *Registered Land Act* only applies to certificates of title issued by the Registrar to a purchaser of land upon transfer or transmission. They further

urge that sections 23 and 24 of the Registered Land Actdo not apply to the suit properties, more specifically MN/1/5902 and part of MN/1/5901, which was allotted to the 1st and 2nd respondents by way of an allotment letter. The appellants rely on the Court of Appeal's Decision of *Town Council of Ol'Kalou v Ng'ang'a General Hardware* CA No 269 of 1997 (Unreported) to support this argument. They therefore urge the court to allow the appeal with costs.

**ii. The 1st and 2nd respondents**

26. The 1st and 2nd respondents oppose the appeal through their grounds of objection dated August 21, 2017 and filed on August 22, 2017 and submissions dated September 17, 2020 and filed on September 28, 2020. In objection, they urge that article 47 of *the Constitution* is not retrospective in nature. They further submit that, the appellants were guilty of inordinate delay having slumbered for 20 years before filing the present petition. Finally, the respondents submit that the High Court lacked jurisdiction to determine a dispute that predated the promulgation of *the Constitution*.

27. Regarding the issue as to whether article 47 of *the Constitution* of Kenya 2010 applies retrospectively, the respondents submit that *the Constitution* is forward looking and does not have retrospective application. They urge that it is an admitted fact that the alienation in question was concluded in 1989 and 1992 before the promulgation of the 2010 Constitution, hence one cannot claim to enjoy a right or alleged violation of a right that had not been recognized at the time the events complained of occurred. They rely on the Decisions of *Samuel Kamau Macharia v Kenya Commercial Bank*; SC Application No 2 of 2011, [2012] eKLR, *SK Macharia* case); *Jane Wanjiku Maina & 185 others v Attorney General & another*; HC Petition 20 of 2011, [2012] eKLR and *BA & another v Standard Group Limited & another*; HC Petition No 48 of 2011, [2012] eKLR to support the argument that the Constitution does not apply retrospectively.

28. It is the respondents' further case that article 47(3) of *the Constitution* provides that the right to fair administrative action was to be given effect through the enactment of a future legislation that is the *Fair Administrative Action Act*, which came into force on the 17th of June 2015. They urge that any attempt to import retrospective application of the provisions of article 47 has no foundation in *the Constitution* and ought to be dismissed. The respondents add that this court in the *SK Macharia* case cautioned against retrospective application of constitutional provisions where it would have the effect of divesting an individual of their rights legitimately occurring before the commencement of *the Constitution*.In view of the above assertion, it is the respondents' case that this court lacks jurisdiction to entertain the appeal before it.

29. The 1st and 2nd respondent, in addition, contend that the applicable law in this appeal is the law in force prior to the promulgation of *the Constitution*, that is sections 8 and 9 of the *Law Reform Act* which codified the common law rules of natural justice. They add that these rules were saved under section 12 of the *Fair Administrative Action Act, 2015*.

30. On indefeasibility of title under section 23 of the Registered Land Act, the respondents submit that the suit properties were registered under the Registered Land Act and pursuant to section 23 the said titles were indefeasible, and could only be challenged on grounds of fraud or misrepresentation. They rely on the decisions in *Dr Joseph Arap Ngok v Justice Mojo Ole Keiwua Civil Application No 60 of 1997* (unreported) and *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others*; CA Application No 12 of 2013, [2013] eKLR to support the argument that section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. They add that the appellants neither pleaded fraud or misrepresentation on the part of the respondents, nor gave a reason for the delay in challenging the titles allocated. Consequently, they argue, the orders of *certiorari* and *mandamus* which are discretionary were not available to the appellants under article 22 of *the Constitution*.

31. On the issue as to whether the suit property was excised from public land, it is the respondents' submission that the suit property was neither public land nor was it reserved for public use. They urge that it was Government land reserved for Government purposes as provided for in regulation 110(1) of the Survey Regulations 1994. It is their contention that the reserve land being Government land was subject to the provisions of section 3(a) of the Government Lands Act (repealed) which empowered the President to make grants or dispositions of any estate, interests or right in or over unalienated Government land. It is therefore their submission that the suit properties were alienated and granted to them by Presidential Decree in accordance with section (a) of the Act. They also urge that the suit properties were alienated before the enactment of *the Constitution* and do not fall within the scope of article 62 of *the Constitution*.

32. On whether the appellants have the right of access to the public beach and Indian Ocean through the suit properties, it is submitted that following the assertion that the suit properties were not public land but government land which has since been alienated and allotted to the 1st and 2nd respondents, in absence of any easement over the suit properties, the appellants cannot claim any right of access through the suit properties

33. On whether the appellants were entitled to declaratory orders sought under article 22 of *the Constitution*, the respondents submit that in the absence of proof of violation of their rights under articles 40 and 42 of *the Constitution*, the appellants are not entitled to the declaratory

or injunctive orders granted by the High Court. In conclusion they urge the court to dismiss the appeal with costs.

**iii. The 3rd and 4th respondents**

34. The 3rd and 4th respondents' submissions are dated September 22, 2020 and filed on the September 23, 2020. The Attorney General submits on three limbs on behalf of the 3rd and 4th respondents. On whether article 47 of the *Constitution* of Kenya 2010 has retrospective effect, it is argued that the 3rd respondent's decisions to allot the suit properties to the 1st and 2nd respondents were made before the enactment of the *Constitution, 2010* and therefore cannot be challenged as offending the provisions of article 47. It is submitted that article 47 has no indication that it was intended to have retrospective effect. This, they submit, is reflected in the reading of article 47(b) of the *Constitution* which mandates Parliament to enact legislation to give effect to article 47(1) and resulted in the enactment of the *Fair Administrative Action Act* in 2015. To support this argument, the respondents rely on this court's decision in the *SK Macharia* case. They further submit that article 163(4) of *the Constitution* does not confer upon the Supreme Court, appellate jurisdiction to entertain matters that had been finalized by the Court of Appeal before the commencement of the *Constitution*.

35. On the issue as to which party bears the burden of proving that the reserve land was public land, the Attorney General submits that the burden lies with the appellants, and that they failed to discharge this evidentiary burden. It is further submitted that article 62 of *the Constitution* defines public land as land which at the effective date was un-alienated Government land as defined by an Act of Parliament in force at the effective date including all land between the high and low water marks, and any land not classified as private community land under *the Constitution*, any other land declared to be public land by an Act of Parliament in force at the effective date or enacted after the effective date. To this end, it is the 3rd and 4th respondents' case that parcel LR Number MN/1/5902 and part of LR No MN/1/5901 was un-alienated Government land and had never been public land or land reserved for public use. For these reasons, the Attorney General contends that the alienation to the 1st and 2nd respondents was done within the scope of statutory authority under section 3 of the Government Lands Act. The suit properties, in the view of the Attorney General, do not fall under the categories of public land defined under article 62 of *the Constitution*.

**D. Issues for Determination**

36. Having considered the respective cases by the parties and attendant submissions in support thereof, we have concluded that four issues commend themselves to our attention in order to dispose of this appeal. The four issues are:

i. Whether this court has jurisdiction to determine the appeal herein;

ii. Whether the 2010 Constitution (article 47) applies retrospectively to this dispute;

iii. Whether the appellants were time-barred in lodging their claim;

iv. Whether the portion of land which is the subject matter of the dispute was public land, and if so, whether it was available for allocation.

**E. Analysis**

**i. On jurisdiction**

37. The respondents have tangentially challenged the jurisdiction of this court to determine the appeal. In this regard, the 1st and 2nd respondents argue that the High Court lacked jurisdiction to determine a dispute that predated the promulgation of *the Constitution*. On their part, the 3rd and 4th respondents submit that the Supreme Court has no jurisdiction to entertain matters that had been finalized by the Court of Appeal before the commencement of the 2010 Constitution.

38. We find these arguments baffling for two reasons; firstly, the jurisdiction of the High Court was never challenged at the Court of Appeal, nor was the issue raised in any manner at the two superior courts. Secondly, the basis upon which the jurisdiction of this court is being impugned is not borne out of fact, in that, the dispute before us had never been finalized by the Court of Appeal, before the commencement of *the Constitution*. Suffice it to say that the judgment of the Court of Appeal which gave rise to this appeal, was delivered on November 11, 2016.

39. Without further belabouring this issue therefore, we have no hesitation in holding that this court is properly seized with jurisdiction to entertain and determine the appeal.

**ii. On whether the 2010 Constitution (article 47) can retrospectively apply to this dispute**

40. The respondents have made heavy weather of the issue of the retrospectivity of the 2010 Constitution and in particular, article 47 thereof. It is their argument that *the Constitution* is forward looking and should never be applied retrospectively, especially, if such application can lead to the deprivation of rights legitimately acquired. In support of this position, they cite the *SK Macharia* case [*supra*]. It is their further argument that article 47 of *the Constitution* ought not to have been applied to the dispute because, sub-article 3 of the same, provides that:

> Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-

a. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

b. Promote efficient administration

41. The respondents found support for their argument, in the Court of Appeal's conclusion, that article 47 ought not to have been resorted to by the High Court, in the absence of the legislation envisaged under sub-article 3 above. Such legislation, was only enacted in 2015, long after the impugned Judgment of the High Court.

42. In the *SK Macharia* case (*supra*) cited by the respondents in support of their submissions regarding the non-retrospectivity of the *2010 Constitution*, this court rendered itself thus at paragraph 62:

> "At the onset, it is important to note that a Constitution is not necessarily subject to the same principles against retrospectivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting *the Constitution* to determine whether it permits retrospective application of any of its provisions, a court of law must pay due regard to the language of *the Constitution*. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the court ought not to import it into the language of *the Constitution*. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately acquired before the commencement of *the Constitution*."

43. A clear reading of the foregoing pronouncement, leaves no doubt that this court did not outrightly rule out the retrospective application of the 2010 Constitution. The court however cautioned that where the language of a particular provision in *the Constitution* does not contain even a whiff of retrospectivity, then such provision cannot apply retroactively. The court was to return to this question later in *Town Council of Awendo v Nelson O Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties)*, SC Petition No 37 o 2014; [2019] eKLR at paragraph 54 when citing *SK Macharia* with approval, it stated:

> "Even as the law as we have pronounced it, appears to be clear, it is imperative that we consider the provisions of the 2010 Constitution to determine whether any insights can be drawn therefrom for a just and fair resolution of the dispute at hand. In this regard, we derive inspiration from this *court's dictum in Samuel*

> *Kamau Macharia & 2 others v Kenya Commercial Bank & 2 others* [2012] eKLR; on when a court of law may fall back to the provisions of the *Constitution of 2010* in determining a dispute that may have crystallized before the promulgation of the *Constitution*.
>
> when certifying this appeal as one involving a matter of general public importance, the determination of which, goes beyond the interests of the parties, we were cognizant of the fact that similar disputes were likely to occur in other parts of the country. In resolving such disputes as may occur post the *2010 Constitution*, our decision in this appeal will no doubt be instructive, hence the need to consider the relevant provisions of *the Constitution*, to the extent that the same are backward and forward looking."

44. The court then went on to identify a number of provisions in the *2010 Constitution*, which it considered relevant to the dispute then before it, notwithstanding the fact that the questions before it, had arisen out of a set of circumstances that had long crystallized before the promulgation of *the Constitution*. Such provisions were considered to be both backward and forward looking.

45. It is in this context that we must consider the issue as to whether article 47 of *the Constitution* can be applied retrospectively to the dispute at hand. First and foremost, in agreement with the appellants, we note that article 47 is a Bill of Rights provision which is stated in deliberate and clear normative terms. Thus, sub-article 1 thereof provides that:

> " Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair"
>
> While sub-article 2 provides that:
>
> > " If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

46. These provisions set out clear and un-ambiguous entitlements within the language of the Bill of rights. They are expressed in normative terms, as opposed to general principles that would require the further input of the legislature so as to attain prescriptive force. In our view, contrary to the holding by the Court of Appeal, these are substantive entitlements whose enjoyment was not intended to be suspended by sub-article 3 thereof. The legislation contemplated was not meant to create any other norms apart from the ones provided for by *the Constitution*. The Supreme law thus required that such legislation provide for review of administrative action by either a court or independent tribunal. The legislation was also to provide for efficient administration. The basis for review of administrative action is

already provided for in sub-article 1 (expedition, efficiency, lawfulness, reasonableness and procedural fairness). The effect of sub-article 3 was therefore to perfect the enjoyment of these rights, as opposed to suspending such entitlement by divesting the High Court of Jurisdiction to review administrative action.

47. In this regard, the absence of legislation does not render a court helpless given the interpretative refuge afforded by article 20(3) of *the Constitution*. It provides that:

> " In applying a provision of the Bill of Rights, a court shall-
>
> a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and
>
> b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom."

48. In view of the foregoing analysis, we must answer in the affirmative, the question as to whether article 47 of *the Constitution* was correctly applied by the High Court in addressing the original claim.

**iii. Whether the appellants were time barred in lodging their claim**

49. The respondents submit that the appellants are guilty of inordinate delay, having waited for twenty years before filing suit at the High Court. The Court of Appeal held in favour of this argument, finding that the process of transfer, affecting both parcels of land, had been commenced in 1989 and concluded in 1992, while the petition was filed over twenty years later. On the other hand, the appellants contend that they acted promptly as soon as they became aware of the construction of the wall whose effect was to block their view of and access to the ocean. It is their case that, the offending wall was constructed in August 2011, while they filed their petition on February 17, 2012; exactly seven months after the commencement of the wall.

50. The assertions by both parties, regarding the dates of completion of the transfer of the suit lands, and the commencement of the erection of the wall, have not been factually controverted. It is trite law that for a party to be time-barred from litigating its claim, such limitation of time must be stated in *the Constitution*, statute or as a principle of Common law. To be successfully raised against a litigant, a court must determine when the time started running. In other words, the question as to when the cause of action arose has to be settled so as to shut out a litigant on grounds of passage of time. These principles/conditions were never at play in the appeal, nor are they evident on the face of the appellate court's conclusions. It is not lost to us, that the gravamen of the appellants' grievance, was the allocation of the disputed land by the 3rd respondent to the 1st and 2nd respondents and

consequent erection of the wall thereon by the latter. Therefore, the cause of action arose, not at the time of the completion of the transfers, but at the commencement of the erection of the wall. We therefore find no basis upon which the appellants can be said to have slept on their rights.

**iv. Whether the disputed land was public land, and if so, whether the same was available for allocation**

51. It is the appellants' case that the land known as MN/1/5901 was allocated to the 2nd respondent after the 3rd respondent had consolidated three plots, namely MN/1/3622/ A&B and MN/1/856. It was after consolidation that an additional portion measuring 6.0 Ha was allocated to the 2nd respondent through a Letter of Allotment dated June 2, 2011June 2, 2011. They therefore submit that the 3rd respondent's action of extending the boundary of MN/1/5901 to the High-Water Mark was unlawful as it violated the appellants' right to property (Easement of view) and also breached the provisions of section 45 of the *Survey of Kenya Act* (cap. 299) and regulation 110 (1) of the *Survey Regulations*. The appellants argue that this portion of land was excised out of the "foreshore" which is land reserved for public use, including recreation, and therefore not available for allocation to private entities. In support of their position, they cite the contents of a Survey Report which had been tabled in evidence at the High Court, confirming the public status of the land.

52. The respondents on the other hand, submit that the land in question, was un-alienated government land, within the meaning of section 3 of the Government Lands Act (repealed) pursuant to which it was allocated. The said section, submit the respondents, empowers the President to make grants or dispositions of any estate, interest, or right in or over un-alienated government land. It is their contention that the allocation having been made under this Section, conferred absolute and indefeasible title upon the 1st and 2nd respondents, which title could not be defeated, unless on grounds of fraud. It is their further argument, that absent an easement over the land, no right of access to the ocean could be claimed by the appellants. They are categorical that land parcels MN/1/5901 and MN/1/5902 had never been public land, nor had they ever been reserved for public use. As such, they conclude, these parcels do not fall under the categories of public land as defined under article 62 of *the Constitution*.

53. The status of the two parcels of land, can only be determined by an examination of the relevant provisions of *the Constitution* and applicable statutes. Towards this end, article 62(1) (a) and (l) provides that Public Land is *inter alia*;

    a. land which at the effective date was un-alienated government land as defined by an Act of Parliament in force at the effective date;

    l. all land between the high and low water marks.

54. Pursuant to section 45 of the *Survey Act*, the *Survey (Amendments) Regulations 1994*, were enacted. Regulation 110 thereof provides as follows:

Coastal offshore reservation

> "110. (1) Where unalienated Government land fronting on the area coast is being surveyed for alienation, a strip of land not less than 60 metres in width shall normally be reserved above the high-water mark for Government purposes:
>
> Provided that, if the interests of development require, the Minister may direct that the width of this reservation shall be less, than 60 metres in special cases.
>
> (2) High-watermark in all cases in these regulations means the 'Mean High Water Mark of Spring Tides."

Section 82 of the repealed *Government Lands Act* provides:

> "a conveyance, lease or license under this Act shall not, unless otherwise expressly provided therein, confer any right to the foreshore".

55. A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, un-alienated government land is public land within the context of article 62 of *the Constitution* and the Government Lands Act (repealed). This notwithstanding the fact that, the expression "Public Land" only came to the fore with the promulgation of the 2010 Constitution. What article 62 of *the Constitution* does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of "public tenure". The retired constitution used the term "government" instead of "public" to define such lands. Therefore, it is incorrect for the respondents to assert that the lands in question were un-alienated government land but not public land. It is even more inaccurate to argue that the said parcels had never been public land. Un-alienated government land remains public until it is privatized through allocation to individuals or other private entities.

56. Secondly, to the extent that this assertion by the appellants remains un-controverted, the additional portion of land (6.0 Ha. thereof), which land is comprised within Plots MN/1/5901 and MN/1/5902 (allocated to the 2nd and 1st respondents respectively) was hived off the coastal foreshore by the 3rd respondent. Such foreshore consists of land lying between the Low-Water Mark and the High-Water Mark plus an additional 60 metres above the High-Water Mark within the meaning of regulation 110(1) of the *Survey Regulations of 1994*. Such land is reserved for Government/Public use.

57. Although article 62(1)(l) of *the Constitution* makes no reference to the 60 metres above the High-Water Mark (only limiting itself to the language of "the high and low water mark") sub-article (1)(n) provides for another category of public land as being any other land declared to be public land by an Act of Parliament in force at the effective date; or enacted after the effective date; hence the relevance of regulation 110(1) which was enacted before the effective date pursuant to section 45 of the *Survey Act*. Furthermore, section 82 of the *Government Lands Act* (repealed) which predates the *Survey Act*, and under which the lands herein fell as un-alienated government land, out-rightly forbids the conferment of any right to the foreshore by a conveyance, lease or license.

58. Thirdly, the right of access to the Ocean through the foreshore by members of the public or any other owner of land along the coast (ie, the appellants) whether for economic, recreational or aesthetic reasons, is a public right secured by a public easement. Such right is not acquired through a private treaty. It follows that a person or private entity who has encroached on the foreshore cannot interfere with or limit the enjoyment of a public easement through acts of commission or omission. On the other hand, the Government may interfere with or limit such easement only in promotion or protection of the Public Interest as guaranteed by *the Constitution* and the law.

59. The foregoing determination of the issues, leads us to make the following declarations:

    a. The 3rd respondent herein, acted illegally by allocating land parcel No MN/1/5901 to the 2nd respondent, which land he had partly curved out of the foreshore contrary to section 82 of the Government Lands Act (repealed) and regulation 110(1) of the Survey Regulations of 1994.

    b. The 3rd respondent herein, acted illegally by allocating land parcel No MN/1/5902 to the 1st respondent, which land he had curved out of the foreshore contrary to section 82 of the *Government Lands Act* (repealed) and regulation 110(1) of the *Survey Regulations of 1994*.

    c. The actions of the 3rd respondent herein, violated the appellants' right to fair administrative action as guaranteed by article 47 of *the Constitution*.

60. As a consequence of the foregoing declarations, we make the following orders:

**F. Orders**

i. The appeal is hereby allowed.

ii. The Judgment of the Court of Appeal dated November 11, 2016 is hereby set aside.

iii. The Judgment of the High Court dated October 13, 2015 is hereby affirmed only to the extent consistent with and limited to our declarations in (a)(b) and (c) above.

iv. The 1st and 2nd respondents herein, shall take immediate action to remove the offending wall and any other structures that they may have caused to be erected on land parcels No. MN/1/5901 and MN/1/5902.

v. The costs of this appeal shall be borne by the 1st and 2nd respondents.

It is so ordered.

**Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others (Petition 2 of 2018) [2021] KESC 50 (KLR) (16 July 2021) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2021] KESC 50 (KLR)

***Constitutional Law*** *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms - rights to property and inherent human dignity and security of the person – claim that inhabitants of an informal settlement had been forcefully evicted without a valid court order - whether the constitutional guarantees of the right to property extended to property that had been unlawfully acquired – whether the demolition of the houses and property of inhabitants of informal settlements and their forced eviction without a valid court order was a violation of their fundamental rights to inherent human dignity and security of the person – Constitution of Kenya, 2010, articles 28, 29(c) and 40.*

***Constitutional Law*** *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms - social and economic rights – progressive realization of social and economic rights – obligations of the State – what were the obligations of the State in applying economic and social rights – whether the mandate of the progressive realization of economic and social rights by the State extended to private entities - Constitution of Kenya, 2010, article 43.*

***Constitutional Law*** *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms – remedies of violation of fundamental rights and freedoms – award of damages – award of damages for constitutional violations vis-à-vis award for damages in tortious or civil liability - whether the questions and issues that a court had to consider in order to make an award of damages with regards to constitutional violations were different to what the court would consider in tortious or civil liability claims – Constitution of Kenya, 2010, article 23.*

**Brief facts**

The petitioners filed a petition at the High Court concerning the alleged forceful and illegal eviction of the petitioners, who were inhabitants of City Cotton and Upendo villages, two informal settlements within the Nairobi County. The petitioners' claim was that they had settled on the suit property in 1968. They further claimed that since settlement, they had constructed semi-permanent houses and business structures; had been supplied with social amenities and services such as water and electricity, and had been legally licensed to carry on and operate businesses on the suit property. They also alleged that their children attended nearby public primary schools.

The High Court found that the demolition of the petitioners' houses and their forced eviction from the suit property without providing them and their children with alternative land or shelter was a violation of their fundamental rights to inherent human dignity, security of the person and access to adequate housing, a violation of the fundamental rights of children and a violation of the rights of elderly persons. The High Court also awarded the petitioners, damages.

Aggrieved by the decision of the High Court, the respondents filed an appeal at the Court of Appeal. The appeal at the Court of Appeal was partly allowed and the court issued a declaration that the

forced evictions and demolition of the petitioners' houses without a valid court order was a violation of their right to inherent human dignity and security of the person. The Court of Appeal found that there was no evidence placed before the High Court to enable it assess damages and that whereas it was the duty of the State to take measures, (legislative, policy and other measures) to achieve the progressive realization of the rights guaranteed under article 43 of the Constitution of Kenya, 2010 (the Constitution), it was not under a positive obligation to provide the evictees with housing. Further aggrieved, the petitioners filed the instant appeal.

**Issues**

i. Whether the constitutional guarantees of the right to property applied to property that had been unlawfully acquired.
ii. What were the obligations of the State in applying article 43 rights (economic and social rights – provided in article 43 of the Constitution)?
iii. Whether the mandate of the progressive realization of economic and social rights by the State extended to private entities?
iv. Whether the questions and issues that a court had to consider in order to make an award of damages with regards to constitutional violations was different to what the court would consider in say, a tortious or civil liability claim.
v. Whether the demolition of the houses and property of inhabitants of informal settlements and their forced eviction without a valid court order was a violation of their fundamental rights to inherent human dignity and security of the person.
vi. Whether the demolition of the houses and property of inhabitants of informal settlements and their forced eviction was a violation of the fundamental rights of children.

**Relevant provisions of the Law**

**Constitution of Kenya, 2010**

**Article 43 - Economic and social rights**

*(1) Every person has the right—*

*(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;*

*(b) to accessible and adequate housing, and to reasonable standards of sanitation;*

*(c) to be free from hunger, and to have adequate food of acceptable quality;*

*(d) to clean and safe water in adequate quantities;*

*(e) to social security; and*

*(f) to education.*

*(2) A person shall not be denied emergency medical treatment.*

*(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.*

**Held**

1. The constitutional guarantees of the right to property ownership and entitlement under article 40 of the Constitution were only in relation to property that had been legally acquired, and did not extend to property that had been unlawfully acquired.
2. The issue of the legality of the letter of allotment would be better determined by the National Land Commission as provided under section 152(C) of the Land Act, and which provision further allowed for the procedure to be followed in the event of an eviction(s). However, the procedures enacted in the amendments to the Land Act, through the Land Laws (Amendments) Act No. 28 of 2016, amended the provisions of the Land Act to include the powers of the National Land Commission in land eviction matters, and were only enacted in September, 2016, when the instant matter had already been instituted and determined by the High Court. The relevant court seized of jurisdiction over land matters – the Environment and the Land Court – should have determined that question.
3. Forced evictions generally constituted a violation of fundamental rights and freedoms and an abuse of inherent human rights and dignity under article 43 of the Constitution, including, but not limited to, the right to the highest attainable standards of health and healthcare services, accessible and adequate housing, freedom from hunger and to adequate food, clean and safe water, social security and education. The onus of ensuring that those rights and freedoms were attained and provided for fell squarely under the ambit of the State; and that it was the obligation of the State to ensure that those rights and freedoms were not limited without reasonable justification in an open and democratic society based on human dignity, equality and freedom as provided for under article 24(1) of the Constitution.
4. In ensuring that social and economic rights were protected, the State had to strike a delicate balance between the rights of those that were most vulnerable in the society and those that were in economic advantage. The State thus had to ensure that in the protection of the rights of an individual or group of persons, it did not inadvertently abuse the rights of other individuals or other groups of persons. There was no abuse of the rights of the parties and thus, that the State's negative obligation not to abuse or violate those rights and fundamental freedoms was carried out.
5. The eviction of the petitioners was violent and did not accord with the expected constitutional obligation of the State to ensure that those in informal settlements were treated with the dignity that was conferred on article 28 of the Constitution. The petitioners were evicted when the 1st respondent had already acquired certain private rights over the suit property but they entered the land well aware of the presence of the petitioners who occupied the land when it was public land. Even without prescriptive rights, where the landless occupied public land and established houses thereon, they acquired no title to the land, but a protectable right to housing over the same. The participation of State agents in violent evictions only pointed to the fact that the 1st respondent ultimately acquired favoured

status outside the law in acquiring ultimate and total control of the suit property at the cost of violation of the rights of the petitioners including the elderly and children.

6. The principles laid out in *Mitubell Welfare Society v. Kenya Airports Authority*, SC Petition No.3 of 2018 and *Satrose Ayuma & 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*, Constitutional Petition No.65 of 2010 which were crystalized in law in section 152(a) to (h) of the Land Act were applicable to the instant matter. The principles included the duty;
   a. to give notice in writing;
   b. to carry out the eviction in a manner that respected the dignity, right to life and security of those affected; to protect the rights of women, the elderly, children and persons with disabilities; and
   c. the duty to give the affected persons the first priority to demolish and salvage their property.
7. The principles flowed from United Nations Guidelines on Evictions: General Comment No.7 and were intended to breathe life into the right to dignity and the right to housing under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights respectively.
8. It was redundant to ask whether the eviction of the petitioners resulted in a violation of their rights under the Constitution. Even the ordinary man in the street, confronted with the facts would answer the question in the affirmative.
9. It was the responsibility of the State to ensure that the rights guaranteed in article 43 of the Constitution were realized progressively. The obligation to ensure the rights of petitioners under article 43 thus fell on the State. The State was imbued with the duty to ensure that those rights were realized, in consideration of prevailing circumstances such as the availability of resources, or the implementation of policy and structural programs to ensure that the rights were realized.
10. The mandate to ensure the realization and protection of social and economic rights did not extend to the 1st respondent, a private entity. Even though the 1st respondent had a negative obligation to ensure that it did not violate the rights of the petitioners, it was not under any obligation to ensure that those rights were realized, either progressively or immediately. The progressive realization of article 43 rights (economic and social rights) was the mandate of the State, and that obligation did not extend horizontally to private entities. Private entities had the obligation under article 20(1) of the Constitution not to violate article 43 rights as non-violation of all rights in the Bill of Rights applied both horizontally and vertically and bound both the State and all persons.
11. There was sufficient evidence that was presented before the trial court which enabled it to arrive at the decision that it did. The Court of Appeal in disturbing the award of damages issued by the trial court did not show how the court abused its discretionary powers to award damages, or that the court exercised its discretion whimsically or capriciously.

12. What the Court of Appeal failed to consider was that the questions and issues that a court had to consider in order to make an award of damages with regards to constitutional violation was manifestly different to what the court would consider in say, a tortious or civil liability claim. In the latter, the issues were clear cut and quantification of the appropriate award was in most instances, straight forward. The same, however, was not true of constitutional violation matters, such as the instant one. Quantification of damages in such matters did not present an explicit consideration of the issues; other issues such as public policy considerations also come into play.
13. A court obligated and mandated in evaluating the appropriate awards for compensation in constitutional violations did not have an easy task; there was no adequate damage standard that had been developed in our jurisprudence that recognized that an award for damages in constitutional violations was quite separate and distinct from other injuries. In that regard, the Court of Appeal was unclear on what other material that the petitioners needed to present before the trial court to establish that there was a violation of their constitutional rights by the respondents, and that the court therefore abused its discretionary powers in issuing the award of damages.
14. It was a sad state of affairs that ten years into the promulgation of the Constitution of Kenya 2010, the State sought to rid itself of its mandate and obligations by hiding behind the perceived inconsistencies sometimes presented in the Constitution, and in the instant context, the provisions of article 21(2) of the Constitution, and to abdicate its role in ensuring that article 43 rights of the Constitution were realized. Article 21(2) did not protect the State from realizing those rights, but rather sought to ensure that even though those rights were not immediately achieved, there was at least some modicum of effort by the State to realize those rights. There should be continued concerted efforts by the State in the progressive realization of those rights and therefore, the State should take deliberate steps, both immediately and in the future, towards the full realization of the rights.
15. Policy and legislative formulation and lack of adequate resources had been the reasons given by the State in the realization of article 43 of the Constitution rights. Although the State seemed to be at the forefront in the realization of article 43 rights, more was yet to be done, especially in the realization aspect. As for the enforcement of those rights, nothing much could be achieved if the legislative and policy processes were at the nascent stage.
16. The acts by the State could be regarded and considered by some, as acts of regression, which ended up depriving the people of the rights that they should be enjoying. They were a contradiction to the progressive realization principle and constituted a violation of those rights. Those acts, unless they were limitations to the realization of those rights which were justifiable and reasonable in accordance with article 24(1) of the Constitution, were counter-intuitive to the realization of social economic rights under article 43 of the Constitution. The State had to take a more drastic and purposive approach to its mandate and obligations

in ensuring that the rights to the people of Kenya were not violated, or in the very least, that those rights were not deprived or denied.

*Appeal partly allowed.*

***Orders***

i. *A declaration was issued that the demolition of the petitioners' houses and property and their forced eviction by the 1st and 2nd respondents without a valid court order was a violation of their fundamental rights to inherent human dignity and security of the person guaranteed under articles 28 and 29(c) of the Constitution.*

ii. *A declaration was issued that the demolition of the petitioners' houses and property and their forced eviction by the 2nd and 3rd respondents was a violation of their fundamental rights to inherent human dignity, security of the person, and to accessible and adequate housing guaranteed under article 43 of the Constitution*

iii. *A declaration was issued that the demolition of the petitioners' houses and property and their forced eviction by the 2nd and 3rd respondents was a violation of the fundamental rights of children guaranteed under article 53 of the Constitution.*

iv. *A declaration was issued that the demolition of the petitioners' houses and property and their forced eviction by the 2nd and 3rd respondent was a violation of the fundamental rights of elderly persons guaranteed under article 57 of the Constitution.*

v. *The 1st respondent was to pay a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000) to each of the petitioners.*

vi. *The State was to pay a sum of Kenya shillings One Hundred Thousand (Kshs. 100,000) to each of the petitioners.*

vii. *Costs awarded to the petitioners.*

**Citations**

**Cases**

***Kenya***

1. *Ayuma, Satrose & 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* Petition 65 of 2010; [2011] KEHC 3992 (KLR) - (Followed)
2. *BA & another v Standard Group Limited & 2 others* Civil Appeal 224 of 2012 ;[2016] eKLR - (Followed)
3. *Baobab Beach Resort and Spa Limited v. Duncan Muriuki Kaguuru & another* Civil Appeal 296 of 2014; [2017] KECA 192 (KLR) - (Followed)
4. *Butt v Khan* Civil Appeal 40 of 1977; [1978] KECA 24 (KLR); [1981] KLR 297 - (Followed)
5. *COI & another v Chief Magistrate Ukunda Law Courts & 4 others* Civil Appeal 56 of 2016; [2018] KECA 15 (KLR) - (Explained)
6. *Ethangatta, Simon M v Eddah Wanjiru Mbiyi & another* Civil Case 117 of 2007; [2007] KEHC 281 (KLR) - (Followed)

7. *Gicheru, Johnston Evan v Andrew Morton and another* Civil Appeal 314 of 2000; [2005] KECA 81 (KLR) - (Mentioned)
8. *Gitobu Imanyara & 2 others v Attorney General* Civil Appeal 98 of 2014; [2016] KECA 557 (KLR) - (Followed)
9. *Ikere, Jemimah Wambui v. Standard Group Limited & another* Petition 466 & 416 of 2012; [2013] KEHC 636 (KLR) - (Followed)
10. *In Re the Matter of Kenya National Human Rights Commission* Reference 1 of 2012' [2012] eKLR - (Followed)
11. *In the matter of the principle of gender representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR)
12. *Kagunda , Loice Wanjiku v Julius Gachau Mwangi* Civil Appeal No. 142 of 2003 - (Mentioned)
13. *Kariuki, Peter M v Attorney General* Civil Appeal 79 of 2012; [2014] KECA 713 (KLR) - (Mentioned)
14. *Kariuki, Susan Waithera & 4 others v Town Clerk Nairobi City Council & 3 other* Petition 66 of 2010; [2013] KEHC 2240 (KLR) - (Followed)
15. *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Olive Lubia & another* Civil Appeal 34 of 1982; [1983] KECA 61 (KLR); (1982 –88) 1 KAR 727 - (Mentioned)
16. *Kenya Airports Authority v Mitu-Bell Welfare Society & others* Civil Appeal 218 of 2014; [2016] KECA 432 (KLR) - (Followed)
17. *Miano, Jamlik Muchangi v Attorney General* Constitutional Petition 300 of 2015; [2017] KEHC 8422 (KLR) - (Followed)
18. *Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA) (Applicant)* Petition 3 of 2018; [2019] KESC 18 (KLR) - (Explained)
19. *Onjuro , Kepha Omondi & others v Attorney General & 5 others* Petition 239 of 2014; [2015] KEHC 6868 (KLR) - (Explained)
20. *Osman, Ibrahim Sangor v. Minster of State for Provincial Administration and Internal Security & 3 others* Constitutional Petition 2 of 2011; [2011] eKLR - (Explained)
21. *Rubia, Mike & another v Moses Mwangi & 2 others* Petition 70 of 2012; [2014] KEHC 8200 (KLR) - (Mentioned)
22. *Wanderi & 106 others v Engineers Registration Board & 7 others; Egerton University & another (Interested Parties)* Petition 19 of 2015 & 4 of 2016 (Consolidated); [2018] KESC 54 (KLR) - (Explained)

***South Africa***

1. *Dendy v University of Witwatersrand, Johannesburg & others* [2006] 1 LRC 291 - (Mentioned)
2. *Government of the Republic of South Africa and others v. Grootboom and others* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 - (Explained)

***Canada***

*Doucet-Boudreau v Nova Scotia (Minister of Education)* 2003 SCC 62 - (Mentioned)

***Regional Court***

1. *Coussens v Attorney General* [1990] 1 EA 40 - (Followed)
2. *Georgia v Russia* Application No 13255/07 - (Followed)

**Trinidad and Tobago**

*Romauld Jame v Attorney General for Trinidad & Tobago* [2010] UKPC 23 ; Privy Council Appeal No 0112 of 2009 - (Followed)

**Statutes**

***Kenya***

1. Constitution of Kenya - (Interpreted) articles 2(5)(6); 20(5)(a), (b); 21(2); 23; 28 ;29; 40 ; 43 ; 53; 57; 163(4)(a)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 - (Interpreted) rule 10, 22
3. Land Act (cap 280) - (Interpreted) section 152(A)-(G)
4. Supreme Court Act (cap 9B) - (Interpreted) section 15(2)
5. Supreme Court Rules, 2014 (cap 9B Sub Leg) - (Interpreted) rule 33

**Instruments**

1. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), E/1992/23, 13 December 1991

2. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, E/1998/22, 20 May 1997

3. UN Economic and Social Council, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), E/1991/23, UN Committee on Economic, Social and Cultural Rights (CESCR), 14 December 1990

4. UN General Assembly, International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966

**Advocates**

None mentioned

July 16, 2021, the Court delivered the following Judgment:

## A Introduction

1. This Petition of Appeal dated and lodged on 29th January 2018 is brought pursuant to the provisions of Article 163(4)(a) of the *Constitution*, together with Section 15(2) of the *Supreme Court Act* and Rule 33 of the *Supreme Court Rules*, 2012 (repealed). The Petitioners seek to set aside the Judgment of the Court of Appeal (Waki, Makhandia & Gatembu, JJA) in Civil Appeal No.363 of 2014 delivered on 15th December 2017, which partially allowed an appeal against the High Court (Mumbi Ngugi, J (as she then was) Judgment in Constitutional Petition No.264 of 2013 as consolidated with Constitutional Petition No.274 of 2013 delivered on 14th October 2014.

2. The Petition concerns the alleged forceful and illegal eviction of the Petitioners, who were inhabitants of City Cotton and Upendo villages, two informal settlements within the County of Nairobi. The main issue for determination regards the interpretation of the right to accessible and adequate housing provided under Article 43 of the *Constitution of Kenya*, 2010 (the Constitution). The Petition also seeks to interrogate and contrast the obligations of the State and that of private citizens to observe, respect, protect, promote or fulfil constitutional rights, more specifically the right to dignity under Article 28, the right to adequate housing in Article 43, rights of children pursuant to Article 53 and of older persons under Article 57. It also seeks to address the issue of the interpretation of the constitutional remedy of compensation, provided under Article 23(3) of the Constitution, in instances where a Court has made a pronouncement on violation of rights and fundamental freedoms as enunciated under the *Constitution*.

## B Background

### i. Proceedings at the High Court

3. The Petitioners, on their own behalf and on behalf of other persons, filed two constitutional Petitions before the High Court; Petition No.264 of 2013 and Petition No.274 of 2013, which were subsequently consolidated and heard as Petition No.264 of 2013. The Petitioners' claim was that they had settled on the property known as LR No.209/11207 (the suit property) sometimes in 1968, which they contended, was unalienated public land, and that since settlement, they had constructed semi-permanent houses and business structures; had been supplied with social amenities and services such as water and electricity, and had been legally licensed to carry on and operate businesses on the suit property. They also alleged that their children attended nearby public primary schools.

4. It was also claimed that in 1980 or thereabouts, the 1st Respondent invaded the suit property and, in the process, evicted and displaced about 200 families. These evictees, it was further alleged, were resettled in an informal settlement village known as Fuata Nyayo in South B, Nairobi County. In the meantime, it is alleged that the 1st Respondent was issued with a letter of allotment dated 22nd January 1981 by the Commissioner of Lands. The 1st Respondent then subsequently commenced the construction of Moi Educational Centre, a private primary school.

5. The Petitioners' claim arises out of their alleged forced eviction and the demolition of their property on 10th and 17th May 2013 by groups of persons alleged to have been assisted by officers of the 2nd Respondent. The eviction from the suit property was allegedly carried out following an order issued by the Chief Magistrate's Court at Milimani Commercial Court in Misc. Civil Application No. 303 in 2013, in which the 1st Respondent was levying distress for rent against Elijah Memba, the 4th Petitioner herein and one Milcah Wanjiru. The order had been issued to Kangeri Wanjohi T/A Kindest Auctioneers Ltd in favour of the 1st Respondent. It was issued on the basis that the 4th Petitioner and the said Milcah Wanjiru were tenants of the 1st Respondent, and had fallen into rent arrears to the tune of Kshs. 960,000/-.

6. The 4th Petitioner and the said Milcah Wanjiru denied being tenants of the 1st Respondent, or that they had entered into any lease agreement as alleged in the Court proceedings. They instead claimed that they had settled on the suit property on or about 1973 and 1976, and that any lease agreement purportedly entered into by themselves and the 1st Respondent were forgeries.

7. The Petitioner's furthermore claimed that the evictions from the suit property on 10th May 2013 and 17th May 2013 were violent and brutal; that the persons carrying out the eviction not only demolished their houses and business structures, but also burnt down the building material and other possessions belonging to the Petitioners. They also alleged that they were unable to salvage anything during the evictions and that they were never issued with any notice to vacate or the aforesaid order of eviction or distress for rent from the Court.

8. In its Judgment delivered on 14th October 2014, the Court Mumbi Ngugi, J (as she then was) found that the demolition of the Petitioners' houses and their forced eviction from the suit property without providing them and their children with alternative land or shelter was a violation of their fundamental right to inherent human dignity, security of the person and access to adequate housing, a violation of the fundamental rights of children guaranteed by Article 53 of the *Constitution* and a violation of the rights of elderly persons guaranteed by Article 57. In addition to those declarations, the Court awarded the Petitioners, damages.

9. With regard to the evictions, the Court stated that there was an unapologetic admission by the 1st Respondent that it carried out the eviction of the Petitioners from the suit property. It was also observed that the 1st Respondent hired police officers to oversee the eviction and the construction of a wall around the subject property once the Petitioners had been evicted and their houses demolished. The Court thus proceeded to conclude that the eviction of the Petitioners was not sanctioned by the law or authorized through a Court order and in the circumstances, the acts of the Respondents were unlawful and unjustified. The Court, in addition, found that an eviction of the nature undertaken by the Respondents did not just violate the right to housing but also violated the Petitioners' rights guaranteed under Articles 28, 29, 43, 53 and 57 of the *Constitution*.

**ii. Proceedings at the Court of Appeal**

10. Aggrieved by the decision of the High Court, the Respondents filed an appeal, Nairobi Civil Appeal No.363 of 2014, where the issues for determination were summarized as follows;

    i. Whether the evictees' amended petition was properly drafted to show the rights infringed, the manner of infringement and the remedies sought;

    ii. Whether the appellant has any obligation to provide alternative accommodation to the evictees and to ensure the realization of economic and social rights under Article 43 of the Constitution;

    iii . Whether the Judge appreciated and considered the appellant's rights over the property under Article 40 of the Constitution;

    iv. Whether the appellant was obligated to obtain a court order prior to evicting the evictees;

    v. Whether the appellant gave justifiable reasons and sufficient notice to the evictees prior to eviction;

    vi. Whether there was sufficient proof of violation of the evictees rights; and

    vii . Whether the learned Judge of the High Court was correct in granting the orders that she did and in awarding compensation to the evictees.

11. On the issue of whether the amended Petition was competent, the Court of Appeal was of the same view as the High Court, that the amended Petition filed at the High Court met the requirements under Rule 10 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013. The Court added that since the Respondents had admitted the evictions from the property and demolition of structures, and since there was no suggestion in the lower Court that the Respondents did

not understand the case put forth or that they were in any way handicapped from answering the evictees' complaints, then there was no merit in this ground of appeal.

12. With regards to property rights guaranteed and provided for under Article 40 of the *Constitution*, the learned Judges found that the Respondents' grievance giving rise to this issue was, to some extent, based on a misapprehension of the impugned judgment. The Court held that the evictees did not claim ownership of the property, but their complaint was that they were already in possession well before the 1st Respondent became the registered proprietor and that the allotment of the property and the registration of the same in the name of the 1st Respondent was irregular and illegal. That they accordingly had sought a declaration that the 1st Respondent had acquired the property unlawfully.

13. Furthermore, the learned Judges found that the High Court Judge refused to entertain the complaint as to the legality or otherwise of the 1st Respondent's title on the reasoning that the determination of that issue, was best left to the National Land Commission or a Court of law seized of that particular matter which could then call for relevant evidence and examine all such documents pertaining to the allocation of the land to the 1st Respondent.

14. On the High Court's interpretation of Article 43 of the *Constitution* as entailing "a negative obligation not to deprive citizens of ... shelter" and that "the Bill of Rights applies both vertically-as against the State, and horizontally-against private persons, and that in appropriate cases, a claim for violation of a constitutional right can be brought against a private individual", the learned Judges differed with the High Court's holding and instead held that the Judge misdirected herself in extending the obligation for provision of alternative land or shelter to the 1st Respondent. The Judges also faulted the High Court for lumping the 1st Respondent together with the State, as having or bearing the responsibility or obligation to provide the evictees with housing.

15. The Court in that context stated that under Article 21(2) of the *Constitution*, it was the duty of the State to take measures, "legislative, policy and other measures" to achieve the progressive realization of the rights guaranteed under Article 43. That whereas the 1st Respondent was on its part under an obligation not to violate the evictees' rights in that regard, it was not under a "positive" obligation to provide the evictees with housing.

16. On whether the High Court correctly and properly awarded damages to the Respondents, the appellate Court found that the High Court ought to have taken into consideration the provisions of Article 21(2) of the *Constitution* when granting such reliefs, and proceeded to find that in declaring, in effect, that the 1st Respondent and the State had violated the Respondents' rights to accessible and adequate housing, it was not apparent that the Court had regard to Article 21(2). The Court thus proceeded to find that there was no evidence placed before the trial Court to enable it assess damages, and further, that in the

circumstances of the case, it was incumbent upon the present Petitioners to place material before the Court on the basis of which the Court would undertake an enquiry to ascertain the extent of loss so as to arrive at a reasonable amount.

17. In its final holding, the appellate Court set aside parts of the decision of the High Court, and the appeal was rendered partially successful. The appellate Court thus substituted the Judgment with a declaration that the forced evictions and demolition of the Respondents houses without a valid Court order was a violation of their right to inherent human dignity and security of the person. In reaching this holding, the appellate Court stated;

> "To our mind; the only relief that should have commended itself to the trial Court was a declaration that the forced eviction and demolition of their houses without a Court order is a violation of their right to human dignity and security of the person. The rest of the prayers would fall by the wayside." [Para. 74]

**iii. Proceedings before the Supreme Court**

18. Aggrieved by the Judgment and orders of the appellate Court, the Petitioners have filed this Petition arguing that the learned Judges of the Court of Appeal erred in law and in fact in:

i. Holding that it was not clear from the High Court's judgment what informed the awards or how the amounts of the award were arrived at yet the Judge had stated the proportional objective was deterrence and vindication;

ii. Upsetting the Judge's discretionary award of compensation for pleaded violations when the 1st Respondent admitted to carrying out the evictions;

iii. In unduly interfering with the constitutional jurisdiction of the High Court under Article 23 to award any appropriate relief including an order for compensation for violation of the Petitioners' rights and freedoms;

iv. Imposing the need to conduct a separate hearing for the assessment of damages where the same was not pleaded and in reliance of a foreign case from a jurisdiction with no constitutional provisions that are equivalent to Article 23 of the *Constitution*;

v. Requiring the Petitioners to strictly prove or quantify damages for violation of constitutional rights without taking into consideration that a request for general damages was pleaded which need not be proved through evidence of material loss;

vi. Failing to find that under international law, forced and illegal evictions are prima facie violations of the right to adequate housing similarly protected under Article 43 of the *Constitution*;

vii. Failing to find that the 1st Respondent violated its negative obligation under Article 21(1) to observe and respect the Petitioners' right to adequate housing under Article 43 of the Constitution;

viii. Failing to find that the 2nd to 4th Respondents failed in their obligations to observe, respect, protect and fulfil the Appellants' right to adequate housing under Article 43 of the *Constitution*;

ix. Conflating the negative immediately-realizable obligation (to observe and respect) and the positive progressively-realizable obligation (to promote and fulfil) the right to housing;

x. Failing to develop the law to the extent that it did not give effect to the right to housing or adoption of the interpretation most favorable to the enforcement of the Petitioners' right to housing;

xi. Improperly invoking the concept of progressive realization of the right to adequate housing where the State had not pleaded resource unavailability under Article 20(5)(a) and (b);

xii. Failing to find that owing to the interrelationship and interdependency of human rights, the evictions conducted by the Respondents were in violation of the Petitioners' rights to housing, security, dignity and of children and elderly persons;

xiii. Failing to find the Respondents had not in reasonable time given the Petitioners an opportunity for consultations, adequate and reasonable notice, information on the proposed evictions and opportunity for public hearings of the proposed plans and alternatives to evictions; and

xiv. Failing to find that the Petitioners were not given information on the reasons and procedures for their displacement, non-compensation or relocation.

**C. Parties Submissions**

**(a) The Petitioners' submissions**

19. The Petitioners filed their submissions on 18th February, 2020. Therein, they have outlined five issues for determination;

a. Whether the alleged forced evictions violated the Petitioners' rights to adequate and accessible housing, right to dignity, security to persons, rights of children and elderly persons under Articles 28, 29, 43, 53 and 57 of the *Constitution*;

b. Whether the Petitioners were accorded adequate and reasonable time and notice, genuine consultations, or opportunities for hearing or information of the evictions or reasons for their displacement, non-compensation or relocation;

c. Whether the Court of Appeal misinterpreted Article 21 of the Constitution with regard to the positive and negative obligations of the Respondents;

d. Whether the Court of Appeal erred by misapplying the progressive realization doctrine in the realization of the rights under Article 21 as read together with Articles 20(5) (a) and (b) of the *Constitution*; and

e. Whether the Court of Appeal erred in interpreting Article 23 of the Constitution specifically the available remedies in the form of compensation in damages once a Court has determined that there were violations of rights.

20. With regards to the forced evictions being a violation of their rights and fundamental freedoms, the Petitioners submit that the appellate Court erred in law when it failed to make a finding that their right to accessible and adequate housing was infringed as a result of the said illegal evictions, despite stating that the evictions were indeed a violation of their right to human dignity and security. The Petitioners thus urge that illegal evictions are recognized as a prima facie violation of the right to adequate housing.

21. Additionally, they argue that the appellate Court's judgment failed to construe the right to adequate housing in Article 43(1) in a liberal manner, and submit that the Court's interpretation was not in consonance with the provisions of Article 20(2). On this submission, they rely on the decisions in *Satrose Ayuma & 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* Constitutional Petition No.65 of 2010 and *Ibrahim Sangor Osman v. Minster of State for Provincial Administration and Internal Security & 3 Others* [2011] eKLR, where the High Court found that the alleged forced evictions affected several other rights of forcibly evicted persons, including children's rights under Article 53(1) (b) & (c), right to free and compulsory basic education, nutrition, shelter and health care and the rights of elderly persons under Article 57 of the *Constitution*.

22. On the issue of reasonable and adequate notice, genuine consultations, provisions of a hearing, information, reasons for displacement and relocation, the Petitioners submit that the appellate Court erred in failing to find that there were no genuine consultations nor was information granted to the Petitioners prior to the evictions. That the 1st Respondent's failure to consult with the Petitioners, and the State's failure to provide information to the Petitioners was thus contrary to the law. They further submit that under Article 10 of the Constitution, the 1st Respondent and the State are required to facilitate participation of affected persons through consultations prior to conducting any planned evictions.

Furthermore, that the State has a duty under Article 21 of the *Constitution* to ensure that there are relocation or resettlement provisions as well as adequate and reasonable compensation for those that are evicted. They have in that regard cited the decision in *Kepha Omondi Onjuro & Others v. Attorney General & 5 Others* [2015] eKLR where the High Court upheld the legal requirement of continuous public participation and consultations in line with the World Bank Project Affected Persons.

23. With regards to the issue whether the appellate Court's interpretation of Article 21 of the *Constitution* was misguided, it was the Petitioners' contention that the appellate Court misinterpreted and misconstrued the Respondents' obligations under the said provisions. They urge that the Court failed to hold that, in the prevailing circumstances of the case, the 1st Respondent violated their negative obligation while the 2nd to 4th Respondents violated both their positive and negative obligations.

24. The Petitioners furthermore submit that where a private person violates the rights of other private persons, the latter can seek remedies in court for these violations. They rely on the Court of Appeal decisions in *Baobab Beach Resort and Spa Limited v. Duncan Muriuki Kaguuru & another* Civil Appeal No. 296 of 2014; [2017] eKLR and *B A & Another v. Standard Group Limited & 2 Others* [2016] eKLR. They also cited the High Court decisions in *Jemimah Wambui Ikere v. Standard Group Limited & Another* [2013] eKLR as well as *Mike Rubia & Another v. Moses Mwangi & 2 Others [*2014] eKLR. They add that the appellate Court failed to hold that the State failed to meet both its positive and negative obligations under the Constitution by carrying out the evictions and failing to prevent the 1st Respondent from interfering with the Petitioners' enjoyment of their rights.

25. They also fault the Appellate Court's interpretation of the progressive realization principle under Article 20(5) of the *Constitution* especially in relation to the right to adequate housing, on the grounds that the State had not pleaded the principle as a defense. In that context, they highlighted the four main components of the progressive realization doctrine under Article 21(2) namely; (i) an obligation to take positive and necessary steps, (ii) the use of the maximum available resources, (iii) prohibition against retrogressive measures and (iv) international cooperation and assistance. They also cite the provisions of the United Nation's Committee on Economic, Social & Cultural Rights, (CESCR), prohibiting retrogressive measures, and urge that this can only be justified following a consideration of the reasonableness of the act, examination of alternatives to progressive action, genuine participation, long term impacts of the action and whether it deprives access to the minimum essential levels of rights.

26. On whether the Court of Appeal in its interpretation of Article 23 of the *Constitution*, and more particularly on the award of damages as a remedy available for violation of rights, the Petitioners submit that the appellate Court erred in faulting the High Court Judge's award

of damages on the purported ground that it was not clear what informed the award nor the Judge's quantification of the award.

They thus submit that the Judgment of the High Court was unambiguous in its finding that the Respondents had violated the Petitioners' rights, and damages were subsequently awarded based on the principles of deterrence and vindication. They also submitted that the appellate Court erred in faulting the trial Judge's discretionary power to award damages as compensation for pleaded violations and a remedy set out under Article 23 of the *Constitution* as pronounced in *Bashir Ahmed Butt v. Uwais Ahmed Khan* [1981] KLR 297.

27. They furthermore submit that the appellate Court erred in requiring them to strictly prove or quantify damages for violation of their rights and freedoms without taking into consideration that the Petitioners had not prayed for special, but general damages, which do not require to be proved strictly nor quantified. They further argue that the Court of Appeal was wrong in contradictorily holding that although the evictions were illegal, that there was nonetheless, no violation of the right to adequate housing. They add that a declaration of violation of rights alone was not an appropriate remedy and the trial Court was correct in granting award of damages and that the calculation of damages for constitutional violations does not lend itself to a process of calculation or precise quantification. They rely on the High Court case of *Jamlik Muchangi Miano v. Attorney General* [2017] eKLR, *Georgia v. Russia*, European Court of Human Rights, Application No. 13255/07 and *Coussens v. AG* [1990] 1 EA 40 to buttress this argument.

28. In conclusion, the Petitioners fault the appellate Court for holding that there was a requirement to conduct a separate hearing for assessment of damages. They urge that the Appellate court relied on foreign jurisprudence in *Romauld Jame v. Attorney General for Trinidad & Tobago* [2010] UKPC 23 Privy Council Appeal No. 0112 of 2009 from Trinidad and Tobago, which has no constitutional equivalence of Article 23 of the *Constitution*.

**b. 1st Respondent's submissions**

29. The 1st Respondent's written submissions dated 30th June, 2020 were filed on even date. In their submissions, they submit and respond to two issues;

    (a) whether the forced eviction violated the Petitioners' rights under Articles 28, 29, 49, 53 and 57 of the *Constitution*; and

    (b) whether the Court of Appeal misinterpreted Article 21 of the *Constitution* with regards to the positive and negative obligations on the right to accessible and adequate housing.

30. In the above context, they submit that the appellate Court did not fault the trial Court in its finding in respect to the nature of the right to accessible and adequate housing or the positive and negative obligations of the State. They however, argue that the trial Court's holding on the duty bearers in respect of the right to accessible and adequate housing, and more specifically, for enjoining them with the State as duty bearers in respect to the right to adequate and accessible housing, was erroneous.

31. They furthermore argue that it was erroneous of the trial Court to extend the State's obligation to ensure and provide alternative land or shelter to the 1st Respondent, a private entity. They therefore submit that Article 21(1) of the *Constitution* imposes a fundamental obligation on the State and every State organ to promote, respect and fulfil fundamental rights and freedoms, but most importantly, that Article 21(2) compels the State to take legislative, policy and other measures including the setting of standards to achieve progressive realization of rights guaranteed under Article 43.

32. They in addition, argue that the provision of accessible and adequate housing is not the responsibility or obligation of any private citizen(s), but that of the State. On this point they rely on the decision by the Constitutional Court of South Africa in *Government of the Republic of South Africa and Others v. Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (Grootboom) where the Court emphasized on the obligation by the State to actualize the right to housing as pronounced under Section 26 of the South African Constitution.

33. They further rely on the decisions in *Kepha Omondi Onjuro & others v. AG & 5 Others*, (Odunga J) (*supra*); *Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 Others* [2016] eKLR and urge that it was wrong for the trial Court to find that they had violated the rights of the Petitioners to have access to adequate housing, the rights of children and older persons by failing to provide alternative land or housing as that obligation is imposed upon the State.

34. As to whether the Appellants were accorded reasonable time, genuine consultations, adequate and reasonable notice prior to the evictions, they submit that the trial Court's finding that the eviction of the Petitioners was carried out with no lawful order and no notice to them was erroneous. It was thus argued that the evictions were necessary for the reasons enunciated in the 1st Respondent's Replying Affidavit. They further submit that the negative effects of the rapidly expanding and sprawling slums including increased insecurity, rape, abduction and fights, increased theft, increased cases of illicit brews, drug abuse and trafficking, were likely to adversely affect the school children, more so their learning activities and security.

35. They further submit that the finding by the trial Court that the 1st Respondent did not issue a notice to the Petitioners prior to the eviction was incorrect, and submit that it issued notices to the Petitioners to vacate the suit property, to wit, on 21st May 2009, on 14th March 2013 and an Enforcement Notice was issued by the City Council of Nairobi on 16th May, 2012 requiring the illegal occupants of the land to leave and have the land returned to its original position. They contend therefore that the Petitioners were aware as early as 2009 that they were illegally in occupation of the suit property, and that they were required to vacate the same.

36. With regards to progressive realization of the State's obligation to provide accessible and adequate housing under Article 43 of the *Constitution*, it is submitted that the Court of Appeal did not misdirect itself, but correctly faulted the trial Court for not considering the progressive realization of the State's obligations under Article 43 with respect to the right to access to adequate housing.

    It is thus urged that the Petitioners misunderstood the Court of Appeal's judgment on the negative obligations of the State, and that the appellate Court distinguished the State's from a private citizen's duties in respect to positive obligations vis a vis negative obligation in so far as the right to housing is concerned.

37. On the contention as regards the final orders issued by the trial Court, the 1st Respondent submits that the nature of the Petitioners' claims before the trial Court in relation to the loss of houses, business structures, household items, goods and other items were in the nature of losses that were quantifiable and could be assessed and settled notwithstanding that the instant matter originated as a Constitutional Petition. They therefore submit that the trial Court failed to provide a basis for the award of damages, and further, that the compensation of a sum of Kshs.150,000 to each of the Petitioners was in error.

38. In the alternative and while relying on the High Court decision in *Simon M. Ethangatta v. Eddah Wanjiru Mbiyi & Another* [2007] eKLR, the 1st Respondent submits that given that the Petitioners were illegal occupiers and trespassers onto the 1st Respondent's property, they were not entitled to benefit from their illegality by getting compensation from the 1st Respondent. In relying on the High Court decision in *Susan Waithera Kariuki & 4 Others v. Town Clerk Nairobi City Council & 3 Other*s (2013) eKLR, they submit that the trial Court erred and ought not have issued a blanket award of damages to the Petitioners, including to persons who were never before the High Court in person or whose existence, residency and/or occupancy in the two villages was and remains in contention.

**c. 2nd, 3rd & 4th Respondents' submissions**

39. The 2nd, 3rd and 4th Respondents' written submissions are dated 29th June, 2020 and were filed on even date. They address three (3) issues, namely; (a) the jurisdiction of the Court to entertain this Appeal; (b) the State's obligation in relation to Article 43 of the *Constitution*; and (c) the remedies for the alleged breach of Constitutional rights and fundamental freedoms.

40. On the jurisdictional question, they urge that, the issue to be addressed is whether the question of compensation is properly before this Court for its determination. They argue in that regard that although this Court has the jurisdiction to deal with matters of general public importance and cases involving the interpretation and application of the Constitution, the issue of compensation, however, is one that should be dealt with in other fora as it involves adducing evidence and cross-examining witnesses. They thus agree with the appellate Court's decision that no material evidence had been placed before the trial Court to enable it make a reasoned and informed determination in assessing the award for damages. They submit further that the damages awarded could only be so awarded in a civil claim before the Environment and Land Court or in a constitutional Petition where parties are obligated to produce, present and question evidence in accordance to Rule 22 of The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Rules*, 2013.

41. With regards to the State's obligation in relation to Article 43 of the *Constitution*, the 3rd Respondent submits that Article 43 of the *Constitution* guarantees the enjoyment of socio-economic rights, including the right to accessible and adequate housing and to reasonable standards of sanitation. It further submits that it is the State that has a duty and obligation to provide accessible and adequate housing to its citizenry. That while this is the case, this comes with a proviso under Article 21(2), which obligates the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43, and relies on this Court's holding in *Re the Matter of Kenya National Human Rights Commission* SC Advisory Opinion Reference. No.1 of 2012 for that submission. While also relying on the decision in *Grootboom*, they submit further that the prevailing economic circumstances do not allow for the immediate realization of the socio-economic right to housing.

42. On the issue of the remedies available for the alleged breach of constitutional rights and fundamental freedoms, the 2nd to 4th Respondents rely on the decisions in *Gitobu Imanyara & 2 others v. Attorney General* (2016) eKLR, *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another & Gathogo Kanini v. A.M Lubia & another* (1982 – 88) 1 KAR 727, *Johnston Evan Gicheru v. Andrew Morton and Another* (2005) 2 KLR 333

and *Major General Peter M. Kariuki v. Attorney General* Civil Appeal No.79 of 2012 and submit that the Court of Appeal's decision to disturb the trial Court's compensation award was proper and justified. They also cite the South African case of *Dendy v. University of Witwatersrand, Johannesburg & Others* - [2006] 1 LRC 291 and argue that in some cases, a declaration of the breach or violation is sufficient to ensure justice, as a declaration is a powerful statement which can go a long way in effecting reparation of the breach.

43. They furthermore submit that it is of critical importance that the Courts' discretion in making an award of damages be exercised with rationality, proportionality and on the basis of the compensation being just and appropriate dependent on the facts of the case. As to what entails a just and appropriate remedy in a constitutional violation, they urge the Court to find guidance in the Supreme Court of Canada decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 as cited with approval by the Court of Appeal in *COI & another v. Chief Magistrate Ukunda Law Courts & 4 others* (2018) eKLR where it was held that just and appropriate remedy must "meaningfully vindicate the rights and freedoms of the claimants; employ means that are legitimate within the framework of our constitutional democracy; be a judicial remedy which vindicates the right while invoking the function and powers of a court; and be fair to the party against whom the order is made." They therefore urge, in the circumstances, that this is not a case that requires that a declaration of violation of rights be accompanied by compensation.

**D. Analysis And Determination**

44. Having considered the respective parties' pleadings and submissions in the instant Petition, this Court is of the considered view that the issues arising for determination are;

    a. Whether the forced evictions violated the Petitioners' rights under Articles 28, 29, 43, 53 and 57 of the *Constitution*;

    b. Whether the Court of Appeal misinterpreted and misapplied the provisions of Article 21 of the *Constitution* on the doctrine of progressive realization of rights; and

    c. Whether the Court of Appeal erred in interpreting Article 23 of the *Constitution* specifically on the available remedies once a Court has determined that there were violations of rights.

45. We shall determine each issue separately as here below;

**a. Whether the forced evictions violated the Petitioners' rights under Articles 28, 29, 43, 53 and 57 of the Constitution**

46. With regard to the claims instituted by the Petitioner against the Respondents, and particularly on the violation of their rights as pronounced under Articles 28, 29, 43, 53 and

57 of the *Constitution*, the constitutional rights they allege to have been violated are founded on the right to property ownership and entitlement, which is provided for under Article 40(1)(a) & (b) of the *Constitution*, and which reads;

> "Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –
>
> a. of any description; and
>
> b. in any part of Kenya".

47. In ensuring that the right to property ownership is not violated, it is provided at Article 40(2)(a) that;

> "Parliament shall not enact a law that permits the State or any person –
>
> b. to arbitrarily deprive a person of property of any description, or of any interest in, or right over, any property of any description; or
>
> c. to limit, or in any way restrict the enjoyment of any right under this Article, on the basis of any of the grounds specified or contemplated under Article 27(4)".

48. These constitutional rights as guaranteed under the cited provisions are only in relation to property that has been legally acquired, and does not extend to property that has been unlawfully acquired. In that regard, Article 40(6) of the *Constitution* is instructive and provides that;

> "The rights under this Article do not extend to any property that has been found to have been <u>unlawfully acquired</u>". [Emphasis added].

49. The Petitioners' claim in the above context was that the 1st Respondent had entered into and forcefully evicted them from the suit property which they had resided in since the 1960s, thereby depriving them of their right to own property under Article 40(1), as well as a violation of their social and economic rights under Article 43. They decried that after they were evicted from the suit property, the 1st Respondent was then issued with a letter of allotment to the property by the 3rd Respondent.

50. Whether the 1st Respondent was issued with a letter of allotment is one issue; what was more important from the outset however was the determination of the question whether the letter of allotment was issued lawfully or legally. That question was not an issue that was conclusively determined at the High Court or the Court of Appeal. We note in that regard that the Petitioners had sought a declaration that the acquisition of the suit property

was illegal and unlawful. The learned Judge of the High Court in her rendition on the issue held, *inter alia*;

> "I am, however, not in a position to issue orders in relation to the legality or otherwise of the 1st respondent's title. The determination of that issue is, I believe, best left to the National Land Commission or a court of law seized of that particular matter which can call for the relevant evidence and examine all such documents pertaining to the allocation of the land to the 1st respondent as it deems necessary for it to establish the validity or otherwise of the title." [Emphasis added, Para. 86]

51. The learned Judge had thus, on her part, correctly held that the issue would be better determined by the National Land Commission as provided under Section 152C of the *Land Act*, and which provision further allows for the procedure to be followed in the event of an eviction(s). At the said Section 152C of the *Act*, it is provided that;

> "The National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction".

It should be noted, however, that the procedures enacted in the amendments to the Land Act, through the Land Laws (Amendments) Act No. 28 of 2016, amended the provisions of the Land Act to include the powers of the National Land Commission in land eviction matters, and were only enacted in September, 2016, when the instant matter had already been instituted and determined by the High Court. On our part, we note that the learned Judge also correctly held that the relevant Court seized of jurisdiction over land matters – the Environment and the Land Court – should have determined that question. We see no reason to say more on that issue as it is moot.

52. Having so stated and since the title held by the 1st Respondent remains unimpeached, what ought to be determined is the question whether, in evicting the Petitioners, the Respondents violated the Petitioners' rights to human dignity and security, as well as the rights to housing and health under Article 43, read with Articles 28, 29, 53 and 57 of the *Constitution*.

53. In that regard, it is an undeniable fact that forced evictions generally constitute a violation of fundamental rights and freedoms and an abuse of inherent human rights and dignity under Article 43 of the *Constitution*, including, but not limited to, the right to the highest attainable standards of health and healthcare services, accessible and adequate housing, freedom from hunger and to adequate food, clean and safe water, social security and

education. The onus of ensuring that these rights and freedoms are attained and provided for falls squarely under the ambit of the State; and that it is the obligation of the State to ensure that these rights and freedoms are not limited without reasonable justification in an open and democratic society based on human dignity, equality and freedom as provided for under Article 24(1) of the *Constitution*.

54. Further, in ensuring that these social and economic rights are protected, the State has to strike a delicate balance between the rights of those that are most vulnerable in the society and those that are in economic advantage. The State thus has to ensure that in the protection of the rights of an individual or group of persons, it does not inadvertently abuse the rights of other individuals or other groups of persons. Such is the position that this Court finds itself in the instant Petition; we are tasked with the making of a determination on the rights of the Petitioners against those of the 1st Respondent; to determine whether the State took an active positive role in ensuring that the fundamental rights and freedoms of all the parties concerned in this instant matter were protected and that in so doing, there was no abuse of the rights of the parties and thus, that the State's negative obligation not to abuse or violate these rights and fundamental freedoms was carried out.

55. In the above context, like the High Court, we are certain that the following facts are uncontested:

i. The Petitioners were forcefully evicted from the suit property by the 1st Respondent with the assistance of police officers from Langata Police Station and alongside M/s Kindest Auctioneers.

ii. While the eviction was purportedly carried out using distress for rent orders issued in Milimani Chief Magistrate's Court Misc. Application No.303 of 2013 directed at the 4th Petitioner and one, Milcah Wanjiru, the 1st Respondent denied knowledge of such orders and in any event, distress for rent orders are not akin to eviction orders. In effect, the eviction was carried out without a lawful Court order.

iii. Whereas the 1st Respondent indicated in evidence that it had made prior attempts to remove the Petitioners from the suit property, no evidence was tabled to show that prior to the eviction in issue, any notice or adequate notice was given to the Petitioners.

iv. Whereas the ten (10) named Petitioners in their Petition before the High Court clearly indicated that they were suing on behalf of 326 other adult persons plus 90 children and their names and other details annexed to the affidavit in support of the Petition, no serious contestation was made of that fact and the issue hardly attracted the attention of both Courts below, the same must be said of the list of elderly persons similarly annexed.

56. With the above facts in mind and noting our findings above, like the High Court, we are of the firm view that the eviction of the Petitioners was violent and did not accord with the expected constitutional obligation of the State to ensure that those in informal settlements are treated with the dignity that is conferred on Article 28 of the *Constitution*. Granted, the Petitioners were evicted when the 1st Respondent had already acquired certain private rights over the suit property but they entered the land well aware of the presence of the Petitioners who occupied the land when it was still public land. Even without prescriptive rights, we stated in *Mitubell Welfare Society v. Kenya Airports Authority*, SC Petition No.3 of 2018 (Mitubell) only recently, that "where the landless occupy public land and establish houses thereon, they acquire not title to the land, but a protectable right to housing over the same". In the present case, the participation of State agents in violent evictions only points to the fact that the 1st Respondent ultimately acquired favoured status outside the law in acquiring ultimate and total control of the suit property at the cost of violation of the rights of the Petitioners including the elderly and children.

57. In *Satrose Ayuma* (*supra*), the High Court laid out certain principles that an evicting party must comply with. The Court, in doing so, applied international principles of law later clarified by this Court in Mitubell and which were crystallised as law in Section 152(A) – (H) of the *Land Act*. We reiterate that these principles were applicable to the eviction of the Petitioners as a matter of obligation by the State under international law as provided for in Articles 2(5) and 2(6) of the *Constitution*.

58. The principles include the duty to give notice in writing; to carry out the eviction in a manner that respects the dignity, right to life and security of those affected; to protect the rights of women, the elderly, children and persons with disabilities and the duty to give the affected persons the first priority to demolish and salvage their property. These principles flow from *U. N. Guidelines on Evictions: General Comment No.7* which in Mitubell, we stated, are "intended to breathe life into the Right to Dignity and Right to Housing under the ICCPR and ICESCR respectively".

59. It is our finding in that context that the learned Judge was correct in finding that "it is redundant to ask whether the eviction of the Petitioners resulted in a violation of their rights under the *Constitution*. Even the ordinary man in the street, confronted with the facts before [her], would answer the question in the affirmative". We so affirm.

**b. Whether the Court of Appeal misinterpreted and misapplied the provisions of Article 21 of the Constitution on the doctrine of progressive realization of rights.**

60. The 2nd – 4th Respondents have intimated that the rights of the Petitioners, applied generally, are rights that fall under the ambit of the progressive realization principle under Article 21(2) of the *Constitution* which provides that;

> "The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43". [Emphasis added]

61. In *General Comment No. 3* of the CESCR, the term progressive realization is defined thus;

> The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the *International Covenant on Civil and Political Rights* which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources. [Emphasis ours]

62. The Court of Appeal, whose Judgment embodied the generalities of the doctrine of progressive realization as pronounced in *General Comment No. 4 of the CESCR*, correctly held that it was the responsibility of the State to ensure that the rights guaranteed in Article 43 of the *Constitution* are realized progressively. The obligation to ensure the rights of Petitioners under Article 43 thus fell on the State, and that the State is imbued with the duty to ensure that these rights were realized, in consideration of prevailing circumstances such

as the availability of resources, or the implementation of policy and structural programs to ensure that the rights are realized.

63. This Court has previously addressed its mind to the principle of progressive realization of rights when *in Re the Matter of the Principle of Gender Representation in the National Assembly and the Senate* SC Advisory Opinion No.2 of 2012; [2012] eKLR, and in making a distinction between progressive and immediately realizable rights, we emphasized on the context in which the rights are pronounced within the Constitution. We stated thus, inter alia;

> "This leads us to the inference that whether a right is to be realized "progressively" or "immediately" is not a self-evident question: it depends on factors such as the language used in the normative safeguard, or in the expression of principle; ...it depends on the nature of the right in question ..." [Para. 59]

64. From the foregoing, it is manifestly evident in the present context that the mandate to ensure the realization and protection of social and economic rights does not extend to the 1st Respondent, a private entity. Even though the 1st Respondent has a negative obligation to ensure that it does not violate the rights of the Petitioners, it is not under any obligation to ensure that those rights are realized, either progressively or immediately. The Court of Appeal thus correctly held that the progressive realization of Article 43 rights was the mandate of the State, and that obligation does not extend horizontally to private entities. We hasten to add however, that private entities have the obligation, under Article 20(1) not to violate Article 43 rights as non-violation of all rights in the Bill of Rights applies both horizontally and vertically and binds both the State and all persons. We so find.

**d. Whether the Court of Appeal erred in interpreting Article 23 of the Constitution specifically on the available remedies once a Court has determined that there were violations of rights.**

65. The Petitioners argued that the Court of Appeal erred in reversing the judgment of the High Court in which they had been awarded damages in addition to the declarations that had been issued. They contend that the award of damages in constitutional issues was correctly made by the High Court, relying on the provisions of Article 23 of the *Constitution*. In arriving at its determination on the question of damages, the learned Judge of the High Court rendered herself as follows:

> "The Petitioners have also sought general and exemplary damages for violations of their fundamental rights. In light of my findings above, I believe that they are entitled to damages for the said violations. An award of damages will not make up entirely for the violation of the Petitioners' rights, nor for the disruption of their

> lives and the affront to their dignity that the acts of the Respondents occasioned. However, it will hopefully serve as a reminder to the 1st Respondent that it is not so privileged as to have an unfettered right to violate the rights of the poor.
>
> With regard to the State, it is important for its officers to remember that its cardinal duty and the duty of all its officers is to safeguard the rights of all, without discrimination, but particularly so, the rights of the vulnerable in society, the poor, children, the elderly and persons with disability. Its officers should never be used to carry out the unlawful acts of any citizen, however powerful.
>
> The 1st Respondent is the author of the unlawful acts that led to the violation of the Petitioners' rights. The State, through the National Police Service, chose to aid the 1st Respondent against the interests of the Petitioners, poor marginalized residents of the two informal settlements. In the circumstances, I believe that they should bear liability for the violation of the Petitioners' rights." [Paras. 88-90]

66. The Court of Appeal, on its part, overturned this decision holding that there wasn't sufficient evidence that was presented before the Court to enable it evaluate the damages that would adequately compensate the Petitioners. The Court went on to hold that;

> "Whereas the High Court, whilst granting relief, was exercising its constitutional jurisdiction to uphold or vindicate a constitutional right that it found had been contravened, in awarding compensation for the specific damage that the evictees claimed they had suffered, the court should have inquired into the nature of such loss. <u>If necessary, the evictees should have been granted an opportunity to prove the damage and for the appellant and the State to test the evictees claims.</u>" [Para. 68, emphasis added]

67. The Court of Appeal rationalized the disturbing of the award of damages by the High Court as follows;

> "There was clearly no evidence before the Judge to assist the court in assessing the amount of appropriate compensation. We hold that, in the circumstances of this case, it was incumbent upon the evictees to place material before the court on the basis of which the court would undertake an enquiry to ascertain the extent of loss so as to arrive at a reasonable amount." [Para. 72]

68. The justification by the Court of Appeal for disturbing the award was therefore, that the Petitioners did not present to the trial Court sufficient evidence of the loss incurred and suffered for the Court to make a fair assessment and determination on the quantum of damages to award. The Court relied on the decision in *Butt*, where the Court had held that an appellate Court could disturb an award of damages if it was established that a trial Judge

proceeded on a wrong principle, or misapprehended the evidence in some material manner to arrive at a figure which was inordinately low or high.

69. Although the Court of Appeal concedes that it was within the mandate of the trial Court to make an order for the award of damages for constitutional violations against the Petitioners by the Respondents, it did not however, show how the award, as issued, went against the provisions of Article 23(3) of the *Constitution.* In *Butt*, decision which formed the basis for their decision to disturb the award of damages, the rationale that was enunciated therein was that it had to be shown or established that the Judge proceeded on the wrong principle or misapprehension of the evidence to arrive at a disproportionate award.

70. In our considered view, there was sufficient evidence that was presented before the trial Court which enabled it to arrive at the decision that it did. With regard to the 1st Respondent, they admittedly stated that they had participated in, and engaged with the 2nd Respondent in the unlawful and illegal demolition of property belonging to and eviction of the Petitioners from the suit property. The evidence presented before the trial Court was that the demolition and evictions were carried out without lawful Court orders, that the evictions and demolition were carried out in a manner that violated the Petitioners' right to human dignity and security, and that there was a violation of their rights to exercise and enjoy social and economic rights pronounced under Article 43, as read together with Articles 53 and 57 of the *Constitution*.

71. The Court of Appeal in disturbing the award of damages issued by the trial Court did not also show how the Court abused its discretionary powers to award damages, or that the Court exercised its discretion whimsically or capriciously. In *Gitobu Imanyara*, the Court of Appeal had earlier held that;

> "In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

In the same matter, the appellate Court also held that an appellate Court should not disturb an award of damages on the mere notion that if it had tried the matter in the first instance, it would have awarded differently. The question therefore should not have been what it would have awarded, but rather whether the trial Court had proceeded on the wrong principle. (See generally *Loice Wanjiku Kagunda v. Julius Gachau Mwangi* Civil Appeal No. 142 of 2003).

72. Furthermore, in *Kemfro Africa* Kneller J.A. held that;

> "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage." [Emphasis added]

73. We agree with the learned Judge and would add that, what the Court of Appeal failed to consider, in our opinion, was that the questions and issues that a Court has to consider in order to make an award of damages with regards to constitutional violation is manifestly different to what the Court would consider in say, tortious or civil liability claim. In the latter, the issues are clear cut and quantification of the appropriate award is in most instances, straight forward. The same, however, is not true of constitutional violation matters, such as the instant one. Quantification of damages in such matters does not present an explicit consideration of the issues; other issues such as public policy considerations also come into play. A Court obligated and mandated in evaluating the appropriate awards for compensation in constitutional violations does not have an easy task; there is no adequate damage standard that has been developed in our jurisprudence that recognizes that an award for damages in constitutional violations is quite separate and distinct from other injuries. In this regard, the Court of Appeal was unclear of what other material that the Petitioners needed to present before the trial Court to establish that there was a violation of their constitutional rights by the Respondents, and that the Court therefore abused its discretionary powers in issuing the award of damages. In the event and following our reasoning in *Martin Wanderi & 106 Others v Engineers Registration Board & 10 others*, SC Petition No.19 of 2015 [2018] eKLR we must overturn the appellate Court's decision on this issue.

**d. A brief commentary on the state of affairs with regard to realization of Article 43 rights**

74. Before we render our final determination in the instant matter, we must revisit the pronouncement made by Mutunga, CJ (as he then was) *in Re the Matter of the Principle of Gender Representation in the National Assembly and the Senate* SC Advisory Opinion No. 2 of 2012; [2012] eKLR where he stated that;

> "It is true the Constitution will present the Courts with inconsistencies, grey areas, contradictions, vagueness, bad grammar and syntax, legal jargon, all hallmarks of a negotiated document that took decades to complete. It reflects

> contested terrains, vested interested that are sought to be harmonized, and a status quo to be mitigated. These features in our constitution should not surprise anybody, not the bench, or the bar or the academia. What cannot be denied, however, is we have a working formula, approach and guidelines to unravel these problems as we interpret the Constitution. We owe that interpretative framework of its interpretation to the Constitution itself."
>
> [Para. 9.2, dissenting opinion, emphasis added]

75. We completely agree and it is indeed a sad state of affairs that ten (10) years into the promulgation of the *Constitution* in 2010, the State still seeks to rid itself of its mandate and obligations by hiding behind the perceived inconsistencies sometimes presented in the Constitution, and in the present context, the provisions of Article 21(2) of the *Constitution*, and to abdicate its role in ensuring that Article 43 rights are realized. Article 21(2) does not protect the State from realizing these rights, but rather seeks to ensure that even though these rights are not immediately achieved, there is at least some modicum of effort by the State to realize those rights. There should be continued concerted efforts by the State in the progressive realization of these rights and therefore, the State should take deliberate steps, both immediately and in the future, towards the full realization of the rights.

76. Policy and legislative formulation and lack of adequate resources have been the reasons given by the State in the realization of Article 43 rights. It is evidenced as such; in October 2009, the Ministry of Lands formulated the Eviction and Resettlement Guidelines, which provided that forced evictions were not only illegal and unjust, but also counterproductive to economic growth and development. The guidelines also provided for insights and procedures on how to deal with the issue of evictions and resettlement by the State, noting that the State was under an obligation to provide alternative resettlement to those that had been evicted.

77. Further on in 2012, a Bill was presented in the National Assembly titled the Evictions and Resettlement Procedures Bill No.44 of 2012. The Bill has never gone past the 1st Reading – on 12th September, 2012. The Senate also introduced the Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill No.27 of 2018. The Bill proposes that each County should have an integrated development plan and to establish mechanisms to monitor and promote adherence to Article 43 of the Constitution. It has not gone past the 1st Reading – on 25th September, 2018. These may be just some of the few, if not only, legislative and policy structures that the State has sought to come up with in the past few years.

78. The above notwithstanding, few amendments have been made to land laws, and in particular the *Land Act*, through the Land Laws (Amendments) Act No. 28 of 2016, which amended

Sections 152 of the Land Act, to include provisions for the procedures of eviction of illegal settlers in both public and private land. Those amendments were made following the decision of the High Court in *Satrose Ayuma* and indeed the language of the amendments to Section 152(A)-(G) is borrowed directly from that decision. Although the State may therefore seem to be at the forefront in the realization of Article 43 rights, more is yet to be done, especially in the realization aspect. As for the enforcement of these rights, nothing much can be achieved if the legislative and policy processes are still at the nascent stage.

79. These acts by the State may be regarded and considered by some, as acts of regression, which end up depriving the people of the rights that they should be enjoying. They are a contradiction to the progressive realization principle and constitute a violation of those rights. These acts, unless they are limitations to the realization of those rights which are justifiable and reasonable in accordance with Article 24(1) of the *Constitution*, are counter-intuitive to the realization of social economic rights under Article 43 of the *Constitution*. The State has to take a more drastic and purposive approach to its mandate and obligations in ensuring that the rights to the people of Kenya are not violated, or in the very least, that these rights are not deprived or denied. We say no more.

**E. Determination**

80. In consideration of the foregoing, it is our considered view that there was a violation of the Petitioners' rights by the Respondents in the manner expressed above and issue orders are follows;

i. A declaration that the demolition of the Petitioners' houses and property and their forced eviction by the 1st and 2nd Respondents without a valid Court order is a violation of their fundamental right to inherent human dignity and security of the person guaranteed under Articles 28 and 29(c) of the *Constitution*;

ii. A declaration that the demolition of the Petitioners' houses and property and their forced eviction by the 2nd and 3rd Respondents is a violation of their fundamental right to inherent human dignity, security of the person, and to accessible and adequate housing guaranteed under Article 43 of the *Constitution*;

iii. A declaration that the demolition of the Petitioners' houses and property and their forced eviction by the 2nd and 3rd Respondent is a violation of the fundamental rights of children guaranteed under Article 53 of the *Constitution*; and

iv. A declaration that the demolition of the Petitioners' houses and property and their forced eviction by the 2nd and 3rd Respondent is a violation of the fundamental rights of elderly persons guaranteed under Article 57 of the *Constitution*.

81. We furthermore affirm the orders issued by Mumbi Ngugi, J (as she then was) at the High Court on the award of damages, and set aside the Judgment of the Court of Appeal in that regard. For the avoidance of doubt, we order that;

    v. The 1st Respondent shall pay a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs.150,000) to each of the Petitioners;

    vi. The State shall pay a sum of Kenya shillings One Hundred Thousand (Kshs.100,0000) to each of the Petitioners;

    vii . The Petitioners shall also have costs thereof.

82. It is so ordered.

**Base Titanium Limited v County Government of Mombasa & another (Petition 22 of 2018) [2021] KESC 33 (KLR) (16 July 2021) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2021] KESC 33 (KLR)

***Devolution*** *– county governments – power of county governments – power to charge cess, levy or tax - circumstances in which a county government could charge a cess, levy or tax – claim that a county government charged cess for road transport services for a road vested in the National Government - whether a county government could levy a charge for road transport services for a road that was vested in the National Government – Constitution of Kenya, 2010, article 209 and the Fourth Schedule Part 2 section 5.*

***Constitutional Law*** *– public finance – accounting for payment – claim that a receipt for payment of cess to a county government was indicated as miscellaneous - whether the use of the term miscellaneous to account for payment was ambiguous and was against the spirit of article 201 of the Constitution on the principles of public finance – Constitution of Kenya, 2010, article 201(a).*

***Statutes*** *– interpretation of statutes – interpretation of the Kenya Roads Act - distinction of the roles of Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KERRA) - what was the distinction of the roles of Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KERRA) in building, maintaining and regulating Kenya's road networks.*

***Words and Phrases*** *– service – definition of service – a system that provides something that the public needs, organized by the government or a private company - Oxford Dictionary of English 3rd Edition 2015.*

***Words and Phrases*** *– miscellaneous - definition of miscellaneous - consisting of many different kinds of things that are not connected and do not easily form a group - Oxford Dictionary of English 3rd Edition, 2015.*

**Brief facts**

The appeal concerned a cess of Kshs 3000 imposed upon each of the appellant's trucks from June 17, 2014, whenever transporting its minerals from Kwale County to Mombasa Port (the port) which was within the 1st respondent's jurisdiction. That cess was levied under item 90 of the Schedule to the Mombasa County Finance Act, 2014. The 1st respondent continued to impose the cess despite a protest from the appellant that the same contravened the Constitution of Kenya, 2010, (the Constitution) and further confirmation from the Attorney General that the cess imposed was unconstitutional.

Aggrieved by the 1st respondent's action, the appellant filed a suit at the High Court and sought among other orders; a declaration that the actions of the 1st respondent to charge the cess was unconstitutional; and a declaration that the 1st respondent had no mandate under the Constitution

to pass any legislation that restricted the appellant's right of movement by imposing a tax or revenue to be paid by the appellant as a condition for moving its goods across the 1st respondent's boundaries.

The High Court dismissed the appellant's petition with costs and stated that county governments had, under article 209(3) and (4) of the Constitution, the power to levy taxes and charges for services that they provided including road transport services. Dissatisfied by the High Court's finding, the appellant lodged an appeal at the Court of Appeal. The Court of Appeal dismissed the appeal with costs hence the appellant filed the instant petition of appeal at the Supreme Court.

**Issues**

i. What were the circumstances in which a county government could charge a cess, levy or tax?

ii. Whether a county government could levy a charge for road transport services for a road that was vested in the National Government.

iii. Whether the use of the term miscellaneous to account for payment was ambiguous and was against the spirit of article 201 of the Constitution on the principles of public finance.

iv. What was the distinction of the roles of Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KERRA) in building, maintaining and regulating Kenya's road networks?

**Held**

1. Article 209 of the Constitution empowered counties to raise revenue and levy taxes, rates, or other charges. Under article 209(4), the 1st respondent was authorized to impose charges for services provided. Service included county transport which entailed county roads; street lighting; traffic and parking; public roads transport; and ferries and harbors, excluding the regulation of international and national shipping and matters related thereto comprised some of the functions and powers of county governments under section 5 part 2 of schedule four to the Constitution. The intention of article 209(4) of the Constitution was to confer county governments the discretionary powers to impose charges for services, more specifically, that they could charge or impose payment in exchange for a public need or amenity.

2. The insertion of the words 'for services' in article 209(4) of the Constitution were a qualification to the charge of the services. Whereas a county could levy charges, it had to do so in exchange for an amenity. A county did not have the authority to charge a cess, levy or tax where they did not offer anything in return.

3. The Constitution permitted county governments to impose charges for the realization of their powers under the Fourth Schedule. But that power did not go unchecked. In the spirit of harmonious interpretation of the Constitution, in enacting the law, county governments had to heed the provisions of article 209(5) of the Constitution and ensure that the charges imposed would not be detrimental to national economic policies, economic activities across boundaries or the national mobility of goods, services, capital or labor. Hence Counties could charge for services.

4. Mobility of goods in Kenya was governed by the Kenya Roads Act (the Act). Under that Act, the Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KERRA), were established for among other functions constructing, upgrading, rehabilitating and maintaining roads, controlling and implementing policies relating to national roads, rural roads and urban roads.
5. The Kenya Roads Board was established with its mandate under the Kenya Roads Board Act being to oversee the road network in Kenya and coordinate maintenance, rehabilitation and development, all funded by the Kenya Road Board Fund established under section 31 of the Kenya Roads Board Act.
6. KeNHA was responsible for the development, rehabilitation, management, and maintenance of all national trunk roads comprising classes S, A, and B roads. KURA was responsible for the management, development, rehabilitation and maintenance of all public roads in cities and municipalities except where the roads were categorized as national roads. After the January 2016 gazettement, KURA's mandate was expanded to all counties in line with article 6(3) of the Constitution. On their part, KERRA was in charge of constructing, upgrading, rehabilitating and maintaining rural roads, controlling reserves for rural roads and access to roadside developments and implementing road policies in relation to rural roads. Under the classification of roads, KERRA was in charge of categories D, E, F, G, K, L, P, R, S, T, U, and W.
7. There was a distinction between national roads and county roads. National roads were maintained solely by the National Government through KeNHA while counties maintained their roads in collaboration with the other authorities.
8. To access the port, the appellant had to use the Likoni-Ukunda Road which the Kenyan road system identified as an A14 road. That road, A14 fell directly into the category of a national road. That category fell directly under the mandate of KeNHA and the National Government which was in charge of its development, rehabilitation, management and maintenance. The 1st respondent had not clarified how the charge met the categories it set out in item 90 of the Mombasa County Finance, 2014.
9. The 1st respondent had not stated if they provided street lighting, parking or maintenance of the road accessed by the petitioners. While the superior courts were in agreement with them that the charge was a road service charge, the Supreme Court was of a contrary opinion, as the 1st respondent did not illustrate how such road services were provided. It was improper for the 1st respondent to levy a charge for road transport services when the same road was vested in the National Government.
10. Article 201(a) of the Constitution called for openness and accountability including public participation in financial matters. The intention of that provision was to ensure efficiency within the public financial management sector which had faced tremendous challenges occasioned by gaps that had resulted in the past embezzlement of public funds. Article 201(a) of the Constitution sought to curb the problem of abuse of public resources and

corruption, by calling for transparency in the handling of those resources. Public finances were to be managed efficiently with firm checks and balances.

11. In issuing receipts marked 'miscellaneous income' the 1st respondent had created avenues for possible abuse. The word miscellaneous was vague and it was not easily discernible what the payments were directed at. Using the term miscellaneous to account for payment led to ambiguity which went against the spirit of article 201 of the Constitution. Miscellaneous could refer to any number of things and it was essential that that form of opaqueness in accountability was discouraged. It was imperative that any payments to counties should clearly state in precise, unambiguous words what the payments were for.

12. The National Government was the provider of the road service in the instant case. Should an access fee be owing, then the proper entity to which that amount was owed should be the National Government not the 1st respondent. The cess imposed by the 1st respondent under item 90 of the Schedule to the Mombasa County Act, 2014 was improperly imposed as a charge for services provided by the County Government and was not a charge for service as contemplated by article 209(4) of the Constitution.

*Petition of appeal allowed.*

***Orders***

i. *Judgment of the Court of Appeal dated July 5, 2018 set aside.*

ii. *Judgment of the High Court dated February 21, 2018 set aside.*

iii. *The actions of the 1st respondent to charge the appellant a cess in the sum of Kshs. 3,000 per truck, or any sum at all, a condition for the appellant to move its goods across the boundaries of the 1st respondent's county were declared unconstitutional, null and void.*

iv. *The 1st respondent was directed to refund to the appellant the sum of Kshs. 1,542,000 paid by the appellant to the 1st respondent as of December 31, 2014.*

v. *Any other additional sums that the appellant had paid to the 1st respondent from January 1, 2015, to the date of the judgment as cess on trucks transporting goods across the 1st respondent's boundaries were to be pursued at the High Court.*

vi. *The 1st respondent was to bear the costs of the appeal.*

**Citations**

**Cases**

***Kenya***

1. *Base Titanium Limited v County Government of Mombasa & another* Civil Appeal No 69 of 2017 - (Explained)
2. *Base Titanium Limited v County Government of Mombasa & Attorney General* Petition 9 of 2015; [2016] KEHC 3776 (KLR) - (Explained)
3. *Council of County Governors v Attorney General & 4 others* Petition 472 of 2014; [2015] eKLR - (Explained)

4. *Kariuki, James Gacheru t/a Constituyen Traders & 536 others v County Government of Kiambu & others* Constitutional Petition 8 of 2016; [2017] eKLR - (Mentioned)
5. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Mentioned)
6. *Pwani Super Capacity Transporters Savings & another v County Government of Mombasa* Constitutional Petition 27 of 2019; [2020] eKLR - (Mentioned)
7. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Mentioned)

**Texts**

1. Hornby, AS., et al (Eds) (2015), *Oxford English Dictionary* Oxford : Oxford University Press 3rd Edn

**Statutes**

***Kenya***

1. Constitution of Kenya, 2010 - (Interpreted) articles 2(2); 6(3); 10; 62; 163(4)(a); 185(2); 186(1);187(2)(b); 201; 209(3)(4)(5); 259; 261; Schedule 4 part 2 section 5
2. County Governments Act (cap 265) - (Interpreted) section 5
3. Kenya Roads Board Act, 2007 (cap 408A) - (Interpreted) sections 22, 31
4. Public Finance Management Act (cap 412A) - (Interpreted) section 161
5. Supreme Court Rules, 2010 (cap 9B Sub Leg) - (Interpreted) rules 8, 32
6. Traffic Act (cap 403) - (Cited) In general

**Advocates**

None mentioned

July 16, 2021, the Court delivered the following Judgment:

## A. Background

1. The present appeal arises from the Judgement of the Court of Appeal (Visram, Karanja & Koome, JJA) which upheld the decision of the High Court which had dismissed the appellant's petition.

2. This appeal concerns a cess of KES. 3000 imposed upon each of the appellant's trucks from June 17, 2014, whenever transporting its minerals from Kwale County to Mombasa Port which is within the 1st respondent's jurisdiction. The 1st respondent continued to impose the cess despite a protest from the appellant that the same contravened the *Constitution*, and a further confirmation from the Attorney General that the cess imposed was unconstitutional.

3. Aggrieved by the 1st respondent's action, the appellant filed HC Petition No 9 of 2015,*Base Titanium Limited v the County Government of Mombasa & another* where it sought the following orders: (a) a declaration that the actions of the 1st respondent to charge the appellant a cess in the sum of Kshs 3,000 per truck, or any sum at all, a condition for the appellant to move its goods across the boundaries of the 1st respondent's County is unconstitutional, null and void; b) a declaration that the 1st respondent has no mandate under the to pass any legislation that restricts the appellant's right of movement by imposing a tax or revenue to be paid by the appellant as a condition for moving its goods across the 1st respondent's boundaries; and (c) a mandatory injunction compelling the 1st respondent to refund to the appellant the sum of Kshs.1,542,000 paid by the appellant to the 1st respondent under duress as at December 31, 2014, and/or any other additional sums that the appellant has so paid to the 1st respondent from 1st January 2015, as cess on trucks transporting goods across the 1st respondent's boundaries to the date of compliance with the mandatory injunction.

4. On February 21, 2017, the High Court (Ogola J) delineated one issue for determination that is, whether levy by the County Government of Mombasa of a cess charge for transportation of the appellant's goods through the County is constitutional within the power of the County Government under article 209 of the *Constitution*. While dismissing the appellant's petition with costs, the learned judge found that County Governments have, under article 209 (3) and (4) of the *Constitution*, the power to levy taxes and charges for services that they provide including road transport services. In that context, he concluded that the cess charge imposed by the Mombasa County Finance Act, 2014 for "all goods carrying vehicles entering Mombasa County and offloading in Mombasa County" is not a tax or charge on the mineral product of Titanium mined and transported by the appellant, and the charge is, accordingly, not barred by reference to article 62 of *the Constitution*, which vests minerals as part of public land under the authority of the National Government. Further, that the appellant failed to demonstrate how the imposition of the cess on the vehicles carrying its product into Mombasa prejudices the national interests as per article 209 (5) of *the Constitution*.

5. Dissatisfied by the above finding, the appellant lodged an appeal at the Court of Appeal, Civil Appeal No 69 of 2017 *Base Titanium Limited v County Government of Mombasa & another*. In its appeal, the appellant faulted the trial Judge mainly for: finding that the cess was a charge for services referred to 'road transport service' provided by the 1st respondent; making a determination on issue(s) not pleaded thus infringing on the appellant's right to a fair hearing; misapprehending the law with respect to implementation of article 209(5) of *the Constitution*; and failing to hold that the imposition of the cess was unconstitutional. It sought for the appeal to be allowed, grant of the prayers in the petition dated February 20, 2015, and for the costs of the appeal and at the High Court.

6. On July 5, 2018, the learned judges of appeal dismissed the appeal with costs. In doing so, they identified two issues for determination as follows: whether the 1st respondent had power to levy the cess in question and that in the alternative, if it did have such power, whether the same was exercised contrary to *the Constitution*. The appellate court agreed with the trial Judge that the cess levied by the 1st respondent was in line with article 209(4) of *the Constitution* which empowers a County Government to impose charges on services rendered and in accordance with item 90 of the Schedule to the Mombasa County Finance Act, 2014. The learned judges of appeal concluded that the appellant failed to demonstrate the manner in which the 1st respondent had violated article 209(4) and (5) of the *Constitution* by hindering the movement of its goods or how it was prejudicial to national economic policies or unlawful in any way.

7. Aggrieved further by the finding of the Court of Appeal, the appellant filed the present appeal under rule No. 8 and 32 of the *Supreme Court Rules 2010*. The appeal is premised on the grounds *inter alia* that the Court of Appeal erred in its interpretation and application of article 209(4) of the when it found that a levy in the Mombasa County Finance Act, 2014 was properly imposed as a charge for services provided within the meaning of the said article without specifying whether the levy related to a service offered by the 1st respondent, and if so, the nature of the said service. The appellant also faults the court's finding that the said levy was properly imposed for services provided by the 1st respondent without considering whether the said levy complied with the *Constitution*.

8. In summary, the appellant seeks the following orders: the appeal be allowed; a declaration that the Court of Appeal in its decision made on July 5, 2017 erred in its interpretation and application of article 209(4) of the *Constitution*; a reversal of the Court Appeal's decision of July 5, 2017; and costs of this appeal as well as those of the Court of Appeal.

**B. Parties Subissions**

**a. The appellant**

9. In its submissions filed on March 3, 2020, and supplementary submissions filed on June 26, 2020, the appellant submits that its appeal is premised on article 163(4)(a) of the *Constitution* as it challenges the superior courts' interpretation and application of article 209(4) and (5) of the *Constitution*. The appellant urges that the High Court and the Court of Appeal erred when they failed to follow the guidelines on the interpretation and application of the Constitution as provided for under articles 259 and 10 of the *Constitution*.

10. Relying on article 209(4) of the *Constitution*, the appellant argues that even if the Constitution empowers the 1st respondent to impose charges for services it renders, it cannot raise charges under the said article where no services have been rendered.

11. Learned counsel for the appellant urges that taxes or levies charged by the 1st respondent were undisclosed in their receipts which indicated that the payments were for either "miscellaneous income" or "Likoni Revenue Barrier". In that context, the appellant maintains that the 1st respondent did not provide any evidence of the services, if any, rendered by it to the appellant so as to justify the charges in terms of article 209(4) of the *Constitution*. It urged that it was entitled to know the nature of services provided by the 1st respondent and the price of the charges. It relied on article 261 of the *Constitution*, section 161 of the *Public Finance Management Act*, and the Mombasa County Finance Act 2014 to support its argument that there was no such service(s) known as "miscellaneous."

12. In addition, the appellant urges that no evidence was placed before the trial court to support its finding that the alleged levy was a cess, payment for road service, garbage collection, parking facilities, street lighting, drainage and roads maintenance or for services rendered by the 1st respondent. Furthermore, that the Cabinet Secretary (Treasury) was not consulted before the enactment or enforcement of Item 90 of Mombasa Finance Act 2014.

13. Relying on article, 209(5) of the *Constitution*, the appellant also submits that the 1st respondent's powers to raise revenue should not be exercised in a way that prejudices national economic policies, activities across county boundaries or national mobility of goods, services, capital or labour. In that context, it maintains that the 1st respondent contravened the foregoing article of the Constitution and the Roads Act which governs mobility of goods on public roads.

14. The appellant concludes its submissions by stating that the 1st respondent's action contravened articles 2(2), 10 and 209(5) of the *Constitution*. Consequently, it faults the Court of Appeal for interpreting the "miscellaneous charge" levied upon the appellant to fall under Item 90 as a cess, yet the said item does not define a cess to mean a road service. Towards that end, it urges for the appeal to be allowed as prayed.

**The 1st respondent**

15. The 1st respondent's submissions were filed on 12th June 2020. It is the 1st respondent's case that the superior courts properly applied and interpreted article 209(4) of the *Constitution* and that the revenue it imposed on each of the trucks ferrying the appellant's goods is proper under Item 90 of the Schedule to the Mombasa County Finance Act, 2014.

16. Citing section 5 of the *County Government Act, 2012* and the Fourth Schedule of the *Constitution*, the 1st respondent urges that county governments are charged with the responsibility of managing and running transport including county roads, street lighting, traffic and parking, public transport, and ferries and harbors. It also submits that the sum of

KES 3000/- levied as cess charges was specifically pleaded and that the same was pegged on item 90 of Mombasa County Finance Act 2014.

17. The 1st respondent refutes the appellants contention that the superior courts made a finding that the KES 3000/- imposed was cess on all motor vehicles carrying and offloading goods within its County. Instead, it submits that the issue as to whether Item 90 to the Mombasa County Finance Act 2014 as enacted contravened article 201 of the *Constitution*, was never pleaded, neither was it an issue for determination at the High Court and that the Appellant is estopped from pleading the same at this stage. It relies on this court's decision in *Francis Karioko Muruatetu &another v Republic & 5 others,* Petition 15 as consolidated with 16 of 2015[2017] eKLR to support its argument.

18. Furthermore, the 1st respondent agrees with the superior courts' interpretation and application of its powers under article 209(4) of the *Constitution of Kenya*. It urges that it has powers to impose charges for the services it provides and relies on the cases of *James Gacheru Kariuki t/a Constituyen Traders & 536 others v County Government of Kiambu & others,* Kiambu HC Petition No 8 of 2016 [2017]eKLR, and *Pwani Super Capacity Transporters Savings & another v County Government of Mombasa* [2020]eKLR to support its argument that it has powers to raise revenue through imposition of charges as long as they are founded in legislation pursuant to article 201 of the *Constitution*.

19. Finally, the appellant urges that the appeal be dismissed with costs and that the appellant should bear its costs at the Court of Appeal and in this court considering that it instituted the cause on its own behalf and not that of the public.

    It relies on the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others Petition No 4 of 2012*; [2014] where this court stated that costs follow the event.

**The 2nd respondent's**

20. We note that the 2nd respondent did not attend the hearing and did not file written submissions.

**C. Issues for Determination**

21. Having carefully considered the grounds of appeal, the submissions of the parties, the authorities cited in support thereof, it is clear to us that there are two issues falling for determination, that is:

    i. Whether the cess charge imposed by the Mombasa County Government upon each of the appellant's truck was a charge on services as contemplated under article 209(4) & (5) of *the Constitution* of Kenya, and if so

ii. What remedies should the court offer?

**D. Analysis**

**i. Whether the cess charge imposed by the Mombasa County Government upon each of the appellant's truck was a charge on services as contemplated under article 209(4) & (5) of the Constitution of Kenya?**

22. The bone of contention in this appeal is whether the cess charge imposed by the 1st respondent upon each of the appellant's truck is a charge on a service as contemplated under article 209(4) and (5) of the *Constitution*. It is the appellant's case that the 1st respondent's levy of KES. 3000 against each of its truck contravenes article 209(4) and (5) of the *Constitution* as they do not provide any services to them to justify the charge. Furthermore, that under article 209(5) of the Constitution, such charges prejudice national economic policies and economic activities across county boundaries. Conversely, the 1st Respondent is adamant that the said article bestows on them the power to impose any such charges for the services they provide and have not acted in excess of the powers stipulated in the said provisions. It is also the 1st respondent's case that the constitutionality of Item 90 of the Mombasa County Finance Act, 2014 was never raised at the trial court and that the appellant is barred from raising the same in this Court.

23. Article 185(2) of the *Constitution of Kenya* confers a County Government with the Legislative Authority to make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County government under the Fourth Schedule.

24. Further, article 186(1) states that the powers and functions of the National government and the County governments, respectively, are as set out in the Fourth Schedule, and finally, under article 187 (2)(b) of the *Constitution*, the constitutional responsibility for the performance of the functions or exercise of the power remain with the government to which it is assigned by the Fourth Schedule.

25. Under the provisions of article 209, a county is empowered to raise revenue and levy taxes, rates, or other charges. Additionally, under sub article (4), the 1st respondent is authorized to impose charges for services provided. So then, what is the meaning of the word 'services' for purposes of application within the meaning of article 209(4) of *the Constitution*? The word 'service' as provided in the *Oxford Dictionary of English* 3rd Edition 2015 is "a system that provides something that the public needs, organized by the government or a private company". This may include for County transport which entails County roads; street lighting; traffic and parking; public rods transport; and ferries and harbors, excluding the

regulation of international and national shipping and matters related thereto comprise some of the functions and powers of County Governments under Schedule four part 2, section 5.

26. Taking that definition into account, a plain reading of that article reveals that the intention of article 209(4) of the *Constitution*, is to confer County Governments the discretionary powers to impose charges for services, more specifically, that they can charge or impose a payment in exchange of a public need or amenity.

27. To our minds, the insertion of the words 'for services' in article 209(4), are a qualification to the charge of the services. Whereas a County can levy charges, it must do so in exchange for an amenity. Put differently, a County does not have the authority to charge a cess, levy or tax where they do not offer anything in return.

28. Undoubtedly, Constitution permits County Governments to impose charges for the realization of its powers under the Fourth schedule. But that power does not go unchecked, in the spirit of harmonious interpretation of the Constitution, in enacting the law, County Governments must heed the provisions of article 209 (5) and ensure that the charges invoked will not be detrimental to national economic policies, economic activities across boundaries or the national mobility of goods, services, capital or labor.

29. Consequently, we agree with the High Court and the Court of Appeal, only to the extent that County Governments have the mandate to charge levies for services rendered.

30. Having found that Counties can charge for services, it then falls to us to determine if the roads accessed by the Petitioners are those within the purview of the Counties. Mobility of goods in Kenya is governed by the Kenya Roads Act.

    Under that Act, the Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KERRA), are established for among others "constructing, upgrading, rehabilitating and maintaining roads, controlling and implementing policies relating to national roads, rural roads and urban roads."

31. More specifically, section 22 of that Acts vests in these authorities' power to: maintain, operate, improve and manage the roads under its jurisdiction; construct new roads; measure and assess the weights, dimensions and capacities of vehicles using any road and provide measures to ensure compliance with rules relating to axle load control, other provisions of the *Traffic Act* (cap. 403) and any regulations under this Act; and provide such amenities or facilities for persons making use of the services or facilities provided by the Authority as may appear to the Authority necessary or desirable.

32. There is also established a Kenya Roads Board whose mandate under the Kenya Roads Board Act, is to oversee the road network in Kenya and coordinate maintenance, rehabilitation,

and development, all funded by the Kenya Road Board Fund established under section 31 of the Kenya Roads Board Act.

33. In High Court in Petition no 472 of 2014, *Council of County Governors v Attorney General & 4 others* [2015] eKLR the court clarified that the County governments will be in charge of Class D, E, F and G (County Roads), whilst the National government is in charge of Class A, B and C (National Trunk Roads). That court decision resulted in a subsequent Legal Notice No 2 of 2016, which clearly elucidated the road network management system in the Country. Following that notice, the Kenya Roads Board, further categorized the roads network into various classes.

34. KeNHA is responsible for the development, rehabilitation, management, and maintenance of all National Trunk Roads comprising Classes S, A, and B roads. Class-S Road is defined as a highway that connects two or more cities and carries safely a large volume of traffic at the highest speed of operation; Class-A Road is defined as a highway that forms a strategic route and corridor connecting international boundaries at an identified immigration entry and exit points and international terminals such as international air or sea ports; and finally a Class-B Road, which is a highway that forms an important national route linking national trading or economic hubs, County Headquarters and other nationally important centres to each other and to the National Capital or to Class A roads.

35. KURA is responsible for the management, development, rehabilitation and maintenance of all public roads in cities and municipalities except where the roads are categorized as national roads. After the January 2016 gazettement, KURA's mandate was expanded to all counties in line with article 6(3) of the *Constitution*.

36. On their part, KERRA is in charge of constructing, upgrading, rehabilitating and maintaining rural roads, controlling reserves for rural roads and access to roadside developments and implementing road policies in relation to rural roads. Under the classification of roads, KERRA is in charge of categories D, E, F, G, K, L, P, R, S, T, U, W.

37. It is therefore clear to us that there is a distinction between national roads and county roads. National roads are maintained solely by the national government through KeNHA while Counties, maintain their roads in collaboration with the other authorities.

38. So, what is the classification of the road used by the trucks transporting the appellants goods? In other words, does the 1st respondent operate, or maintain the road used by the appellant in accessing the Port? What service does the 1st Respondent offer in regard to this particular road to entitle it to levy a sum of Kes 3000 on each of the appellant's trucks? Does entry into the 1st respondent's jurisdiction via such road justify the levy of the charge which would then be for entry? Is that a service and are they entitled to that fee?

39. It is not in dispute that to access the Port, the appellant must use the Likoni-Ukunda Road which the Kenyan road system identifies as an A14 road. Going by the background and network system explained in detail above, that road, A14 falls directly into the category of a national road. That category falls directly under the mandate of KeNHA and the National government which is in charge of its development, rehabilitation, management and maintenance. In this matter, we note that the County Government has not clarified how the charge meets the categories it sets out in Item 90 of the Mombasa County Finance, 2014. They have not stated if they provide street lighting, parking or maintenance of the road accessed by the petitioners. While the superior courts were in agreement with them that the charge was a 'road service' charge, we are of a contrary opinion, as the 1st respondent did not illustrate how such road services are provided.

40. Further, having established that it is not a county road, it is then improper for County Government of Mombasa to levy a charge for road service for the same road that vests in the National Government.

41. We also note that it is the appellant's further case that the 1st respondent in issuing receipts marked 'miscellaneous income' or 'Likoni Revenue Barrier', did not disclose the nature nor details of the payment.

42. In plain language, article 201 (a) of the *Constitution of Kenya* calls for openness and accountability including public participation in financial matters. It is not lost to us the intention of this provision is to ensure efficiency within the public financial management sector which has faced tremendous challenges occasioned by gaps that has resulted in the past embezzlement of public funds. This article seeks to curb the problem of abuse of public resources and corruption, by calling for transparency in the handling of these resources. We emphasize that public finances should be managed efficiently with firm checks and balances.

43. It is clear to us that in issuing receipts marked 'miscellaneous income' the County government of Mombasa has created avenues for possible abuse. The *Oxford Dictionary of English* 3rd Edition 2015 defines miscellaneous as a word "consisting of many different kinds of things that are not connected and do not easily form a group". By that very definition, the word 'miscellaneous' is vague, and it is not easily discernable what the payments are directed at. Using the term "miscellaneous" to account for payment leads to ambiguity which goes against the spirit of article 201 of the *Constitution*. That word could refer to any number of things and it is essential that this form of opaqueness in accountability be discouraged. It is imperative that any payments to Counties must clearly state in precise, unambiguous words what the payments are for.

44. Flowing from the above, we underline that it is the National government that is the provider of the road service in this instance. It is clear therefore that should an access fee be owing,

then the proper entity to which that amount is owed should be the National government not the County government. In that regard, we find that the cess imposed by the County Government of Mombasa under Item 90 of the schedule to the Mombasa County Act 2014 was improperly imposed as a charge for services rendered for services provided by the County Government and is not a charge for service as contemplated by article 209 (4) of the *Constitution of Kenya*.

45. We, therefore, fault the superior courts' interpretation and application of article 209(4) of the *Constitution* in their finding that the cess levied by the 1st respondent was in line Constitution.

**ii. What reliefs should the Court offer?**

46. In the petition before us, the appellant in summary seeks the following orders: the appeal be allowed; a declaration that the Court of Appeal in its decision, made on July 5, 2017, erred in its interpretation and application of article 209(4) of the *Constitution*; a reversal of the Court Appeal's decision of 5th July 2017; and costs of this appeal, as well as those incurred before the Court of Appeal.

47. Having faulted the superior court's interpretation and application of article 209(4) of the *Constitution* regarding the constitutionality of the cess KES 3000/-imposed on each of the Appellant's truck upon entering the 1st Respondent's jurisdiction, we hereby declare the superior courts' interpretation of article 209(4) of the *Constitution* unconstitutional and therefore, null and void. Consequently, we set aside the Judgements of the High Court and of the Court of Appeal.

48. We note that the appellant sought us to grant the reliefs sought in Civil Appeal No 69 of 2017. We have noted that from page 4 of the record of appeal, the appellant sought the Court of Appeal to grant the prayers sought in the petition of appeal dated February 20, 2015. In that petition, the prayers sought were as follows: (a) a declaration that the actions of the 1st respondent to charge the appellant a cess in the sum of Kshs.3,000 per truck, or any sum at all, a condition for the appellant to move its goods across the boundaries of the 1st respondent's county is unconstitutional, null and void; b) a declaration that the 1st respondent has no mandate under the Constitution to pass any legislation that restricts the appellant's right of movement by imposing a tax or revenue to be paid by the appellant as a condition for moving its goods across the 1st respondent's boundaries; and (c) a mandatory injunction compelling the 1st respondent to refund to the appellant the sum of Kshs.1,542,000 paid by the appellant to the 1st respondent under duress as at December 31, 2014, and/or any other additional sums that the appellant has so paid to the 1st respondent from January 1, 2015 as cess on trucks transporting goods across the 1st respondent's boundaries to the date of compliance with the mandatory injunction.

49. Since we have already addressed the first two prayers, we now turn to the third prayer in that petition where the appellant sought: a mandatory injunction compelling the 1st respondent to refund to the appellant the sum of Kshs.1,542,000 paid by the appellant to the 1st respondent under duress as at December 31, 2014 and/or any other additional sums that the appellant has so paid to the 1st respondent from January 1, 2015 as cess on trucks transporting goods across the 1st respondent's boundaries to the date of compliance with the mandatory injunction. We note with concern that neither the High Court nor the Court of Appeal considered the appellant's claim for a refund of the sum of KES 1, 542,000/- that had been remitted as of December 31, 2014 and any other payments remitted afterwards. Having confirmed from the record that the said amount was pleaded and proven and having nullified the 1st respondent's action to collect the same amount, if is our finding that the appellant is entitled to a refund of the sum of KES 1, 542,000/ being the amount remitted as of December 31, 2014. As for any other additional sums paid by the appellant from January 1, 2015 onwards, the same may be pursued at the High Court.

50. Concerning costs, this court has previously settled the law on award of costs: that costs follow the event, and that a Judge has the discretion in awarding costs in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC. Petition No 4 of 2012: [2014] eKLR. The appellant sought for costs at the appellate court and before this court. We note that the learned Judges of appeal made no orders as to costs on the ground that this was a public interest matter. Since this was a pure exercise of discretion which discretion has not been challenged by the Appellant, we shall not interfere with the same. As for the costs before this court, it is our finding that the 1st respondent shall bear the same.

**E. Orders**

51. Consequent upon our findings above, the final orders are that:

    1. The Petition of Appeal dated August 14, 2018 and filed on August 15, 2018 is hereby allowed.

    2. The Judgment of the Court of Appeal dated July 5, 2018 is hereby set aside.

    3. The Judgment of the High Court dated February 21, 2018 be and is hereby set aside.

    4. For the avoidance of doubt:

        a. a declaration is hereby issued declaring that the actions of the 1st respondent to charge the appellant a cess in the sum of Kshs 3,000 per truck, or any sum at all, a condition for the appellant to move its goods across the boundaries of the 1st respondent's County is unconstitutional, null and void.

b. The 1st respondent is hereby directed to refund to the appellant the sum of Kshs 1,542,000 paid by the appellant to the 1st respondent as of December 31, 2014.

c. Any other additional sums that the appellant has so paid to the 1st respondent from January 1, 2015 to the date of this judgment as cess on trucks transporting goods across the 1st respondent's boundaries shall be pursued at the High Court.

d. The 1st respondent shall bear the costs of the appeal.

52. Orders accordingly.

**Kimani & 2 others v Kenya Airports Authority & 3 others (Petition 11 of 2019) [2021] KESC 43 (KLR) (16 July 2021) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2021] KESC 43 (KLR)

***Civil Practice and Procedure*** *– appeals – appeals to the Supreme Court - appeals involving matters of constitutional interpretation or application - requirements for an intended appeal to the Supreme Court as of right in a case involving the interpretation or application of the Constitution - whether it was necessary to seek leave to apply to the Supreme Court where an appeal involved a matter of constitutional interpretation or application – Constitution of Kenya, 2010, article 163(4)(a).*

***Jurisdiction*** *– jurisdiction of the Supreme Court – appellate jurisdiction – jurisdiction as of right in a case involving the interpretation or application of the Constitution - whether the mentioning of constitutional provisions by the Court of Appeal in a decision being appealed against automatically invoked the Supreme Court's appellate jurisdiction as of right in a case involving the interpretation or application of the Constitution - under what circumstance did the Supreme Court have jurisdiction to entertain appeals from interlocutory decisions - Constitution of Kenya, 2010, article 163(4)(a).*

**Brief facts**

The appellants moved the High Court challenging their exclusion from operating their taxis at the Jomo Kenyatta International Airport (JKIA) by the 1st respondent in breach of an existing lease. Pending the hearing and determination of the suit, the High Court allowed an application seeking an interlocutory mandatory injunction to compel the 1st respondent to allow them to continue operating their taxi business at JKIA. Aggrieved, the 1st respondent appealed against the decision and the Court of Appeal set aside the orders made by High Court.

Subsequently, the High Court allowed the 1st respondent's preliminary objection seeking to have the appellants' suit struck out on among other grounds that: the appellants' suit and the entire proceedings therein had been filed in contravention of the mandatory provisions of sections 33 and 34(a) of the Kenya Airports Authority Act, Cap. 395, (KAAA). Aggrieved by that High Court ruling striking out the suit, the appellants appealed to the Court of Appeal. The Court of Appeal dismissed the appeal in its entirety and ordered each party to bear its own costs. The appellants were aggrieved by the Court of Appeal decision and thus filed the instant appeal seeking among others the substitution of the orders of the High Court and the Court of Appeal with an order allowing the appellant's plaint challenging their exclusion from operating their taxis at the JKIA as prayed.

**Issues**

i. Whether it was necessary to seek leave before applying to the Supreme Court where an appeal involved a matter of constitutional interpretation or application.

ii. What were the requirements for an intended appeal to the Supreme Court as of right in a case involving the interpretation or application of the Constitution?

iii. What were the circumstances in which the Supreme Court could have jurisdiction to entertain appeals from interlocutory decisions?

iv. Whether the mentioning of constitutional provisions by the Court of Appeal in a decision being appealed against automatically invoked the Supreme Court's appellate jurisdiction as of right in a case involving the interpretation or application of the Constitution.

**Held**

1. Where an appeal involved a matter of constitutional interpretation and/or application, it signaled access to the Supreme Court as of right and no form of authorization or leave from the court was required. Thus, in the instant matter, once the court established that there was an issue that involved a matter of constitutional interpretation and/or application, the appellants would have right of appeal before the court.
2. Article 163(4)(a) of the Constitution had to be seen to be laying down the principle that not all decisions from the Court of Appeal could be further appealed to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution could be entertained by the Supreme Court. Towards that end, it was not the mere allegation in pleadings by a party that clothed an appeal with the attributes of constitutional interpretation or application.
3. The appeal had to originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant had to be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party had to be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it could not support a further appeal to the Supreme Court under the provisions of article 163(4)(a) of the Constitution.
4. The court should be wary of litigants who merely cited constitutional provisions in their pleadings with the intention of finally seeking an appeal to the Supreme Court even when their case had nothing to do with constitutional interpretation and/or application. To the contrary in determining whether it had jurisdiction, the court should keenly evaluate the Court of Appeal decision, whether in disposing of the matter, there were elements of constitutional interpretation and/or application. That did not however mean that citing constitutional provisions in one's pleadings was not a ground for founding an appeal before the court.
5. Where specific constitutional provisions of the Constitution were cited and formed the gist of the matter before the Court of Appeal, the appeal was well anchored in article 163(4)(a) of the Constitution. One way to determine whether the court had jurisdiction was to look at the original pleadings to determine whether specific constitutional provisions were pleaded. That was, however, only conclusive where the matter as originally filed in the superior court had been wholly heard and determined and the same had been appealed to the Court of

Appeal and was subject of the appeal before the Supreme Court. Where the substantive matter as originally filed was pending and what was before the Supreme Court was subject of an interlocutory matter, the inquest did not start and end with the original pleadings as originally filed.

6. The court did not have jurisdiction to entertain appeals from interlocutory decisions save where the interlocutory decision in question was a substantive determination of a constitutional issue that had been canvassed through the superior courts below.

7. The court dismissed the appellants' assertion that the court had jurisdiction, and that they had a right of appeal before the court because in their original pleadings, they alleged contraventions of their rights under sections 3, 75, 77, 82 and 85 of the repealed Constitution. That was because, their substantive suit as filed before the High Court was not fully determined. The same was struck out by the High Court in determining a preliminary objection filed by the 1st respondent. Hence, in determining the jurisdiction question in the instant matter, the preliminary objection was the focal reference point.

8. The preliminary objection sought to strike out the suit on the ground that the same was premature as it had been filed in contravention of the mandatory provisions of sections 33 and 34(a) of the Kenya Airports Authority Act. The preliminary objection as raised invoked no issue of constitutional interpretation.

9. A perusal of the ruling revealed that the High Court's reasoning, and the conclusions which led to the determination of the issue, put in context, could not properly be said to have taken a trajectory of constitutional interpretation or application. At the High Court, the matter had nothing dealing with the Constitution.

10. On *res judicata*, the Court of Appeal invoking section 7 of the Civil Procedure Act, found that it was not applicable since neither the High Court nor the Court of Appeal pronounced themselves on sections 33(1) and 34 of the Kenya Airports Authority Act. In making that finding, there was no indication of application or interpretation of the Constitution. The Court of Appeal found that it had previously pronounced itself on the constitutionality of the appellants' claim, and particularly section 33(1) of the Kenya Airports Authority Act. That it had twice made a finding that the appellants claim was not for enforcement of fundamental rights as alleged and it was thus *functus officio* on the issue. The Court of Appeal did not interpret and/or apply the Constitution in making that finding.

11. There was nothing constitutional in a court making a finding that on an issue or suit before it, it was *functus officio*. Be that as it may, the Court of Appeal having made a finding that it had twice determined the issue in separate cases, which cases were not before the instant court on appeal, the instant court could not sit on appeal on those issues. Consequently, the allegation as framed by the appellants did not invoke the instant court's jurisdiction under article 163(4)(a) of the Constitution.

12. The issue whether there was inordinate delay in the filing of the preliminary objection had no constitutional aspect; so was the issue whether the preliminary objection constituted a pure

point of law. The Court of Appeal found that there was a pure legal question, whether the appellants had complied with sections 33(1) and 34 of the Kenya Airports Authority Act or not. A question the Court of Appeal answered that it had not been complied with. Hence on all those issues framed and determined by the Court of Appeal, there was no constitutional issue to cloth the court with jurisdiction.

13. The court would zealously guard against schemes that could seek to invoke the court's jurisdiction where none was available through the craft of pleadings drafting.

14. The instant reference was not enough to invoke the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution. The Court of Appeal dismissed the appellants attempt at clothing their suit as one for enforcement of fundamental rights and held that it was pure a contractual dispute. Equally, the Court of Appeal dismissed the appellants' allegations that the High Court disregarded article 159(2)(d) of the Constitution by resorting to statutory provisions of the Kenya Airports Authority Act. Looking at the Court of Appeal judgment on that issue, its sentiments on the issue were not material enough to reach a finding that the Court of Appeal interpreted and/or applied article 159(2)(d).

15. It was not granted that whenever the Court of Appeal mentioned a provision of the Constitution in its decision, the matter under consideration automatically invoked the Supreme Court's appellate jurisdiction under article 163(4)(a) of the Constitution. In any event, the Constitution was the supreme law of the land and all decisions had to abide and follow it. Hence a mention of the Constitution by the court when making a determination would not always cloth the matter with constitutional issues.

16. **[*Obiter*]** Before the final orders, we would like to state that even on the single question of constitutionality of section 33(1) of the Kenya Airports Authority Act, which issue we have found was not determined in this particular matter, this court pronounced itself on its constitutionality in *Modern Holdings (EA) Limited v Kenya Ports Authority* [2020] eKLR. In that case, the Supreme Court was called upon to determine the constitutionality of section 62 of the Kenya Ports Authority Act, which has the same import as section 33 of the Kenya Airports Authority Act , this Court held section 62, together with similar sections in other statutes, as being constitutional and in accordance with article 159(2)(c).

*Petition of appeal dismissed; no order as to costs.*

**Citations**

**Cases**

***Kenya***

1. *Anami Silverse Lisamula v Independent Electoral & Boundaries Commission, Returning Oficer Nyando Constituency – Daniel Len & Justus Gesito Mugali M'mbaya* Petition 9 of 2014; [2014] KESC 40 (KLR); [2014] eKLR - (Explained)
2. *Ananias N Kiragu v Eric Mugambi, Franklin Mwirigi & Martin Njeru* Civil Application 10 of 2020; [2020] KESC 77 (KLR); [2020] eKLR - (Explained)

3. *Attorney General v Manchester Outfitters Limited & another* Miscellaneous Application 551 of 2008; [2008] eKLR - (Explained)
4. *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others* Petition 4 of 2015; [2017] KESC 11 (KLR); [2017] eKLR - (Explained)
5. *Bia Tosha Distributors Limited v Kenya Breweries Limited, UDV (Kenya) Limited, Cogno Ventures Limited, East African Breweries Limited, Diageo PLC, Kamahuha Limited & Four Winds Trading Company Limited* Application 10 of 2017; [2018] KESC 70 (KLR); [2018] eKLR - (Explained)
6. *Daniel Kimani Njihia v Francis Mwangi Kimani & Thika District Land Registrar* Civil Application 3 of 2014; [2015] KESC 19 (KLR); [2015] eKLR - (Explained)
7. *Dominic Arony Amolo v Attorney General* Miscellaneous Application 494 of 2003; [2003] KEHC 220 (KLR); [2003] eKLR - (Explained)
8. *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* Petition 5 of 2012; [2012] eKLR - (Explained)
9. *Fahim Yasin Twaha v Timamy Issa Abdalla, Independent Electoral and Boundaries Commission & Silvano Buko Bonaya* Civil Application 35 of 2014; [2015] KESC 20 (KLR); [2015] eKLR - (Explained)
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12. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] eKLR - (Explained)
13. *Joseph Nyamamba,Isaac Kiprono Ngetich,William Nyaega,Benjamin Njeru & Timothy Berre v Kenya Railways Corporation* Civil Appeal 235 of 2009; [2015] KECA 181 (KLR); [2015] eKLR - (Explained)
14. *Kenya Airports Authority v Paul Njogu Mungai, James Kimani & New Jambo Taxis* Civil Appeal No 282 of 2001 - (Mentioned)
15. *Kenya Airports Authority vs Paul Njogu Mungai, James Kimani & New Jambo Taxis* Civil Application 29 of 1997; [1997] KECA 261 (KLR); [1997] eKLR - (Mentioned)
16. *Kenya Association of Air Operators v Kenya Airports Authority* Civil Case No 974 of 2002 - (Explained)
17. *Kimani & 20 others (On behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others* Petition 45 of 2018; [2020] KESC 9 (KLR); [2020] eKLR - (Explained)
18. *Kivuti v Independent Electoral and Boundaries Commission (IEBC) & 3 others* Petition 35 of 2018; [2019] KESC 51 (KLR); [2019] eKLR - (Explained)

19. *Lawrence Nduttu & 6000 others v Kenya Breweries Limited & another* Petition 3 of 2012; [2012] eKLR - (Explained)
20. *Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki,Giro Commercial Bank & Commercial Bank Limited* Civil Appeal 68 of 2016; [2018] KECA 768 (KLR); [2018] eKLR - (Explained)
21. *Maya Duty Free Limited v Attorney General & Kenya Airports Authority* Petition 93 of 2010; [2019] KEHC 6745 (KLR); [2019] eKLR - (Explained)
22. *Modern Holdings (EA) Limited v Kenya Ports Authority* Petition 20 of 2017; [2020] KESC 53 (KLR); [2020] eKLR - (Explained)
23. *Munene v King'ara & 2 others* Petition 7 of 2014; [2014] KESC 37 (KLR); [2014] eKLR - (Explained)
24. *Parapet Limited v Kenya Airports Authority* Civil Case No 4 of 1999 - (Explained)
25. *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* Petition 2 of 2012; [2012] eKLR - (Explained)
26. *Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited* Civil Appeal No 110 of 2001 - (Explained)
27. *Rhumba Kinuthia v Attorney General* Misc ellaneous Application No 1408 of 2004 - (Explained)
28. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR); [2013] eKLR - (Explained)
29. *Stanley Munga Githunguri v Jimba Credit* Civil Appeal No. 144 of 1988 - (Explained)
30. *Taxtar Investments Limited v Kenya Airports Authority* Civil Case 1238 of 1999; [2001] KEHC 794 (KLR); [2001] eKLR - (Explained)
31. *Teachers Service Commission v Kenya National Union of Teachers (KNUT) & 3 others* Petition 3 of 2015; [2015] KEELRC 863 (KLR); [2015] eKLR - (Explained)
32. *W'Njuguna v Republic* Miscellaneous Criminal Case 710 of 2002; [2004] eKLR; [2004] 1 KLR 520 - (Explained)

***United States***

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**Statutes**

***Kenya***

1. Civil Procedure Act (cap 21) - (Interpreted) section 7
2. Constitution of Kenya - (Interpreted) articles 2(4); 159(2)(d); 163(4)(a)
3. Constitution of Kenya (Repealed) - (Interpreted) sections 3; 75; 77; 82; 84; 85
4. Elections Act (cap 7) - (Cited) In general
5. Intergovernmental Relations Act (cap 265F) - (Interpreted) section 32
6. Kenya Airports Authority Act (cap 395) - (Interpreted) sections 12; 14; 15; 33; 33(1); 34(a); 34
7. Kenya Ports Authority Act (cap 391) - (Interpreted) section 62
8. Kenya Railways Corporation Act (cap 397) - (Interpreted) section 83(1)
9. Supreme Court Act (cap 9B) - (Interpreted) section 15(2)
10. Supreme Court Rules, 2011 (cap 9B Sub Leg) - (Interpreted) rule 32

**Advocates mentioned**

Mr. Gibson Kamau Kuria for Appellants

Mr. Daniel Mukeli for 1st respondent

July 16, 2021, the Court delivered the following Judgment:

## I. Introduction

1. This is a Petition of Appeal dated 15th March, 2019 and filed on 19th March, 2019 pursuant to section 15(2) of the *Supreme Court Act*, 2011, rule 32 of the *Supreme Court Rules* 2011, articles 2(4) and 163(4)(a) of the *Constitution*. A supplementary record of appeal was filed on 26th June 2020. The Appeal is challenging the entire judgement of the Court of Appeal (Waki, Musinga & Odek JJA) delivered on the 25th January 2019 in Nairobi Civil Appeal No 2 of 2013. The Court of Appeal upheld the decision of the High Court (Mwera J) which struck out the appellants' suit with costs.

2. In particular, the Petition seeks the following reliefs, reproduced verbatim, that:

   (i) The Petition be allowed with costs.

   (ii) There be substituted, for the orders of the superior court and the Court of Appeal, an order allowing the Plaint dated 14th October, 1996 as prayed.

## II. Background

### a. Proceedings in the High Court

3. The appellants moved the High Court via HCCC No 2543 of 1996 challenging their exclusion from operating their taxis at the Jomo Kenyatta International Airport (JKIA) by the 1st respondent in breach of an existing lease. They sought the following specific orders, produced verbatim:

   (a) A declaration that a taxi business like that operated by members of the third plaintiff is property within the meaning of section 75 of the *Constitution*.

   (b) A declaration that the removal of the taxis of the first and second plaintiffs and those of the members of the third plaintiff from Jomo Kenyatta International Airport on grounds of their ethnic origin is in breach of the plaintiffs' right under section 82 of the *Constitution of Kenya* not to be subjected to discriminatory practices.

   (c) A declaration that the removal of the taxis of the first and second plaintiffs and of the members of the third plaintiff from Jomo Kenyatta International Airport was in breach of the plaintiffs' right under section 75 of the *Constitution of Kenya* not to be deprived of property.

   (d) A declaration that the removal of the taxis of the first and second plaintiffs and those of the members of the third plaintiff was a contravention of their right under section 77, to the protection of the law.

   (e) A declaration that the removal of the taxis of the first and second plaintiffs and those of the members of the third plaintiff is a contravention of their right under sections 78 and 82 of the *Constitution* to hold such opinions and views including political as persuades their consciences.

   (f) A permanent and perpetual injunction to restrain the first defendant from further excluding the plaintiffs' taxis from the said Airport.

   (g) A mandatory injunction to compel the first defendant to allow the return of the excluded taxis of the third plaintiff.

   (h) A permanent and perpetual injunction to restrain the defendants from trespassing to the plaintiffs' offices.

   (i) A mandatory injunction to remove the second, third and fourth defendants from the plaintiffs' office.

   (j) Mesne profits for trespass against the defendants.

(k) Damage for breach of contract against the first defendant.

(l) Costs of this suit.

(m) Interest.

4. Pending the hearing and determination of the suit, the appellants filed an application seeking an interlocutory mandatory injunction to compel the 1st respondent to allow them to continue operating their taxi business at JKIA. The 1st respondent opposed the application on the grounds that: no statutory notice had been served upon the 1st respondent as required by section 34(a) of the *Kenya Airports Authority Act* (KAA Act) (cap 395); the provisions of section 33(1) of *cap 395* which provide for Statutory arbitration had not been followed by the appellants; the proceedings were wholly misconceived, incompetent and bad in law; the application did not satisfy the tests in *Giella v Cassman Brown And Company Limited* (1973) EA 358. the application did not meet the conditions for the granting of a mandatory injunction; and that the application is frivolous, vexatious and an abuse of the court process.

5. In a Ruling delivered on 24th January 1997, Hayanga J, reinstated the appellants' operation at JKIA pending the hearing and determination of the suit.

Aggrieved by the said ruling, the 1st respondent appealed against the decision and the Court of Appeal, in a judgment delivered on 27th November 2009 set aside the orders made by Hayanga, J.

6. Subsequently, upon resumption of the hearing in the High Court, the 1st respondent filed a Preliminary Objection dated 23rd August, 2010, seeking to have the appellants' suit struck out on grounds that: the appellants' suit and the entire proceedings therein had been filed in contravention of the mandatory provisions of section 33 and section 34(a) of the *Kenya Airports Authority Act*, cap 395, ("the Act"); the suit and the entire proceedings therein were premature, misconceived, incompetent and a complete nullity; and that consequently, the High Court lacked jurisdiction to entertain the suit. They sought the Court to strike out the suit with costs

7. Mwera, J (as he then was), upheld the Preliminary Objection and struck out the appellants' suit with costs to the respondents.

**b. Proceedings in the Court of Appeal**

8. Aggrieved by that High Court ruling striking out the suit, the appellants appealed to the Court of Appeal, in Civil Appeal No 2 of 2013. They raised 10 grounds of appeal, which the Learned Judges of Appeal summarized into five (5) issues for determination as follows:

(i) Whether the Preliminary Objection was res judicata.

(ii) Whether the learned judge erred in both law and in fact in upholding the application of sections 33 and 34 of the *KAA Act*.

(iii) Whether the learned judge erred in fact and law in entertaining the Preliminary Objection made 15 years after the suit was filed.

(iv) Whether the Preliminary Objection constituted a pure point of law.

(v) Whether the learned judge erred in failing to appreciate the suit was for enforcement of fundamental rights under section 84 of the *Constitution*.

9. In a ruling delivered on 25th January, 2019 the Court of Appeal dismissed the appeal in its entirety and ordered each party to bear its own costs. On the first issue, as to whether the Preliminary Objection was based on issues which were res judicata, the appellate Court found that it was not since neither the High Court nor the Court of Appeal had previously pronounced themselves on section 34 in the course of the dispute.

10. On the second issue, whether the learned judge erred in both law and in fact in upholding the application of sections 33 and 34 of the *KAA* Act in striking out the appellants' suit, the appellate Court found that since it had previously pronounced itself on the constitutionality of the appellants' claim, and particularly section 33(1) of the *KAA Act*, it was *functus officio* and could not revisit that issue. Thus, the Learned Judges rejected the appellants' claim that the learned Judge erred in failing to appreciate that the suit before him was for enforcement of fundamental rights.

11. As regards the third issue, whether the learned judge erred in fact and law in entertaining the Preliminary Objection made 15 years after the suit was filed, the appellate Court found that there was no basis for finding that there was inordinate delay in filing the Preliminary Objection as the same had been raised in the 1st respondent's grounds of opposition dated 24th October, 1996 and repeated in their defence dated 28th January, 1997 and later filed in 23rd October, 2010 after the resumption of hearing of the main suit. The Court also noted that the delay in this matter was partly occasioned by the hearing of the interlocutory application and the appeal thereto.

12. On the fourth issue, whether the Preliminary Objection constituted a pure point of law, the Court's finding was in the affirmative and agreed with the trial Court's finding that there was no denial that the appellants had not complied with section 33(1) and 34 of the *KAA Act*.

13. Lastly, on whether the learned judge erred in failing to appreciate the suit was for enforcement of fundamental rights under section 84 of the *Constitution* (repealed), the Court of Appeal declined to find that the 1st respondent's assertion that the mandatory provisions of sections 33(1) and 34 of the *KAA Act* had not been complied with was a

mere technicality which the trial court ought to have disregarded as was persuaded by the appellants. Rather, it found that parties' rights were contained in a lease which expressly incorporated the aforesaid provisions of the law and that they had to be complied with.

**III. Appeal Before the Supreme Court**

14. The appellants are aggrieved by the Court of Appeal decision and moved this Honourable Court by filing this Appeal. The Appeal is premised on five (5) grounds, namely that the Learned Judges of the Court of Appeal:

    i. Erred in holding that they had pronounced themselves on the constitutionality of the appellants' claim and that it was *functus officio*;

    ii. Erred in taking the position that the question of constitutionality which had been pleaded in the plaint could be resolved through a Preliminary Objection which had been raised for a second time;

    iii. Were wrong in failing to find that the 1st respondent's prayer to have the suit struck out on grounds that the appellants had not observed the arbitral clause was res judicata;

    iv. Were wrong in failing to recognize that the appellants had sought a substantive order for a declaration that section 33 of the *Kenya Airports Authority Act* is unconstitutional to the extent of its inconsistency with section 75, 77 and 82 of the *Constitution of Kenya* (former), which needed to be considered and determined on its merits at the hearing of the main suit; and

    v. Ignored wholly the principle that legal and factual issues are never resolved through interlocutory proceedings and further that all the proceedings that preceded the appeal were interlocutory.

**IV. Parties' Submissions**

15. The Parties filed written submissions, which they highlighted before the Court. The appellants were represented by Senior Counsel Mr Gibson Kamau Kuria, while the 1st respondent was represented by Counsel Mr Daniel Mukeli. There was no appearance for the 2nd -4th respondents and they also never filed any submissions.

**a. The appellants' submissions**

16. The appellants filed their Written Submissions on 16th April, 2019. Further submissions were filed on 20th June 2020. They reiterated the issues for determination as set out in their Petition, thus:

1) Whether based on article 163(4)(a) of the *Constitution*, the petitioners have a right of appeal and whether this Honourable Court has jurisdiction to hear and determine the appeal.

2) Whether the High Court and the Court of Appeal ignored the doctrine of supremacy of the Constitution which was written into both the current and the *former Constitution*.

3) Whether the appellants were discriminated against on grounds of ethnicity by the respondents.

4) Whether the petitioners right to property under section 75 of the *Constitution* had been contravened by the respondents.

5) Whether the appellants rights under section 82 of the *former Constitution* not to be subjected to arbitrary and capricious exercise of power had been contravened.

6) Whether the petitioners are entitled to the reliefs claimed in their plaint dated 14th October 1996.

7) Whether the 1st respondent filed a Preliminary Objection which was res judicata.

8) Whether the question of the constitutionality of the arbitration clause as was raised in the plaint has been left without being substantively determined.

9) Whether the Court of Appeal ignored the requirement that it do consider comparative constitutional jurisprudence when interpreting the *Constitution*.

17. Citing article 163(4)(a) of the *Constitution*, the appellants submit that this Court is clothed with jurisdiction to hear and determine an appeal from the Court of Appeal. In order to find whether a constitutional issue is involved in a matter, it is urged that the Court should look at the original pleadings filed at the inception of the suit to find whether a constitutional issue was pleaded.

18. They contend that they had pleaded contravention of their fundamental rights to property under section 75 and right to protection of the same under sections 77(9), 82 and 84 of the *repealed Constitution*. To buttress their arguments, they cite this Court's cases of *Anami Silverse Lisamula v Independent Electoral & Boundaries Commission & 3 others* [2014] eKLR, Petition No 9 of 2014; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* [2014] eKLR, Supreme Court Petition No 2 of 2014, *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2014] eKLR, SC Application No 10 of 2014.

19. It is submitted that the Court of Appeal ignored the doctrine of supremacy of the Constitution and provisions of sections 3, 75, 77, 82 and 85 of the *former Constitution*,

which the appellants had relied on. That the Court of Appeal instead elevated and applied sections of the *KAA Act* providing for arbitration as the first point of call in event of a dispute for resolution, as cited by the respondents. This they urge was in total disregard of the *Constitution*, especially by finally holding that the appellants ought to have pursued arbitration first. Further, that the Court of Appeal ignored the decision of this Court on *Speaker of the Senate & Another v Hon. Attorney General & 3 others*, [2013] eKLR that a *Constitution* is a charter for transforming a country. It is also urged that the superior court had entertained a Notice of Preliminary Objection on a point that had been deemed res judicata.

20. The appellants urge that the 1st respondent raised the Preliminary Objection 15 years later thereby contravening the provisions of article 159(2)(d) of the *Constitution* and the overriding objective of the *Civil Procedure Act*. The Preliminary Objection was raised in disregard of the principle that the same should be raised at the earliest time possible. They maintain that the Preliminary Objection as was raised in the defence was never raised as a pure point of law since it required evidence from the lease agreement to prove. The appellants contend that the issue as to whether the subject matter fell under section 33 of the *KAA Act* was a question of fact and evidence and that the court ought to have taken in evidence to determine the same.

21. Furthermore, the appellants urge, that section 33(1) of the *KAA Act* was ultra vires sections 75, 77 and 84 of the *former Constitution*, hence, null and void by virtue of section 3 of the *former Constitution* as it restricts the enjoyment of a right to property and the right to access the court on claims of constitutional violations. They also submit that the alleged section purported to restrict the remedies which were available to the person whose fundamental right had been infringed especially those of prohibition, mandamus and certiorari.

22. While citing sections 12, 14 and 15 of the *KAA Act*, the appellants urge that the issue as to whether the 1st respondent committed the wrongs complained of fell under the said sections and was a question of fact and evidence which could not be determined by way of a preliminary objection. To buttress their submissions, they cite the cases of *Stanley Munga Githunguri v Jimba Credit*, Civil Appeal No. 144 of 1988 and *AG v Manchester Outfitters Limited*, Milimani Misc Appl No 551 of 2008.

23. The appellants argue that their claim at the High Court was one for reliefs for breach of fundamental rights, under section 84 of the *former Constitution* and not section 33 of the *KAA Act*. Consequently, they maintain that the court has a wide unfettered jurisdiction to grant effective reliefs including declarations, damages and judicial review orders which they are entitled to. They cite the cases of *Kenya Bankers Association v Minister of Finance* [2001] eKLR, *Wanjuguna v Republic* [2004] 1 KLR 520, and *Ramanoop v AG* [2004] 1 CLR to support their submissions.

24. They maintain that other than the reliefs sought in their plaint at the High Court, they sought the declaration that section 33 of the *KAA Act* was inconsistent with the *Constitution* for limiting the reliefs parties can seek and containing unreasonable time periods of one month for service of notice and a one-year claim limitation period, which limit access justice. They relied on the cases of *Dominic Arony Aroyo v the Attorney General*, High Court Misc. Application No 494 of 2003 and *Rhumba Kinuthia v Attorney General*, High Court Misc Application No 1408 of 2004.

25. They contend that the Preliminary Objection was misconceived as the subject matter entailed breach of fundamental rights, which the court has a duty to investigate first once it is raised. On this, they relied on the case of *Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited*, Civil Appeal No. 110 of 2001. It is submitted that section 33 of *KAA Act* relied on by the respondents to argue that the court did not have jurisdiction, provided for compensation only, whereas the appellants complaint was in breach of their fundamental rights. They urge that the Constitution provides for unlimited guarantee for access to court for redress of violation of constitutional contraventions. Accordingly, they urge the Court to grant the prayers sought in the Petition before the High Court.

26. Buttressing the written submissions, SC Kamau Kuria argued that section 33 of *KAA Act*, was unconstitutional. This is because it limits redress for wrongs committed by the respondents to compensation and arbitration only, contrary to section 84 of the *retired Constitution* which granted access to the High Court for enforcement of fundamental rights with wide range of orders of redress. He urged that a law enacted by the legislature should not overrule the People's will as expressed in the Constitution as was held in the famous case of *Marbury v Madison* 5 US (1 Cranch) 137 (1803), 2 L Ed 60; 1803 US Lexis 352. Counsel urged that this section offends the appellants' rights in sections 75, 77 and 82 of the *retired Constitution* because it denies them the right to pursue property rights without fair hearing. Reliance was placed on the case of *Mary Wambui Munene v Peter Gichuki King'ara & 2 others* [2014] eKLR, Petition No 7 of 2014, for the assertion that the Supreme Court is the custodian of the *Constitution*. SC Kamau Kuria urged that the words used by the 1st respondent's representative in chasing the appellants away from accessing the airport were discriminatory and should not be allowed to stand unquestioned.

**b. 1st respondent's Submissions**

27. The 1st respondent, (KAA) in its submissions filed on 24th June 2020, vehemently opposed the appeal. It framed the following as the issues for determination by the Court:

    (i) Whether the Court has jurisdiction to hear and determine the petition of appeal before it.

(ii) Whether the suit in the High Court was brought in contravention of sections 33 and 34 of the *KAA Act*.

(iii) Whether the Preliminary Objection was *res judicata*.

(iv) Whether there was delay in filing the preliminary objection.

(v) Whether the High Court suit was a suit for enforcement of fundamental rights under the then Constitution.

28. It is submitted that the appellants do not have an automatic right of appeal to the Supreme Court under article 163(4)(a) of the *Constitution*. That this court lacks jurisdiction to entertain the appeal as it did not originate from a case involving the interpretation or application of the *Constitution*. It is KAA's case that the appeal before the Court of Appeal was premised on the High Court's ruling to the 1st respondent's preliminary objection, upholding the 1st respondent's argument that the appellants ought to have first taken the suit before an arbitrator as per the mandatory provisions of sections 33 and 34 of the *KAA Act* which governed the lease subject of the suit and any disputes arising out of its execution of its mandate, being a creature of statute. It is urged that filing the suit before the High Court was a contravention of those provisions.

29. The 1st respondent cites the following cases to support his argument on the court's lack of jurisdiction: *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* [2018] eKLR; *Lawrence Nduttu & 6000 others v Kenya Breweries Limited & another* [2012] eKLR; *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* [2012] eKLR; *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* [2012] eKLR; and *Lenny Maxwell Kivuti v Independent Electoral Boundaries Commission (IEBC) & 3 others* [2019] eKLR.

30. Further, it is submitted that the appellants had time to comply with the provisions of sections 33 and 34 of the *KAA Act* as incorporated in the lease, but instead chose to file a suit in the High Court, ignoring the clear statutory and contractual mechanism for redress. That a party required by a statute to exhaust procedural dispute resolution mechanisms before approaching the court, cannot invoke jurisdiction of the court unless it has complied with the suit governing statute first. The suit was thus premature because the one-month notice required under section 34 of *KAA* was not served upon the 1st respondent, before commencement of the suit.

31. It is urged that the doctrine of the supremacy of the *Constitution* over the *KAA Act* does not come into question as the main issue in dispute here is based on the contractual obligations, the parties voluntarily entered into. By entering into the lease agreement, the appellants had agreed voluntarily to be bound by the provisions of section 33(1) of the *KAA Act*. Counsel

denied allegations of discrimination based on ethnicity and urged that after inspection, the Authority excluded many taxis of different operators which did not meet the required standards and not only those of the appellants. That the license to operate was always issued upon inspection and the taxis which did not qualify as per set standards were not issued with licenses.

32. The 1st respondent urged that the jurisdiction of the High Court is unlimited but not 'limitless' and can be limited by a statute like in this case. To anchor its argument, KAA cites the following cases; *Narok County Council v Transmara County Council* [2009]1 EA 161; *Taxtar Investment v Kenya Airports Authority*, HCCC No. 1238/1999; *Parapet Limited v Kenya Airports Authority*, HCCC No 4 of 1999; and *Kenya Association of Air Operators v Kenya Airports Authority*, HCCC No 974/2002(unreported), *Joseph Nyamamba & 4 others v Kenya Railways Corporation* (2015) eKLR, *Maya Duty Free Limited v Attorney General & Another* (2019) eKLR among others.

33. Moreover, the 1st respondent submits that the Preliminary Objection was not *res judicata*. First, because both the Rulings by Justice Hayanga and the Court of Appeal were on an interlocutory application and an interlocutory appeal respectively, not on the Preliminary Objection. Secondly, the Court of Appeal did not agree with Justice Hayanga's position on section 33 and ruled that it was one of the issues to be determined in the suit between parties, and therefore it was never dealt with finality. That neither the High Court nor the Court of Appeal dealt with section 34(a) of the *KAA Act*. It cites the case of *Maithene Malindi Enterprises Limited v Kaniki & 2 others* [2018] eKLR in support of its submissions.

34. The 1st respondent also submits that there was no inordinate delay in filing its Preliminary Objection and that the same was on a pure point of law, that is, sections 34(1) and 33 of the *KAA Act*. In that respect it is urged that since the issue raised pertained to the Court's jurisdiction, it ought to have been raised by way of a Preliminary Objection and further that there are no timelines for filing a Preliminary Objection. That it was in any event raised in paragraphs 27-29 of the 1st respondent's defence.

35. KAA asserted that parties were required to follow the procedure set out in section 33 of the *KAA Act* on compensation failure to which they can have an arbitrator chosen for them by the Chief Justice. However, if a party is dissatisfied with that avenue, one is required to issue a one-month notice under section 34 of the *KAA Act* before approaching court, which was not done. In any event, it was urged that the Court of Appeal dismissed the appeal after finding it was not concerned with violation of fundamental rights but based on contractual obligations between the parties.

36. Finally, the 1st respondent submitted that the issue of the alleged violation of fundamental rights under the Constitution was rejected and dealt with in finality by the Court of Appeal

which found that the parties could not invoke constitutional issues to their aid to deal with alleged contractual breaches. KAA urged that the appeal to be dismissed.

**V. Analysis and Determination**

37. Upon appreciation of the parties' pleadings and submissions, the following are the issues for determination by the Court:

    (i) The jurisdiction question:

        (a) whether the petitioners have a right of appeal to this Court; and

        (b) whether this Court has jurisdiction to hear and determine the appeal under article 163(4)(a) of the *Constitution*.

    (ii) Whether the Court of Appeal ignored the doctrine of supremacy of the *Constitution* by elevating section 33(1) of the *KAA Act* over constitutional provisions.

    (iii) Whether the Preliminary Objection was *res judicata* and whether the same was filed out of time in contravention of article 159(2)(d) of the *Constitution*.

    (iv) Whether the orders sought can issue.

**(i) The Jurisdiction question**

38. On the twin jurisdictional question of whether this Court has jurisdiction to hear and determine this matter under article 163(4)(a) of the *Constitution*, and whether the appellants have a right of appeal before this Court, parties raised parallel arguments. The appellants urge that the Court should look at the original pleadings filed at the inception of the matter in the High Court. That it will find that constitutional issues were pleaded, to wit, contravention of their fundamental rights to property under section 75 and right to protection of the same under sections 77(9), 82 and 84 of the repealed *Constitution*. Further that the Court of Appeal disregarded the doctrine of supremacy of the Constitution particularly sections 3, 75, 77, 82 and 85 of the *former Constitution*, and instead elevated and applied sections of the *KAA Act*.

39. The 1st respondent urge that the Court lacks jurisdiction to determine this appeal as the appeal did not originate from a case involving the interpretation or application of the Constitution. That the appeal is founded on a High Court ruling on the 1st respondent's preliminary objection, that the appellants ought to have first taken the suit before an arbitrator as per the mandatory provisions of sections 33 and 34 of the *KAA Act* which is the Statute that governed the lease agreement between the parties. KAA dismisses the invocation of the doctrine of the supremacy of the *Constitution* as alleged by the appellants urging that the same does not come into question as the main issue in dispute here was based

on contractual obligations, the parties having voluntarily entered into a contract as between them.

40. In *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others* [2015] eKLR, the Court settled that where an appeal involves a matter of constitutional interpretation and/or application, it signals access to the Supreme Court "as of right", and no form of authorization or leave from the court is required. Thus in the matter before us, once we establish that there is an issue that involves a matter of constitutional interpretation and/or application, it follows that the appellants will have right of appeal before this Court.

41. The contours of a matter falling within article 163(4)(a) jurisdiction are now set in a number of decisions of this Court, starting with the case of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & Another* [2012] eKLR where the Court stated that:

> " article 163(4)(a) must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the *Constitution* can be entertained by the Supreme Court.....Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.
>
> ... the appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the *Constitution*. In other words, an appellant must be challenging the interpretation or application of the *Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the *Constitution*, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a)"

42. The warning signaled by this Court in the above decision is that the Court should be wary of litigants who merely cite constitutional provisions in their pleadings with the intention of finally seeking an appeal to the Supreme Court, even when their case has nothing to do with constitutional interpretation and/or application. To the contrary in determining whether it has jurisdiction, the court should keenly evaluate the Court of Appeal decision, whether in disposing of the matter, there were elements of constitutional interpretation and/or application.

This does not however mean that citing constitutional provisions in one's pleadings is not a ground for founding an appeal before this court. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, the Court stated thus:

> "(69) The import of the court's statement in the *Ngoge case* is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."

This holding clearly shows that where specific constitutional provisions of the *Constitution* were cited and formed the gist of the matter before the Court of Appeal, the appeal is well anchored in article 163(4)(a) of the *Constitution*.

43. Consequently, we will agree with the appellants that in determining whether the Court has jurisdiction one way is to look at the original pleadings to determine whether indeed specific constitutional provisions were pleaded. This is however, only conclusive where the matter as originally filed in the superior court has been wholly heard and determined and the same has been appealed to the Court of Appeal and is now subject of the appeal before the Supreme Court. What of where the substantive matter as originally filed is still pending and what is before the Supreme Court is subject of an interlocutory matter? Does the inquest start and end with the original pleadings as originally filed? We do not think so.

44. We have severally held that this Court has no jurisdiction to entertain appeals from interlocutory decisions save where the interlocutory decision in question is a substantive determination of a constitutional issue that has been canvassed through the Superior Courts below. (See the cases of *Daniel Kimani Njihia v Francis Mwangi Kimani & another* [2015] eKLR; *Teachers Service Commission v Kenya National Union of Teachers & 3 others* [2015] eKLR; and *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* [2018] eKLR). In the *Ananias N Kiragu v Eric Mugambi & 2 others* [2020] eKLR we stated thus:

> "8. As a general rule, the Supreme Court does not entertain appeals on interlocutory decisions where the substantive matter is still pending before the Superior courts save where the appeal is not only on a substantive determination by the Court of Appeal of a constitutional question, but also on an issue that had been canvassed right through from the High

> Court to the Court of Appeal even though the substantive matter is still pending before the High Court."

45. A perfect example of a matter where despite the substantive matter as originally filed was still pending before the superior court but this Court assumed jurisdiction on an interlocutory matter was in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR. In that matter, the Court discerned and found that the issue it was being called upon to adjudicate (determination of the constitutional validity of section 76(1)(a) of the *Elections Act*, 2011), though raise as an interlocutory issue, it had a constitutional permutation and had been determined by both the High Court and the Court of Appeal.

46. With the foregoing analysis and having evaluated the record before us, we dismiss the appellants' assertion that the Court has jurisdiction, and that they have a right of appeal before this Court because in their original pleadings, they alleged contraventions of their rights under sections 3, 75, 77, 82 and 85 of the *former Constitution*. This is because, their substantive suit as filed before the High Court was not fully determined. The same was struck out by Mwera, J (as he then was) in determining a Preliminary Objection filed by the 1st respondent. Hence, in determining the jurisdiction question in this matter, this Preliminary Objection is the focal reference point.

47. Did the Preliminary Objection as raised in the high Court involve a matter of constitutional interpretation and application? The Preliminary Objection sought to strike out the suit on the ground that the same was premature as it had been filed in contravention of the mandatory provisions of section 33 and section 34(a) of the *Kenya Airports Authority Act*. The particular grounds in support of the preliminary objection were that:

    i. the plaintiffs' suit and proceedings have been filed in contravention of the provisions of section 33, 34(a) of the *Kenya Airports Authority Act* (Cap. 395);

    ii. by virtue of those provisions of law, the entire suit plus proceedings were premature, misconceived, incompetent and a nullity; and

    iii. further by reason of the same provisions, the court had no jurisdiction to entertain the suit and so it must be struck out with costs.

48. Outrightly, at this juncture, it is clear that the Preliminary objection as raised invoke no issue of constitutional interpretation. This leads us to the second consideration signaled in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*:

> "whether the court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application".

49. A perusal of the Ruling reveals the contrary. The submissions of the 1st respondent in support of its Preliminary objection centred on the applicability of section 33(1) and 34 of the *KAA Act*. It never invoked any constitutional provision or issue. On their part, the appellants in opposing the Preliminary Objection referred to the Ruling that had been made earlier by Hayanga, J, in which injunction orders were granted and submitted that the provisions of the *KAA Act* being cited had been dismissed. On that basis, the appellants urged that the Preliminary objection was *res judicata*. Mwera, J (as he then was), upheld the preliminary objection. He dismissed the *res judicata* plea holding that the Court of Appeal had in fact stated that it left the issue of section 33 for consideration by the trial court, and found that indeed the suit had been brought in contravention of sections 33, for not being subjected to arbitration; and section 34 for lack of serving a notice to the respondent. Suffices it to say that clearly, at the High Court, the matter had nothing dealing with the Constitution.

50. Before the Court of Appeal, the Learned Judges of Appeal summarized the appellants appeal and framed five (5) issues for determination as follows:

(1) Whether the Preliminary Objection was *res judicata*.

(2) Whether the learned judge erred in both law and in fact in upholding the application of sections 33 and 34 of the *KAA Act*.

(3) Whether the learned judge erred in fact and law in entertaining the Preliminary Objection made 15 years after the suit was filed.

(4) Whether the Preliminary Objection constituted a pure point of law.

(5) Whether the learned judge erred in failing to appreciate the suit was for enforcement of fundamental rights under section 84 of the *Constitution*.

51. Outrightly, save for the fifth (5th) issue for determination, which we will shortly interrogate whether it really warrants invocation of this Court's jurisdiction under article 163(4)(a), all other issues are not constitutional. Did the Court of Appeal apply the *Constitution* in its determination of the framed issues?

52. On *res judicata*, the Court of Appeal, invoking section 7 of the *Civil Procedure Act*, found that it was not applicable since neither the High Court nor the Court of Appeal pronounced themselves on sections 33(1) and 34. It held:

> " 21. We have considered the ruling of Hayanga, J. and the judgment of this Court against the said ruling. We do not agree that Mwera, J. erred in finding and holding that the preliminary objection was not

> res judicata. An issue can only be considered res judicata when it has been finally determined and is no longer subject to an appeal. If a lower court determines a matter or pronounces itself on an issue and subsequently an appellate court reverses that decision or finding and thereafter the hearing proceeds before the trial court, it cannot be said that the issue that had been raised and determined by the trial court earlier is res judicata."

In making this finding, there was no indication of application or interpretation of the *Constitution*.

53. Turning to the application of sections 33 and 34 of the *KAA Act*, in striking out the suit, the appellants had urged that the learned Judge erred as he failed to appreciate that the constitutionality of these sections was being challenged in the main suit. Further, that their case was for breach of fundamental rights and as such these sections did not apply. *Prima facie*, this is a constitutional issue. But does it warrant invocation of this Court's jurisdiction?

54. We have stated above that it is not the mere allegation or citing of constitutional provisions that places a matter within the four corners of article 163(4)(a) of the *Constitution*. A party must demonstrate that those provisions were indeed subject of the court's findings and determination. In this appeal, the appellate Court found that it had previously pronounced itself on the constitutionality of the appellants' claim, and particularly section 33(1) of the *KAA Act*. That it had twice made a finding that the appellants claim was not for enforcement of fundamental rights as alleged and it was thus *functus officio* on the issue. Did the Court of Appeal interpret and/or apply the *Constitution* in making this finding? We do not think so.

55. It is trite law that a court of law takes judicial notice of its decisions. In holding that it was *functus officio* on the issue, the Court of Appeal made reference to its previous two decisions in: "Civil Application No. NAI 29 of 1997, *Kenya Airports Authority v Paul Njogu Mungai, James Kimani & New Jambo Taxis,* (being an application for stay of execution of Hayanga, J's ruling pending appeal), and Civil Appeal No 282 of 2001, *Kenya Airports Authority v Paul Njogu Mungai, James Kimani & New Jambo Taxis.* Upon that reference the appellate Court concluded thus:

> " 29. This Court, having pronounced itself on the constitutionality of the appellants' claim, and particularly section 33(1) of the *KAA Act*, it is *functus officio* and cannot revisit it. We must therefore reject the appellants' contention that the learned judge erred in failing to appreciate that the suit before him was for enforcement of fundamental rights. As was held by this Court in *Republic v National Environmental Management Authority* [2011] eKLR,

> "It is for the court to undertake a proper scrutiny based on the pleadings before it to determine whether the dispute has a complete constitutional trajectory"."

56. We do not find anything constitutional in a court making a finding that on an issue or suit before it, it is *functus officio*. Be that as it may, the Court of Appeal having made a finding that it has twice determined the issue in separate cases, which cases are not before this Court on appeal, the Supreme Court cannot sit on 'appeal' on those issues. Consequently, this allegation as framed by the appellants does not invoke this Court's jurisdiction under article 163(4)(a) of the *Constitution*.

57. The issue whether there was inordinate delay in the filing of the Preliminary Objection and as determined by the Court of Appeal, dismissing it, has no constitutional aspect. So is the issue whether the Preliminary Objection constituted a pure point of law. The Court of Appeal found that there was a pure legal question, whether the appellants had complied with section 33(1) and 34 of the *KAA Act* or not. A question the Court of Appeal answered in the agreement with the 1st respondent that the same had not been complied with. Hence on all four these issues framed and determined by the Court of Appeal, we find no constitutional issue to cloth this Court with jurisdiction.

58. We now turn to consider the last issue framed by the Court of Appeal: Whether the learned judge erred in failing to appreciate the suit was for enforcement of fundamental rights under section 84 of the *Constitution*. We warn ourselves for the umpteenth time that it is not the alleging or framing of issues by a party as raising a constitutional matter that clothes this Court with jurisdiction.

The Court will zealously guard against schemes that may seek to invoke this Court's jurisdiction where none is available through the craft of pleadings drafting.

59. Be that as it may, on this issue it was urged before the Court of Appeal that the learned judge, in upholding the Preliminary Objection and thereby striking out the appellants' suit, disregarded the provisions of article 159(2)(d) of the *Constitution* that obliges the court to administer justice without undue regard to procedural technicalities. The Court of Appeal disabused this argument citing this Court thus:

> "In *Raila Odinga v I.E.B.C. & others* [2013] eKLR, the Supreme Court held that article 159(2)(d) of the *Constitution* was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court."

Consequently, the appellate Court found that the mandatory provisions of sections 33(1) and 34 of the *KAA Act* ought to be complied with and were not a mere technicality to be

disregarded. The appellate Court found that parties' rights were contained in a lease which expressly incorporated the aforesaid provisions of the law and that they had to be complied with.

60. We reserved this issue for determination last because this is the only issue that in its determination, the Court of Appeal made reference to the *Constitution*, article 163(4)(a). Is this reference enough to invoke this Court's jurisdiction under article 163(4)(a) of the *Constitution*? We do not think so. First we have found that the Court of Appeal dismissed the appellants attempt at clothing their suit as one for enforcement of fundamental rights and held that it was pure a contractual dispute. Equally, the Court of Appeal dismissed the appellants' allegations that the High Court disregarded article 159(2)(d) of the *Constitution* by resorting to statutory provisions of the *KAA Act*. Looking at the Court of Appeal Judgment on this issue we do not think that its sentiments on the issue were material enough to reach a finding that the Court of Appeal interpreted and/or applied article 159(2)(d) of the *Constitution*.

61. It is not granted that whenever the Court of Appeal mentions a provision of the *Constitution* in its decision, the matter under consideration automatically invokes this Court's appellate jurisdiction under article 163(4)(a) of the *Constitution*. In any event, the *Constitution* is the supreme law of the land and all decisions have to abide and follow it. Hence a mention of the Constitution by the court when making a determination will not always cloth the matter with constitutional issues. In *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others*, [2017] eKLR, Petition No. 4 of 2015 we held that the mere reference to the rich generality of the constitutional principle is not a sufficient ground to invoke article 163(4)(a).

62. At this juncture, it is imperative to reiterate this Court's holding in a recent matter that involved some of the appellants, being *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others* [2020] eKLR. In this matter, the Court re-stated its jurisprudence on article 163(4)(a) *Constitution* as follows:

> "(62) We cannot over-emphasize the specialized nature of article 163(4)(a)'s Appellate jurisdiction of this Court. That jurisdiction is not just another level of appeal. Thus, even if the original suit in the High Court or lower Court invoked specific constitutional provisions, that fact alone is not enough for one to invoke and sustain an appeal before this Court. A party has to steer his appeal in the direction of constitutional interpretation and application. He/she should directly point to the specific instances where the Court of Appeal erred in its interpretation and application of

the *Constitution*. It could be while a matter invoked specific constitutional provisions, those provisions were never part of the Court(s)'determination and the matter turned on purely factual and or statutory issues. Thus, the following attributes are imperative for an appeal to the Supreme Court under article 163(4)(a) of the *Constitution*:

(i) The jurisdiction reveres judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the High Court (trial Court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.

(ii) The jurisdiction is discretionary in nature at the instance of the Court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfactory of the Court and with precision those aspects/issues of his matter which in his opinion falls for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of Constitution interpretation and application.

(iii) A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the *Constitution* does not bring an appeal within the jurisdiction of the Supreme Court under article 163(4)(a).

(iv) Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under article 163(4)(a).

(v) Challenges of findings or conclusions on matters of fact by the trial Court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of article 163(4)(a)."

63. It is upon these principles that we have holistically evaluated the jurisdiction question in this matter. We have already demonstrated that of all the issues framed and determined by the Court of Appeal, none involved interpretation or application of the *Constitution*. While the original suit alleged violation of specific constitutional provisions, that suit was not determined on its merit, the same having been struck out in a ruling on a Preliminary objection, subject of this appeal. Hence those specific sections of the *repealed Constitution* do not aid the Petitioner by clothing this Court with jurisdiction. Turning on the Preliminary Objection in the High Court, it was on a pure statutory point of law, whether in filing the suit, the appellants contravened sections 33(1) and 34 of the *KAA Act*. Again, nothing turns on this to cloth this Court with jurisdiction. Lastly, the Court of Appeal reference to the *Constitution*, particularly article 159(2)(d) was so remote that the same cannot warrant assumption of jurisdiction as of right by this Court. The same was in reference to a general constitutional principle that frowns upon preference to procedural technicality instead of substantive justice, which in fact was found not to be applicable in the appeal before it.

64. The upshot of the foregoing is that this appeal fails the jurisdictional test before this Court. The appellants have nothing that grants them the right of appeal before this Court.

65. Before the final orders, we would like to state that even on the single question of constitutionality of section 33(1) of the *KAA Act*, which issue we have found was not determined in this particular matter, this Court pronounced itself on its constitutionality in *Modern Holdings (EA) Limited v Kenya Ports Authority* [2020] eKLR. Called upon to determine the constitutionality of section 62 of the *Kenya Ports Authority Act*, which has the same import as section 33 of the *KAA Act*, this Court held section 62, together with similar sections in other statutes, as being constitutional and in accordance with article 159(2)(c). The Court held:

> " 48. We have no doubt that expeditious and efficient (with the input of experts) disposal of disputes like the one in this case was one of the objectives that informed the enactment of section 62 of the *KPA Act* and other similar provisions such as section 83(1) of the *Kenya Railways Corporation Act*; section 33 of the *Kenya Airports Authority Act*; section 29 of the Kenya Roads Act; and section 32 of *Inter-Governmental Relations Act* (IGRA).
>
> ...
>
> 51. For these reasons, we affirm the Court of Appeal decision that section 62 of the *KPA Act* is not unconstitutional. It simply provides

> for ADR mechanism of arbitration reinforced by article 159(2)(c) of the *Constitution*..."

66. In light of the foregoing determination, we find that we lack jurisdiction to interrogate the other issues and make the following orders:

    (i) The appellants' petition dated 15th March, 2019 is hereby dismissed.

    (ii) There is no order as to costs.

    Orders accordingly.

**Pati Limited v Funzi Island Development Limited & 4 others (Petition 37 of 2019) [2021] KESC 29 (KLR) (16 July 2021) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2021] KESC 29 (KLR)

***Land Law*** *- classification of land - forest land - difference between forest land and trust land - claim that Proclamation No 44 of 1932 declared disputed land as a mangrove forest - whether Proclamation No 44 of 1932 was still in effect by virtue of the provisions of the Third Schedule to the Forest Conservation and Management Act - whether the disputed land was forest land which was unavailable for reallocation - whether the proclamations that converted native land into forest land under the Forest Ordinance Act (cap 176) under the repealed Constitution were still applicable under the Constitution of Kenya, 2010 - Forest Conservation and Management Act (Act No. 34 of 2016) section 77 and the Third Schedule; Forest Ordinance Act (cap 176) section 4; Proclamation No 44 of 1932; Legal Notice No 174 of 1964.*

***Land Law*** *- trust land - setting aside of trust land - applicable legal requirements - whether the setting aside of purported trust land while changing the size of the land to be set aside and the purpose of the setting aside without effecting legal instruments reflecting those changes meant that the land had been set aside irregularly - whether land that had been proclaimed as forest land under the Forest Ordinance Act (cap 176) under the repealed Constitution was trust land and as such was available for reallocation under the Trust Land Act and under the Constitution of Kenya, 2010 - Constitution of Kenya (repealed) sections 115 and 117(1)(c).*

**Brief facts**

A dispute arose when the Commissioner of Lands, for and on behalf of the County Council of Kwale allocated land to the appellant while the 1st to 3rd respondents contended that it was forest and public land. At the High Court the 1st to 3rd respondents sought orders of *certiorari* to set aside the land allocation and orders of prohibition to prevent the appellant from engaging in dealings with the land. The 4th and 5th respondents argued that the land was trust land and the legal procedures relating to its allotment under the Trust Land Act had been complied with.

An issue was raised as to whether the 1st to 3rd respondents had *locus standi*. On the issue of *locus standi* the court held that it was the minister in charge of forests that could challenge the allocation. The High Court dismissed the application. It stated that the 1st to 3rd respondents did not prove that the land was forest land. The decision of the High Court on the issue of *locus standi*, on whether the land was trust land or forest land, and on whether the legal requirements for allotment of the land had been complied with, was challenged by the 1st to 3rd respondents at the Court of Appeal. The appeal at the Court of Appeal was allowed and an order quashing the allocation of the suit land to the appellant was granted. Aggrieved, the appellant appealed to the Supreme Court.

**Issues**

i. Whether Proclamation No 44 of 1932 was still in effect by virtue of the provisions of the Third Schedule to the Forest Conservation and Management Act which provided that public forests included swamp forests declared as such under Notice No 44 of 1932.

ii. Whether the proclamations that converted native land into forest land under the Forest Ordinance Act (cap 176) under the repealed Constitution were still applicable under the Constitution of Kenya, 2010.

iii. Whether the setting aside of purported trust land while changing the size of the land to be set aside and the purpose of the setting aside without effecting legal instruments reflecting those changes meant that the land had been set aside irregularly.

iv. Whether land that had been proclaimed as forest land under the Forest Ordinance Act (cap 176) under the repealed Constitution was trust land and as such was available for reallocation under the Trust Land Act and under the Constitution of Kenya, 2010.

v. When would land be deemed to be forest land?

vi. When would legal requirements regarding the setting aside of trust land to third parties have been complied with?

**Held**

1. The Forest Act, Cap 385, was repealed by the Forest Act No. 7 of 2005 while the latter was repealed by the Forest Conservation and Management Act No. 34 of 2016. Proclamation No. 44 of 1932 was not made under the Forest Act, Cap 385. The Proclamation was made under the provisions of the Forests Ordinance Cap 176, which was not one of the laws repealed by the Forest Act Cap 385, the Forest Act No 7 of 2005 or the Forest Conservation and Management Act No. 34 of 2016. The Minister, never degazetted the suit land as a mangrove forest. Section 5 of the Revision of Laws Act left no doubt that Proclamation No. 44 of 1932 could not have formed part of the contents of that which was omitted by section 4 of the Forests Act, Cap 385.

2. Section 77 of the Forest Conservation and Management Act No. 34 of 2016, was to the effect that any land that was a forest or nature reserve under the repealed Act had to be deemed to be a State or local authority forest or nature reserve under the succeeding Act. Under the Third Schedule to the Forest Conservation and Management Act public forests included swamp forests declared as such under Notice No 44 of 1932. The word "Notice" made reference to "Proclamation" and it could only be referring to Proclamation No 44 of 1932. The legal status of mangrove forests as declared in Proclamation No. 44 was saved by the Third Schedule to the Forest Conservation and Management Act.

3. The status of the suit land was as a matter of law declared in Proclamation No. 44 of 1932, and subsequently in Legal Notice No. 174 of 1964, and the suit land was situated between the high and low water-mark on the Coast of Kenya. The suit land fell within the frontiers

of what constituted a mangrove forest as per the Proclamation. The same could therefore, not have been available for allocation within the meaning of the repealed Constitution or the Trust Land Act.

4. By virtue of section 115 of the repealed Constitution, all trust land within the jurisdiction of any county council, was vested in the council for the benefit of the persons ordinarily resident on that land. However, section 115 excluded any body of water that immediately before December 12, 1964 was vested in any person or authority, or any mineral oils.
5. Section 117(1)(c) of the repealed Constitution provided that trust land could be set aside by the county council for use and occupation by any person or persons for a purpose which in the opinion of that county council was likely to benefit the persons ordinarily resident in that area or any other area of trust land vested in that county council, either by reason of the use to which the area so set apart was to be put or by reason of the revenue to be derived from rent in respect thereof.
6. If the land in question had been trust land, it would not have been allocated in compliance with the law. Gazette Notice 3831 of 1994 specified the size of the land to be allocated as 0.7 hectares and the Msambweni Land Control Board gave consent to set aside the same 0.7 hectares but the size of land set aside was 3.126 hectares. Further, contrary to section 7(3) of the Trust Land Act (repealed) Gazette Notice No. 3831 of 1994 did not specify a date before which applications for compensation were to be made to the District Commissioner. While there was no notice for change of purpose of setting aside, the land which was set aside for use as a boat landing base had a five-star hotel constructed on it.
7. The entire process and notice for setting apart, fell far short of the requirements of the Constitution and the law. In view of those shortcomings and the legal status of the suit land, there was no reason to upset the judgment of the Court of Appeal.

*Petition of Appeal dismissed. Appellant was to bear the costs of appeal.*

**Citations**

**Cases**

***Kenya***

1. *Kiarie, Kuria & 2 others v Sammy Magera* Civil Appeal 326 of 2017; [2018] eKLR - (Mentioned)
2. *Pati Limited v Funzi Island Development Limited & 4 others* Civil Application No 4 of 2015; [2019] eKLR - (Explained)

***United Kingdom***

1. *Duport Steels Limited & others v Sirs & others* [1980] 1 AII ER 529; [1980] 1 WLR 142 - (Mentioned)
2. *John Lemm v Thomas Alexander Mitchell* [1912] UKPC 25; [1912] AC 400 - (Applied)

**Statutes**

***Kenya***

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) - (Interpreted) order 53
2. Constitution of Kenya (Repealed) - (Interpreted) sections 114(1); 115(1); 116; 117(a)(b)(c)(4); 118
3. Constitution of Kenya, 2010 - (Interpreted) articles 62(1)(c); 163(4)(5)(b)
4. Crown Lands Ordinance (Repealed) (cap 155) - (Interpreted) section 102
5. Forest Act (Repealed) (cap 385) - (Interpreted) sections 4(1)(a)(2); 5
6. Forest Act, 2005 (Act No 7 of 2005) - (Interpreted) section 65(1)(a)
7. Forest Conservation and Management Act (cap 385) - (Interpreted) section 77
8. Forest Ordinance (Repealed) (cap 176) - (Interpreted) sections 4, 5
9. Government Lands Act (Repealed) (cap 280) - (Interpreted) section 82
10. Interpretation and General Provisions Act (cap 2) - (Interpreted) section 23(3)
11. Land Control Act (cap 302) - (Cited) In general
12. Registered Land Act (Repealed) (cap 300) - (Interpreted) section 2(d)
13. Registration of Titles Act (Repealed) (cap 281) - (Interpreted) section 23
14. Revision of the Laws Act (cap 1) - (Interpreted) section 5
15. Trust Land Act (Repealed) (cap 288) - (Interpreted) sections 2; 7(2)(a)(3)(4)(a); 13(4)

**Advocates**

None mentioned

July 16, 2021, the Court delivered the following Judgment:

## A. Introduction

1. This is a petition of appeal dated September 3, 2019 and filed on September 5, 2019 pursuant to its admittance as one involving a matter of general public importance under articles 163(4)(b) and 163(5) of the *Constitution*. The appellant is challenging the entire Judgment and Orders of the Court of Appeal (Githinji, Karanja & Maraga, JJ.A) at Nairobi in Civil Appeal No. 252 of 2005 delivered on the 27th day of February 2014. In certifying the Appeal as one involving a matter of general public importance, in Supreme Court Civil Application No 4 of 2015, *Pati Limited v Funzi Island Development Limited & 4 others* [2019] eKLR; this court (Mwilu,DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ); stated:

> "(41) .... Consequently, in this matter, duly guided by the issues that the Court of Appeal considered and for pragmatism, we certify the following as the issue of general public importance which this court should consider in the intended appeal:
>
> > "Whether the land subject matter of this suit was initially Trust Land, a public beach or a mangrove forest

protected under the Forest Act; and if it was Trust Land and or public land, it was properly, regularly and legally allocated to Hon. Mwamzandi who later re-allocated it to Pati Limited, the appellant herein."

**B. Background**

**(i) At the High Court**

2. The genesis of this appeal can be traced to a Judicial Review Miscellaneous Application No 272 of 1994 filed in the High Court and brought under the provisions of order 53 *Civil Procedure Act Rules, 2010* and the *Forest Act* section 4 cap 385, Laws of Kenya. The dispute arose consequent upon the allocation by the Commissioner of Lands, for and on behalf of the County Council of Kwale of the piece of land known as LR No 20247 comprised in Grant registered as No CR 106 (the suit land) to Pati Limited, (the appellant herein and an interested party before the High Court), which the 1st to 3rd respondents contended was forest and/or public land. On learning of the allocation, the 1st to 3rd respondents filed the said Judicial Review Application seeking the following Orders:

    1. That the gazette notice No 3831 dated 24.6.1994 setting apart Land on Funzi Island and letter dated 27.7.1994 addressed to interested party Pati Limited relating to the allotment of un-surveyed Plot 0.1. ha for the purpose of boat landing base issued by the Commissioner of Lands be quashed and or set aside being null and void.

    2. That the grant issued CR106 under Registration of Titles Act to Pati Limitedby respondents be quashed and or set aside as being null and void.

    3. That Pati Limited, its employees, servants and agents be prohibited from having any dealings whatsoever, or carry out any development, or occupation entry upon or any access or otherwise on the said land on Funzi Island.

    4. That the costs of and incidental to this application be the applicants' and be paid by the respondents.

3. The main contention by the respondents in the Judicial Review proceedings, was that the original piece of land set apart under section 7 of the *Trust Land Act* cap 288, and allocated to Pati Limited, was at all material times forest land as opposed to Trust Land. They submitted that under section 4(2) of the *Forests Act* cap 385, the Minister is supposed to declare the boundaries and size of such forest areas after publishing a 28 days' Notice. They further submitted that under the *Forest Act* Proclamation No 44/32 and Legal Notice No 174 of 1964, the suit land had already been declared as a "Forest Area". It was the respondent's argument that once the suit land had been declared forest land, it was no longer available for

allocation unless it had ceased to be such. They submitted that the allotment and consequent title to Pati Ltd was null and void.

4. On their part, the 4th and 5th respondents (also the respondents at the High Court) argued that the suit land was Trust Land. They submitted that the Letter of Allotment clearly indicated that the suit land had been set apart for use and occupation under section 117(c) of the retired *Constitution*. They further argued that all legal procedures required under the *Trust Land Act* had been complied with prior to the allotment of the plot and issue of grant to the appellant. The respondents also submitted that the suit land was not forest land, as no evidence had been led to support its status as such.

5. The appellant agreed with the 4th and 5th respondents, adding that, the 1st to 3rd respondents had no *locus standi* in the matter, since they did not fall under section 117(4) of the retired *Constitution*.

6. The court framed two issues for determination; Whether the land in dispute was trust land under *the Constitution* and the *Trust Land Act*; and whether it was forest land falling under the provisions of Forest Land Act. In a judgement delivered on October 14, 2004, the High Court, (Khaminwa, J ), declined to issue the orders sought and dismissed the application with costs. Regarding the issue as to whether the suit land was forest land, falling under the provisions of the *Forest Land Act*, the court opined that no conclusive evidence been tendered in support of such claim. The court held that Proclamation No 44/32 and Legal Notice No 174 of 1964 referred to by the 1st to 3rd respondents, was not adduced in evidence.

   It was the learned judge's view that the 1st to 3rd respondents, had not made any effort to prove that, the land in dispute was forest land under the provisions of the Forest Land Act.

7. The High Court held that the land had been legally transferred and hence dismissed the suit.

**(ii) At the Court of Appeal**

8. Aggrieved and dissatisfied with the entire Judgment and directions of the High Court, the 1st, 2nd and 3rd respondents filed an appeal to the Court of Appeal on several grounds. Subsequently the appellate court condensed the grounds of appeal into the following: whether:

   (i) The judge erred in holding that the appellants had no *locus standi* in the matters as it is only the Minister in charge of forests that could challenge the allocation of the suit land to Pati Limited;

   (ii) The judge erred in finding that the suit land was Trust Land and not forest or beach land;

(iii) That even if the suit land was Trust Land, the judge erred in finding that it had properly been set aside and allocated to Pati Limited, a private developer.

9. To determine the appeal, the appellate court framed three issues for determination namely: whether or not the applicants have *locus standi* in the matter; whether or not the suit land was initially Trust Land, a public beach or a mangrove forest protected under the *Forest Act*; and If it was Trust Land, whether or not the Council had authority to and did properly and regularly alienate it to one, Hon. Mwamzandi at whose request it later re-allocated it to Pati Limited.

10. In its Judgement delivered on February 27, 2014, the Court of Appeal (Maraga, Karanja & Githinji, JJ.A) unanimously allowed the appeal and granted an Order quashing the allocation of the suit land to Hon. Mwamzandi and later to the appellant. It also quashed the letter of allotment dated July 27, 1994 as well as the Grant No 106 relating to L.R 20247.

11. The three learned Justices wrote their Judgments separately. Maraga, JA (as he then was) found that the suit land was forest land, while on the second issue, the Judge held that the suit land was neither trust land, nor had it been properly allocated. His reasoning was that by dint of Proclamation No 44 of 1932, as restated by legal notice No 174 of 1964, the suit land was forestland. He observed that such land could only have ceased to be forestland pursuant to section 4(1)(a) of the *Forests Act* cap 385, of the Laws of Kenya, which requires the Minister in charge of forests to make a declaration to that effect. He clarified that by legal notice No 174, the Minister for Natural Resources, after consultation with the National Forest Authority, declared as forest area, *inter alia*, "Those pieces of land approximately 111, 366 acres, situated between the high and low water-mark on the coast of Kenya, which were declared to be forest areas by Proclamation No 44 of 1932." The Judge added that it was conceded by the appellant's managing director in paragraph 13 of his affidavit sworn on January 13, 1995, that the suit land always became completely submerged at high tides two times a year. The learned judge concluded that from this concession, and as stated in Legal Notice No 174 of 1964, the suit land was situated between the high and low water mark on the coast of Kenya.

12. Recalling Proclamation No 44 of 1932, to the effect that the "Islands adjacent to the Coast from Chale point in the North to the boundary of the Trust Territory of Tanganyika in the South: Provided that any areas that lie within the foregoing boundaries which may have been, or may be, declared private property under the Land Titles Ordinance, or which are subject to grants from the Crown, are excluded from forest reserve" the Judge concluded that from this *proviso*, there was no dispute that the suit land fell within the area covered by that Proclamation.

13. In agreeing with Judge Maraga, Githinji JA, held that the suit land was not trust land, for had it been trust land, it would have been adjudicated together with Funzi Island in the 1990s. The learned Judge concluded that the land was part of the foreshore which, in terms of the provisions of section 102 of the *Crown Lands Ordinance* Chapter 155 of Laws of Kenya, 1948 as read with section 82 of *Government Lands Act* (cap 280) of the Laws of Kenya, was not available for allocation to private entities or individuals. In conclusion, the learned Judge observed that following the promulgation of *the Constitution* of Kenya 2010, by dint of article 62(1)(c) thereof, all land between high and low water marks (foreshore) is public land. Finally, the learned Judge held that the suit land was part of the mangrove swamp forest reserve as described in Proclamation No 44 of 1932.

14. Karanja JA agreed entirely with her colleagues' findings of fact, analysis of the legal issues arising from the appeal, and conclusions.

**(iii) At the Supreme Court**

15. The appellants moved this court, citing twelve (12) broad grounds of appeal; namely that the learned Judges erred:

    (i) In concluding that one does not need to go to foreign countries to see that public beaches are public property before ascertaining whether the suit property was either a public breach or trust land;

    (ii) In concluding that the high and low watermarks (ordinary tides) on the Island adjacent to the Coast included the appellant's disputed parcel of land, when evidence provided, this property does not fall within those limits as defined;

    (iii) In concluding that the subject land fell within a protected mangrove forest, when it is not;

    (iv) In holding that the subject land fell within a mangrove forest on the basis of the bare affidavit evidence of one Charles Kariuki, and without any cogent proven evidence in support;

    (v) In concluding that to present *Forest Act No 7 of 2005* reintroduced the omitted proclamation of forest areas into the present law, when it had held that the proclamation of forests by a minister under section 4 of the repealed *Forest Act* (cap 385) were omitted from the schedule in that subsidiary legislation;

    (vi) In re-introducing and applying both the provisions of the *Forest Act*, 2005 and article 62(1)(c) of *the Constitution*, 2010 in resolving the dispute before, it in a litigation commenced in 1994, when none of these laws were in force;

(vii) In applying the provisions of the repealed sections of the *Forest Act* (cap 385) without considering that the in the schedules of the repealed Act, proclamations of forest areas were completely omitted as held by Githinji J, creating disharmony and conflicting findings which lead to the conclusion that the suit land was a forest area at the time of alienation when indeed it was not;

(viii) In visiting the suit property and recording its observations when the same had been done by the trial court and subsequently in dismissing the finding of the trial court that the suit land was a loose description of an Island which was not part of the Funzi Island;

(ix) In concluding that the suit land was not trust land and in holding that the procedure followed in privatizing the suit land was a nullity;

(x) In proceeding as a matter of law, to conclude that the suit land was not trust land despite correctly referring to the Trustland Ordinance 1962, revised edition and correctly concluding the definition of trust lands set out therein;

(xi) In concluding that even if the suit land was trust land, the same had been erroneously alienated;

(xii) In failing to consider and evaluate all the evidence tabled before the trial court, especially which confirmed that the suit land was properly alienated, allotted and registered in the name of the appellant; and

(xiii) In failing to correctly apply the provisions of the repealed Constitution, the *Trustland Act* and the *Land Control Act*, which are laws that applied at the time of the impugned transaction.

16. The appellant seeks the following reliefs;

a. That this appeal be allowed and the Orders of the Court of Appeal, given on the February 27, 2014 and issued on the February 17, 2015 all be set aside;

b. In its place, there be sustained an Order (s) that the appellant's suit property was trust land that was correctly alienated and registered in the name of Pati Limited, the appellant herein;

c. The orders of the High Court given on the October 14, 2004 dismissing the notice of motion of the 1st, 2nd & 3rd respondents as variously re-amended up to 30th June 1999 be reinstated; and

d. Costs of the Appeal and in the courts below

## C. Parties' Respective Submissions on the Issue

### (a) The appellant's submissions

17. The appellant's submissions are dated October 24, 2019, and filed on November 1, 2019. On the first issue framed by this court, whether the suit land was mangrove forest protected under the *Forest Act*, the appellant in its written and oral submissions, contends that the High Court was correct in holding that the subject land was not a Mangrove Forest. In that regard, the appellant submits that none of the respondents (1st, 2nd & 3rd) placed before the court the contents of the Proclamation Number 44 of 1932 which they sought to rely on in their quest to show that the land was a Mangrove Forest. The appellant claims that even if the said land was a Mangrove Forest in the year 1932, there was no material placed before court to show that the same was still a Mangrove Forest in 1994, when the appellant was registered as owner of the parcel of land.

18. The appellant contends that Proclamation Number 44 of 1932 was not in force in the year 1994 since the same ceased to be of legal force at the advent of the *Forests Act* cap 385 of the Laws of Kenya, which replaced the *Forest Ordinance* cap 176 of the Laws of Kenya in 1963. It adds that since the Proclamation was made in the year 1932, and since the respondents failed to state under which law the proclamation was made, it can be presumed that the same was made under the *Forests Ordinance* (cap 176), which it urges further ceased to have legal effect in 1963.

19. It is the appellant's submission that the *Forests Ac*t, cap 385 of the Laws of Kenya, omitted all proclamations of forest areas under section 4, meaning that the Proclamation No 44 of 1932 contained in the *Forest Ordinance* cap 176, revised in 1948, was omitted from the subsidiary legislation of the 1962 edition of the Forests Act. Further, that the revisions made to the Act in 1982 and 1992 also omitted all proclamations which should have been made pursuant to section 4 of the Act.

20. It is further submitted that Proclamation No 44 of 1932 was omitted under section 5 of the *Forests Act* cap 385, of the Laws of Kenya, and such, was not part of Kenya's legal system pursuant to section 23(3) of the *Interpretation and General Provisions Act*. The appellant places reliance on the Interpretation and General Provisions Act, which provides that, where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not revive anything not in force or existing at the time the repeal takes effect. It also relies on the House of Lords holding in *John Lemm v Thomas Alexander Mitchell* (1912) AC400 to buttress this submission.

21. The appellant further considers as erroneous, the finding by the Court of Appeal to the effect that, the provisions of section 5 of the *Revision of Laws Act*, as read together with section

65(1)(a) of the *Forest Act* No 7 of 2005, mean that Proclamation No 44 of 1932 was in force, at the time of the purported allocation of the suit land. The appellant adds that, the *Forest Act* cap 385, having omitted Proclamation No 44 of 1932, had stripped the latter, of any legal force

22. As to whether the subject land was trust land, the appellant submits that it is clear from the wording of the Trust Land Actin force on May 31, 1963, the whole of Funzi Island, together with the islets lying to the South were all defined as trust Land. It also agrees with the trial court finding that only the "small Island" in front of the Main Is land is what is referred to as trust land in the *Trust Land Act* in force in 1963 together with its islets. It therefore faults the Court of Appeal's determination that the suit land did not fall within the definition of Trust land under the Act. The appellant urges that the learned judges failed to apply, the golden rule of interpretation by failing to give clear words their ordinary and natural meaning, and for resorting to other extraneous facts and matters not contained in the Trust Land Act, to reach its conclusion. The case of *Duport Steels Limited & others v Sirs & others* [1980] 1 AII ER 529 was cited to support the argument that properly interpreted "the small island" fell within the meaning of trust land, and remained such trust land up to the time of its alienation.

23. On the issue whether the alienation of the suit land was in accordance with the law, while citing sections 116 and 117 of the repealed *Constitution*, it is the appellant's case that, the County Council is empowered to set apart any trust land for use and occupation by any person or persons, which in the opinion of that County Council is likely to benefit the persons ordinarily resident in that area. The appellant urges that Kwale County Council was consequently empowered to alienate the suit land to Hon Mwamzandi and subsequently to the appellant. The appellant submits that the suit land was set apart in accordance with the provisions of section 117 of the repealed *Constitution*, and the modalities of allotment and procurement of the consent of the local land control board properly effected. It therefore concludes that all legal procedures were complied with.

24. The appellant also urges that the 1st, 2nd and 3rd respondents did not adduce any evidence before the trial court to prove that its title deed was illegally acquired. The appellant submits that it was an innocent purchaser of the interests and rights in the suit property for value, and without notice of any defects therein, if any existed which is denied.

25. Finally, the appellant urges that the suit property was not a Mangrove Forest as at November 1994, when the same was set apart by Kwale County. that the said property was trust land and at that time was properly dealt with as such and that the alienation and consequent registration in the name of the appellant was regular, legal and properly done in all respects.

**(b) The 4th and 5th respondents' submissions**

26. The 4th and 5th respondents filed their joint submissions dated December 31, 2019 on 2nd January, 2020 in support of the appellant's case. In their written and oral submissions, the 4th and 5th respondents urge in support of the High Court's decision that the suit property is trust land as provided under section 114(1) of the repealed *Constitution* and the Trust Land Act which expressly provided that trust land is vested in the County Council within whose jurisdiction it is situated. In that context, they urge that the County Council of Kwale had the power to set apart the land in accordance with the purpose outlined under section 117 (a), (b) and (c) of the repealed Constitution as well as section 13 of the *Trust Land Act*.

27. The 4th and 5th respondents submit further that the suit land, could be set apart for occupation or use by any individual for a purpose which in the opinion of that County Council, was likely to benefit the person ordinarily resident in that area, or any other area of trust land, in that County Council either by reasons of the use to which the area set apart was to be put, or by reasons of revenue to be derived for rent in respect thereof.

28. The respondents urge further that the suit property was not public land as held by the Court of Appeal and that due process was followed in allocating the same to the appellants pursuant to the powers vested on the 4th respondent under section 117 of the repealed *Constitution* and sections 7 and 13 of the *Trust Land Act*. They urge that letters from the 4th respondent dated January 23, 1993, January 7, 1993, the minutes of the Msambweni Land Control Board dated 9th June 1993, and the approval given on the 9th June 1993, and the subsequent letter dated 11th June 1993, confirm that due process was followed in setting apart the suit property. They add that full compensation assessed as Kshs 400,000 in regard to the suit property, was paid as provided for under section 13(4) of the *Trust Land Act*and that Gazette Notice No 3831 published on 8th July 1994, set apart and stipulated the dimensions of the suit land in accordance with sections 13(2)(d) and 7(3) of the Trust Land Act.

29. As to whether the suit property was a Mangrove Forest pursuant to Proclamation No. 44 of 1932, it is the 4th and 5th respondents' submission, that the issue was introduced by an affidavit that was never produced in court. They reiterate the appellant's submissions that Proclamation no. 44 of 1932 was made under the *Forest Ordinance cap* 176, which was in turn replaced by the *Forests Act* cap 385, of the Laws of Kenya. The said Act was revised in 1982, omitting all Proclamations that had delineated "forest areas" under section 4. They conclude that the respondent, did not provide substantial evidence to confirm that, the said land was mangrove forest and not trust land.

30. On the alleged issue of fraudulent acquisition of the suit property, the 4th and 5th respondents submit that, under section 23 of the repealed *Registration of Tiles Act*, for a

title to be vitiated on account of fraud, the fraud must be proved against that person to the required standard, and that it must be proved that the person participated in the fraud. To buttress this submission, they cite the Court of Appeal decision in the case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR. It is their contention that the alleged fraud or misrepresentation was never proved to the required standard.

**(c) The 1st, 2nd and 3rd respondents' Submissions**

31. The respondents filed their written submissions dated November 21, 2019, on November 26, 2019. They submit both orally and in writing, that Grant No CR106 issued to the appellant in respect of the suit land, was never set apart by the 4th respondent (Kwale County) for the purpose of a boat landing base under the *Trust Land Act*. They maintain that the whole land comprised in the said Grant was not trust land. It is their contention that, the suit land was a public beach, which is a protected Mangrove Forest, connecting to the main Funzi Island measuring 50 meters wide all along the Island. They submit that pursuant to Gazette Notice No. 3831, the suit land is described as lying along Funzi beach on the Western side of Funzi Island.

32. The respondents urge that after the said grant was issued to the appellant under the registration of Titles Act, the latter took over exclusive possession of the Public beach, and converted it to a private beach for its own use thereby displacing the local fishermen, and preventing the 1st, 2nd and 3rd Respondents and all members of the public including the villagers on Funzi Island from gaining any access whatsoever thereto.

33. Contrary to the appellant's submissions, the respondents also submit that the suit property is a Mangrove Forest protected under the *Forest Act*, 2005. They urge, that the *Forest Ordinance* cap 176 (1948) has not been repealed and is still in force. They maintain that the said Ordinance has neither been, nor could it have been, replaced by the Forests Act, which commenced on 1st March 1942, and only applied to central forests, forests and forest areas in the Nairobi areas and on unalienated Government land.

34. Further, the respondents submit that section 4(1) of the Repealed *Forests Act* cap 385, of the Laws of Kenya, only applied to declarations made by the Minister by Notice in the Gazette with effect from 1st March 1942, hence it could not have applied retrospectively. They therefore submit that, there is no legal edict indicating that, the Forest areas No. 45 Mangrove Swamp Forest Reserves set out in proclamation No 44 of 1932 have ever ceased to be such.

35. The respondents urge that the trial Judge overlooked their submissions in regard to the *Forest Ordinance* cap 176 as well as submissions that the Proclamation 44 of 1932 were still in force as at 1994. They contend that both the *Forest Act* (cap 385) and The *Forest ordinance* (cap 176) came into operation on 1st March 1942, and therefore it is not possible for either of

the two legislations to replace the other. The respondents further urge that that The Forest Ordinance has been expressly referred to and applied to the *Forest Act* (cap 385) as subsidiary legislation and hence cannot have been replaced by the latter Act.

36. It is their submission that The *Forest ordinance* was revised in 1948, but under section 4 of the Ordinance, forest areas are maintained since the main purpose of the said Ordinance, was to amend and consolidate the laws relating to forests. Furthermore, they submit that section 5 of the Revision of Laws Act has not been implemented in respect to the Forest Ordinance, contrary to the appellant's arguments. In their view, the Proclamations made under section 4 of The *Forests Ordinance* (cap 176), have not been omitted by virtue of section 5 of The Revision of Laws Act and are therefore still in force. They submit that both laws have co-existed as laws of Kenya until the *Forest Act* (cap 385) was repealed but the Ordinance still remains in force to date.

37. Additionally, the respondents urge that, both the beach and the Mangrove Swamp, are in between the high and low watermark as both these areas are usually flooded and sub-merged during high spring tides. Finally, the respondents submit that, Proclamation No. 44 of 1932 has not been omitted by the Subsidiary Legislation in the *Forests Act*, and that the suit property remains a Mangrove Forest protected under the *Forest Ordinance*, as read with LN 174 of 1964 and the *Forests Act*, 2005.

38. As to whether the suit property is trust land, the respondents submit to the contrary. They urge that although the suit property is situated within the jurisdiction of the County Council of Kwale within the area described as Trust Land, the same could not have been vested in the Council nor could it be set apart under Part IV of the *Trust Land Act*, as the area where it is situate was a public beach and a Mangrove Swamp Forest Reserve under proclamation 44 of 1932 as read with LN 174 of 1964.

39. The 1st, 2nd and 3rd respondent further submit that since the suit property is not trust land, any allocation of the same to the Appellant was illegal. They maintain that Gazette Notice 3831 was defective since the land referred to therein, had not been set apart in accordance with the provisions of Part IV of the *Trust Land Act*. The respondents add that the suit land was never surveyed as required by the law. This omission led to an unwarranted increase in size of the same from 0.7 Ha to 3.126 Ha, as at the time the Grant was made in favour of the appellant.

40. They add that there is no specification of the compensation date in the gazette notice, as required by sections 7(4), 9 and 13(4) of the *Trust Land Act*, and neither is there proof that the land was initially allocated to Hon Mwamzandi, as the letter of allotment dated 27th July 1994, was issued to the appellant. It is their argument that the absence of this crucial evidence, confirms that there was no formal transfer of the suit land to the appellant.

41. Consequently, the 1st to 3rd respondents urge that should the court hold that the land was initially trust land, then it should find that the same was not legally allocated to Hon. Mwamzandi who allegedly re-allocated it to the appellant.

**D. Analysis**

42. The central issue for determination in the petition before court is the legal status of the suit land. The appellant argues that the suit land is not a forest reserve, as Proclamation No. 44 of 1932 relied on by the 1st to 3rd respondents to contend that the suit land was a mangrove forest, ceased to have effect after the *Forests Act* (cap 385, Laws of Kenya) came into effect and omitted the content of the Proclamation.

43. The 4th and 5th respondents argue that no conclusive evidence had been placed on record to show that the suit land was part of a mangrove forest reserve. It is urged that the same is Trust land within the meaning of sections 114(1) and 115(1) of the retired *Constitution* as read with section 2 of the *Trust Land Act*, cap 288 of the Laws of Kenya (repealed). They add that the suit land was vested in the Council by virtue of section 115(1) of the retired *Constitution* and that the Council had jurisdiction to set aside and alienate it.

44. The 1st to 3rd respondents on the other hand, urge that the suit land was at all times a mangrove forest and not trust land. They rely on the provisions of the *Forest Ordinance* cap 176, Proclamation No 44/32 and Kenya Independence Order-in-Council Legal Notice No 174 of 1964, to urge that the suit land was declared a mangrove forest protected under the Forest Act. The respondents further rely on the sworn affidavit of Charles Kariuki, the Forests Officer at Buda Forest Station at Msambweni, to urge that the suit land is a protected forest area, declared in Legal Notice No 174 of 1963 and Proclamation No 44 of 32. It is added that the Proclamation was made under the *Forests Ordinance* cap 176 (1948) which has not been repealed to date.

45. In the alternative, the respondents urge that, even if the court was to find that the suit land was indeed trust land, which the council had authority to alienate, the alienation was irregular. It is contended that contrary to section 7 of the *Trust Land Act*, cap 288, Laws of Kenya (repealed), the suit land was not surveyed and no Notice of the date for applications for compensation was given. It is also the respondent's argument that the Letter of Allotment refers to the un-surveyed land as comprising approximately 0.7 of a hectares, while the land eventually allocated was 3.126 hectares, which is *ultra vires* the provisions of section 7(2)(a) and (3) of the *Trust Land Act*. It is also contended that since Gazette Notice No. 3831 of 1994 did not specify the date for submission of applications for compensation, none were consequently made. A further ground relied on to support the assertion that the land was irregularly allotted, is that only land registered under the *Registered Land Act* cap 300, Laws of Kenya (repealed), would, by dint of section 2(d) thereof, be available for setting

aside by virtue of sections 117 and 118 of the former Constitution. The respondents urge that the Grant in this case was issued under the Registration of Titles Act (repealed), which has no similar provision. It is urged that contrary to the provisions of Gazette Notice No 3831 of 1994, and the conditions on Grant No 106, the suit land has not been put to use for the purpose for which it was allocated, that is, as a boat landing base, but instead, the appellant has constructed a five-star hotel on it for individual commercial gain.

**(a) Forest or Trustland?**

46. For us to determine the legal status of the suit land herein, we have to revisit the laws relied upon by the parties in support of their divergent submissions.

47. The *Forests Ordinance* cap 176 was enacted to amend and consolidate the law relating to Forests in Kenya. Section 4 of the Ordinance provided that;

> " The Governor-in-Council may from time to time, by proclamation in the gazette, declare any unalienated and unreserved Crown Land and, subject to the provisions of the Natives Lands Trust Ordinance, any area in any native land to be forest area and may in like manner declare that any forest area or any part thereof shall cease to be a forest area."

Further, section 5 provided that:

> " The Governor-in-Council may from time to time, by proclamation in the gazette, declare any forest area or any part thereof to be a demarcated forest."

48. By Proclamation No 44 of 1932, mangrove swamp forest reserves were declared as follows;

> " 'All land between high water and low water marks (ordinary spring tides) in the localities as described below, viz on the mainland and islands adjacent to the coast from Chale Point in the North, to the boundary of the Trust Territory of Tanganyika in the South.
>
> Provided that any areas that lie within the foregoing boundaries which may have been, or may be, declared private property under Crown, are excluded from the forest reserves."

49. Subsequently, Legal Notice No 174 of 1964 was issued by the then Minister for Natural Resources, in consultation with the then National Forest Authority, declaring all central forests situated in various districts in Kenya. It is worth noting that the Legal Notice makes pointed references to various Proclamations made between 1932 to 1960s, declaring various pieces of land central forest areas in Kenya.

50. In this legal notice, Mangrove swamp forests in Mombasa, Kwale, Lamu and Kilifi Districts were declared as comprising;

> " Those pieces of land approximately 111.366 acres, situated between the high and low water marks on the coast of Kenya, which were declared to be forest areas by Proclamation No 44 of 1932."

51. The *Forest Act* cap 385 was enacted in 1942 and revised last in 2012. It was an Act of Parliament to provide for the establishment, control and regularization of central forests, forests and forest areas in the Nairobi area and on unalienated Government land. Section 4 of the Act provided that;

> " The Minister may from time to time, by notice in the gazette declare any unalienated Government land to be a forest area; declare the boundaries of a forest and from time to time alter those boundaries and declare that the boundaries shall cease to be a forest area....."

52. In its subsidiary legislation, the Act provides that, 'all proclamations under section 4 are omitted, by virtue of section 5 of the *Revision of the Laws Act* section 5 of the *Revision of the Laws Act* cap 1 provides as follows;

'There may be omitted from Laws of Kenya–

a. Annual appropriation Act

b. Specific loan or specific loan guarantees Acts

c. Any act which, in the opinion of the Attorney-General, is-

   i. of temporary effect; or

   ii. of local or limited application; or

   iii. of application only to a time past

d. Any Constitution of Kenya (Amendment) Act or provisions in such Act which does not become incorporated in the *Constitution*;

e. Any Act which in the opinion of the Attorney General ought to be temporarily omitted by reason of-

   i. proposed substantial amendment to the Act or subsidiary legislation made thereof; or

ii. the proposed making of a substantial quantity of new subsidiary legislation thereunder;

iii. the Act in question not yet being in force at the time of a given revision

53. The *Forest Act* cap 385, Laws of Kenya was repealed by the *Forest Act* No 7 of 2005 while the latter was repealed by the Forest Conservation and Management Act No 34 of 2016.

54. The appellant relies on the provisions of the Forest Act, cap 385 as read with its Subsidiary Legislation and section 5 of the *Revision of Laws Act*, set out above, to urge that Proclamation No 44 of 1932 ceased to have effect after the enactment of the *Forest Act* cap 385, as the latter omitted the content of the Proclamation. However, it should be noted that Proclamation No 44 of 1932 was not made under the Forest Act cap 385. The Proclamation was made under the Provisions of the *Forests Ordinance Cap* 176, which is not one of the laws repealed by the *Forest Act* cap 385, the *Forest Act* No 7 of 2005 or the *Forest Conservation and Management Act* No 34 of 2016. Of significance, is the fact that the Minister, never degazetted the suit land as a mangrove forest. A clear reading of section 5 of the Revision of Laws Act, leaves no doubt that Proclamation No 44 of 1932 could not have formed part of the contents of that which was omitted by section 4 of the Forests Act, cap 385 of the Laws of Kenya.

55. Besides, the *Forests Act* No 7 of 2005 at section 65 and the Forest Conservation and Management Act No 34 of 2016 at section 77, provide (d) that, notwithstanding the repeal of the preceding Act, 'any land which, immediately before the commencement of the subsequent Act was a forest or nature reserve under that Act, shall be deemed to be a state or local authority forest or nature reserve, as the case may be, under the succeeding Act.' Section 77 of the Forest Conservation and Management Act specifically sets out that all gazetted or land registered as a forest reserve in its Third Schedule or under any other relevant law shall be deemed to be a public forest under the Act. The Third Schedule identifies mangrove swamp forests as land declared under Notice No 44 of 1932. Although the word 'Proclamation' is not used, we have no doubt that the 'Notice' referred to, can only be "Proclamation No 44 of 1932". The conclusion to which we must therefore arrive, is that the legal status of mangrove forests as declared in Proclamation No. 44 was saved by the Third Schedule of the Forest Conservation and Management Act.

56. Having so found, the next issue that we must determine is whether, the suit land falls within the frontiers identified in Proclamation No 44 of 1932. The Proclamation describes a mangrove forest as;

> " All land between high water and low water marks (ordinary spring tides) in the localities as described below, viz .....on the mainland and islands adjacent to the

coast from Chale Point in the North, to the boundary of the Trust Territory of Tanganyika in the South."

57. The 1st to 3rd respondents urge that the suit land is between the high and low watermarks and is therefore, a mangrove forest. The appellant disputes this assertion. However, at paragraph 13 of the affidavit sworn by its Managing Director, Alessandro Torriani on January 13, 1995, a concession is made of the fact that 'the suit land floods and becomes completely submerged only at very high tides about twice a year.'

58. The status of the suit land is first and foremost a matter of law and as declared in Proclamation No 44 of 1932, and subsequently in Legal Notice No 174 of 1964, the said land is situated between the high and low water-mark on the Coast of Kenya. The inescapable conclusion is that the suit land falls within the frontiers of what constitutes a mangrove forest as per the Proclamation. The same could therefore, not have been available for allocation within the meaning of the retired Constitution or the Trust land Act. This was a mangrove forest which has never ceased to be such, not because (as submitted by the first respondent, and wrongly so in our view) the Ordinance under which the Proclamation creating it is still part of the Law of Kenya, but because its status as a forest was saved by the *20 of 2016 Forest Conservation and Management Act*.

**(b) Was the Suit Land, Trust Land? And if so, was it legally set apart?**

59. Assuming for purposes of argument that the land in question was Trust land, we have to determine whether the same was regularly set apart, in accordance with the applicable law at the time.

Section 114(1) of the retired *Constitution* defined Trust land to include:

(a) land which is in the Special Areas (meaning the areas of land the boundaries of which were specified in the First Schedule to the Trust Land Actas in force on May 31, 1963,) and which on May 31, 1963 vested in the Trust Land Board by virtue of any law or registered in the name of Trust land board;

(b) the areas of land that were known before 1st June, 1963 as Special Reserves, Temporary Special Reserves, Special Leasehold Areas and Special Settlement Areas and the boundaries of which were described respectively in the Fourth, Fifth, Sixth and Seventh Schedules to the Crown Lands Ordinance as in force on May 31, 1963, the areas of land that were on May 31, 1963 communal reserves by virtue of a declaration under section 58 of that Ordinance, the areas of land referred to in section 59 of that Ordinance as in force on May 31, 1963 and the areas of land in respect of which a permit to occupy was in force on May 31, 1963 under section 62 of that Ordinance; and

(c) land situated outside the Nairobi Area (as it was on December 12, 1964) the freehold title to which is registered in the name of a county council or the freehold title to which is vested in a county council by virtue of an escheat:

Provided that Trust land does not include any estates, interests or rights in or over land situated in the Nairobi Area (as it was on December 12, 1964) that on 31st May, 1963 were registered in the name of the Trust Land Board under the former Land Registration (Special Areas) Ordinance.

60. By virtue of section 115 of the retired *Constitution*, all Trust land within the jurisdiction of any County Council, is vested in the Council for the benefit of the persons ordinarily resident on that land. However, this Section excludes any body of water that immediately before December 12, 1964 was vested in any person or authority, or any mineral oils.

61. According to section 116 of the retired *Constitution*, 'A County Council could, in such manner and subject to such conditions as may be prescribed by or under an Act of Parliament, request that any law to which this subsection applies shall apply to an area of Trust land vested in that County Council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the County Council, it shall cease to be Trust land. The laws to which this *proviso* applied were; the Land Consolidation Actand the Land Adjudication Act, and any other law permitting the registration of individual titles to estates, interests or rights in or over land that, immediately before registration, was Trust land (except so far as the law permitted the registration of estates, interests or rights vested in persons or authorities for whose use and occupation the land had been set apart.

62. In accordance with sections 117 and 118 of the retired *Constitution*, a County Council had the power to set apart an area of Trust land for use and occupation by a public body or for purposes specified therein. Of significance to the issue before us, is section 117(1)(c) which provided that the council could set apart an area of trust land for use and occupation by "any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof". Even then, a county council could only set apart an area of Trust land pursuant to an enabling Act of Parliament, to wit, the Trust land Act. In line with sections 117 and 118 of the retired *Constitution*, the *Trust Land Act* cap 288 (repealed) was enacted, as an Act of Parliament to make provision for Trust land. Part IV of the Act provided for setting apart of Trust land.

63. Having set out the law regulating the setting aside of trust land, and supposing the suit land in this matter was trust land, was the setting aside in accordance with the law in place at the

time? The answer to this question is in the negative, due to the following uncontroverted findings of law and fact. Firstly, the gazette notice No 3831 of 1994 specified the size of the land set apart as comprising approximately 0.7 of a hectare. However, the land ultimately set apart and allocated to the appellant was 3.126 hectares. There is no further notice on record in respect of the change of size of the suit land. By the same token, the Msambweni Land Control Board, gave consent to set apart 0.7 of an hectare of land, yet there is no further consent from that Board, for the change of the acreage to 3.126 hectares. Thirdly, contrary to the requirement under section 7(3) of the *Trust Land Act* (repealed), Gazette Notice No 3831 of 1994 did not specify a date before which applications for compensation were to be made to the District Commissioner. Fourthly, the suit land was set apart for use as a boat landing base, (a purpose that would have benefitted the local communities ordinarily resident in the area) yet the appellant has constructed a five-star hotel on it. There is no further notice on record for change of purpose of setting aside. This is in contravention of the provisions of section 117 of the former *Constitution* and section 7(3) of the *Trust Land Act* (repealed), which required the notice of an intended alienation to specify the purpose for which the land is required to be set apart.

64. The entire process and notice for setting apart, fell far short of the requirements of *the Constitution* and the law. In view of these shortcomings and our conclusion regarding the legal status of the suit land, we find no reason to upset the judgment of the Court of Appeal.

**E. Orders**

(i) The petition of appeal dated September 3, 2019 is hereby dismissed

(ii) The judgment of the Court of Appeal dated February 24, 2014 is hereby affirmed

(iii) The appellant shall bear the costs of the appeal.

Orders accordingly.

**Jirongo v Soy Developers Ltd & 9 others (Petition 38 of 2019)**
**[2021] KESC 32 (KLR) (16 July 2021) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2021] KESC 32 (KLR)

***Constitutional Law*** *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to a fair trial – claim that a suit for fraud was instituted 24 years after the alleged fraud was committed and that the documentation necessary to prove the offence was no longer be available - whether the institution of the suit for fraud infringed on the right to a fair trial - under what circumstance could delay in preferring criminal charges warrant the halting of the criminal proceedings – Constitution of Kenya, 2010, articles 25(c), 49(1)(a)(ii), 50 and 157.*

***Constitutional Law*** *– Director of Public Prosecutions (DPP) – powers of the DPP – institution of prosecutions - factors to consider when instituting prosecutions - whether section 193A of the Criminal Procedure Code on concurrent criminal and civil proceedings could be invoked where the prosecution had been mounted to aid proof of matters before a civil court – Constitution of Kenya, 2010, articles 25(c), 50 and 157; Criminal Procedure Code (cap 75) section 193A.*

***Jurisdiction*** *– jurisdiction of the Supreme Court – appellate jurisdiction - what was the test applicable in invoking the appellate jurisdiction of the Supreme Court as of right in any case involving the interpretation and application of the Constitution – Constitution of Kenya, 2010, article 163(4)(a).*

***Jurisdiction*** *– jurisdiction of the High Court – jurisdiction to review prosecutorial powers of the Director of Public Prosecutions (DPP) - what were the guidelines to be considered when reviewing prosecutorial powers of the DPP - Constitution of Kenya, 2010, articles 157(11) and 165(3)(d)(ii).*

**Brief facts**

Pursuant to a sale agreement between the appellant and the 2nd and 3rd respondents and upon payment of the deposit, the original company registration documents of the 1st respondent company and the title deed of the suit property were released to the appellant. The appellant on October 21, 1992, charged the suit property to Post Bank Credit Limited for a sum of Kshs 50 million. The appellant contended that the charge was executed by himself and his partner. The suit property was eventually discharged from all encumbrances and transferred to the 10th respondent.

On or about the year 2015, the 2nd and 3rd respondents alleged that the appellant, while fraudulently holding himself as a director of the 1st respondent, executed a charge in favour of Post Bank Credit Ltd which he used to secure an overdraft facility for the appellant's company, M/s Cyperr Projects International Ltd. The 1st respondent thus instituted a suit over the alleged fraudulent transfer of the suit property. A complaint was later lodged to the 6th respondent, the Directorate of Criminal Investigation (DCI) requesting them to investigate the alleged fraud. Pursuant to the recommendation by the DCI, the 5th respondent, the Director of Public Prosecutions (DPP), on

February 9, 2016, instituted criminal proceedings against the appellant at the Chief Magistrates' Court.

Aggrieved, the appellant moved the High Court seeking among other orders an order to quash the decision of the DPP to charge and institute criminal proceedings against the appellant. It was the appellant's case that the preferred charges were among other allegations an abuse of the court process and constituted an illegal exercise of discretion. Further, due to the 24-year delay in instituting the prosecution, the appellant claimed that his fundamental rights and freedoms had been infringed. The High Court allowed the appellant's application and granted the orders sought. Aggrieved, the 1st, 2nd, 3rd, 4th, 5th, and 6th respondents lodged two appeals at the Court of Appeal which allowed the appeals and set aside the judgment of the High Court. Aggrieved, the appellant filed the instant appeal.

**Issues**

i. Whether the institution of a criminal proceeding 24 years after the alleged offence, and where the documentation necessary to prove the offence was no longer available, infringed on the right to a fair trial?
ii. What was the test applicable when invoking the appellate jurisdiction of the Supreme Court as of right in any case involving the interpretation and application of the Constitution?
iii. Under what circumstances could delay in preferring criminal charges warrant the halting of the criminal proceedings?
iv. What were the factors to be considered by the Office of the Director of Public Prosecutions when instituting prosecutions?
v. Whether section 193A of the Criminal Procedure Code on concurrent criminal and civil proceedings could be invoked where prosecution was mounted to aid proof of matters before a civil court.
vi. What were the guidelines to be considered when reviewing the prosecutorial powers of the Director of Public Prosecutions?

**Relevant provisions of the Law**

**Constitution of Kenya**

**Article 157 - Director of Public Prosecutions**

*(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.*

*(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-*

1. *institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.*

*(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.*

**Article 163 (4) - Supreme Court**

*(4) Appeals shall lie from the Court of Appeal to the Supreme Court –*

1. *As of right in any case involving the interpretation or application of this Constitution; and*
2. *In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)*

*(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.*

**Criminal Procedure Code (cap 75)**

**Section 193A - Concurrent criminal and civil proceedings**

*Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.*

**Held**

1. The applicable test on the jurisdiction of the court in the handling of an appeal under article 163(4)(a) of the Constitution of Kenya, 2010, (Constitution) was;
    a. whether the appeal raised a question of constitutional interpretation or application; and
    b. whether the same had been canvassed in the superior courts and had progressed through the normal appellate mechanism so as to reach the court by way of an appeal, as contemplated under article 163(4)(a).
2. The issues canvassed before the two superior courts leading up to the instant appeal related to an interpretation and application of the Constitution with regards to the appellant's main claim that he was being subjected to an unfair criminal trial contrary to article 50 of the Constitution as well as alleged bias and abuse of power by the DPP contrary to the mandate conferred by article 157 of the Constitution. Those issues were squarely before the Suprem Court, having been the subject of the determinations by the superior courts below. The Supreme Court had been properly moved under article 163(4)(a) of the Constitution.
3. It was not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it was the effect of the delay that determined whether or not the proceedings were to be halted.
4. The right to fair hearing was provided under article 50(1) of the Constitution. The rights of an accused person were set out in article 50(2) which specifically provided that an accused person had to be accorded a fair trial without delay. All persons who went to any court were entitled to a fair hearing whether the matter instituted was criminal or civil in nature. In that context, the drafters of the Constitution in article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters.
5. There was no limitation of time to institute and prosecute criminal offences but where the delay had the effect of denying a suspect the legal tools to mount a credible defence,

then the High Court was properly mandated by the Constitution to step in and stop the intended prosecution. Similarly, where the delay was occasioned by deliberate inaction on the part of a complainant with the intent of getting at a suspect to force the suspect's hand in say, a different transaction between them at a later date or even use the complaint to force settlement in ongoing civil proceedings, then, again the High Court, as a court of first instance, had to step in because the intended prosecution was tainted with malice and not the otherwise unassailable intent to punish criminal wrongdoing, promptly.

6. Both articles 49(1)(a)(ii) and 50(1) and (2)(e) of the Constitution expected that in the resolution of disputes, fairness had to necessarily include the promptness of action and the inhibition against unreasonable delay. What was reasonable included both the reason for delay and the period of delay.

7. All the evidence before the court pointed to the fact that the documentation necessary to prove the alleged fraud could no longer be available. Where both parties had admitted that the same issues were also pending resolution in another court and the issue of lost documentation remained unresolved. It would be most unfair to subject the appellant to a criminal trial, 24 years after the impugned transaction.

8. In instituting the prosecution, the DPP, without in any way taking away the constitutional mandate to prosecute crimes, ought always to act judiciously and not act in perpetuation of an unfair and malicious criminal complaint. In doing so, that office had to always be guided by the principle that the right to a fair trial could not be limited thus raising the bar in the determination of the question whether to prosecute or not. The prosecution of the appellant was in breach of his right to a fair trial as protected by article 25(c) as read with article 50 of the Constitution.

9. Where it was obvious to a court that a prosecution was being mounted to aid proof of matters before a civil court or where the hand of a suspect was being forced by the sword of criminal proceedings to compromise pending civil proceedings, then section 193A of the Criminal Procedure Code could not be invoked to aid that unlawful course of action. Criminal proceedings, whether accompanied by civil proceedings or not, could not and should never be used in the manner that the 2nd and 3rd respondents had done. It was advisable for parties to pursue civil proceedings initially and with firm findings by the civil court on any alleged fraud, proceed to institute criminal proceedings to bring any culprit to book.

10. In the unique circumstances of the instant case, the institution of civil proceedings, simultaneously with criminal proceedings, claiming on one hand that title documents had been lost, while in another, claiming that they were in the possession of the appellant and his banks or a third party, was an expression of mischief and dishonesty. Courts were never to countenance such conduct for it brings the entire criminal justice into disrepute.

11. The DPP was not bound by any directions, control or recommendations made by any institution or body. However, the DPP being an independent public office, where it

was shown that the expectations of article 157(11) of the Constitution had not been met, then the High Court under article 165(3)(d)(ii) of the Constitution could properly interrogate any question arising therefrom and make appropriate orders. The guidelines to be considered on when the High Court could review prosecutorial powers were as follows;

1. where institution/continuance of criminal proceedings against an accused could amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or
2. where it manifestly appeared that there was a legal bar against the institution or continuance of the said proceeding, for example want of sanction; or
3. where the allegations in the first information report or the complaint taken at their face value and accepted in their entirety, did not constitute the offence alleged; or
4. where the allegations constituted an offence alleged but there was either no legal evidence adduced or evidence adduced clearly or manifestly failed to prove the charge.

12. The unconstitutional continuance of the criminal proceedings against the appellant amounted to an abuse of the court process and that, balancing the scales of justice, the weight would favour the appellant and not the respondents.
13. On public interest, what was in issue was a dispute arising from a commercial transaction 24 years earlier where the complainants had not denied receiving a part payment of the purchase price. There was hardly any public interest element in such a transaction save the wide interest of the law to apprehend criminals.
14. The High Court was well within its mandate under article 165(3)(d)(ii) as read with article 157(11) of the Constitution to curtail the appellant's prosecution. The DPP'S powers had not in any way been interfered with, outside the constitutional mandate conferred on the High Court.

*Appeal allowed.*

***Orders***

i. *The entire judgment of the Court of Appeal sitting at Nairobi delivered on July 19, 2019, in Nairobi Civil Appeal No. 43 of 2017 and Civil Appeal No. 48 of 2018 were set aside and the judgment and orders of the High Court in Miscellaneous Application No. 78 of 2016 on January 11, 2017 was reaffirmed.*
ii. *Costs of the appeal and costs of proceedings in the instant court, the Court of Appeal and in the High Court were awarded to the appellant in any event as against the 1st, 2nd and 3rd respondents only.*

**Citations**

**Cases**

***Kenya***

1. *Commissioner of Police and the Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others* Civil Appeal 56 of 2012; [2013] eKLR - (Explained)
2. *Githunguri v Republic* [1986] KLR 1 - (Explained)
3. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) - (Explained)
4. *Juma , Francis Anyango v Director of Public Prosecutions & another* Petition 160 of 2012; [2012] eKLR - (Mentioned)
5. *Karan, Christopher Odhiambo v David Ouma Ochieng & 2 others* Petition No 36 of 2019; [2019] eKLR - (Mentioned)
6. *Kenya Commercial Bank of Kenya Limited & 2 others v Commissioner of Police and Director of Criminal Investigations Department & another; Interested Party Benjoh Amalgamated Ltd* Petition 218 of 2011; [2012] eKLR - (Mentioned)
7. *Kilonzo, Diana Kethi v Independent Electoral & Boundaries Commission & 10 others* Petition 359 of 2013; [2013] eKLR - (Mentioned)
8. *Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] 2 KLR 804 - (Explained)
9. *Nyaga, Paul Nganga v Attorney General & 3 others* Petition 518 of 2012 ; [2013] eKLR - (Mentioned)
10. *Okungu, George Joshua & another v Chief Magistrate's Court Anti-Corruption Court at Nairobi & another* Petitions 227 & 230 of 2009; [2014] eKLR (Consolidated) - (Explained)
11. *Republic v Attorney General ex parte Kipngeno Arap Ngeny* Civil Application 406 of 2001; [2001] eKLR - (Explained)
12. *Republic v Chief Magistrate's Court at Mombasa ex parte Ganijee & another* [2002] 2 KLR 703 - (Explained)
13. *Republic v Commissioner of Police & another ex-parte Michael Monari & another* Judicial Review 68 of 2011; [2012] eKLR - (Mentioned)

***South Africa***

1. *Zanner v Director of Public Prosecutions, Johannesburg* [2006] ZASCA 56; 2006 (2) SACR 45 (SCA); [2006] 2 All SA 588 (SCA); 2006 (11) BCLR 1327 (SCA) - (Mentioned)

***United Kingdom***

1. *Director of Public Prosecutions v Humphreys* [1977] AC 146; [1977] AC 1; [1976] 2 All ER 497; (1976) 63 Cr App R 95; [1976] 2 WLR 857 - (Mentioned)

***India***

1. *RP Kapur v State of Punjab* 1960 AIR 862; 1960 SCR (3) 311 - (Explained)

***United States***

1. *United States v Trammel* [1998] USCA10 55; 133 F 3d 1343 - (Mentioned)

**Statutes**

***Kenya***

1. Constitution of Kenya articles 10(1)(2); 19(1)(2)(3); 20(1); 22(1); 25(c); 27(1)(2); 47(1)(2); 49(1)(a)(ii); 50(1)(2)(a)(e)(4); 77(1); 157(6)(10)(11); 163(1)(3)(b)(4)(a); 164(4)(a); 165(3)(d)(ii); 249(1)(2) - (Interpreted)
2. Criminal Procedure Code (cap 75) section 193A - (Interpreted)
3. National Police Service Act (cap 84) section 35(b) - (Interpreted)
4. Office of the Director of Public Prosecutions Act (cap 6B) section 6 - (Interpreted)
5. Penal Code (cap 63) sections 129, 314, 353, 357(a) - (Interpreted)

**Advocates**

Dr. Kenneth Kiplagat for the Appellant
Mr. Ambrose Rachier & Mr. Ligunya for the 1st , 2nd and 3rd Respondents

July 16, 2021, the Court delivered the following Judgment:

## A. Introduction

1. Before this court is an appeal challenging the Judgment of the Court of Appeal (Visram, Karanja & Otieno-Odek, JJA) in Civil Appeals No 43 and 48 of 2017 (consolidated) which decision set aside the orders of *certiorari* and prohibition issued by the High Court (Odunga J) in Miscellaneous Application No 78 of 2016.

## B. Background

2. Sometime in the year 1991, the appellant entered into a conveyancing transaction with the 2nd and 3rd respondents through Soy Development Ltd (SDL), for the sale of a parcel of land known as LR No 209/11151 (the suit property) for a total consideration of Kshs 20 Million. The suit property which is situate in Nairobi's Upperhill Area was registered in the name of SDL, the 1st respondent herein. Pursuant to the sale agreement, the appellant paid a deposit of Kshs 10 Million via a Bankers Cheque No NA/AE 219907 drawn from Barclays Bank of Kenya. Upon payment of the aforesaid sum, the original company registration documents of the 1st respondent Company and the title deed of the suit property were released to the appellant.

3. Subject to the release of the documents, the appellant, on December 13, 1991, proceeded to charge the suit property to City Finance Bank Limited to secure a loan of Kshs 30 Million. Soon after the loan was settled and the suit property discharged, the appellant, on October 21, 1992, again charged the suit property to Post Bank Credit Limited for a total sum of Kshs 50 Million. The appellant contended that the charge was executed by himself and his partner, Davy Koech. The suit property was eventually discharged from all encumbrances and transferred to ASL Ltd, the 10th respondent.

4. A dispute arose when the 2nd and the 3rd respondents, on or about the year 2015, alleged that the appellant, while fraudulently holding himself as a director of SDL, executed a charge dated September 25, 1992 in favour of Post Bank Credit Ltd which he used to secure an overdraft facility for the appellant's Company, M/s Cyperr Projects International Ltd. The 1st respondent thus instituted a civil suit, ELC No 132 of 2015; *Soy Developers Limited v Deposit Protection Fund Board, ASL Ltd and Chief Land Registrar* over alleged fraudulent transfer of the suit property.

5. According to the 2nd and 3rd respondents, the charge documents that they allege had been fraudulently executed by the appellant were subsequently investigated and subjected to forensic examination. Upon conclusion of the investigations, the Forensic Examiner's report dated 1st April 2015, revealed preliminary findings which ascertained that the 1st respondent's suit property had been fraudulently charged and that the 2nd and 3rd respondent's signatures had been forged. Consequently, a complaint was lodged at the Directorate of Criminal Investigation (DCI) requesting them to further investigate the alleged fraud and thereafter, take appropriate action.

6. Pursuant to the recommendation by the DCI, the Director of Public Prosecutions (DPP), on February 9, 2016, instituted criminal proceedings against the appellant before the Chief Magistrates' Court at Nairobi being Criminal Case No 207 of 2016 where he was charged with the following offenses;

    i. Obtaining execution of security by false pretenses contrary to section 314 of the *Penal Code*;

    ii. Making a document without authority contrary to section 357(a) of the *Penal Code*;

    iii. Uttering a false document contrary to section 353 of the *Penal Code*;

    iv. Giving false information to a person employed in the public service contrary to section 129 of the *Penal Code*.

7. Aggrieved by institution of the said charges, the appellant moved the High Court in Miscellaneous Application No 78 of 2016(JR)seeking the following reliefs; i. an order of *certiorari* to quash the decision of the 1st respondent made on February 9, 2016, to charge and institute criminal proceedings against the appellant; ii. an order of *certiorari* to quash the charges contained in the charge sheet dated February 9, 2016; iii. an order of prohibition directed to the respondents jointly and severally prohibiting any of them from carrying out and/or proceeding with the criminal case; iv. an order of prohibition directed to all the respondents prohibiting them from reopening or purporting to reopen, bringing, instigating, instituting, carrying out any criminal proceedings in connection with the sale of the suit property.

8. It was the appellant's case before the High Court that the preferred charges were selective, partial, discriminatory, unreasonable, an abuse of the court process and constituted an illegal exercise of discretion. Furthermore, due to the 24-year delay in instituting the prosecution, the appellant's fundamental rights, freedoms and legitimate expectations had been infringed.

9. In analysing the evidence, the High Court (GV Odunga J) considered the issue of the delay and concluded that a mere lapse of time between the alleged commission of the offense and the criminal charges did not *ipso facto* justify the halting of the criminal process. however, the learned judge placed the *onus* upon the appellant to satisfy the court that in the circumstances of the case, a fair trial would not have been possible in the sense that it would be prejudicial to him as a result of the lapse of time.

10 The court also made a finding that a considerable period of time had passed and records in relation to the transaction had gone missing and had to be reconstructed. The learned Judge thus observed that the manner in which the 2nd and 3rd respondents conducted themselves was scandalous, gluttonous, corrupt, fraudulent and an illegal scheme to unlawfully reclaim the suit property. He also faulted the 2nd and 3rd respondentsfor failing and/or neglecting to utilize the available remedies of enforcing any alleged wrongdoing in relation to the transaction.

11. As regards the right to a fair hearing as envisaged in article 50 of the *Constitution*, the High Court held that where the right is violated or threatened with violation, the court, without necessarily pronouncing itself on the innocence or otherwise of the applicant, is entitled to and has a duty to step in and does not have to wait until the applicant's rights are actually violated before doing so. As such, the mere fact that the applicant would be subjected to a criminal process where he will get an opportunity to defend himself is not a reason for allowing a clearly flawed, unlawful and unfair trial to run its course.

12. Consequently, in allowing the appellant's motion, the learned Judge in his Judgment dated January 11, 2017granted the orders sought and expressed himself thus;

> "Having considered the material placed before me in this application, without making a finding as to the innocence of the applicant, it is my view and I so hold that in the circumstances of this case, it would be unjust and contrary to article 50 of the Constitutionto prosecute the applicant for an offence which was allegedly committed nearly two and a half decades ago, particularly when both the complainants and the applicant contend that the relevant transactional documents may have been lost, misplaced or tampered with."

13. Dissatisfied by the decision of the High Court, the 1st, 2nd and 3rd respondents lodged an appeal at the Court of Appeal being Civil Appeal No 43 of 2017. Contemporaneously, the 4th, 5th and 6th respondents also appealed against the same decision vide Civil Appeal No 48 of 2017. The two appeals were consolidated and heard simultaneously. The learned Judges of Appeal framed three issues for determination as follows; i. whether the learned judge erred in issuing orders of *certiorari* and prohibition stopping indictment and prosecution of the 1st respondent; ii. whether the learned Judge exceeded his jurisdiction; iii. whether the prosecution of the appellant would deprive him of a fair trial.

14. By a Judgment delivered on July 19, 2019, the Court of Appeal (Visram, Karanja & Otieno-Odek, JJA) allowed the two appeals and set aside the Judgment of the High Court. Specifically, on the issue of delay in instituting criminal proceedings against the appellant, the Judges of Appeal found that the delay was explained to their satisfaction. It was also their view, that no evidence was provided to demonstrate the prejudice that the appellant would suffer if given an opportunity to put forth his defense in a criminal trial.

15. On whether the learned judgeexceeded his jurisdiction, the appellate court observed that the learned judgedelved into extraneous matters not supported by the evidence on record by making adverse observations without the benefit of oral evidence and cross-examination of the parties. In this regard, the learned Judges held that the trial judgeerred in making conclusions grounded on disputed contents of documents submitted by the parties.

16. In addressing the issue of whether the High Court interfered with the DPP'S constitutional mandate of initiating prosecutions, the Court of Appeal found that there was no evidence on record to prove bias on the part of the DPP or any ulterior or collateral purpose in the making of the decision to charge the appellant. As such, it was their considered view that the trial judge went against public interest in preventing the investigation and prosecution of allegations relating to fraudulent transfer and acquisition of the suit property.

17. Aggrieved by the appellate court's finding, the appellant has now filed the present petition of appeal dated 24th July 2019, anchored on the following provisions of the *Constitution*; articles 10(1) & (2), 19(2) & (3), 22(1), 25(c), 27(1) & (2), 47(1) & (2), 50(2)(a), 50(4), 157(11), 163(3)(b), 164(4)(a) and 249(1) & (2) of the *Constitution*. The appellant seeks the following orders:

    (a) The entire Judgment of the Court of Appeal sitting at Nairobi delivered on July 19, 2019in Nairobi Civil Appeal No 43 of 2017 and Civil Appeal No 48 of 2018 be set aside and the Judgment and Orders of the High Court in Miscellaneous Application No 78 of 2016 delivered by Honourable Mr. Justice Odunga on January 11, 2017 be reaffirmed.

(b) The costs of this Appeal and costs of proceedings in the Court of Appeal and in the High Court be awarded to the appellant herein in any event.

(c) Any other orders that this court may deem fit in the circumstances.

18. The appeal is premised on the following grounds; That the learned Judges of the Court of Appeal erred;

(a) In failing to appreciate that the appellant had established a clear and/or intended infringement of his constitutional rights in breach of articles 19(1) & (2), 20(1), 25(c), 27(2) and 50(2) of the *Constitution*;

(b) In failing to consider that the appellant had entered into a simple and straightforward conveyancing transaction where he honoured his obligations as per the terms of the sale agreement;

(c) In failing to consider that the respondents waited for more than two decades to institute criminal proceedings, which action was prejudicial to the appellant;

(d) In failing to apply constitutional standards of justice, fairness, equity and/or dignity of the appellant which requires this court's interpretation and application of the Constitution.

19. It is noteworthy that as at the time of filing this appeal, the appellant concurrently filed an interlocutory application under certificate of urgency, being Petition Application No 22 of 2019, seeking a stay of execution of the Court of Appeal's decision, pending the hearing and determination of this appeal. On September 19, 2019, this court rendered its ruling in favour of the appellant and granted the stay of execution.

20. Subsequent to the filing of the appeal, the appellant also filed a notice of motion dated December 19, 2019 on January 16, 2020 being an application for leave to adduce fresh and new evidence. The application was premised on the main ground that the new and fresh evidence could not, with any due diligence, have been discovered or adduced earlier because the appellant's own office file could not be traced. As such, the appellant could only request the National Bank of Kenya to retrieve the same from its archives.

21. By a ruling delivered on August 4, 2020, this court dismissed the motion seeking to adduce additional and new evidence on the basis that the appellant had failed to demonstrate that this new evidence could not have been obtained by him upon the exercise of due diligence during the hearing of the matter before the High Court.

**C. Parties' Submissions**

**(a) The Appellant**

22. The appellant invokes this court's jurisdiction pursuant to articles 163(b)(1) and 163(4)(a) of the *Constitution*. At the hearing, Dr. Kenneth Kiplagat, counsel for the appellant, rehashed what is stated in the written submissions dated 23rd September 2020. He urges that the appellant's right to a fair trial under article 50 of the *Constitution* is threatened, and is thus entitled to appeal the decision of the Court of Appeal as of right, being a decision directly arising out of a constitutional determination of his rights. The appellant further impugns the decision of the Court of Appeal to the effect that the learned judges shifted the burden to him to explain the 2nd and 3rd respondents' inactivity and failure to raise any complaints during the 24-year delay period.

23. The appellant furthermore criticizes the learned judges of Appeal for validating and sanitizing the 2nd and 3rd respondent's fraudulent act of claiming that the title to the suit property was lost when in fact, they had willingly and voluntarily surrendered the same to the appellant through their advocate, Mr Ambrose Rachier. Accordingly, he submits that the decision to prosecute the appellant was unreasonable, irrational and an afterthought which was intended to repair their case in Civil Suit No 132 of 2015 at the ELC Court in which the 2nd and 3rd respondents had alleged that the title to the suit property was lost. The appellant further submits that the Court of Appeal had disregarded the pleaded facts and documentary evidence that unequivocally established that the alleged criminal charge was contrived.

24. The appellant, in addition, concurs with the High Court's finding that the intended criminal prosecution was contrived with a clear intent to bully the appellant in a manner prohibited by law. He relies on the decision of *Republic v Chief Magistrates Court at Mombasa ex parte Ganijee & Another* [2002] eKLR where the learned Judge of the High Court expressed himself thus:

> "It seems to me, whichever way I look at it, that the interested party in this matter is more actuated by a desire to punish the applicant or oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive. And that is when the High Court steps in."

25. The Appellant also disputes the Court of Appeal's finding that there would be no prejudice if the criminal trial were to be allowed to proceed. He contends that the missing files and

documentary history from the Ministry of Lands and Registrar of Companies were material to his defense whereof absence of the aforesaid documents had denied him the very tools necessary to prove his innocence, thus breaching his right to fair hearing.

26. The appellant has also faulted the reasoning of the Court of Appeal in arriving at the unsupported conclusion that bias was not established by the High Court. According to him, the statements that were made to court and to the Police about the lost title were blatantly false. Furthermore, the 5th and 6th respondents failed to take any steps to query, charge or otherwise interrogate the false utterances. Moreover, the Court of Appeal erred in holding that a party was still entitled to *viva voce* proof of the original documentation, notwithstanding the long period of delay and expiry of the relevant statutory period of limitation.

27. In regards to article 10 of the *Constitution*, the appellant submits that the sole reason why the criminal process was activated was so as to save and salvage the 2nd respondent's civil case which the appellant has upended by joining the proceedings and scampering the 2nd respondent's fraudulent claims.

28. Lastly, on the issue of private rights of the accused *vis-a-vis* the rights of a complainant and the public interest, the appellant points out that the 2nd respondent has a myriad of cases against him which are all related, hence the public interest aspect in this matter is lacking as this is a personal contest between two parties who have previously dealt in the same transaction. It is on this basis that the appellant urges that the Court of Appeal failed to properly consider the grave prejudice that he was now being exposed to, not only given the effluxion of time, but the convenient disappearance of original records as well. As such, the appellant prays that this court ought to set aside the decision of the Court of Appeal and reinstate the High Court's decision with costs.

**(b) The Respondents'**

**i. 1st, 2nd and 3rd Respondents**

29. In opposing the appeal, the 1st, 2nd and 3rd respondents on 16th January 2020 filed a replying affidavit dated January 1, 2020, sworn by Sammy Boit Kogo as a Director of the 1st respondent Company. Thereafter they filed their written submissions dated October 9, 2020 in which they deal, firstly, with the issue of this court's jurisdiction which, they submit, has been wrongly invoked by the Appellant. Reliance was placed on the case of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013 [2013] eKLR where this court set the principles required to evaluate its jurisdictional standing.

30. The 1st, 2nd and 3rd respondents are also of the view that the role assumed by the High court of evaluating evidence, can only be effectively discharged by the trial court which shall

have the chance to interrogate the reliability of the evidence tendered, the demeanor of the witnesses procured and the sustainability of the charges proffered. Therefore, they add, this court cannot also assume the role of that court.

31. More specifically, they argue that article 157(6) of the *Constitution* grants the DPP prosecution powers to institute criminal proceedings. Further to the above, section 35 (b) of the *National Police Service Act* provides for the functions of the Directorate of Criminal Investigations to *inter alia* undertake investigations on serious crimes. In that context, they rely on the persuasive case of *Diana Kethi Kilonzo v Independent Electoral & Boundaries Commission & 10 others* [2013] eKLR to emphasize that this power is continually donated and it is thus the intention of the Constitution that each constitutional organ, commission and body should be allowed to exercise their respective mandates without interference.

32. Further, the 1st, 2nd and 3rd respondents elucidate that, under article 50 of the *Constitution*, an accused person has the right to be presumed innocent unless the contrary is proved; right to adduce and challenge evidence; right to challenge a decision of the court through appellate mechanisms and that the Kenyan Criminal Justice System has inbuilt constitutional safeguards which ensure that the criminal process is not subjected to any form of abuse.

33. Based on the foregoing, it is submitted that the office of the DPP and the Police ought to be accorded leeway to perform their functions without interference. In comparing with other jurisdictions, the 1st, 2nd and 3rd respondents refer us to the House of Lords Commentary on the Statutory and Constitutional Powers of Public Entities and Offices on the need to accord offices sufficient ambience to exercise their duties as was also expressed in the case of *Director of Public Prosecutions v Humphreys* [1976] 2 All ER 497 at 511.

34. They furthermore contend that the appellant did not provide sufficient evidence to demonstrate that the decision by the 5th respondent was actuated by malice, ill-will or ulterior motives. The 1st, 2nd and 3rd respondents in addition, maintain that the DCI carried out investigations based on their complaint to the DPP and later forwarded the findings to the DPP for further action. The High Court case of *Republic v Commissioner of Police & another ex parte Michael Monari & another* [2012] eKLR is relied on to support the argument that the Police have a "... duty to investigate on any complaint once a complaint is made..."

35. The 1st, 2nd and 3rd respondents also take the view that the trial magistrates' court ought to be afforded an opportunity to establish the nature and veracity of the charges preferred against the appellant against any defense that might be tendered thereto by way of taking *viva voce* evidence.

36. With regard to the issue of whether the intended prosecution of the appellant will infringe his fundamental rights and freedoms, the 1st, 2nd and 3rd respondents assert that the

inordinate delay in charging him did not violate his rights to a fair trial for the reasons that; first, there is no time limitation within which the DPP can prefer criminal charges and second, the 24-year delay period was satisfactorily explained. They also urge that the institution of the criminal proceedings will not be prejudicial to the appellant because none of the documents are lost, none of the witnesses are dead or cannot be found or are of diminished memory.

37. As such, they reiterate that delay in itself cannot suffice as a defense to stop a criminal prosecution; it is the effect of the delay that matters. To support this point, they rely on the authority of the Constitutional Court of South Africa in *Frank Peter Zanner v The Director of Public Prosecution* [2006] ZASCA 56 (RSA) where the court concluded that an accused person must show definite and not speculative prejudice, and in what specific manner the missing witnesses would have aided the defense. (See – *US v Trammel* [1998] USCA10 55; 133 F 3d 1343).

38. In his oral submissions, Mr Ligunya, counsel for the 1st, 2nd and 3rd respondents clarified that the pending Civil Suit in ELC No 132 of 2015 is about recovery of the suit property from the 10th respondent. On the issue of whether the appellant is entitled to the reliefs sought, it is urged that the appellant's conduct does not warrant this court's exercise of discretion in his favour on the basis that he has deliberately exuded lack of respect for constitutional offices and institutions and; secondly, he has misrepresented to the court that he recently came across additional evidence while this matter was still pending in this court. It is thus their position that this court ought to dismiss the appeal with costs for being an abuse of the court's process.

**ii. 5th, 6th and 7th Respondents**

39. In their written submissions dated October 7, 2020 and filed on even date, the 5th, 6th and 7th respondents identify five issues for determination; jurisdiction;decision to charge; constitutional mandate of the DPP; when courts may prohibit or quash a prosecution; and delay in commencement of prosecution. On the issue of jurisdiction, they concede that *prima facie* this court has jurisdiction to consider the appeal by dint of article 163(4)(a) as the appeal is challenging the interpretation or application of some articles of the *Constitution* including articles 50 and 157.

40. On the decision to charge the appellant, they submit that the decision to charge him was made independently based on sufficiency of evidence and the underlying public interest in relation to prosecution of criminal offenses. They further submit that the appellant has failed to demonstrate the DPP's abrogation (if any) of any provisions of the Constitutionor any written law.

41. The 5th, 6th and 7th respondents reiterate that the office of the DPP is an independent prosecution authority established under article 157 of the *Constitution*. Therefore, the decision to institute criminal proceedings by the DPP is discretionary and such exercise of power or functions is not subject to the direction or control by any authority by dint of article 157(10) of the *Constitution* and section 6 of the *Office of the Director of Public Prosecutions Act*.

42. On whether the courts may prohibit or quash a prosecution, it is their assertion that the court can only interfere with or interrogate the Office of the DPP where there exists a clear contravention of the Constitution. They cite authorities such as *Paul Nganga Nyaga v Attorney General & 3 Others* [2013] eKLR;*Francis Anyango Juma v Director of Public Prosecutions & another* [2012] eKLR; *Kenya Commercial Bank Ltd & 2 Others v Commissioner of Police and the Director of Criminal Investigations Department & Another Interested Party Benjoh Amalgamated Ltd* [2012], eKLR to emphasize that the Office of the DPP and the Police are independent and a court would not ordinarily interfere in the exercise of their discretion within limits provided by law.

43. The question posed then is, under what circumstances will the court grant an order prohibiting the commencement or continuation of criminal proceedings? In answer, they refer us to the case of *George Joshua Okungu & another v Chief Magistrates' Court Anti-Corruption Court at Nairobi & another*[2014] eKLR where the court summarized the considerations that do not form the basis for a court to interfere with the DPP's mandate.

**D. Analysis and Determination**

44. Having considered the respective parties' pleadings and submissions in the instant Petition, this court is of the considered view that the issues arising for determination are;

    (a) Whether there is a right of appeal to this court following the decision of the Court of Appeal under article 163(4)(a) of the Constitution;

    (b) Whether the inordinate delay in instituting the intended prosecution of the appellant would infringe his rights and freedoms under articles 19,20,27 and 50 of the Constitution;

    (c) Whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the Director of Public Prosecutions contrary to article 157 of the Constitution; and

    (d) What are the appropriate reliefs?

    We shall determine each issue separately as here below:

**(a) Whether there is a right of appeal to this Court following the decision of the Court of Appeal under Article 163(4)(a) of the Constitution**

45. The appellant argues that this court has the jurisdiction to determine the appeal under article 163(4)(a) of the *Constitution*, which allows appeals as a matter of right, in cases involving the interpretation or application of the Constitution. He maintains that the main issue for determination is whether his right to a fair trial was infringed due to, *inter alia*, the delay in instituting criminal proceedings. The 5th, 6th and 7th respondents concur that this court does have the jurisdiction to entertain the appeal as the appellant is challenging the interpretation and application of articles 50 and 157 of the *Constitution*. The 1st, 2nd and 3rd respondents however take a contrary view, arguing that though this court has appellate jurisdiction, the appellant has wrongly invoked it.

46. Article 163(4)(a) states as follows on the appellate jurisdiction of this court:

> 4. Appeals shall lie from the Court of Appeal to the Supreme Court –
>
> (a) As of right in any case involving the interpretation or application of this Constitution; and
>
> (b) In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)
>
> 5. A certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

47. This court has on many decisions, pronounced itself on its jurisdiction to determine appeals under the said Article 163(4)(a) of the *Constitution*. In the case of *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another* SC Petition No. 3 of 2012; [2012] eKLR, a two-Judge Bench of this court (Tunoi and Wanjala SCJJ) remarked that [paragraph 28];

> "The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitutionwhich the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot

support a further appeal to the Supreme Court under the provisions of article 163(4)(a)."

48. Further, in the case of *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013, this court settled the applicable test on the jurisdiction of this court in the handling of article 163(4)(a) appeals by holding thus:

> 37: "In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the superior courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the *Constitution*" [Emphasis added].

49. Therefore, for us to determine whether the present appeal is properly before us, we must confirm that issues of constitutional interpretation and application presented before us have risen through the normal appellate process before reaching us.

50 In that context, a perusal of the record and the determinations by the two superior courts below would lead to only one inescapable conclusion; the issues canvassed before them related to an interpretation and application of the Constitution with regards to the appellant's main claim that he was being subjected to an unfair criminal trial contrary to article 50 of the *Constitution* as well as alleged bias and abuse of power by the DPP contrary to the mandate conferred by article 157 ofthe the *Constitution*. Those issues are squarely before us, having been the subject of the determinations by the superior courts below and without saying more, and following our prior decisions cited above, we hold and find that we have been properly moved under article 163(4)(a) to determine the present appeal.

**(b) Whether the inordinate delay in instituting the intended prosecution of the appellant would infringe his rights and freedoms under Articles 19, 20, 27 and 50 of the Constitution**

51. The appellant claims that the events surrounding the sale transaction of the suit property, which is the basis of indictment and institution of fraud charges against him took place 24 years before the criminal proceedings were initiated. The appellant thus claims that his constitutional rights founded on the right to equality before the law and the right to equal protection and equal benefit of the law provided for under article 27(1) of the *Constitution* and the right to a fair trial provided for under article 50 of the *Constitution* were violated.

**i) Reason for the delay**

52. The 5th, 6th and 7th respondents insist that the reason for the delay was that land registry file on the suit property was missing at the Lands registry hence the complaint against the appellant was lodged only when the file was found in 2015.

They also insist that there is no limitation period for instituting criminal proceedings and maintain that the appellant does not stand to suffer any prejudice if his prosecution proceeds.

53. The 1st, 2nd and 3rd respondents on their part deny that the appellant's imminent prosecution violated his right to a fair trial arguing that article 50 of the *Constitution* had inbuilt mechanisms to protect this right; that the delay was explained and the appellant did not stand to be prejudiced as he had all the evidence to rebut the allegations and all the relevant witnesses were also available. They reiterate that delay is not a defence to stop any criminal prosecution.

54. The High Court, while addressing the issue of delay, where a complainant lodges a complaint after a long period of time *vis-a-vis* its implication on an accused person's right to a fair hearing held as follows:

> 140. Where a person against whom wrongdoing has been allegedly committed takes an inordinately long period of time before lodging his complaint with the police and as a result of which crucial evidence is lost and or witnesses become unavailable, to subject the applicant to a process of prosecution will amount to nothing but persecution. This is not to say that the applicant is in such circumstances innocent. It is simply a recognition that the criminal process must be conducted in an atmosphere of fairness to both the accused person and the complainant and where the right to a fair hearing has been jeopardised by the long delay in the commencement of the criminal process thus placing the applicant's rights into jeopardy, such a process must not be permitted to continue."

55. The Court of Appeal on its part, and to the contrary, found that the respondents had submitted evidence that showed that all the relevant witnesses are alive and that the relevant documentation and the Land Registry file on the suit property are available. The Court thus found that the appellant did not stand to be prejudiced if he is given an opportunity to defend himself and found the reason for delay issued by the respondents in the institution of the criminal proceedings as satisfactory to them.

**ii) Was the delay inordinate and was the appellant's right to a fair trial infringed?**

56. The question of delay with respect to the lodging of criminal prosecutions has been addressed by our courts in several matters. The leading persuasive decisions on the subject are the High Court cases of *Githunguri v Republic* (1986) KLR 1 and *Republic v Attorney General & another ex parte Ng'eny* (2001) KLR 612 which both Superior Courts relied on.

57. In *Githunguri v Republic* (*supra*), the court stated as follows:

> "In this instance the delay is said to have been nine years, six years and four years. The court has not been told why these offences have been unearthed after they remained buried for so long. What caused turning up the soil! It is too long, too much of delay. The Attorney-General is not bound to tell the court the reason but it would have made us knowledgeable if told.
>
> We are of the opinion that to charge the applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the court will be within a reasonable time as required by section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General. It was a case which had received notable publicity, and the matter was considered important enough to be raised in the National Assembly.
>
> We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of the *Constitution*. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious."

58. Similarly in the case of *Republic v Attorney General & another ex parte Ngeny* (2001) KLR 612, the court addressed this question and stated that:

> "In the case before us, the delay was nine years. No attempt has been made to explain it. The subject matter of the charges against the applicant is a colossal sum involving an institution that was strategic to the Government when the losses were occasioned; so why did the State not mount a prosecution immediately? Nine years is too long a delay. We cannot think anything else but that the criminal prosecution against the applicant was motivated by some ulterior motive. It is not a fair prosecution. It was mounted quite late: Nine years after the applicant had vacated the relevant public office alleged to have been abused. We were told, and this was not challenged, that having been out of office for that long, he does not have in his possession material to prepare his defence. This we believe. We are of the view that to allow delayed prosecutions is akin to putting a noose around the necks of individuals and then saying to them: 'Go, you may go. We shall decide your fate as and when we wish.' This is to keep the individual in fear. This does not accord with constitutional guarantees of individual rights and freedoms and is nothing more than an abuse of the process of the court".

59. The argument put forth by the appellant is that his right to be tried within a reasonable period of time has been infringed in view of the fact that it has taken 24 years for him to be prosecuted. The appellant cites the various hurdles to the impending trial that will result in him not having a fair trial; the missing Land Registry file as well as the loss of vital documentary evidence.

60. The appellant also contends that as a result of the long delay before the charges were instituted, his defense has been compromised since the documents involved in the company registration and transfer of shares, which allowed for the registration of the charges against the 1st respondent company as regards the suit property, including the company forms required for effecting change at the Registry of Companies, are missing.

61. The appellant thus argues that he stands to suffer prejudice due to the long period of time that has lapsed since the events surrounding the sale of the suit property, occurred between 1991 and 1993.

62. In addressing this issue, we note that in the case of *George Joshua Okungu & another v The Chief Magistrate's Court Anti-Corruption Court at Nairobi & another* (*supra*), the High Court persuasively held that:

> ".....it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines

> whether or not the proceedings are to be halted. In this case, there is no allegation made by the petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial."

63. In that regard, the right to fair hearing is provided under article 50(1) of the *Constitution* which provides:

> "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." [Emphasis supplied]

64 The rights of an accused person are then set out in article 50(2) of the *Constitution* which specifically provides that an accused person must be accorded a fair trial without delay. The said article provides that:

> "(2) Every accused person has the right to a fair trial which includes the right-(e)to have the trial begin and conclude without unreasonable delay."

65. This court in the case of Hon. *Christopher Odhiambo Karan v David Ouma Ocheing & 2 others* [2018] SC Petition No 36 of 2019 had an opportunity to discuss the significance, distinctive meaning, scope and implication of the right to a fair trial and stated that "It is therefore settled law that all persons who come to any court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of the *Constitution 2010* in article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters."

66. It is in the above regard trite that there is no limitation of time to institute and prosecute criminal offences but as stated in *Githunguri,* where the delay has the effect of denying a suspect the legal tools to mount a credible defence, then the High Court is properly mandated by the Constitution to step in and stop the intended prosecution.

67. Similarly, where the delay was occasioned by deliberate inaction on the part of a complainant with the intent of getting at a suspect to force the suspect's hand in say, a different transaction between them at a later date or even use the complaint to force settlement in ongoing civil proceedings, then, again the High Court, as a court of first instance, must step in because the intended prosecution is tainted with malice and not the otherwise unassailable intent to furnish criminal wrong doing, promptly.

68. Furthermore, both articles 49(1)(a)(ii) and 50(1) and (2)(e) of the Constitutionexpect that in resolution of disputes, fairness must necessarily include the promptness of action and the inhibition against unreasonable delay. What is reasonable, it is now settled, includes both the reason for delay and the period of delay.

69. In the present case, all the evidence before us points to the fact that the documentation necessary to prove the alleged fraud may no longer be available and we agree with the learned Judge of the High Court that, where both parties have admitted that the same issues are also pending resolution in another court, and that the issue of lost documentation remains unresolved, it would be most unfair to subject the appellant to a criminal trial, 24 years after the impugned transaction.

70. What of the fact that it is admitted that the 2nd and 3rd respondents indeed received part purchase price for purchase of the suit property? Why would it take them 24 years to decide that they were now entitled to the balance thereof as well as return of the title documents? Our position is that such a delay and use of the criminal process to force the hand of the appellant fatally taints the fairness of the resultant prosecution.

71. Lastly, in instituting the prosecution, the ODPP, without in any way taking away the constitutional mandate to prosecute crimes, ought always to act judiciously and not act in perpetuation of an unfair and malicious criminal complaint. In doing so, that office must always be guided by the principle that the right to a fair trial cannot be limited thus raising the bar in the determination of the question whether to prosecute or not.

72. It is therefore our finding, and in agreement with the learned Judge of the High Court that, the prosecution of the appellant is in breach of his right to a fair trial as protected by article 25(c) as read with article 50 of the *Constitution* and we have stated why.

**iii) Are the Proceedings More of a Criminal or Civil Nature?**

73. The above question is pertinent and must be addressed as a corollary to the issues we have determined above. In that context, the appellant claims that he purchased lawfully all shares in the 1st respondent's company and eventuallybecame a director and shareholder. the 2nd and 3rd respondents on the other hand maintain that there has never been any change of the directorship or shareholding of the 1st respondent, claiming instead that they have always been its sole directors and shareholders. It is evident therefore that the main issue in contention involves the company registration forms of the 1st respondent company as well as the alleged change of its ownership.

74. The question whether a complainant can pursue both civil and criminal proceedings at the same time is not a new one in our realm. In the present case, it is admitted that the 2nd and

3rd respondents have instituted Civil suit No 132 of 2015 at the ELC and one of the claims made therein is that title documents for the suit property have been lost.

75. The appellant has however argued that the 2nd and 3rd respondents then instituted his prosecution on alleged fraud charges and unlawful use of the title documents to obtain credit whilst also claiming that the same documents had been lost thus pointing to malice in his prosecution. What is the law in such a situation?

76. The Court of Appeal persuasively stated in the case of *Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank & 4 others* [2013] eKLR that:

> "Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (section 193A of the *Criminal Procedure Code*) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control."

77. We respectfully agree and adopt this position in this case but must add that where it is obvious to a court, as it is to us and was to the learned Judge of the High Court, that a prosecution is being mounted to aid proof of matters before a civil court or where the hand of a suspect is being forced by the sword of criminal proceedings to compromise pending civil proceedings, then section 193A of the *Criminal Procedure Code* cannot be invoked to aid that unlawful course of action. Criminal proceedings, whether accompanied by civil proceedings or not, cannot and should never be used in the manner that the 2nd and 3rd respondents have done. It is indeed advisable for parties to pursue civil proceedings initially and with firm findings by the civil court on any alleged fraud, proceed to institute criminal

proceedings to bring any culprit to book. In addition, we shall, later in this Judgment, express ourselves on the criteria to be used by the High Court before terminating any criminal prosecution.

78. Having so said, we have already expressed ourselves on the right to fair trial and we must now make a finding that, in the unique circumstances of the present case, the institution of civil proceedings, simultaneously with criminal proceedings, claiming on one hand that title documents had been lost, while in another, claiming that they were in the possession of the appellant and his banks or a third party, ASL Ltd, the 10th respondent, is indeed an expression of mischief and dishonesty. This or another court should never countenance such conduct for it brings the entire criminal justice into disrepute.

**c) Whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP contrary to the Constitution**

79. The High Court in its finding, prohibited the respondents from proceeding with any criminal proceedings against the appellant in relation to the suit property or any subject matter and transaction connected to the suit property. The Court of Appeal reversed this judgment by holding that the High Court had interfered with the discretion given to the Director of Public Prosecutions (DPP) to initiate and conduct prosecution. Essentially, the Court of Appeal found that the High Court went against public interest in preventing investigation and prosecution of allegations relating to fraudulent transfer and acquisition of the suit property and that the learned Judge interfered with the prosecutorial mandate of the DPP to decide on whether to charge or not to charge an individual.

80. The 5th, 6th and 7th respondents on their part, maintain the position that the decision to commence investigations against the appellant was consistent with the provisions of article 157 of the *Constitution* and section 6 of the *Office of Director of Public Prosecutions Act*. They also submitted that the decision to institute criminal proceedings by the DPP is discretionary and that such exercise of power is not subject to the direction or control by any authority as provided for under article 157(10) of the *Constitution*.

81. Under article 157(6) of the *Constitution*, the DPP is mandated to institute and undertake criminal proceedings against any person before any court. Article 157(6) provides as follows:

> (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-
>
> (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed."

Article 157(4) provides that:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction."

However, Article 157(11) stipulates that:

(11) In exercising the powers conferred by this article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

82. Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.

83. In that regard, the Court of Appeal in the case of *Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 others* [2013] eKLR persuasively found that the High Court can stop a process that may lead to abuse of power and held that :

> "Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.
>
> By the same token and in terms of article 157(11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090.
>
> It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are

> bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. *See Ndarua v R[2002] 1EA 205*. See also Kuria & 3 others v Attorney General [2002] 2KLR." (Emphasis supplied)

84. Furthermore, the Supreme Court of India in *RP Kapur v State of Punjab* AIR 1960 SC 866 laid down guidelines to be considered by the court on when the High Court may review prosecutorial powers. They are as follows:

(I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or

(II) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, eg want of sanction; or

(III) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or

(IV) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

85. We are persuaded that this is a good guide in the interrogation of alleged abuse of prosecutorial powers and read alongside article 157(11) of the *Constitution*, we have sufficiently expressed ourselves elsewhere in this Judgment to show that the unconstitutional continuance of the criminal proceedings against the appellant amounts to abuse of court process and that, balancing the scales of justice, the weight would favour the appellant and not the respondents.

86. On public interest, what is in issue is a dispute arising from a commercial transaction 24 years ago where the complainants have not denied receiving part payment of the purchase price. There is hardly any public interest element in such a transaction save the wide interest of the law to apprehend criminals.

87. The learned judge of the High Court, in our view, was well within his mandate under article 165(3)(d)(ii) as read with article 157(11) of the *Constitution* to curtail the appellant's prosecution and the DPP'S powers have not in any way been interfered with, outside the constitutional mandate conferred on the High Court.

**E. Conclusion**

88. Having held as above, we are of the opinion that the Court of Appeal erred in setting aside the decision of the learned judge of the High Court and we have affirmed the latter decision in all its facets. What of costs? Costs follow the event and so the appellant shall have the costs in this court, the Court of Appeal and the High Court as against the 1st, 2nd and 3rd respondents only.

**F. Disposition**

89. The final orders to be made are as follows:

    (a) The entire Judgment of the Court of Appeal sitting at Nairobi delivered on July 19, 2019 in Nairobi Civil Appeal No 43 of 2017 and Civil Appeal No 48 of 2018 be set aside and the judgment and orders of the High Court in Miscellaneous Application No 78 of 2016 delivered by Honourable Mr Justice Odunga on January 11, 2017 be reaffirmed.

    (b) The costs of this appeal and costs of proceedings in this court, the Court of Appeal and in the High Court be awarded to the appellant herein in any event as against the 1st, 2nd and 3rd respondents only.

90. It is so ordered.

**Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited & another (Joint receivers and managers of Karuturi Limited) (Petition 8 of 2019) [2021] KESC 51 (KLR) (16 July 2021) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2021] KESC 51 (KLR)

***Civil Practice and Procedure*** *– appeals – appeals to the Supreme Court – appeals to the Supreme Court as of right in cases involving the interpretation of the Constitution - under what circumstances would the Supreme Court have the jurisdiction to determine an appeal from the Court of Appeal as of right in cases involving the interpretation and application of the Constitution - Constitution of Kenya, 2010 article 163(4)(a).*

**Brief facts**

The 1st and 2nd appellants were guarantors to a facility agreement between the 3rd appellant and the 1st respondent. The 3rd appellant defaulted in its repayment obligations to the 1st respondent. That led to the appointment of receivers in accordance with the power annexed to the debenture, as issued by the 3rd appellant. That appointment was challenged by the appellants at the High Court. The High Court confirmed the appointment of the receivers, but restrained them from selling the charged properties, and ordered the 3rd appellant to continue operating as a going concern in the interest of all the parties. Later on, the High Court issued winding up orders against the 3rd appellant.

The High Court in its ruling found that the appellants had made an admission that the 3rd appellant owed the 1st respondent a pre-receivership sum of US$ 4,028,194.30 and Kshs. 2,706,966.13 together with interest thereon. The High Court further directed the parties to agree on a forensic audit. The parties agreed on the auditor. The audit report was duly filed in court, and the parties addressed the court extensively on it. The High Court found that the 3rd appellant owed the 1st respondent a sum of USD 4,028,194.30 and Kshs. 2,706,994.13, together with contractual interest as contained in the facility agreement executed between the 3rd appellant and the 1st respondent, being the pre-receivership debt.

Aggrieved the appellants filed an appeal before the Court of Appeal. The Court of Appeal found that the orders granted by the High Court did not constitute a wrong exercise of judicial discretion. As such, the Court of Appeal did not interfere with the orders made by the High Court and dismissed the appeal with costs to the respondents. Aggrieved, the appellants filed the instant appeal.

**Issues**

i. Under what circumstances would the Supreme Court have the jurisdiction to determine an appeal from the Court of Appeal as of right in cases involving the interpretation and application of the Constitution (under article163(4)(a) of the Constitution)?

**Relevant provisions of the Law**

**Constitution of Kenya, 2010**

**Article 163 - Supreme Court**

*(4) Appeals shall lie from the Court of Appeal to the Supreme Court—*

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

**Held**

1. Under article 163(4)(a) of the Constitution of Kenya, 2010 (the Constitution) the Supreme Court had jurisdiction to entertain appeals from the Court of Appeal as of right in any case involving the interpretation or application of the Constitution. An appeal had to originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. An appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it could not support a further appeal to the Supreme Court under the provisions of article 163(4)(a).
2. The pleadings before the High Court confirmed that the constitutional issues raised before the Supreme Court were never pleaded and also that the High Court did not interpret or apply the same. The Court of Appeal, just like the High Court did not interrogate or apply any of the articles of the Constitution alleged to have been violated, that was, articles 25 and 50 of the Constitution.
3. Several issues were pending determination before the High Court. There was no substantive determination by the superior courts below of a constitutional nature, to warrant the Supreme Court to exercise its jurisdiction under article 163(4)(a) of the Constitution. Non-determination of the constitutional issues raised before the Court of Appeal, that was, violation of their right to be heard pursuant to articles 25 and 50 of the Constitution, did not form a basis for the instant court to entertain the appeal under article 163(4)(a) of the Constitution. It would have been pre-mature for the Court of Appeal to make a finding on the constitutional issue raised since the High Court had not fully determined the rights of the parties before it. The Supreme Court lacked the jurisdiction to entertain the instant appeal.

*Appeal dismissed; appellants to bear the respondents' costs.*

**Citations**

**Cases**

***Kenya***

1. *Ananias N Kiragu v Eric Mugambi, Franklin Mwirigi & Martin Njeru* Civil Application 10 of 2020; [2020] KESC 77 (KLR); [2020] eKLR - (Explained)
2. *Asanyo & 3 others v Attorney General* Petition 21 of 2015; [2018] KESC 15 (KLR); [2018] eKLR - (Explained)

3. *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others* Petition 4 of 2015; [2017] KESC 11 (KLR); [2017] eKLR - (Explained)
4. *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* Application 10 of 2017; [2018] KESC 70 (KLR); [2018] eKLR - (Explained)
5. *Daniel Kimani Njihia v Francis Mwangi Kimani & another* Civil Application 3 of 2014; [2015] KESC 19 (KLR); [2015] eKLR - (Explained)
6. *Deynes Muriithi & 4 others v Law Society of Kenya & another* Civil Application 12 of 2015; [2016] KESC 13 (KLR); [2016] eKLR - (Explained)
7. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Application 5 of 2014; [2014] eKLR - (Explained)
8. *Gitonga v Republic* Petition 11 of 2017; [2020] KESC 61 (KLR); [2020] eKLR - (Explained)
9. *Habib Bank A. G. Zurich v Pop-In (Kenya) LTD. & 3 others* Civil Appeal 147 of 1989; [1995] KECA 15 (KLR) - (Explained)
10. *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No. 4 of 2012; [2014] eKLR - (Explained)
11. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] eKLR - (Explained)
12. *Kiai Mbaki & 2 others v Gichuhi Macharia & another* Civil Appeal 178 of 2002; [2005] KECA 143 (KLR); [2005] eKLR - (Explained)
13. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR); [2014] eKLR - (Explained)
14. *Lavuna & others v Civil Servants Housing Co. Ltd & another* Civil Miscellaneous application14 of 1995; [1995] KECA 111 (KLR); [1995] eKLR - (Explained)
15. *Lawrence Nduttu & 6000 others v Kenya Breweries Limited & another* Petition No 3 of 2012; [2012] eKLR - (Explained)
16. *Milligan Heritage Ltd & another v Anthony M.Mwaura* Civil Appeal 91 of 2013; [2014] KEHC 2730 (KLR); [2014] eKLR - (Explained)
17. *Nguruman Limited v. Jan Bonde Nielsen & others* Civil Appeal 77 of 2012; [2014] eKLR - (Explained)
18. *Outa v Okello & 3 others* Petition 6 of 2014; [2017] KESC 25 (KLR); [2017] eKLR - (Explained)
19. *Parliamentary Service Commission v Martin Nyaga Wambora & others* Application 8 of 2017; [2018] KESC 74 (KLR); [2018] eKLR - (Explained)
20. *Patriotic Guards Ltd v James Kipchirchir Sambu* Civil Appeal 20 of 2016; [2018] KECA 799 (KLR); [2018] eKLR - (Explained)
21. *Royal Media Services Limited & 2 others v Attorney General & 8 others* Civil Application 341 of 2013; [2014] KECA 777 (KLR); [2014] eKLR - (Explained)
22. *SAJ v AOG & another; ZOG (Interested Party)* Petition 1 of 2013; [2013] KESC 19 (KLR); [2013] eKLR - (Explained)

23. *Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited* Civil Suit 78 of 2014; [2018] KEHC 304 (KLR); [2018] eKLR - (Mentioned)
24. *Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited & another* Civil Appeal No 114 of 2018 - (Mentioned)
25. *Teachers Service Commission v Kenya National Union of Teachers & 3 others* Application 16 of 2015; [2015] KESC 29 (KLR); [2015] eKLR - (Explained)

***India***

*Bareilly Electricity Supply Co. Ltd v. The Workmen & others* 1972 AIR 330, 1972 SCR (1) 241, AIR 1972 SC 330, 1972 LAB. I. C. 188, 1972 (1) SCR 241, 1971 2 LABLJ 407, 1972 23 FACLR 273, 1973 2 SCJ 499, 40 FJR 360, 23 FAC LR 273 - (Explained)

**Regional Court**

*Shah v Devji* [1969] EA 91 - (Explained)

**Statutes**

***Kenya***

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) - (Interpreted) order 13 rule 1; order 2 rule 15(1)(a); 15(9)(d)
2. Companies Act (cap 486) - (Interpreted) section 319
3. Constitution of Kenya - (Interpreted) articles 25(c); 50; 159(2)(e); 163(4)(a)
4. Supreme Court Act (cap 9B) - (Interpreted) sections 15(1); 15(2)

**Advocates**

None mentioned

July 16, 2021, the Court delivered the following Judgment:

## A. Introduction

1. The petition of appeal before us is dated 14th February 2019 and filed on even date, and it challenges the Judgment of the Court of Appeal sitting in Nairobi (Ouko, Musinga & Gatembu, JJA) dated 25th January 2019, in Nairobi Civil Appeal No 114 of 2018. The Court of Appeal in its Judgment upheld the High Court's decision and found that the orders granted on 19th January 2018 did not constitute wrongful exercise of jurisdiction. The Appeal is filed as of right under article 163(4)(a) of *Constitution*.

## B. Background

### a. Proceedings at the High Court

2. The brief background to this matter is that the 1st and 2nd appellants are guarantors to a facility agreement between the 3rd appellant and the 1st respondent. The 3rd appellant defaulted in its repayment obligations to the 1st respondent. This led to the appointment of receivers on 10th February 2014, in accordance with the power annexed to the debenture, as issued by the 3rd appellant. This appointment was challenged by the appellants at the High Court. By a Ruling dated 11th June 2014, the High Court (F Gikonyo, J) confirmed the appointment of the receivers, but restrained them from selling the charged properties, and ordered the 3rd appellant to continue operating as a going concern in the interest of all the parties. Later, on 30th March 2016, the High Court in Winding up Cause 12/2013 issued Winding up Orders against the 3rd appellant.

3. Subsequently, the appellants filed HCC No 78 of 2014 seeking the following orders against the 1st respondent: a declaration that the 1st respondent was in breach of its contractual obligations; a declaration that the appointment of receivers by the 1st respondent over it was unlawful; a permanent injunction to restrain the 1st respondent from selling the charged properties; a permanent injunction restraining the 1st respondent from appointing a receiver-manager; a permanent injunction restraining the 1st respondent from advertising or offering the charged properties for sale; and a mandatory injunction to compel the 1st respondent and its appointed receiver managers to lift the receivership and to vacate the premises of the 3rd appellant.

4. On 22nd June 2016, the 1st respondent filed an application to the court dated 21st June 2016 seeking several substantive orders namely: grant of leave to make an application against the 3rd appellant which was in liquidation; the claim be marked as adjusted and compromised on the terms that: the 1st and 2nd appellants were to, within a period of 30 days' pay to the 1st respondent a sum of USD 4, 028, 194.30 and KES 2, 706, 994.13 together with contractual interest as was contained in the Facility Agreements that were executed between the 3rd appellant and the 1st respondent; the 1st and 2nd appellants were to, at their own cost appoint a forensic auditor within 30 days from the date thereof in conjunction with the interested parties, review all the business and operational transactions undertaken by the 3rd appellant from the time it was placed under receivership to determine the amount owed, the same was to be settled by a third audit firm being KPMG, Delloite or Earnest Young who were to be appointed by either party within 7 days of a disagreement and their determination will be final. The appointed firm was to determine the issue in dispute within 14 days of appointment; the 1st and 2nd appellants was to thereafter, within 60 days make

payment to settle all the sum certified in the aforesaid audit after which the 1st respondent was to discharge any security held in respect of advances made to the 3rd appellant; and if the 1st and 2nd appellants defaulted in making the payment referred above on its due date, the 1st respondent was to thereupon be at liberty to exercise all or any of its rights in respect of advances made to the 3rd appellant including but not limited to the right to sell all assets covered or contained in the securities given by the appellants to the 1st respondent. Finally, the 1st respondent sought that upon making of orders (2) above, all interim orders were to be discharged forthwith.

5. By a Ruling dated 13 October 2016, the court (F. Tuiyot, J) found that the appellants had made an admission that the 3rd appellant owed the 1st respondent a pre-receivership sum of US$4,028,194.30 and Ksh.2,706,966.13 together with interest thereon. The Court further directed the parties to agree on a forensic audit to review all the Business and Operational Transactions undertaken during the receivership period and to determine the amount, if any, owed by the 3rd appellant to the 1st respondent. In the event of a disagreement on the appointment of a forensic auditor, the Court was to appoint one. The Forensic auditor was to, within 30 days of appointment, file his/her findings with the court and provide copies thereof to the parties. The court was then to make further orders upon receipt of that report.

6. Subsequently, the parties agreed on the auditor, Deloitte Consulting Group. The audit report was duly filed in court, and the parties addressed the court extensively on it. On 19th January 2018, the High Court (Tuiyot J) found that the 3rd appellant owed the 1st respondent a sum of USD 4,028,194.30 and Kshs. 2,706,994.13, together with contractual interest as contained in the facility agreement executed between the 3rd appellant and the 1st respondent, being the pre-receivership debt. He ordered the 1st and 2ndappellants to pay the pre-receivership debt within sixty (60) days. The 1st and 2nd respondents were also ordered to pay the 1st respondent within 90 days: USD (US dollars) 6,337,120.48 being the sums outstanding to the Creditors other than the 1st respondent during the receivership period; USD (US dollars) 6,734,083.25 being monies advanced by the 1st respondent, post the receivership period up to 31st December 2016; and USD (US Dollars) 978,849.36 being expenses incurred by the 1st respondent in preserving the assets of the 3rd appellant from 1st January 2017 to 31st July 2017.

7. The court directed that the firm of Deloitte Consulting Limited undertake an immediate audit to establish further expenses that may have been incurred in the preservation of the assets of the 3rd appellant from 1st August 2017 to the date of the ruling and file a report within 30 days for further Orders. In default of payment of the monies as set out in the said ruling, the Orders of injunction granted on 11th June 2014 in favour of the appellants were to stand discharged and the 1st respondent was at liberty to exercise all or any of its rights, in respect of the advances made to the 3rd appellant, including but not limited to the right to sell assets covered or contained in the securities given to it.

8. Aggrieved by the said Ruling, the appellants filed Civil Appeal No 114 of 2018, *Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited & another*. In the memorandum of appeal, the appellants faulted the Learned Judge for: failing to appreciate that the alleged post-receivership debt was in essence post receivership losses attributable to the 1st respondent and the receivers; failing to appreciate that the alleged post-receivership sum was not pleaded; failing to appreciate that the audit report by Delloite Consulting Ltd on which the Judge based his decision was disputed; entering judgment on unproven debt and that the 1st and 2nd appellants as guarantors were not liable for post-receivership debt; making a final determination without conducting a trial thereby violating article 50 of *Constitution*; holding that the 3rd appellants owed the 1st respondent a sum of USD 4, 028, 194.30 and KES 2, 706, 994.13; failing to appreciate the difference between what was referred to as a contractual rate of interest and interest lawfully due; and failing to appreciate that the composite proposal that the appellants had made as contained in the Affidavit sworn on 24th March 2016 was not severable or susceptible to cherry picking by the 1st respondent and that the proposal was not in any event an admission of debt in law.

9. While determining the Appeal, the learned Judges of Appeal listed one issue for determination namely, whether the impugned orders made by the High Court on 19th January 2018 directing the appellants to make payments to the 1st respondent and in default for the 1st respondent to be at liberty to exercise its powers of sale constituted a wrong exercise of discretion. In its judgment dated 25 January 2019, the appellate court was not convinced that the orders granted by the learned Judge on 19 January 2018, constituted a wrong exercise of judicial discretion. As such, the Court did not interfere with the orders made by the High Court and dismissed the appeal with costs to the respondents.

10. The appellants, aggrieved by the decision of the Court of Appeal, have now moved to the Supreme Court.

**C. Parties' Respective Submissions**

**i. The appellants' case**

11. The appellants' appeal is premised on four grounds framed as follows: whether the failure by the Court of Appeal to adjudicate on Constitutional issue of fair hearing amounts to a violation of the appellants' right to fair hearing enshrined in articles 25( c) and 50(1) of *Constitution*; whether the Court of Appeal's dismissal of the issues raised by the appellants as "merely muddying the waters" is a dereliction of the court's duty under article 164(3) as read with articles 25(c), 50 and 159(2)(e) of *Constitution*; whether the Court can determine a dispute with finality without giving effect to a party's non-derogable right to a fair hearing guaranteed under articles 25(c) and 50(1) of *Constitution*; and whether it is constitutional

for judicial discretion to be exercised in a manner that violates a litigant's right to fair trial as enshrined in article 50 as read together with article 25 of *Constitution*.

12. The appellants filed their written submissions on 12th March 2020. The appellants commence their submissions by faulting the Court of Appeal for failing to adjudicate the allegation that their right to a fair hearing under article 50(1) of *Constitution* was violated by the High Court. While citing articles 25(c), 50(1) and 159(e) of *Constitution*, the case of *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR, the appellants urge that the High Court failed to conduct proceedings before it in a judicious manner. They submit that they were denied the opportunity to challenge the contents of the audit report as provided for in *Constitution*. They fault the Court of Appeal for upholding the High Court's decision which, in their view, was wrong and evaded a determination of the real issues in the appeal before it.

13. The appellants also submit that the Court of Appeal missed the vital point that the alleged acknowledged debt was about the alleged pre-receivership debt, and not the alleged receivership debt which was the subject of an appeal before it. The appellants argue that by denying them a right to a fair hearing, the Court of Appeal negated its constitutional mandate under article 164(3) (a) and 159(2)(e) of Constitutional. To support their argument, they cite a decision from the Supreme Court of India, *Bareilly Electricity Supply Co. Ltd v. The Workmen & others* [1972] AIR 330, 1972 SCR (1) 241, this Court's decisions in *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu* SC Petition No 18 as consolidated with Petition No 20 of 2014 and *Kia Mbaki & 2 others v Gichui Macharia & another* [2005] eKLR.

14. The second limb of the appellant's submissions is that the Court of Appeal's dismissal of the issues raised as merely "muddying the waters" is a disregard of the Court's duty under article 50 and 159(2)(e) of *Constitution*. On this, the appellants submit that the Court of Appeal erroneously proceeded to dispose of the appeal on the wrong basis that they were exclusively challenging the trial Court's exercise of judicial discretion thereby ignoring the main issue in dispute.

    The cite the cases of *Miligan Heritage Ltd & another v Anthony M Mwaura* [2014] eKLR and *Royal Media Services Limited & 2 others v Attorney General & 8 others* [2014] eKLR to anchor their submissions.

15. On the third and last issue, that is, whether it is constitutional for a court to exercise judicial discretion in a manner that violates a litigant's right to a fair trial as enshrined under article 50 as read with article 25 of *Constitution*, the appellants submit that the alleged Notice of Motion dated 21st June 2016, was based on pre-receivership debt and not otherwise as was submitted in the audit report. Therefore, they urge that the High Court's contemplation that any amount found to be undue to the 1st respondent would be refunded to the

appellants is an admission that a decision was yet to be made as regards the post-receivership debt if any, and the party liable to pay. They maintain that the Court of Appeal's decision contravened order 13 rule 1 of the *Civil Procedure Rules*, and articles 25(c) and 50(1) of *Constitution*. To support their argument on this issue, they cite the case of *Parliamentary Service Commission v. Martin Nyaga Wambora & others* [2018] eKLR. Ultimately, they urge this court to uphold the appeal as prayed.

**ii. The 1st respondent's case**

16. On the first two issues that is, whether the Court of Appeal failed to adjudicate Constitutional issue of fair hearing and whether the petitioners' right to fair hearing as enshrined in article 50(1) of *Constitution* were violated, it is submitted that contrary to the appellants' argument that the matter was decided based on affidavits filed in Court on 24th March 2016, the Application was based on letters from the 1st respondent's Advocates acknowledged by the appellants' advocates. Further, that the High Court's decision was based on the existence of an admission arising from correspondence between the advocates on record.

17. The 1st respondent also submits that the Court of Appeal considered and determined the appellants' contention that their right to a fair trial under articles 25 (c) and 50(1) were violated but found that it did not arise in this case as the matter in issue was an application for judgment on admission. The respondent supports the Court of Appeal's decision not to fault the learned Judge for making his findings on a *prima facie* basis. To support its argument, the 1st respondent relies on the cases of *Lavuna & others v. Civil Servants Housing Co. Ltd & another*, Civil Appeal No. 14 of 1995, *Habib Bank AG Zurich v. Popin (Kenya) Ltd, & 3 others* [1997] eKLR, *Shah v. Devji* [1969] EA 91 and *Nguruman Limited v. Jan Bonde Nielsen & others* Civil Appeal No. 77 of 2012 [2014] eKLR.

18. Furthermore, the 1st respondent submits that Constitutional issue of fair hearing does not arise in the circumstances of this case as the same involved the High Court's exercise of discretion, that is, conditions for the extension of an interlocutory injunction pending the hearing to determine the rights of the parties. It is the 1st respondent's case that the orders made by the High Court did not determine the suit in finality as alleged by the appellants but preserved the suit by granting conditional orders.

19. The 1st respondent argues that the Court of Appeal rightly found that the belated introduction of a constitutional claim of lack of access to justice or fair hearing had no basis in law since the issue they were dealing with was of an interlocutory nature under Order 13 Rule 2 of the *Civil Procedure Rules*, 2010.

They state that the court's decision was a pure exercise of discretion and that the case is still at the interlocutory stage of a suit and that parties are yet to proceed to a full hearing.

20. In response to the appellants' claim that the Court of Appeal failed to adjudicate the appellants' claim of failure by the High Court to grant them a fair hearing, the 1st respondent submits that the Court of Appeal dealt with and determined the issue of the claim of denial to Constitutional right to a fair hearing. Furthermore, the 1st respondent submits that the Court of Appeal could not have faulted the High Court for the course it took because the High Court would have erred in law and fact if the learned Judge had converted the application for judgment on admission to a mini trial. The 1st respondent cites the case of *Deynes Muriithi & 4 others v. Law Society of Kenya & another*, Supreme Court Appl. No. 12 of 2015 [2016] eKLR to anchor its argument.

21. On the question of this Court's jurisdiction to entertain the appeal, the 1st respondent submits that there was no issue involving the right to a fair hearing before the High Court and there is a clear material that this was not the thrust of the arguments by the appellants in the Court of Appeal. The 1st respondent relies on the case of *Charles Maina Gitonga v. Republic*, SC petition No 11 of 2017; [2020] eKLR, *Lawrence Nduttu & 6000 others v. Kenya Breweries Limited & another*, SC Petition No 3 of 2012; [2012] eKLR and *Aviation & Allied Workers Union v Kenya Airways & 2 others* SC Petition No 4 of 2015 [2017] eKLR to support its argument. The respondent also argues that this Court, in dismissing its application and preliminary objection, departed from its set principle that issues of constitutional application and interpretation must rise through the superior courts in the clearest of cases as was held in the case of *Geoffrey Asanyo & 3 others v Attorney General* [2018] eKLR. They urge the Court to review its decision on jurisdiction in this case. They also cite the case of *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR to support their case.

22. Disagreeing with the appellants' contention that the need for the audit review arose as a result of the erroneous finding by the learned Judge that the appellants' statement in their affidavit was an admission, the 1st respondent submits that the audit firm of Deloitte & Touch was agreed upon by the parties. Additionally, they contend that the pre-receivership debt was admitted by the appellants hence the learned Judge's findings on the audit report whose terms of reference were crafted consensually by the parties. They maintain that the appellants were accorded a fair hearing.

23. The 1st respondent argues that the Court of Appeal rightly found that the belated introduction of a constitutional claim of lack of access to justice or fair hearing had no basis in law since the issue they were dealing with was of an interlocutory nature under Order 13 rule 2 of the *Civil Procedure Rules*, 2010. They state that the court's decision was a pure exercise of discretion and that the case is still at the interlocutory stage of a suit and that parties are yet to proceed to a full hearing.

24. It is also contended that despite the introduction of additional grounds of appeal by the appellants, that is, relating to the admission of the amount of USD 4, 028, 194.30, the Court addressed all the issues before it thereby according to the appellants the right to be heard, and that finally that the main suit is yet to be heard.

**iii. 2nd respondent's case**

25. Through its submissions filed on 16th June 2020, the 2nd respondent submits that the Court of Appeal correctly determined that the imposition of terms on the injunction, that the appellants were enjoying, was a matter of discretion which the High Court judge had exercised correctly. Further, that the question of whether the appellants' right to be heard had been infringed did not arise, as the issues they had complained about had been reserved for determination at a full hearing of the suit.

26. The 2nd respondent submits that the Court of Appeal considered all arguments made by parties, including the allegation that the petitioners had not been heard by the High Court on the issues of post-receivership debt. It is also submitted that the court correctly determined the interlocutory appeal before it concerning the High Court's exercise of jurisdiction in imposing conditions for the continued enjoyment by the appellants of the injunction that had restrained the sale of the charged assets. The 2nd respondent's maintains that the appellants made extensive submissions on the audit report before the order appealed against was made.

27. The 2nd respondent furthermore submits that the order made by the High Court on 19th January 2018, did not involve the interpretation and application of *Constitution* but merely imposed the condition that the appellants must deposit the sums that were admitted and agreed upon, and pays the further amount determined via a process they had chosen. This respondent urges that the mere fact that the appellants were disputing some amounts claimed by the 1st respondent is not and cannot be a basis for the appellants to assert a right to an injunction.

28. It is additionally submitted that the contest between the parties could only be resolved by the Court of Appeal applying the principles that govern the exercise of discretion by the High Court in granting or refusing to grant or extend an injunction. That the resolution of that issue did not require the interpretation or application of *Constitution* and the issue does not arise before this Court.

29. They conclude that the appeal herein is based on a misrepresentation of the true dispute between the parties and the issues in contest before the Court of Appeal, and that the same should be dismissed with costs.

30. We are cognizant of the fact that on 22nd March 2019, this Court issued a conservatory Order restraining the respondents, by themselves, their servants, agents, employees or whomsoever, from offering for sale, alienating, or in any manner disposing of the 1st and 2nd appellants' parcels of land, namely LR Nos. 12248/19; 12248/20; 12248/21; 12248/38; 25261 and 25262 and LR No. 10854/60 (Title No. LR 87312) — pending the hearing and determination of the appeal. The Court also stayed the execution and/or enforcement of the Orders issued on 19 January 2018, in High Court Civil Suit No. 78 of 2014, *Surya Holdings Limited & 2 others v. CFC Stanbic & Another*, pending the hearing and determination of the appeal.

**D. Issues for Determination**

31. From the filed pleadings, written and oral submissions by parties, the following issues emerge for determination:

    a. Whether the appeal before this Court meets Constitutional threshold under article 163(4)(a) of *Constitution*.

    b. If the answer to issue (i) is in the affirmative, what remedies are available in the circumstances?

**E. Analysis**

32. It is the 1st and 2nd respondents' argument that there was no issue involving the right to a fair hearing before the superior courts below. In other words, it is the respondents' case that the subject matter of this appeal did not involve issues interpretation and application of *Constitution* to warrant this Court's exercise of jurisdiction under article 163(4) (a) of *Constitution*.

33. Under article 163(4)(a) of *Constitution*, this Court has jurisdiction to entertain appeals from the Court of Appeal as of right in any case involving the interpretation or application of *Constitution*.

34. Section 15(1) of the *Supreme Court Act* makes provision for this Court's appellate jurisdiction with regards to appeals under article 163(4)(b) of *Constitution*. Section (15)(2) of the same *Act* on the other hand provides that Sub-section (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of *Constitution*. We note that this appeal is premised on article 163(4)(a) of *Constitution* and section 15(2) of the *Act*.

35. This Court set guiding principles in the case of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Petition No 3 of 2012; [2012] eKLR, with regard to its

appellate jurisdiction under article 163(4)(a) of *Constitution*, where it stated that an appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of *Constitution*. In other words, an appellant must be challenging the interpretation or application of *Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of *Constitution*, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a).

36. In the case of the *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013; [2014] eKLR, this Court emphasized that the appeal should have raised questions of constitutional interpretation or application, and the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under article 163(4)(a) of *Constitution*.

37. The same principle was affirmed in this Court's decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC App No 5 of 2014; [2014] eKLR (Munya 1) where we stated that specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.

38. We have perused the record of appeal and taken note that the ruling of the trial court issued on 19th January 2018, was a follow up on the ruling of the same court issued on 13 October 2016 flowing from a Notice of Motion Application dated 21st June 2016, premised under order 2 rule 15(1)(a) and 9d), order 13 rule 2 of the *Civil Procedure Rules*, section 319 of the *Companies Act*, and the pleadings before the trial court confirm that Constitutional issues raised before us were never pleaded and also that the trial court did not interpret or apply the same.

39. Furthermore, we have looked at the issue before the Court of Appeal, that is, whether the impugned orders made by the High Court on 19th January 2018 directing the appellants to make payments to the 1st respondent and in default, for the 1st respondent to be at liberty to exercise its powers of sale constituted a wrong exercise of discretion, and have come to the conclusion that the Court of Appeal, just like the High Court did not interrogate or apply any of the articles of *Constitution* alleged to have been violated that is, articles 25 and 50 of *Constitution*.

40. This Court has previously found that it lacks jurisdiction to entertain appeals from interlocutory decisions save where the interlocutory decision in question is a substantive determination of a constitutional issue that has been canvassed through the superior courts below in the cases of *Daniel Kimani Njihia v Francis Mwangi Kimani & Another*, SC. Civil Application No 3 of 2014; [2015] eKLR; *Teachers Service Commission v. Kenya National Union of Teachers & 3 others* Sc Application No 16 of 2015; [2015] eKLR; and *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* [2018] eKLR. In the *Ananias N Kiragu v Eric Mugambi & 2 others* [2020] eKLR. In *SAJ v AOG & 2 others* [2013] eKLR, this court found that its jurisdiction can only be invoked when substantive matters in the appellant's petition have been answered.

41. Having perused the record, more so, the amended plaint and the decision of the trial Court and that of the Court of Appeal, it is obvious to us that several issues are still pending determination before the trial court. Consequently, it is our finding that there is no substantive determination by the superior courts below of a Constitutional nature, to warrant this Court to exercise its jurisdiction under article 163(4)(a) of *Constitution*. Although the appellants have urged us that non-determination of Constitutional issue raised before the Court of Appeal, that is, violation of their right to be heard pursuant to articles 25 and 50 of *Constitution*, should form a basis for us to entertain this appeal under article 163(4)(a) of *Constitution*, we unanimously disagree with them. It is our finding that it would have been pre-mature for the Court of Appeal to make a finding on Constitutional issue raised since the trial court had not fully determined the rights of the parties before it.

42. We are cognizant of a ruling of this Court issued on 22nd March 2019, dismissing a Preliminary Objection dated 22nd February 2019 and a Notice of Motion dated 25th February 2019, which Preliminary Objection and Application contested this Court's jurisdiction in this matter. However, having listened to all the parties in the matter and re-evaluated the pleadings before us, and the record of appeal, and considering our findings herein, we are satisfied that we lack the jurisdiction to entertain the matter before us. Further, under article 163(7) of *Constitution*, this Court is not bound by its decisions.

43. Since costs follow the event as previously decided this Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition No 4 of 2012; [2014] eKLR, the appellant shall bear the costs of appeal in this Court.

44. Consequently, the appeal is dismissed.

**F. Orders**

45. Flowing from above, the final Orders are:

i. The Petition of appeal dated 14th February 2019 and filed on even date is hereby dismissed.

ii. The appellants shall bear the respondents' costs.

Orders accordingly.

**Getao v Mokare & 4 others (Petition 9 of 2020)**
**[2021] KESC 36 (KLR) (16 July 2021) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2021] KESC 36 (KLR)

***Land Law*** *– tenancy – proprietorship in land - community of ownership (co-ownership) of land vis-a-vis community or communal ownership of land - what was the distinction between community of ownership (co-ownership) of land and community or communal ownership of land - what was the type of land tenure operating in a group ranch - whether the equality in undivided shares of a group ranch should be based on acreage as opposed to value of the property.*

***Land Law*** *– tenancy – tenancy in common - what was the nature of tenancy in common.*

**Brief facts**

The appellant was the administrator of the deceased's estate, whom it was alleged that at the time of his death, had been in occupation and possession of the suit property. The 3rd respondent was a group ranch comprised of about 519 members and owned about 100,000 hectares in a parcel of land from which the suit property was excised. The Ministry of Lands consented to the dissolution and subdivision of the ranch into equal individual holdings to the registered members. After subdivision, the deceased's estate was allocated a different parcel of land (the allocated land) and not the originally occupied land. The import therefore was that the appellant and other beneficiaries of the deceased's estate had to vacate the suit property and relocate to the allocated land.

The appellant and one of his brothers failed to vacate the suit property thereby compelling the 1st respondent to institute a suit at the trial court in a bid to evict them. The appellant claimed that the dissolution of the 3rd respondent was conditioned on the principle that, all the members would be allocated a share of all that parcel occupied at the time of dissolution. It was contended that the 2nd and 3rd respondents contravened that condition and allocated the suit property to the 1st respondent. He therefore claimed that his and the dependents' fundamental rights to a fair administrative action, to own property, equality and freedom from discrimination had been violated.

The trial court found that the 1st respondent had been lawfully allocated the suit property, ordered the appellant to vacate and deliver the same with vacant possession to the 1st respondent within 90 days of the date of the judgment and in default thereof, be evicted. Aggrieved, the appellant filed an appeal at the Court of Appeal which dismissed the appeal with costs. The appellant was further aggrieved and thus filed the instant appeal.

**Issues**

i. What was the type of land tenure operating in a group ranch?
ii. What was the distinction between community of ownership (co-ownership) of land and community or communal ownership of land?
iii. What was the nature of tenancy in common?

iv. Whether the equality in undivided shares of a group ranch should be based on acreage as opposed to value of the property?

**Held**

1. The repealed Land Group Representatives Act was introduced to enable the inhabitants of large swathes of land in largely semi-arid pastoralist areas, to hold such land as a group, under one title. The title would be issued to and held by elected representatives on behalf of the group. Through that instrumentality, the group ranch not only acquired a corporate character, but became legally insulated from the tragedy of the commons. The group ranch was therefore owned by members of the group, in equal but undivided shares, until such time that each member acquired their individual titles. In the law of property in land, that was what could be characterized as a community of ownership (or co-ownership) as opposed to community or communal ownership.
2. In community of ownership (or co-ownership), each member had an equal share, though undivided, while in community or communal ownership, there was no equality of shares. The members derived their security of tenure *qua members* of that community. The nature of that tenure would also differ depending on the status of the members. The type of tenure operative in a group ranch under the Land (Group Representatives) Act, was a tenancy in common, as opposed to a joint tenancy. Members of the group ranch were tenants in common as opposed to joint tenants.
3. At common law, each co-owner was as much entitled to possession of any part of the land as the others. He could not point to any part of the land as his own to the exclusion of the others; if he could, there would be separate ownership and not co-ownership. No one co-owner had a better right to the property than another. Tenants in common held property in undivided shares. Each tenant in common had a distinct share in property which had not yet been divided among the co-tenants. The only fact which brought them into co-ownership was that they both had shares in a single property which had not yet been divided among them. Therefore, while the tenancy in common lasted, no one could say which of them owned any particular parcel of land.
4. There was no legal basis upon which the appellant could lay claim to the parcel of land in question, to the exclusion of any other member of the group ranch. For as long as the group ranch remained undivided, his share in the land was equal to the other members of the group. It remained a tenancy in common until each member went their separate ways, having acquired their individual titles. The equality in the undivided shares of a group ranch, could only be based on acreage as opposed to value, for that was what brought its members into a community of ownership.
5. A group ranch hardly came into existence on the basis of its value as opposed to its acreage. The frontiers of a group ranch could only be determined by its acreage as established by a survey which mapped its boundaries. That explained why the mechanism that was used

by the group representatives at the time of sub-division was balloting. Balloting was acreage sensitive but value blind. After sub-division, individual parcels were bound to differ in terms of value, depending on various factors. However, such differences in the value of distinct parcels were a post sub-division phenomenon, and therefore irrelevant to the process.

*Petition of appeal dismissed; judgment of the Court of Appeal dated December 1, 2017 upheld; appellant to bear the costs of the instant appeal.*

**Citations**

**Cases**

***Kenya***

1. *Bor, Jonathan Kiplangat & 524 others v Sub County Police Commander Narok & another* Petition 19 of 2019; [2020] KEELC 2221 (KLR) - (Mentioned)
2. *Bruel, Niels v Moses Wachira & 2 others* Civil Appeal (Application) 188 of 2012 (R 1/2016); [2018] eKLR - (Mentioned)
3. *CKC & another (Suing through their mother and next of friend JWN) v ANC* Civil Appeal 121 of 2018; [2019] eKLR - (Explained)
4. *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* Petition Nos 14, 14A, 14B & 14C of 2014; [2014] eKLR (Consolidated) - (Mentioned)
5. *Dellian Langata Limited v Symon Thuo Muhia,Mary Njoki Thuo, Agricultural Finance Corporation, Nairobi City Council & Council of Legal Education* Civil Appeal 144 of 2014; [2018] eKLR - (Mentioned)
6. *DEN v PN* Civil Appeal 226 of 2012; [2015] eKLR - (Explained)
7. *East African Cables Ltd v Public Procurement Complaints, Review and Appeals Board & another* Civil Application 109 of 2007; [2007] eKLR - (Explained)
8. *Gwer, Samson & 5 others v Kenya Medical Research Institute & 3 others* Petition No 12 of 2019; [2020] eKLR - (Explained)
9. *In the Matter of Kenya National Commission on Human Rights* [2014] 2 KLR 356 - (Explained)
10. *In the Matter of the Speaker of the Senate & another* Advisory Opinion Reference 2 of 2013; [2013] eKLR - (Explained)
11. *Kinyanjui, Kamau v George Kamau Njoroge* Civil Appeal 132 of 2005; [2015] eKLR - (Mentioned)
12. *Kitur, Bernard Kibor v Alfred Kiptoo Keter & another* Election Petition No 1 of 2017; [2018] eKLR - (Mentioned)
13. *Koinange & 13 others v Charles Karuga Koinange* Civil Suit 66 of 1984; [1986] eKLR - (Mentioned)
14. *Meru County Government v Ethics and Anti-Corruption Commission* Civil Appeal 193 of 2014; [2018] eKLR - (Explained)

15. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others (Munya 2)* Petition 2B of 2014; [2014] eKLR - (Mentioned)
16. *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 - (Mentioned)
17. *Njau, Joseph Ndung'u v Margaret Magiri Mbuki* Petition 13 of 2015; [2017] eKLR - (Explained)
18. *Outa, Fredrick Otieno v Jared Odoyo Okello & 3 others* Petition 6 of 2014; [2017] eKLR - (Mentioned)
19. *Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others* Petition 23 of 2014; [2015] eKLR - (Mentioned)
20. *Waweru, Peter K v Republic* Miscellaneous Civil Application 118 of 2004; [2006] eKLR - (Explained)

***Regional Court***

1. *Meme v Republic & another* [2004] EA 124 - (Mentioned)
2. *Selle v Associated Motor Boat Company* [1968] EA 123 - (Applied)

**Texts**

1. Harpun, C., (Ed) (1996), *Megarry and Wade, The Law of Real Property* London: Sweet & Maxwell 6th Edn pp 477, 480

**Statutes**

***Kenya***

1. Appellate Jurisdiction Act (cap 9) - (Cited) In general
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) - (Interpreted) order 2 rule 10(1)(a)
3. Constitution of Kenya - (Interpreted) articles 2(4); 19(3); 22; 23; 27; 40; 47; 50; 159(2)(d); 163(3)(b)(4)(a)
4. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) - (Interpreted) rule 3(1)
5. Court of Appeal Rules, 2010 (cap 9A Sub Leg) - (Interpreted) rule 29(1)(a)
6. Evidence Act (cap 80) - (Interpreted) sections 107, 108
7. Judicature Act (cap 8) - (Interpreted) section 3
8. Land (Group Representatives) Act (Repealed) (cap 287) - (Cited) In general
9. Land Adjudication Act (cap 284) - (Cited) In general
10. Limitation of Actions Act (cap 22) - (Cited) In general
11. Registered Land Act (Repealed) (cap 300) - (Interpreted) section 28, 30

**Advocates**

*Mr Kahari and Ms Mwachiro* for appellant

*Mr Larabi and Mr Rono* for 1st respondent

*Mr Weru* for 2nd and 3rd respondent

July 16, 2021, the Court delivered the following Judgment:

## A. Introduction

1. This is a petition of appeal dated May 18, 2020 and lodged on June 11, 2020. It is brought pursuant to article 163(4)(a) of *the Constitution*, challenging the entire judgment and orders of the Court of Appeal (Makhandia, Musinga & Gatembu, JJ A delivered in Civil Appeal No 361 of 2014 on December 1, 2017.

## B. Litigation Background

### (i) At the High Court

2. The petition before the High Court was filed by the appellant pursuant to articles 22, 23, 27, 40, 47 and 50 of *the Constitution*, section 3 of the *judicature Act* and Sections 28 and 30 of the *Registered Land Act* cap 300 (Repealed). The appellant was the administrator of the estate of the late Joshua Matindi Gitau Karanja alias Ole Karanja Gitau (deceased), who at the time ofhis death, it was alleged, had been in occupation and possession of LR No Kajiado Kaputiei-South 2241 measuring 76.457 HA or 188.849 acres. This property was subdivided into two parcels and now exists as L.R No. Kajiado/Kaputiei-South/2625 and L.R No. Kajiado/Kaputiei-South/2626, (hereinafter, the suit property).

3. The 3rd respondent was a group ranch situate within Kajiado County and registered under the now-repealed *Land (Group Representatives) Act*, 1968. The ranch comprised about 519 members and owned about 100,000 hectares in the parcel of land known as LR No Kajiado/ Kaputiei-South 94 from which the suit property was excised. The appellant's father, the 1st respondent as well as the 2nd respondent were among the *bona fide* members of the Ranch.

4. Following the 3rd respondent's application in 1990, the Ministry of Lands consented to the dissolution and subdivision of the ranch into equal individual holdings to the registered members. From then on, the 3rd respondent's officials remained in office for the sole purpose of overseeing the sub-division.

5. After subdivision, the deceased's estate was allocated a different parcel of land, known as LR No Kajiado/Kaputiei South/2211"the allocated land" and not the originally occupied land. The import therefore was that the appellant and other beneficiaries of the estate had to vacate the suit land and relocate to the allocated land. Title to the allocated land was duly issued to the appellant and his two brothers, Daniel Parsimia Matindi and Peter Koikai Pukei. Conversely, the title to the suit property was issued to the 1st respondent who became the registered owner. The appellant and one of his brothers failed to vacate the suit property

thereby compelling the 1st respondent to institute Machakos, HCCC No 278 of 2012 in a bid to evict them. This matter was transferred to the Environment and Land Court (ELC) and given a new number ELC No 1055 of 2012.

6. Consequently, the appellant, who was issued with a Limited Grant of letters of Administration ad Litem on 24th August 2011, in Machakos HC Succession Case No 651 of 2011, instituted Constitutional Petition No 541 of 2012 which was also transferred to the ELC and given a new number, ELC No 929 of 2014. The appellant urged that the dissolution of the 3rd respondent was conditioned on the principle that, all the members would be allocated a share of all that parcel occupied at the time of dissolution. It was contended that the 2nd and 3rd respondents, without any justification contravened this condition and allocated the suit property to the 1st respondent to the prejudice of the appellant and other dependents of the estate of the deceased. He therefore claimed that his and the dependents' fundamental rights to a fair administrative action, to own property, equality and freedom from discrimination had been contravened and violated.

7. The two suits were consolidated and determined together. In a Judgment delivered on 25th September 2014, the ELC Court (Mutungi, J) found that the particulars of alleged fraud and irregularity against the respondents had not been specifically pleaded or proven by the appellant as required in law and could consequently not stand. Further, the court found that there was neither unfairness, discrimination or arbitrariness in the respondents' actions nor infringement of his fundamental rights and freedoms under articles 27, 40, 47 and 50 of the *Constitution* as alleged. Ultimately, it found the 1st respondent had been lawfully allocated the suit property, ordered the appellant to vacate and deliver the same with vacant possession to the 1st respondent within 90 days of the date of the Judgment and in default thereof, be evicted.

**(ii) At the Court of Appeal**

8. Aggrieved and dissatisfied with the entire judgment and Directions of the ELC, the appellant filed Civil Appeal No 361 of 2014, citing 12 grounds which are summarized as follows, that the learned Judge: misdirected himself on the applicability and adherence to the rules of civil procedure in a constitutional petition; erred by framing his own issues and proceeding to pronounce judgment on them thereby reaching an erroneous conclusion; erred by failing to give credence and relevance to uncontested facts like the valuation report; erred in considering issues not canvassed or pleaded before him; erred in anchoring and basing his decision on legal technicalities thus occasioning a miscarriage of justice to the appellant; misdirected himself on the law relating to fraud, legitimate expectation and discrimination on the face of cogent evidence placed before him; erred by finding that the appellant had not proved his case to the required standard; contradicted himself by finding on one hand that the parties were entitled to equal portions of land but holding that it

was impractical to achieve that equality; erred in granting reliefs not sought by the parties; erred in disregarding the appellant's evidence and submissions without reasons thereof; erred in arriving at findings not supported by the applicable law and finally, erred by failing to consider a supplementary affidavit filed with leave of court in support of the amended petition.

9. In a judgment delivered on 1st December 2017, the Court of Appeal dismissed the appeal with costs. The learned Judges upheld the ELC's finding that it is trite, particulars of fraud must be specifically pleaded and strictly proved. It was of the reasoning that although article 159 of the *Constitution* enjoins the court to administer substantial justice without undue regard to procedural technicalities, it does not allow the parties to totally ignore the rules of evidence. The court upheld the trial Judge's finding that no promise of any benefit was extended to the appellant to form a basis for the legitimate expectation that the appellant's family would be allocated the suit property. It dismissed allegations of discrimination on ethnic basis on grounds that it was a new issue introduced through a supplementary affidavit where the respondents were denied a chance for rebuttal.

10. On whether the appellant was entitled to the suit property, the court found that since there was no other established criterion for sub-division of the ranch rather than on the basis of equal acreage to all the members, which as far as can be discerned was achieved, it could not interfere. It was the appellate court's further finding that if the appellant wished or intended to introduce another criterion, such as value of the land, he should have raised that proposal with the 2nd and 3rd respondent and the membership of the ranch. The learned Judges found that such a criterion would be raised for discussion and a resolution passed by virtue of the provisions of the 3rd Schedule of the *Land (Group Representatives) Act* (cap 287) (now repealed), which was the applicable law and provided that a resolution at a general meeting was to be decided by show of hands or a ballot where more than 60% of the members' demand. The court subsequently found that it was not within its domain to lay down the ground rules to be followed in the event of subdivision of group ranches as invited by counsel for the appellant and further that the process of subdivision and allocation was fair and regular, contrary to the appellant's assertions.

11. On whether the trial court disregarded evidence tendered, to wit the valuation reports, the learned Judges upheld the trial Judge's finding that the issue in the reports was new, was not contained in the appellant's petition but raised in a supplementary affidavit after closure of pleadings, and as a result denied the respondents an opportunity to rebut. In view of its finding above, the appellate court dismissed the appeal and found that the appellant's rights as guaranteed under articles 27, 40, 47 and 50 of the *Constitution* had not been violated.

**(iii) At the Supreme Court**

12. Dissatisfied, the appellant moved this court, citing eight (8) grounds summarized as follows, the learned Judges erred in law:

    (i) In applying the *Civil Procedure Rules* in arriving at its decision in a matter raising constitutional violations;

    (ii) In interpreting the law relating to fraud, legitimate expectation and discrimination and failed to evaluate the evidence before it;

    (iii) In the application of the law relating of equality of a parcel of land by limiting the scope to acreage as opposed to value contrary to article 27 of the *Constitution*;

    (iv) In finding that the appellant was not discriminated based on his ethnicity contrary to article 27 of the *Constitution*;

    (v) In finding that the misplacement of the appellant from his ancestral land was not an infringement of his right to property contrary to article 47 of the *Constitution*; and

    (vi) In finding that the appellant had not proved allegations of fraud in disregard of article 159(2)(d) of the *Constitution*;

13. The appellant has framed four (4) issues for determination, namely:

    (i) Whether the doctrine of equality in parcels of land applies to value or acreage;

    (ii) Whether displacement amounts to a violation of the right to own property;

    (iii) Whether the Court of Appeal exercised its jurisdiction to re-evaluate the evidence placed before it; and

    (iv) Whether the rules of Civil Procedure apply in Constitutional Petitions.

14. The appeal seeks the following reliefs:

    (a) The petition be allowed;

    (b) The judgment and decree in ELC Case No 929 of 2012 Nairobi consolidated with ELC Case No 1055 of 2012 delivered on 25th September 2014, and confirmed by the Court of Appeal in the Judgment delivered on 1st December 2017 in Civil Appeal No 361 of 2014-Nairobi be vacated and/or set aside and the same be substituted with an Order allowing the appellant's amended petition in ELC Case No 929 of 2012 dated 2nd December 2013; and

    (c) Costs.

## C. Parties' Respective Cases

### (a) The appellant

15. The appellant's written submissions are dated August 3, 2020 and filed on even date, while the supplementary written submissions are dated September 7, 2020 and filed on September 8, 2020. The appellant's case is premised on articles 22, 23, 27, 40, 47, 159(2), 163(3(b) and 163(4)(a) of the *Constitution* and addresses the issues delineated for determination.

16. On the issue of the criterion of sub-division of group ranches, the appellant, through his counsels on record Mr Kahari and Ms Mwachiro seeks the court to interpret the criterion of sub-division of group ranches. He poses the question whether the doctrine of equality in parcels in such sub-divisions is based on acreage or value. It is the appellant's submission that sub-division by acreage, as was the case in this appeal, is both unfair and unconstitutional. He contends that equality of land cannot be based on acreage per se for reasons that there are geographical and topographical differences between two parcels of land of equal acreage. He submits that relocation to a property in a remote area that is valued at 7 million without giving him a chance to own the property he was in occupation and possession of, which is valued at 17 million, was discriminatory. He submits that the suit property and the allocated land though equal in acreage, were different in value, and as such, the allocation had offended the principles of equality and non-discrimination. To support his arguments, he cites articles 1o and 27 of the *Constitution* and the cases of *CKC & another (Suing through their mother and next of friend JWN) v ANC*; CA Appeal No 121 of 2018, [2019] eKLR (CKC case), *Peter K Waweru v Republic*; HC Misc. Application N 118 of 2004, [2006] eKLR, *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others*; SC Petition 12 of 2019, [2020] eKLR (Samson Gwer case), and *DEN v PN*; CA Appeal No 226 of 2012, [2015] eKLR

17. It is the appellant's further submission that under articles 2(4) and 40 of the *Constitution*, displacement amounts to a violation of the right to own property. He faults the Court of Appeal for finding that the policies of the 3rd respondent superseded his fundamental rights and freedoms as enshrined under part 4 of the *Constitution*. On these grounds, he urges that the move by the 2nd and 3rd respondents to displace him and his family from the suit land violated his right to property.

18. He submits further that while the *Land (Group Representative) Act* (repealed) provided for balloting, his failure to request for a ballot did not waive his fundamental rights and freedoms or bar him from seeking the protection of his rights. The appellant adds that there is no time limit within which to enforce fundamental rights and freedoms, either under *the Constitution* or the *Limitation of Actions Act*. He relies on this court's decisions in *In the*

*Matter of the Speaker of the Senate & another*; Reference No 2 of 2013, [2013] eKLR and *In the Matter of the Kenya National Commission on Human Rights*; Reference No 1 of 2012, [2014] eKLR to support this argument. He also maintains that in accordance with the provisions of articles 19(3) and 22 of the *Constitution*, fundamental rights and freedoms are personal and the mere fact that other people affected by the process were not aggrieved by the outcome, did not preclude him from seeking redress from the court. he relies on the court of appeal decisions in *Meru County Government v Ethics & Anti-Corruption Commission*; CA No 193 of 2014, [2018] eKLR and the *CKC* Case to support this submission.

19. The appellant contends that the Court of Appeal failed to exercise its jurisdiction to re-evaluate the evidence placed before the High Court. He submits that the appellate court erroneously ignored the valuation reports placed before the High Court. It is his case that the Valuation Report was admissible evidence that had been placed on record through a supplementary affidavit. He further urges that the respondents had an opportunity to respond to the Report, yet they chose not to. He cites Section 3(2) of the *Appellate Jurisdiction Act* and the cases of *Niels Bruel v Moses Wachira & 2 others*; CA No 188 of 2012, [2018] eKLR and *Fredrick Otieno Outa v Jared Odoyo Okello & 4 others*; SC Petition No 6 of 2014, [2014] eKLR to support his argument.

20. The appellant submits that in Constitutional Petitions, the applicable rules of procedure are the *Constitutional Practice and Procedure Rules* 2013, and not the *Rules of Civil Procedure*. In support, he relies on rule 3(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013. He further maintains that his Petition was anchored on articles 22, 23, 27, 40, 47 and 50 of the *Constitution* and was not an ordinary suit filed by way of a plaint or an originating summons. He relies on the cases of *Jonathan Kiplangat Bor & 524 others v Sub County Police Commander Narok & another*; ELC Petition No 19 of 2019, [2020] eKLR, *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*; SC Petition No 23 of 2014, [2015] eKLR and article 159 (2)(d) of the *Constitution* to urge his case. He also faults the Court of Appeal for relying on the case of *Meme v Republic* [2004] EA 124, which in his opinion, has been overtaken by events. Consequently, the appellant urges this court not to sanction an illegality and to allow the appeal with costs.

**(b) The 1st respondent**

21. The 1st respondent's submissions are dated 27th August 2020 and filed on 28th August 2020. On the issue of the criterion for subdivision and allocation of land in group ranches, the 1st respondent, through his counsel on record Mr Larabi and Mr Rono,submits that sub-division on the basis of acreage is the practice used in group ranch sub-divisions all over the country. He cautions that adopting a different criterion that is based on value of land would be contrary to the long-standing practice and would create a crisis all over the country.

22. The 1st respondent, submits that there was no discrimination in the allocation of the land to the appellant and other members of the group ranch. He urges that the sub-division was in accordance with the provisions of the former Constitution, the *Land Adjudication Act* (Repealed) and the *Land Group (Representatives) Act*, which was the applicable law. He states that each member of the 3rd respondent was allocated their individual shares of approximately 180 acres, and that in the process some members had to be relocated to areas that had initially been set aside for communal grazing.

23. It is the 1st respondent's submissions that there was no legitimate expectation that members would be allocated land based on value rather than acreage. He contends that to the contrary, the legitimate expectation of all the 519 members was that each was to get an equal portion of the group ranch land. He relies on the decision of this court in *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR to urge that legitimate expectation must be express, clear, unambiguous and reasonable.

24. On the issue as to whether the relocation amounted to violation of the appellant's right to own property, the 1st respondent submits that relocation of members of group ranches or communally owned land during subdivision, is a very prevalent and acceptable practice. He contends that during relocation, some members may be required, in the collective interest of the group, to relinquish parcels of land to which they are sentimentally attached. He urges that some other members of the ranch were also relocated and that since the appellant was given alternative land, he cannot allege that his right to own property was violated.

25. On whether the Court of Appeal failed to re-evaluate evidence presented before the trial court, he urges that it is only in exceptional circumstances that the Court of Appeal interferes with the findings of fact by the trial Court. In his view, there were no such circumstances, to warrant a re-evaluation of evidence by the Appellate Court. He relies on section 29(1)(a) of the *Court of Appeal Rules* and the case of *Selle v Associated Motorboat Company* [1968] EA 123 to support his argument.

26. On whether the superior courts below erred in relying on the *Civil Procedure Rules* with regard to allegation of fraud, the 1st respondent supports the Court of Appeal's finding that matters of fraud and discrimination, whether in constitutional or ordinary civil litigation, must be specifically pleaded and proved. He cites *Koinange & 13 others v Koinange* [1968] KLR 23, Civil Appeal No 132/2005, *Kinyajui Kamau v George Kamau Njoroge* and *Ndolo v Ndolo* [2008] 1 KLR (G& F) 742 in support of this argument. It is his further contention that the appellant cannot invoke article 159(d) of the *Constitution* to cure his failure to discharge the burden of proof required under sections 107 and section 108 of the *Evidence Act*. He concludes his submissions by urging this Court to dismiss the appeal.

**(c) The 2nd and 3rd respondents**

27. The 2nd and 3rd respondents support the Court of Appeal's finding in their submissions dated 21st August 2020 and filed on 25th August 2020. Their counsel on record Mr Weru submits that the only criterion that was applicable in the subdivision and allocation of the ranch was equality in acreage, which was sufficiently achieved. They urge that this was the equality in allocation contemplated in the letter by the Director of Land Adjudication and Settlement. They submit that any dissatisfaction with the sub-division ought to have been raised with the officials at a general meeting. It notes that no objection on the criteria used to sub-divide the ranch was raised by the appellant or any other member in the period of 15 years it took to conclude the subdivision and allocation.

28. They further submit that the valuation reports referred to by the appellant, were inadmissible and could not form the basis of the criteria for subdivision. They urge that the discrepancies in the value of the properties were never pleaded in the petition and were only raised later in a supplementary affidavit. They rely on the cases of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others*; SC Application No 5 of 2014, [2014] eKLR , and *Samson Gwer*, to urge that the appellant is inviting the court to re-examine the probative value of the valuation reports not admitted by the trial court. It is also submitted that the appellant deliberately failed to disclose that, whereas the valuation reports were tabled before the trial court by way of a supplementary affidavit, their production in evidence was declined by that court, on the basis that admitting the same would have been tantamount to allowing an amendment to the Petition through the backdoor. They rely on the decision by the Court of Appeal in *Dellian Langata Limited v Symon Thuo Muhia, Mary Njoki Thuo, Agricultural Finance Corporation, Nairobi City Council & Council of Legal Education*; CA Appeal No 144 of 2014, [2018] eKLR to support their argument.

29. The respondents submit that all allegations of fraud and misrepresentation must be specifically particularized and proved. In support of their argument, they cite article 50 of the *Constitution* and the judgment by the Environment and Land Court in Jonathan *Kiplangat Bor & 524 others v Sub-County Police Commander Narok & another*; ELC Petition No 19 0f 2019, [2020] eKLR. In this regard, the respondents submit that article 159 of the *Constitution* cannot be a basis for a party to disregard rules of evidence.

30. The 2nd and 3rd respondents submit that the appellant's right to property was not violated as the objective of the dissolution and sub-division of the ranch, was to ensure equitable allocation of the ranch land to all its members. Further, they submit that the property allocated to the appellant was equal in acreage to that allocated to all the other members. The respondents submit that the mere fact that the appellant was allocated a different parcel of land did not divest him of the right to own property. They urge the court not to interfere

with the Court of Appeal's finding on the issue as it will affect the rights of the other 518 members who have already settled and developed their allocated parcels. They rely on the Court of Appeal Decision in *East African Cables Limited v Public Procurement Complaints, Review & Appeals Board & another*; CA Appeal No 109 of [2007] eKLR to make the case for the court to bear in mind the rights and interests of other members where an individual is agitating for specific rights within a whole.

**(d) The 4th and 5th Respondents**

31. The 4th and 5th respondents' submissions are dated 31st August 2020 and filed on 4th September 2020. They submit that this court lacks jurisdiction to entertain this appeal either as of right or as one involving a matter of general public importance. They urge that the appellant has not demonstrated how his rights were denied or violated by the respondents or how the Court of Appeal misinterpreted the *Constitution* for this court to intervene. They also submit that the appellant has filed this suit to advance his interests and that cannot amount to an issue of public importance. They cite the case of *Bernard Kibor Kitur v Alfred Kiptoo Keter & another*; Election Petition No 1 of 2017, [2018] eKLR and *Joseph Ndungu Njau v Margaret Magiri Mbuki*; SC Petition No 13 of 2015, [2017] eKLR to support their argument.

32. On whether the sub-division and allocation of the ranch was equitable, the 4th and 5th respondents submit that they complied with the applicable laws and the letter instructing them to sub-divide the land, by ensuring that each member got an equal share based on acreage. It is the respondents' submission that the land was grazing land, communally owned in undivided shares and therefore unless the appellant can demonstrate that he could not graze his land in his allocated parcel, his appeal is one for dismissal.

33. On whether the appellant's right to property was violated, the respondents submit that the process of subdivision involved making provision for roads, schools and other public utilities, hence original settlements. In this regard, they echo the sentiments of the 1st to 3rd respondents.

34. On whether *Civil Procedure Rules* apply to constitutional matters, the respondents argue that allegations of fraud must be specifically pleaded and proved as set out under order 2 rule 10(1)(a) of the Civil Procedure Rules. It is the respondents' case that, in any event, the burden of proof as was laid in the *Gatirau Munya* case does not shift or change in constitutional matters.

Therefore, they associate themselves with the appellate court's holding and urge this court to dismiss the Appeal.

35. Finally, the respondents support the Court of Appeal's finding that the content of the Valuation Report was un-procedurally introduced in court. They submit that the Report in question, cannot be invoked to activate the jurisdiction of this court.

**D. Issues for Determination**

36. Having considered the gist of the appellant's case, and the submissions of the respective parties, we have determined that only two issues arise for determination in this appeal. These are:

    1. What criterion should determine the sub-division and consequent allocation of land to individual members of a Group Ranch? Is it the Acreage or Value of the Land?

    2. Was the appellant's Constitutional Right to own land violated by the respondent's decision to base the sub-division on Acreage as opposed to Value of the Land?

37. Suffice it to say that the nature of the two issues as couched above, leaves no doubt that this court has jurisdiction to entertain this appeal. Our determination in this regard disposes of the contention by the 4th and 5th respondents to the contrary.

**(i) Acreage or Value?**

38. The appellant faults the decision by the respondents, to base the sub-division and consequent allocation of land, to individual members of the Group Ranch on acreage, as opposed to value. This resulted in his relocation from the initially 'held' parcel, to a different one which was of a lower value, hence his grievance. The answer to this question lies in the nature of the operative "tenure" and attendant legal regime in "Group Ranches". The origin and rationale of Group Ranches in Kenya is well documented. In a nutshell, the *Land Group Representatives Act* (now repealed) was introduced to enable the inhabitants of large swathes of land in largely semi-arid pastoralist areas, to hold such land as a group, under one title. The title would be issued to and held by elected representatives on behalf of the group. Through this instrumentality, the group ranch not only acquired a "corporate character", but became henceforth legally insulated from the 'tragedy of the commons'

39. The group ranch was therefore owned by members of the group, in equal but undivided shares, until such time that each member acquired their individual titles. So what type of tenure is created in these ranches? In the law of property in land, this is what can be characterized as "a community of ownership" (or co-ownership) as opposed to "community or communal ownership". In the former, each member has an equal share, though undivided, while in the latter, there is no equality of shares. The members derive their security of tenure 'qua members' of that community. The nature of that security will also differ depending on the status of the members. Therefore, the type of tenure operative in a

group ranch under the *Land (Group Representatives) Act*, is what is known at common law as "a tenancy in common", as opposed to "a joint tenancy" (the ingredients of which may be clarified in future litigation). Members of the group ranch are "tenants in common" as opposed to "joint tenants".

40. At common law, each co-owner is as much entitled to possession of any part of the land as the others. He cannot point to any part of the land as his own to the exclusion of the others; if he could, there would be separate ownership and not co-ownership. No one co-owner has a better right to the property than another. Tenants in Common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. Therefore, while the tenancy in common lasts, no one can say which of them owns any particular parcel of land. (See *Megarry and Wade, The Law of Real Property*' 6th Edition Pages 477 and 480).

41. Applying these principles to the dispute at hand, we cannot see the legal basis upon which the appellant could lay claim to the parcel of land in question, to the exclusion of any other member of the group ranch. For as long as the group ranch remained undivided, his share in the land was equal to the other members of the group. It remained a tenancy in common until each member went their separate ways, having acquired their individual titles. Logically and undeniably therefore, the equality in the undivided shares of a group ranch, can only be based on acreage as opposed to value, for that is what brings its members into "a community of ownership". Can it be said that a group ranch comes into existence on the basis of its value as opposed to its acreage? Hardly so. The frontiers of a group ranch can only be determined by its acreage as established by a Survey which then maps its boundaries. This explains why the mechanism that is used by the group representatives at the time of sub-division is balloting. Balloting is acreage sensitive but value blind. After sub-division, individual parcels are bound to differ in terms of value, depending on various factors. However, such differences in the value of distinct parcels are a post sub-division phenomenon, and therefore irrelevant to the process.

42. The answer to the first issue as framed, renders the determination of the second one unnecessary, as it disposes of the gist of the Appeal. For these reasons, we find no difficulty in upholding the Judgment of the Court of Appeal.

**E. Orders**

(i) The petition of appeal dated May 18, 2020 is hereby dismissed;

(ii) The judgment of the Court of Appeal dated December 1, 2017 is hereby upheld;

(iii) The appellant shall bear the costs of this appeal.

**Orders Accordingly.**

**Attorney General & another v Uasin Gishu Memorial Hospital Limited & another (Petition 20 of 2019) [2021] KESC 57 (KLR) (24 March 2021) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, Ag.CJ & Ag. P, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2021] KESC 57 (KLR)

***Civil Practice and Procedure*** *– appeals – appeals to the Supreme Court – appeals as of right in any case involving the interpretation or application of the Constitution - what were the requirements for a party to appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution - Constitution of Kenya 2010, article 163(4)(a).*

***Jurisdiction*** *- jurisdiction of the High Court - unlimited and original jurisdiction and jurisdiction to enforce the Bill of Rights - whether the High Court had jurisdiction to entertain a dispute about the ownership of a hospital and its assets and liabilities - Constitution of Kenya 2010, article 165.*

***Jurisdiction*** *- jurisdiction of the Court of Appeal - appellate jurisdiction - whether the Court of Appeal had jurisdiction to make determinations about the ownership of a hospital and its assets and liabilities where the High Court had not heard and determined the dispute on its merits.*

**Brief facts**

Legal Notice Number 78 of 1998 established the 2nd respondent as a State corporation and appointed a board to take over the 1st respondent's hospital and properties including rights, duties, obligations, assets and liabilities. Pursuant to the legal notice, the appellants and the 2nd respondent, without following due process, compulsorily acquired the 1st respondent hospital and suit properties by ordering that its assets, rights and interests be transferred and managed by 2nd respondent under the provisions of the State Corporations Act.

The 1st respondent filed HCCC No 123 of 1998 seeking temporary orders to restrain the 2nd respondent from interfering with the hospital and its properties and the orders were granted. After publishing Gazette Notice No 6623 of August 20, 2004, expressing the intent to dissolve a number of companies, the Registrar of Companies published Gazette Notice No 815 of February 4, 2005 through which the 1st respondent was dissolved and struck off the register. On March 11, 2001, the 2nd respondent forcefully entered and took over possession of the hospital and its property. The 2nd respondent also successfully applied for HCCC no 123 of 1998 to be struck out on grounds that the 1st respondent was no longer a legal entity.

Later, the 1st respondent filed Miscellaneous Cause No. 350 of 2005, and it obtained orders for its reinstatement on the companies register. The 1st respondent then filed HC Constitutional & Judicial Review Misc. Civil Case No. 12A of 2006 (OS). In that matter it sought various reliefs including declaratory reliefs to the effect that Legal Notice No 78 of 1998 which led to the transfer of its assets and liabilities to the 2nd respondent was illegal and that its rights to property had been violated. The High Court found that the originating summons raised a property ownership dispute whose determination required *viva voce* evidence and not affidavit evidence. The originating summons was

dismissed by the High Court which cited lack of jurisdiction to determine who the real owner of the suit property was or the nature of the 1st respondent's interest.

On appeal, the Court of Appeal found that the originating summons was competent as it raised allegations of violations of property rights. It also found that the 1st respondent was the lawful owner of the disputed property and that the High Court should have made determinations on the alleged violation of property rights and the legality of the legal notice. The Court of Appeal found that the impugned legal notice (Legal Notice No. 78 of 1998) violated the 1st respondent's rights to property and was illegal and unconstitutional. An appeal against the Court of Appeal's decision was lodged at the Supreme Court.

A cross-appeal was also filed at the Supreme Court by the 2nd respondent. Amongst the contentions of the 2nd respondent were that the suit premises comprised of public land acquired by the Government in 1961 and the Government made capital investments on the land in 1998. The 2nd respondent claimed that the 1st respondent had no interest or investment in the land. The 2nd respondent contended that the Court of Appeal had awarded a wrong-doer as the 1st respondent had fraudulently alleged that its title deed was lost and converted the land registration regime from the Registration of Titles Act to the Registered Land Act. The 2nd respondent also stated that the Court of Appeal, after finding that the originating summons was competent, should have referred the matter to the High Court to exercise its original jurisdiction.

**Issues**

i. What were the requirements for a party to appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution.

ii. Whether the High Court had jurisdiction to entertain a suit about the ownership of a hospital and its assets and liabilities.

iii. Whether the Court of Appeal had jurisdiction to make determinations about the ownership of a hospital and its assets and liabilities where the High Court did not hear and determine the dispute on its merits.

**Held**

1. The appeal was filed under article 163(4)(a) of the Constitution of Kenya, 2010 (the Constitution) as one that lay as of right as it involved the interpretation or application of the Constitution. For the Supreme Court to entertain the appeal, it had to raise matters of constitutional interpretation and application and those matters should have been canvassed in the superior courts and progressed through the normal appellate mechanism so as to reach the Supreme Court. Considering the issues raised at the High Court and the Court of Appeal, the matter fell within the ambit of article 163(4)(a) and the court had jurisdiction to hear and determine it.

2. The High Court's jurisdiction under article 165 of the Constitution included unlimited original jurisdiction in criminal and civil matters and jurisdiction to enforce the Bill of Rights. Under section 60(1) of the repealed Constitution, provision was made for the High

Court's unlimited original jurisdiction in civil and criminal matters. The High Court had an obligation to determine the issues raised by the parties and in failing to do so, the High Court failed to fulfil its constitutional mandate.

3. The property ownership dispute was highly contested and the matter could not be determined by affidavit evidence in the manner in which the suit was presented before it. The Court of Appeal had determined substantive issues that had not been exhaustively determined by the High Court. That act denied the parties the opportunity to be heard and effectively and exhaustively address the contested issues.
4. The High Court and Court of Appeal denied the parties their right to be heard as provided for in article 25 and 50 of the Constitution. The Court of Appeal ought to have referred the matter back to the High Court for determination of contested issues. Consequently, the Court of Appeal erred in determining the matter as it did.
5. The High Court erred in not exercising its original jurisdiction on the issues before it. The Court of Appeal erred in exhaustively determining issues before it without having them effectively and exhaustively determined by the High Court. In addition, the Court of Appeal erred in failing to accord the parties an opportunity to test the evidence presented by affidavit.
6. Pursuant to article 162(2)(b) of the Constitution and section 13 of the Environment and Land Court Act, it was appropriate for the matter to be heard afresh before the Environment and Land Court. The Environment and Land Court would have to address the following issues: -
    a. Who was the owner of Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126? How was the land acquired?
    b. Who owned the investment on Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126? By what means were the investments made?
    c. Was the Hospital on the suit land? Was it a public or a private hospital? If it was a private hospital when was it licensed to operate as such? If it was public, did it have a license to operate as such? When was the license given? How had the hospital been running?
    d. Who was the 1st respondent? Was it a public body or a private entity? Had the 1st respondent been paying taxes? If not, why?
    e. Who had been the board members of the 1st respondent? Had they ever changed? If yes, why and when did they change?
    f. Who was the board? Why did the District Commissioner significantly chair the affairs of the 1st respondent over the years? On whose authority did District Commissioner chair?
    g. How did the directorship of the 1st respondent move to the Government?

h. If the 1st respondent were to be found to be entitled to compensation and could claim compensation, what mechanism should be used to quantify the compensation?

i. What was Legal Notice No. 78 of 1998? What was its legal status?

j. What was the legal status of Gazette Notice No. 6623 of August 20, 2004, published by the Registrar of Companies giving a notice of intended dissolution of a number of companies, including the 1st respondent?

k. What was the legality of Gazette Notice No. 815 of February 4, 2005 by which the 1st respondent was dissolved?

7. Costs follow the event, and a Judge had the discretion to award costs. It was the High Court that failed to exercise its constitutional mandate in the matter before it and further, the Court of Appeal exercised jurisdiction that it ought not to have exercised. In addition, since the matter was being sent to the Environment and Land Court for determination of the specified issues, there shall be no order as to costs.

*Appeal and cross-appeal allowed.*

***Orders***

i. *The Petition of Appeal dated May 28, 2019 and filed on an even date and the cross-appeal dated and filed on June 7, 2020 were allowed in the following specific terms: -*

a. *The judgment and order of the Court of Appeal dated October 6, 2017 was set aside.*

b. *The judgment of the High Court dated March 19, 2010 was set aside.*

c. *For the avoidance of doubt, the judgment of the High Court was null and void.*

d. *The matter was remitted to the Environment and Land Court for determination of specified issues.*

ii. *Each party was to bear its own costs.*

**Citations**

**Cases**

***Kenya***

1. *Five Forty Aviation Limited v Erwan Lanoe* Civil Appeal 55 of 2016; [2019] KECA 763 (KLR) - (Followed)
2. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] 1 KLR 111 - (Explained)
3. *Kariuki, Peter M. v Attorney General* Civil Appeal 79 of 2012; [2014] KECA 713 (KLR) - (Followed)
4. *Kenya Commercial Bank Limited & another v Macharia & 2 others* Civil Appeal 181 of 2004; [2008] eKLR; [2008] KLR 61 - (Followed)
5. *Kiguoya, Joseph Kamau v Rose Wambui Muthike* Environment and Land Case 203 of 2016; [2016] eKLR - (Followed)

6. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] eKLR; [2014] 3 KLR 36 - (Explained)
7. *Narok County Government & another v Ntutu & 4 others* Petition 3 of 2015; [2018] KESC 11 (KLR) - (Followed)
8. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] eKLR; [2012] 2 KLR 804 - (Explained)
9. *Ngoge v Kaparo & others* Petition 2 of 2012; [2012] eKLR; [2012] 2 KLR 419 - (Explained)
10. *Njogu, DN & Co advocates v National Bank of Kenya* Civil Appeal 165 of 2007; [2009] eKLR - (Followed)
11. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] eKLR; [2014] 2 KLR 253 - (Followed)
12. *Tinkol, Masek Ole & 3 others v Kenya Grain Growers Limited & 2 others* Civil Case 272 of 2015; [2018] KEELC 2818 (KLR) - (Followed)

***United Kingdom***

1. *Attorney General of Gambia v Jobe* [1985] LRC (Const)556 - (Followed)
2. *Attorney general v Lawrence* [1985] LRC (Const) 921 - (Followed)
3. *Attorney General v Ramanoop* [2005] UKPC 15 - (Followed)
4. *Gairy v Attorney General of Grenada* [2001] UKPC 30 - (Followed)
5. *Merson v Cartwright* [2006] 3 LRC 264 - (Followed)
6. *Ramlogan v The Mayor, Aldermen & Burgesses of San Fernando* [1986] LRC (Const) 377 - (Followed)
7. *Salmon v Salmon Co* [1897] AC 22 - (Followed)
8. *Windward Properties Limited & another v Williams & another* [1988] LRC (Const) 406 - (Followed)

***India***

*N Nagendra Rao and Co v The State of A.P* AIR (1994) SC. - (Followed)

***Regional Court***

*Kuria Greens Limited v Registrar of Titles & another* [2013] 1 EA 162 - (Followed)

***Trinidad and Tobago***

*Maharaj v Attorney General of Trinidad and Tobago* [1978]2 All ER 670 - (Followed)

**Statutes**

***Kenya***

1. Appellate Jurisdiction Act (cap 9) - (Interpreted) section 3(2)
2. Companies Act (cap 486) - (Cited) In general
3. Constitution of Kenya - (Interpreted) articles 25, 40, 50, 163(4)(a); 165
4. Constitution of Kenya (repealed) - (Interpreted) sections 70(a); 75; 84
5. Environment And Land Court Act (cap 8D) - (Interpreted) section 13
6. Land Acquisition Act(repealed) (cap 295) - (Cited)

7. Registered Land Act(repealed) (cap 300) - (Interpreted) sections 26, 27
8. Registration of Titles Act (cap 281) - (Cited) In general
9. State Corporations Act (cap 446) - (Cited) In general
10. Supreme Court Act (cap 9B) - (Interpreted) section 15(2); 17
11. Supreme Court Rules, 2012(repealed) (cap 9B Sub Leg) - (Interpreted) rules 32, 33

March 24, 2021, the Court delivered the following Judgment:

**A. Background**

1. The instant appeal is dated and filed on 28th May 2019. The Appellants seek this Court to overturn the Judgment of the Court of Appeal (Makhandia, Ouko & Murgor, JJA) delivered on 6th October 2017 in Nairobi Civil Appeal No 184 of 2012 which decision allowed an appeal against the decision of the High Court in HC Constitutional & Judicial Review Misc Civil Case No 12A of 2006 (OS).

**(i) Proceedings at the High Court**

2. This matter can be traced to a Legal Notice Number 78 of 1998 published on 12th June, 1998 (the Legal Notice), when retired President of Kenya, Daniel Arap Moi by an order known as "The Moi Teaching and Referral Hospital Board Order, 1998" established the 2nd respondent as a State Corporation, and appointed its Board to take over the 1st respondent's hospital, and properties including rights, duties, obligations, assets and liabilities. Following the promulgation of the Legal Notice, the Appellants and the 2nd respondent, without following the due process of the law, compulsorily acquired the 1st respondent hospital and the suit properties by ordering that its assets, rights and interests be transferred and managed by 2nd respondent under the provisions of the State Corporations Act, cap 446.

3. Subsequently, the 1st respondent filed HCCC No 123 of 1998 and sought temporary orders to restrain the 2nd respondent from interfering with the Hospital and the suit properties, which orders were obtained on 17th July 1998. By gazette notice No 6623 of 20th August 2004, the Registrar of Companies published a notice of intended dissolution of a number of companies, including the 1st respondent. This was followed by Gazette Notice No 815 of 4th February 2005 through which the 1st respondent was dissolved and struck off the Register. On 11th March 2001, the 2nd respondent forcefully entered the 1st respondent's premises and took over possession of the Hospital and the suit properties. Thereafter, the 2nd respondent filed an application to have HCC No 123 of 1998, struck out on the basis that the 1st respondent ceased to exist as a legal entity. HCCC No 123 of 1998 was subsequently dismissed on this basis on 15th June 2005.

4. Subsequently, the 1st respondent filed in the High Court, Miscellaneous Cause No 350 of 2005, seeking reinstatement on the Companies Register, which orders were obtained on 25th November 2005, paving way for the filing of HC Constitutional & Judicial Review Misc Civil Case No 12A of 2006 (OS). The 1st respondent sought both declaratory and conservatory orders against the Appellants and the 2nd respondent. The declaratory prayers sought were as follows: (a) a declaration that Legal Notice No 78 of 1998 in so far as it purported to vest the rights, duties, obligations, assets and liabilities of the 1st respondent and the suit properties in the 2nd respondent was in breach of the 1st respondent's fundamental right to ownership of property hence, illegal, unconstitutional, null and void; (b) a declaration that its fundamental rights as protected and guaranteed by sections 70 (a) and (c) and 75 of the repealed *Constitution* were contravened; (c) a declaration that there was no lawful basis upon which the Appellants deprived the 1st respondent of the right to the ownership and/or proprietorship over its assets; and (d) a declaration that the Appellants were not entitled to deprive the 1st respondent of the rights over its assets inclusive of cash, bank accounts, business and leasehold interest in the suit properties. The 1st respondent further sought Conservatory Orders restraining the 2nd respondent from interfering with its management and from proceeding any further with the implementation of the Legal Notice pending the determination of the Originating Summons. Also sought was a Conservatory Order to safeguard the suit properties.

5. On 19th March 2010, having considered the pleadings and the parties' submissions, the learned Judges, (Wendoh and Dulu, JJ) listed the following as issues for determination: whether the issues determined as preliminary points of law could be revisited; whether there was non-disclosure of material facts; the effect of other related cases; whether the originating summons disclosed any constitutional issue or cause of action; and the costs of the proceedings.

6. On the first issue, the learned Judges found that they could not reopen or review the decision of a single Judge for two reasons that is, there was no application for review of the Judge's decision and secondly, because the order or decision made by the Court for which reasons were given could only be challenged on appeal to the Court of Appeal. On the second issue, the trial Court found that the 1st respondent was not guilty of non-disclosure of material facts, and that the facts and particulars disclosed were adequate to invoke the jurisdiction of the Court. On the effect of other related cases, the Court found that there was a pending appeal in HC Misc. Case No 350 of 2005. The Court found that the Court of Appeal's decision in the said appeal could only be consequential, that is, either confirm their decision or vary it to the extent to which the Court of Appeal would decide. Finally, on the fourth issue, whether the Originating summons disclosed a constitutional issue or cause of action, the learned Judges found that whereas the real issue was whether or not the fundamental rights of the Plaintiff were breached and whereas the 1st respondent claimed that the land

and other assets belongs to it, the Appellants claimed that the Land was government land. Consequently, the Learned Judges came to the conclusion that the Originating Summons raised a dispute as to who really is the owner of the disputed land and other assets, and that required viva voce evidence not affidavit evidence. Consequently, the Court dismissed the Originating Summons for the reasons that the dispute existed between the 1st respondent and Appellants as to the ownership of the hospital and the suit properties, and that the Court was not clothed with jurisdiction to determine who the real owner of the suit properties was or the nature of the 1st respondent's interest.

**ii. Proceedings at the Court of Appeal**

7. Aggrieved by the decision of the High Court, the 1st respondent filed an appeal, Nairobi Civil Appeal No 184 of 2012. In considering the appeal, the Appellate Judges listed five issues for determination namely: Whether the Originating Summons was competent? Whether the 1st respondent was a public or private entity; Whether the Hospital and suit properties belonged to the Appellants or the 1st respondent; Whether the Legal Notice led to a violation of the 1st respondent's constitutional rights, and if so, whether its rights were violated; and, Whether the 1st respondent was entitled to the reliefs sought.

8. On the issue as to whether the Originating Summons was competent, the Court of Appeal found that the infringements alleged under sections 70 (a) and (c) and 75 of the repealed *Constitution* were adequately defined, and that the elements essential to a valid constitutional petition were present. To that extent, they found the Originating Summons to be competent.

9. The Court also found, on the issue concerning the violation of the 1st respondent's constitutional rights by its inclusion in the Legal Notice, and whether it was entitled to the reliefs sought, that the 1st respondent was neither a government entity nor a state corporation or a local authority but a legal entity registered under the *Companies Act* under the control and direction of its own directors and members, and capable of owning its own assets, rights and interest. The Appellate Court also found that the suit properties were registered in the 1st respondent's name and belonged to them as at the time the impugned Legal Notice was published. Furthermore, the learned Judges found that it was incumbent upon the High Court to determine whether or not a violation of rights had occurred due to the Legal Notice and in failing to reach a finding on a matter that was central to the dispute, the court failed to fulfill its constitutional mandate, and in so doing, misdirected itself. The Court of Appeal found the Legal Notice unconstitutional, illegal, null and void.

10. Consequently, the Appellate Court declared that, to the extent the 1st respondent was included in the Legal Notice that purported to vest or transfer its rights, duties obligation, assets and liabilities of the hospital and the suit properties to the 2nd respondent,

such inclusion was in violation of the 1st respondent's fundamental right to ownership of property under aection 70(a) and (c) and 75 of the *Constitution*, and is therefore unconstitutional, illegal, null and void. Likewise, the Court ordered the Appellants to compensate the 1st respondent for deprivation of the suit properties, the hospital and related facilities.

**(iii) Proceedings before the Supreme Court**

11. Aggrieved by the finding of the Court of Appeal, the Hon. Attorney General and the Minister for Health have filed this appeal pursuant to articles 163(4) (a) of the *Constitution* and section 15(2) of the *Supreme Court Act* and Rule 32 of the *Supreme Court Rules*, 2012 (now repealed).

12. The Appellants have advanced several grounds in support of their appeal. They urge that the learned Judges of appeal erred in law and in fact in:

    i. Holding that the 1st respondent's Constitutional rights over the suit land and the hospital had crystalized when they declared that the 1st respondent's constitutional rights had been violated and found that they were entitled to compensation without any formal hearing or trial to determine compensation payable and to whom and why and therefore denied the Appellants the right to a fair hearing.

    ii. Finding that Legal Notice No 78 of 1998 was a violation of the 1st respondent's fundamental rights to ownership of property as per section 75 of the Repealed Constitution.

    iii. In holding that the 1st respondent was a private company and that it owned the suit properties when there was evidence that the 1st respondent was a public property whose Board members illegally took the suit properties.

    iv Failing to establish that the 1st respondent had not established any basis for its claim for deprivation or seizure of the Uasin Gishu Memorial Hospital when the said Hospital belonged to the Government.

    v Failing to find that the suit properties were developed by the Governments since 1924 and that the 1st respondent committed fraud by fraudulently transferring the land to itself purportedly as a private property.

    vi. In finding that the suit properties were compulsorily acquired under section 75(2) of the repealed Constitution and that it was not a must for the same to have been done under the Land Acquisition Act for it to be deemed to have been compulsorily acquired.

vii. When they treated a private property ownership dispute, which should have been litigated in a civil suit, as a constitutional suit.

viii. Failing to appreciate that the 1st respondent had no legal standing to claim the public hospital while a suit regarding ownership of the public hospital was pending in Eldoret HCCC No 78 of 2005.

ix. Failing to appreciate the uncontested fact that the purported Board of Directors were strangers to the 1st respondent, were not legally appointed, but had attempted to convert a public hospital into a private hospital.

x. Failing to hold that the Government was managing Uasin Gishu Memorial Hospital through Uasin Gishu Memorial Hospital Company, but the Government continued to hold absolute interest in the suit properties.

xi. Failing to find that Legal Notice No 78 of 1998 merging Uasin Gishu Memorial Hospital Limited with Eldoret District Hospital was merely formalizing a relationship which was effected in 1988 when the two hospitals were merged.

xii. In finding that the 1st respondent's constitutional rights to the suit properties had been violated when there was no basis, proof or justification to make such a finding.

13. Consequently, the Appellants seek this Court to allow the appeal, set aside the Court of Appeal's Judgement and uphold the Judgment of the High Court.

**B. Parties Respective Submissions**

**(a) The Appellants submissions**

14. In their written submissions and oral arguments, the Appellants outlined six issues for determination namely, jurisdiction, compensation to the 1st respondent, Legal Notice No 78 of 1998, replacement of lost titles, originating summons and replacement of lost titles.

15. On the issue of jurisdiction, it's the Appellants' case that the appeal is properly filed under articles 40 and 163(4)(a) of the *Constitution*, section 15(2) and 17 of the *Supreme Court Act* and Rule 33 of the *Supreme Court Rules*, 2012 (now repealed). The Appellants submitted that the appeal raises questions on the interpretation and application of article 40 of the *Constitution* as read together with section 75 of the retired *Constitution* on compulsory acquisition of land and on whether the Court of Appeal's decision vis a vis the respondent's claim was proper to the extent that it satisfies the mandatory Constitutional criteria. To support their submissions, they relied on this Court's decision in *Narok County Government v Livingstone Kunini Ntutu & 2 others*, SC. Pet. No 3 of 2015; [2018] eKLR (the County Government of Narok Case).

16. Further on the question of jurisdiction, the Appellants submitted that the Court of Appeal ordered for compensation on reliance of section 75 of the retired *Constitution* hence, there is a dispute on interpretation of the Constitution; its retrospective application, and the public interest in the suit properties.

17. Concerning compensation, Learned Counsel for the Appellants submitted that the Appellate Court erred in law and in fact, when it misapplied the Provisions of section 75 of the retired *Constitution* to the extent that the 1st respondent was entitled to compulsory acquisition of the suit properties when it never owned it and that the learned Judges ignored the fact that suit properties were indeed public property developed by the government since 1962.

18. Counsel for the Appellants submitted further that there is no instrument of transfer of the suit properties to the 1st respondent and that they never filed annual returns between 1982 to 2004. Instead, the Appellants argued that the suit properties were donated by white settlers to Wareng County Council, then under the Ministry of Local Government at a consideration of KES 10. The Appellants maintained that the 1st respondent is a company limited by guarantee with trustee whose sole purpose was to manage the hospital and not to convert the suit land to a private property. They maintain that there is no instrument of transfer of ownership to the alleged directors. The Appellants faulted the learned Judges of Appeal for failing to consider that the government has been deploying staff to the facility as it remained a public facility.

19. It was also the Appellants' submissions that that the Appellate Court failed to appreciate that the titles to the suit property were never lost but kept by the District Commissioner since he was the one chairing government institution boards. They added that the government has constructed staff houses and student hostels.

20. Regarding Legal Notice No 78 of 1998, the Appellants urged that the same was promulgated on 12th June 1998 through a special issue of the Kenya Gazette Supplement No 34, signed and issued under the *State Corporation Act* by former President Daniel Moi, thereby creating Moi Teaching and Referral Hospital merging it with Uasin Gishu Memorial Hospital with all assets and liabilities.

21. Concerning replacement of lost titles, the Appellants submitted that the Affidavit of Dr. Fatma Faraj sworn on 12th January, 1994 supporting the application for replacement of lost title was fake, misleading and a misrepresentation that the company was a public company yet the same was a company limited by guarantee and was a trustee of the government of Kenya. The Appellants urged that the suit titles were misplaced at the District Commissioner's Office who was then the chair of the District Development Committee and the custodian of the title which had been handed over by Wareng County Council.

22. Pertaining the Originating Summons, it was submitted by the Appellants that the Learned Judges of Appeal ignored pendency of other suits and that the dispute was one that ought to have been heard via viva voce evidence. They urged that the Court of Appeal ought to have referred the matter to the Environment and Land Court. They submitted that the Court of Appeal denied other parties an opportunity to make their case and summarily concluded the dispute without granting them a hearing. They cited the County Government of Narok Case to support their case.

23. Consequently, they urged us to allow the appeal, and set aside the finding and orders of the Court of Appeal.

**(b) The 2nd respondent's Submissions on the Cross appeal and appeal**

24. The 2nd respondent filed its cross-appeal on 7th June 2019. In support of the Appellants' petition, the Appellants submitted that the suit properties and all developments therein are public land and public investments. It stated that even if the 1st respondent acquired the parcels of land in 1961, further capital investments were done by the Government in 1998; that the 1st respondent did not do any subsequent expenditure on the suit properties; that the 1st respondent has no interest and has no investment in the land parcels that would entitle it to neither the land nor the developments therein; and that the initial suit should either be dismissed or referred back to the High Court for oral trial on title. The 2nd respondent relied on the case of *Masek Ole Tinkol & 3 others v Kenya Grain Growers Limited & 2 others* [2018] eKLR in support of its submissions.

25. Learned Counsel for the 2nd respondent also submitted that all parties, including the 1st respondent had always understood that the land, the investments and developments in the suit property were publicly owned and that the mere fact that the 1st respondent is not a body corporate does not automatically make it entitled to publicly funded land and developments in which they have not invested.

26. Counsel also urged that deeming the 1st respondent as owner of land and the developments therein might amount to rewarding a wrong-doer considering that the 1st respondent committed acts of fraud in alleging that the title was lost, converting the land regime, from *Registration of Titles Act* to Registered Land Act, sub-dividing the land among other contested issues. In support of this assertion, it cited the cases of *Joseph Kamau Kiguoya v Rose Wambui Muthike* [2016] eKLR, *D. N Njogu & Co. advocates v National Bank of Kenya* [2009] eKLR and *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR.

27. The 2nd respondent submitted that awarding the 1st respondent with a return on land and developments or compensation would first, amount to unjust enrichment since it has not expended anything on the suit premises except KES. 10.00 consideration paid by its

predecessors in 1961; second, it has already earned and made income and benefits from a wholly and exclusive Government land and investments; and third, it cannot account for itself transparently as a public company. In that regard, the second respondent cited the case of *Kenya Commercial Bank Limited & another v Samuel Kamau Macharia & 2 others* [2008] eKLR.

28. The 2nd respondents submitted further that the Court of Appeal, having found the Originating Summons competent (and therefore that the High Court's decision to decline jurisdiction was erroneous), ought to have referred the matter back to the High Court to exercise its original jurisdiction.

29. It was the 2nd respondent's further argument that the dispute in this case requires a decision on multiple factual issues that cannot be decided on affidavits as was done by the Court of Appeal. It supported the High Court's decision that the case ought to have been determined by oral evidence.

30. As to whether the originating summons at the High Court, should have awaited determination of a suit filed earlier in August 2005, the 2nd respondent submitted in the affirmative adding that the issues in dispute in HCCC No 123 of 1998 were similar to those in the instant appeal.

31. Additionally, the 2nd respondent submitted that the compensation award given by the Court of Appeal was not pleaded and should not have been granted and that all parties should have been given a chance to comment on the purposed option of compensation.

32. Finally, the 2nd respondent submitted that the whole suit related to a complaint that the 1st respondent's land and assets were taken away by the 2nd respondent at the instance of the Appellants, and that the claim is one for private law for restitution and/or compensation. Consequently, the 2nd respondent urged this Court to grant the prayers sought in the appeal and cross-appeal.

**(c) The 1st respondent's Case**

33. The 1st respondent has opposed the petition through its Replying Affidavit sworn on 3rd July 2019 by its Director and Company Secretary, Charles Arap Kesse. In making its submissions, the 1st respondent identified eight issues for determination by the Court.

34. On the first issue, whether the 1st respondent is a private company or a public entity or a State Corporation, Learned Counsel for the 1st respondent submitted that the same is a company limited by guarantee incorporated as such in 1961, under Certificate of Incorporation No C. 7/61, and that it has never been a public entity nor a state corporation within the meaning of section 2 of the State Corporations Act. Counsel contended that the mere fact that the

Government stepped in to bail out the 1st respondent, did not render it a State Corporation. Counsel relied on the case of *Salmon v Salmon Co*. [1897] AC 22 to support this point.

35. On the second issue, whether or not there were several cases pending in relation to the ownership of the suit premises at the time the Court of Appeal delivered its decision, Counsel for the 1st respondents urged that there were no suits pending in other courts concerning the suit premises as at the time the Court of Appeal made its determination. In that context, he submitted that Eldoret HCCC No 123 of 1998 was struck out on 15th June 2005; Eldoret HCCC No 78 of 2005 involves a suit against its Directors and not the 1st respondent and that the same has never been set down for hearing; and HC Misc. Civil Cause No 350 of 2005 was determined on 30th November 2005.

36. On the third issue, whether or not the issue of the ownership of the suit properties by the 1st respondent was so disputed as to require a trial by way of discovery, adducing of evidence and cross-examination of the parties, the 1st respondent submitted that this ground cannot justify the setting aside of the Judgment of the Court of Appeal, adding that the superior courts made a finding that the 1st respondent's certificate of Title has never been challenged or cancelled and remain valid to date. Additionally, that the High Court Judgment was never challenged by way of a cross-appeal. It contended that the Hospital premises and buildings which have been serving as a hospital have been operated on the suit properties, not by the Government but by a Private Company Limited by Guarantee.

37. On the fourth issue, whether the 1st respondent is the owner of the Hospital known as Uasin Gishu Memorial Hospital and the suit properties, the 1st respondent submitted that the Appellants have expressly admitted the 1st respondent's ownership of the suit properties. Moreover, the 1st respondent urged that the suit properties were at the time of their acquisition by the Appellants and the 2nd respondent protected by the provisions of section 27 and 28 of the Registered Lands Act (now repealed) and now section 25 and 26 of the Land Registration Act. Learned Counsel cited the case of *Kuria Greens Limited v Registrar of Titles & another* [2013] 1 EA 162, to support the 1st respondent's argument. The respondent reiterated that the Appellants have never challenged the High Court's finding on the ownership of the suit properties.

38. On the fifth issue , as to whether the Court of Appeal was right in holding that Legal Notice No 78 of 1998 was a violation of the 1st respondent's Fundamental Rights to ownership of property under s 75 of the repealed *Constitution*, while citing section 26 and 27 of the *Registered Land Act*, section 70 (a) & (c), 75 and 84 of the retired *Constitution* and the *Land Acquisition Act*, the 1st respondent supported the Court of Appeal's finding that its fundamental right to ownership of property was violated. It maintained that having its suit premises acquired without compensation amounted to a violation of its rights to ownership of property.

39. On the sixth issue concerning the Court of Appeal's finding directing that the 1st respondent be paid compensation for the compulsory acquisition of its Hospital and suit properties, the 1st respondent submitted that even though it did not plead to be compensated, the Constitution mandates the Court to make an award where it finds that a right has been violated. The 1st respondent cited the following cases in support of its submissions: *Gairy v Attorney General of Grenada* [2001] UKPC 30; *Merson v Cartwright* [2006]3LRC 264, 272-3, *Attorney General v Ramanoop* [2005] UKPC 15; and *Attorney General of Gambia v Jobe* [1985] LRC (Const)556. The 1st respondent added that the issue of compensation was settled in Misc Cause No 350 of 2005 in the Judgment dated 25th November 2005 and that the Appellants are now estopped from raising the same in this appeal.

40. On the seventh issue, questioning the manner in which the appellate Judges exercised their jurisdiction in setting aside the trial court's judgment, the 1st respondent submitted that the Court of Appeal did not exceed its jurisdiction by adjudicating a constitutional issue as the same is provided for by section 3 of the Appellate Jurisdiction Act. The 1st respondent cited the following cases in support of its argument: *Windward Properties Limited & another v Williams & another* [1988] LRC (Const) 406, *Attorney general v Lawrence* [1985] LRC (Const) 921, *Attorney General of the Gambia v Jobe* [1985] LRC (Const) 556 and *N Nagendra Rao and Co. v the State of A.P*. AIR (1994) SC.

41. On the eighth issue, whether the dispute was a private law matter or a public law one, the 1st respondent, while citing S. 84(1) of the retired Constitution submitted that the matter was not a private law dispute but a public law one. The 1st respondent cited the case of *Peter M. Kariuki v Attorney General* [2014] eKLR, *Ramlogan v The Mayor, Aldermen & Burgesses of San Fernando* [1986] LRC (Const) 377 and *Maharaj v Attorney General of Trinidad and Tobago* (No2) [1978]2 All ER 670. Learned Counsel further submitted that the Appellants did not appeal a ruling issued on 13th October 2006 where the issue was determined.

42. As to whether the dispute was Res Judicata in the light of the decision in HCCC No 123 of 1998, the 1st respondent submitted that the said suit was never determined on merit since the same was struck out on 15th June 2005 on the basis that the 1st respondent had been struck out off the Register as a company had thereby ceased to exist as a legal entity. The 1st respondents also urged that the same argument had been raised by the Appellants in a Preliminary Objection which was dismissed on 13th October 2006 in Misc Civil Appl 12A of 2006, and that they never appealed the said ruling. The 1st respondent concluded its submissions by urging us to dismiss the appeal and cross-appeal with costs.

**D. Issues for Determination**

43. From the pleadings filed, the respective parties' submissions, list and bundle of authorities, the following issues crystalize for determination:

(i) Whether the appeal before this Court meets the constitutional threshold under article 163(4)(a) of the *Constitution*?

(ii) Whether the High Court had jurisdiction to entertain the suit before it?

(iii) Whether the Court of Appeal had jurisdiction to entertain the appeal before it?

(iv) What reliefs should the Court offer?

**E. Analysis and Determination**

**(i) Whether the appeal before this Court meets the constitutional threshold under article 163(4)(a) of the Constitution?**

44. The Appellants submitted that the present appeal is proper before us as it raises questions on the interpretation and application of article 40 of the *Constitution* as read together with section 75 of the repealed *Constitution* on the protection of the right to property. Additionally, the Appellants submitted that the Court needs to make a finding on the Court of Appeal's retrospective application of section 75 of the retired *Constitution* in awarding compensation to the 1st respondent. The 1st and 2nd respondent did not submit on this Court's jurisdiction to entertain the instant appeal.

45. The Supreme Court's appellate jurisdiction is set out in article 163(4) of the *Constitution* of Kenya which states as follows:

> "(4) Appeals shall lie from the Court of Appeal to the Supreme Court –
>
> a. As of right in any case involving the interpretation or application of this Constitution; and
>
> b. In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5.
>
> (5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

46. section 15(1) of the *Supreme Court Act* also provides that appeals to this court shall be heard only with the leave of the Court. section (15)(2) of the same *Act* on the other hand provides that Sub-section (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.

47. Apart from the aforementioned constitutional and legal provisions, this court has also stipulated the limits of its jurisdiction under article 163(4)(a) of the Constitution in its decisions, which decisions are still applicable. In the case of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Pet No 3 of 2012; [2012] eKLR, a two-Judge Bench of this Court (Tunoi and Wanjala SCJJ) set the guiding principles as follows:

> [28]: "The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a)."

48. Further, in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Pet No 10 of 2013 this court observed as follows:

> [37]: "In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the Constitution..." [emphasis added].

49. This Court reiterated the same principle in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC App No 5 of 2014; [2014] eKLR (Munya 1) where we stated thus:

> [69]: "The import of the court's statement in the Ngoge Case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."

50. So then, does the present appeal raise issues of Constitutional interpretation and application and have the same issues been canvassed in the superior courts and progressed through the normal appellate mechanism so as to reach this Court by way of an appeal? Having perused the Record before us (Volume IV at page 909), we note that at the High Court, the Learned Judges listed the following as issues for determination namely: whether the issues determined as preliminary points of law should be revisited; whether there was non-disclosure of material facts; the effect of other related cases; whether the originating summons discloses any constitutional issue or cause of action; and who bears the costs of the proceedings. We note that despite determining the first three issues, the High Court did not conclusively determine the fourth issue namely, whether the originating summons discloses any constitutional issue or cause of action? The learned Judges found that whereas the real issue was whether or not the fundamental rights of the Plaintiff were breached and whereas the 1st respondent claimed that the land and other assets belongs to it, the Appellants claimed that the Land was government land. Consequently, the Learned Judges came to the conclusion that the Originating Summons raised a dispute as to who really is the owner of the disputed land and other assets, and that required viva voce evidence not affidavit evidence. Instead, the Court dismissed the originating summons for lack of jurisdiction.

51. A further perusal of the Record (Volume IV at page 1064) disclose the following as the issues listed for determinations by the Learned Judges of the Court of Appeal: Whether the Originating Summons was competent? Whether the 1st respondent was a public or private entity; Whether the Hospital and suit properties belonged to the Appellants or the 1st respondent; Whether the Legal Notice led to a violation of the 1st respondent's constitutional rights, and if so whether its rights were violated; and whether the 1st respondent was entitled to the reliefs sought. In addressing the question as to whether the Originating Summons was competent before the High Court, the Learned Judges found that the Originating Summons was proper before the High Court. It also found that it was incumbent upon the High Court to determine whether or not a violation of rights had occurred due to the Legal Notice and in failing to reach a finding on a matter that was central to the dispute, the court failed to fulfill its constitutional mandate, and in so doing, misdirected itself. Instead of referring the matter back to the High Court, the Court of Appeal took it upon itself to determine the issues before it.

52. This Court has in previous decisions emphasized the significance of respecting the hierarchy of the judicial system. In *Peter Oduor Ngoge v Francis Ole Kaparo & others*, SC Petition No 2 of 2012; [2012] eKLR at Par [30], we stated:

> "In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional

> competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."

53. Taking all the above matters in context, we hold that this appeal, indeed, falls within the ambit of article 163(4) (a) of the *Constitution* and is rightly before us.

**(ii) Whether the High Court had jurisdiction to entertain the appeal?**

54. The High Court is established as such under article 165 of the *Constitution* with unlimited original jurisdiction in criminal and civil matters and with jurisdiction to determine questions on denial, violation, infringement or threats to rights or fundamental freedoms. The article provides as follows:

> " article 165(1) There is established the High Court of Kenya, which-
>
> ....
>
> (3) Subject to clause (5), the High Court shall have-
>
> (a) Unlimited original jurisdiction in criminal and civil matters;
>
> (b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (c) ..."

55. We are aware that the decision herein was rendered before the *Constitution* 2010 was promulgated. Even so, the retired Constitution did make provision for the High Court's unlimited original jurisdiction in civil and criminal matters at section 60(1) and therefore, there was no excuse for the High Court's failure to address the issues in dispute. We therefore agree with the Court of Appeal's finding to the extent that the High Court had a constitutional obligation to determine the issues before it and in failing to do so, the learned Judges failed to fulfil their constitutional mandate.

**(iii) Whether the Court of Appeal had jurisdiction to entertain the claim before it?**

56. Having found that the High Court failed to execute its constitutional mandate, the learned Judges of Appeal proceeded to address the substantive issues before them. In doing so, the Appellate Court relied on affidavit evidence, without giving parties the opportunity to present and examine evidence. We are aware that the learned judges of Appeal may have

invoked section 3(2) of the *Appellate Jurisdiction Act*. Ordinarily, this would have been proper had all the facts and law been well presented at the trial court. It is not contested in the superior courts and even before this Court that the question of ownership of the suit premises, the legal status of the 1st respondent and compensation(if any) upon acquisition of the suit premises by the Appellants and vesting the same upon the 2nd respondent are highly contested. We do agree with the High Court on its finding only to the extent that the matter could not be determined by affidavit evidence in the manner in which the suit was presented before it. Consequently, we fault the Court of Appeal for determining the substantive issues before it, which issues had not been exhaustively determined by the High Court. This act denied the parties the opportunity to be heard and effectively and exhaustively address the contested issues. For this reason, we find that both superior courts denied the parties their right to be heard as provided for in article 25 and 50 of the *Constitution*. We do agree with the Appellants' and the 2nd respondent's argument that the Court of Appeal ought to have referred the matter back to the High Court for determination of contested issues. Consequently, we find error on the part of the Court of Appeal in determining the matter as it did.

**iv What reliefs should the Court offer?**

57. The Appellant sought that: (a) this appeal be allowed with costs; (b) the judgment of the Court of Appeal be set aside; and (c) the judgment of the High Court be affirmed. It is our finding that the High Court erred in not exercising its original jurisdiction on the issues before it and that the Court of Appeal erred in exhaustively determining issues before it without having them effectively and exhaustively determined by the High Court, and without affording the parties an opportunity to test the evidence presented by affidavit. Based on our findings above, we will allow the petition of appeal and cross-appeal but subject to the matter being heard afresh before the Environment and Land Court which, pursuant to article 162(2)(b) of the *Constitution* and section 13 of the *Environment and Land Court Act* No 19 of 2011, has exclusive jurisdiction to, among others, hear and determine disputes relating to title, tenure, compulsory acquisition of land, public, private and community land. Furthermore, the Court has the requisite jurisdiction under section 13(7) of the *Act* to make any order and grant any relief as it deems fit and just including: interim or permanent preservation orders including injunctions; prerogative orders; award of damages; compensation; specific performance; restitution; declaration; or costs.

58. Cognizant of the period in which it has taken for this matter to be prosecuted, the expiry date of the lease pertaining the suit premises, and in order to do justice for all the parties involved herein, we direct that the Environment and Land Court hears and determines this matter on a priority basis. Towards that end, we specifically direct the Environment and Land Court to address the following issues:

(i) Who is the owner of Eldoret Municipality/ Block 7/125 and Eldoret Municipality/ Block 7/126? How was the land acquired?

(ii) Who owns the investment on Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126? By what means were the investments made?

(iii) Is the Hospital on the suit land? Is it a public or a private hospital? If it is a private Hospital when was it licensed to operate as such? If it is public, does it have a license to operate as such? When was the license given? How has the hospital been running?

(iv) Who is the 1st respondent? Is it a public body or a private entity? Has the 1st respondent been paying taxes? If not, why?

(v) Who have been the Board Members of the 1st respondent? Have they ever changed? If yes, why and when did they change?

(vi) Who is the Board? Why did the District Commissioner significantly chair the affairs of the 1st respondent over the years? On whose authority did District Commissioner chair?

(vii) How did the Directorship of the 1st respondent move to the Government?

(viii) If the 1st respondent were to be found to be entitled to compensation and can claim the same, what mechanism should be used to quantify the same?

(ix) What is Legal Notice No 78 of 1998? What is its legal status?

(x) What is the legal status of Gazette notice No 6623 of 20th August 2004, published by the Registrar of Companies giving a notice of intended dissolution of a number of companies, including the 1st respondent?

(xi) What is the legality of Gazette Notice No 815 of 4th February 2005 by which the 1st respondent was dissolved?

59. As to the questions of costs in this matter, this Court has previously settled the law on award of costs: that costs follow the event, and that a Judge has the discretion in awarding costs. This was the decision in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC. Petition No 4 of 2012: [2014] eKLR. Considering our findings above, that it is the High Court that failed to exercise its constitutional mandate in the matter before it and further that the Court of Appeal exercised jurisdiction that it ought not to have exercised, and further that now we are sending the matter to the Environment and Land Court for determination of the specified issues, we find that there should be no order as to costs.

60. Consequently, we make the following orders:

(i) The Petition of Appeal dated 28th May 2019 and filed on an even date and the Cross-appeal dated and filed on 7th June 2020 be and is hereby allowed in the following specific terms:

(a) The Judgment and order of the Court of Appeal dated 6th October 2017 be and is hereby set aside.

(b) The Judgement of the High Court dated 19th March 2010 be and is hereby set aside.

(c) For the avoidance of doubt, the Judgment of the High Court is null and void.

(d) The matter is hereby remitted to the Environment and Land Court for determination of the issues specified herein.

(ii) Each party shall bear their own costs.

Orders accordingly.

**Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others (Petition 42 of 2019) [2021] KESC 35 (KLR) (24 March 2021) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, Ag.CJ & Ag. P, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2021] KESC 35 (KLR)

***Constitutional Law*** *- constitutional commissions - Commission on Administrative Justice (CAJ) - mandate and powers of CAJ - whether the recommendations made to public bodies by CAJ were binding - Constitution of Kenya 2010, article 254; Commission on Administrative Justice Act (cap 7J) section 43(3).*

***Judicial Review*** *– unfair administrative action - remedies - damages - whether the Court of Appeal had jurisdiction to award damages in a judicial review appeal, where the damages were a remedy sought for a failure to implement the recommendations of the Commission on Administrative Justice .*

***Evidence Law*** *- burden of proof - burden of proof in cases of abuse of discretion by public officers - who bore the burden of proof in cases of abuse of discretion by public officers where exceptional circumstances were pleaded.*

**Brief facts**

The 3rd respondent was employed under a three-year employment contract by the Kenya Vision 2030 Delivery Board (the Board) in the position of Director. The contract was renewable six months before its expiry. The 3rd respondent's employment contract was not renewed on grounds that his performance was below par. The 3rd respondent appealed to the Minister for Planning and National Development and Vision 2030 (the Minister). The Minister renewed his contract for a year but the Board declined to allow him back to work.

The 3rd respondent then sought the assistance of the Commission on Administrative Justice (CAJ). The conclusions of CAJ were that the Board violated articles 47 and 59 of the Constitution of Kenya, 2010 (Constitution) as well as sections 2 and 8(a), (b), and (d) of the Commission on Administrative Justice Act on fair administrative action. CAJ recommended the Board to pay the respondent the equivalent of twelve months' salary and allowances in compensation for the one-year period of the reviewed contract, to allow the 3rd respondent to collect his personal effects from his former office and offer him an unconditional apology for how they had treated him. The Board declined to implement the recommendations and CAJ filed judicial review proceedings at the High Court.

The High Court's findings were that it could not compel the implementation of CAJ's recommendations and that the only thing that CAJ could do when an organization failed to implement its recommendations was to make a report to the National Assembly which would take appropriate action under section 44(4) of the Commission on Administrative Justice Act. Generally, the High Court stated that since CAJ lacked coercive power to compel the implementation of its recommendations, the court could also not compel a Government agency to implement the recommendations. An exception to those rules which would allow the court to compel the implementation of such recommendations was where there was a gross abuse of discretion, manifest

injustice or palpable excess of authority equivalent to a denial of a settled right to which the petitioner was entitled, and there was no other plain, speedy and accurate remedy. An appeal was lodged against the High Court's decision.

The Court of Appeal allowed the appeal and granted the orders of *mandamus* as sought and also monetary compensation for violation of fair administrative action rights. The Court of Appeal stated that CAJ's options in situations where its recommendations were not implemented were not limited to reporting to the National Assembly. It explained that article 254 of the Constitution did not suggest that recommendations had no force of law or were incapable of enforcement by a court of law.

**Issues**

i. Whether the recommendations of the Commission on Administrative Justice were binding on public bodies.

ii. Whether the Court of Appeal had jurisdiction to award damages in a judicial review appeal, where the damages were a remedy sought for a failure to implement the recommendations of the Commission on Administrative Justice.

iii. Who bore the burden of proof in cases of abuse of discretion by public officers where exceptional circumstances were pleaded?

**Held**

1. Section 5 of the Commission on Administrative Justice Act implied that the powers conferred upon CAJ were in addition to the power of commissions in article 253 of the Constitution. Like any other constitutional commission, CAJ was required as soon as practicable, after the end of each financial year, to submit a report to the President and to Parliament. It was wrong for the Court of Appeal to conclude that the report required under article 254(1) of the Constitution was different from reporting on its investigative reports made in the discharge of its mandate.
2. A reading of section 8 of the Commission on Administrative Justice Act which set out the functions of CAJ indicated that CAJ was mandated to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector. Therefore, CAJ had the mandate to entertain and make recommendations with regard to the 3rd respondent's complaint.
3. Section 29 of the Commission on Administrative Justice Act provided that after investigating a complaint about how administrative action had been undertaken by a public officer or public body, CAJ was under a mandatory obligation to resolve the complaint through conciliation, mediation or negotiation. If the matter could not be resolved, and CAJ found that administrative action was undertaken unjustly or unreasonably, CAJ would make recommendations as it deemed fit.
4. Whereas CAJ had the requisite mandate to make recommendations to public officers or public bodies, the recommendations were not binding. A recommendation could only be

binding when its binding nature was specifically provided for under the Constitution or the law. Neither the Constitution nor the Commission on Administrative Justice Act provided that CAJ's recommendations were binding. Consequently, the Board had the discretion to determine the manner in which they were to implement CAJ's recommendations.

5. Under section 42(4) of the Commission on Administrative Justice Act, the remedy where there had been non-compliance with the recommendations of the CAJ, was for the CAJ to prepare a report of the Board's failure to implement the recommendations to the National Assembly for appropriate action. Not even a court of law could dictate the manner in which a CAJ recommendation should be implemented. The only exception was where there was a gross abuse of discretion, manifest injustice or palpable excess of authority equivalent to a denial of a settled right to which the aggrieved party was entitled and there was no other plain, speedy and accurate remedy. The 3rd respondent's circumstances did not fall within the exception.

6. Where exceptional circumstances were pleaded, the party aggrieved by the alleged abuse of discretion by a public officer, had to prove that the exceptional circumstances existed. The 3rd respondent did not discharge that burden of proof.

7. The following were the guiding principles on recommendations from commissions to public bodies: -

   a. Any power to make a recommendation ought to be specifically provided for in the Constitution or in law.
   b. Recommendations did not necessarily bind the person to whom, or entity to which, it was addressed.
   c. A recommendation from a commission was only binding upon a public entity where it has been specifically provided for in the Constitution or in law.
   d. The manner in which a recommendation was to be implemented by a public entity was discretionary.
   e. Exercise of discretion in implementing a recommendation could only be interfered with where there was a gross abuse of discretion, manifest injustice or palpable excess of authority.
   f. Any recommendation by a commission that was not implemented could be reported to Parliament for any further action, if necessary.

8. Since CAJ's recommendations were not binding on the Board, there was no basis for the Court of Appeal to award monetary compensation to the 3rd respondent.

9. Under section 8(c) of the Commission on Administrative Justice Act, CAJ had the mandate to award compensation but that provision should not be read in isolation. Section 41 of the Commission on Administrative Justice Act provided for options that CAJ had after the conclusion of an inquiry. They included referring the matter to the relevant authority (which included the National Assembly) or recommending to the 3rd respondent a course of other judicial redresses, recommending to the complainant appropriate methods of settling the

complaint or obtaining relief and providing a copy of the inquiry report to all interested parties or submitting summons as it deemed fit to fulfill its mandate.

10. Since the dispute was an employer-employee dispute, CAJ ought to have recommended to the 3rd respondent an appropriate method of settling the dispute. One of those methods would be to seek redress at the Employment and Labour Relations Court (ELRC).

11. CAJ could not usurp the role of the ELRC over employment disputes and award compensation. CAJ, under section 8(g) of the Commission on Administrative Justice Act, could only recommend compensation or other appropriate remedies against a person or bodies to which the Act applied.

*Appeal allowed.*

***Orders***

*i. The petition of appeal dated November 6, 2019 and filed on November 7, 2019 was allowed.*

*ii. The judgment of the Court of Appeal sitting at Nairobi, September 27, 2019 was quashed and set aside.*

*iii. For the avoidance of doubt, the judgment of the High Court delivered on February 26, 2015, was upheld.*

*iv. Costs of the appeal to abide the appeal.*

**Citations**

**Cases**

***Kenya***

1. *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* Reference 3 of 2019; [2020] eKLR - (Applied)
2. *Hamisi, Kakuta Maimai v Peris Pesi Tobiko & 2 others* Civil Appeal 154 of 2013; [2013] eKLR - (Explained)
3. *In the Matter of the Interim Independent Electoral Commission* [2011] 2 KLR 32 - (Explained)
4. *In the Matter of the National Land Commission* Advisory Opinion No 2 of 2014; [2015] eKLR - (Explained)
5. *Mate, Justus Kariuki & another v Martin Nyaga Wambora & another* Petition 32 of 2014; [2017] eKLR - (Explained)
6. *Rai & 3 others v Rai & 4 others* [2014] 2 KLR 253 - (Explained)
7. *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others* Petition 368 of 2014; [2015] eKLR - (Explained)
8. *Vuko, Samson Chembe v Nelson Kilumo & 2 others* Civil Appeal 65 of 2015; [2016] eKLR - (Explained)

***Uganda***

*Sentiba Gordon & 2 others v Inspector of Government* [2010] UGSC 30 - (Explained)

***South Africa***

1. *Democratic Alliance v Speaker of the National Assembly and others* [2016] ZACC 11 - (Explained)
2. *Economic Freedom Fighters v Speaker of the National Assembly and others* [2016] ZACC 11 - (Explained)
3. *SABC v DA* (393/2015) [2015] ZASCA 156 - (Explained)

***Zanzibar***

*Selle & another v Associated Motorboat Company & others* [1968] EA 123 - (Explained)

***United Kingdom***

*R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36 - (Explained)

**Texts**

Garner, BA., (Ed) (), *Black's Law Dictionary* St Paul Minnesota: West Group

**Statutes**

***Kenya***

1. Appellate Jurisdiction Act (cap 9) - (Interpreted) section 3(2)
2. Commission on Administrative Justice Act (cap 7J) - (Interpreted) sections 2, 3, 5, 8(a)(b)(d)(g); 29; 30; 41; 42(4); 43(3); 44(4)
3. Constitution of Kenya - (Interpreted) articles 19, 22(1)(2); 47; 59,(2)(4)(5)(b)(h)(i)(j); 159(1)(4),(2); 163(4)(a); 165(5)(1)(2); 253; 254(1)
4. Court of Appeal Rules (cap 9A Sub Leg) - (Interpreted) rule 31
5. Employment and Labour Relations Court Act (cap 8E) - (Interpreted) section 12(3)

**Advocates**

None mentioned

March 24, 2021, the Court delivered the following Judgment:

**Background**

1. This Petition of Appeal is dated November 6, 2019 and was filed on November 7, 2019. The appellant has challenged the entire Judgment and orders of the Court of Appeal (Nambuye, Kiage & Murgor) at Nairobi in Civil Appeal No 141 of 2015 delivered on September 27, 2019.

2. This matter can be traced to the publication of Kenya Gazette Notice No 1386 of February 17, 2009 which established the Kenya Vision 2030 Delivery Board ("the Board") to, inter alia, make policies, provide advice and overall leadership, oversight, guidance and policy direction in the implementation of the Vision 2030. As part of meeting its objectives, the

Board placed an advertisement in the daily newspapers for the position of Director (Enablers and Macro) within its establishment. The 3rd respondent secured a three-year contract of employment for this position with the Board, effective March 23, 2009. Clause 6 of the contract provided for renewal of the contract six months to expiry, but subject to approval by the Board. Six months to the expiry of his contract, the 3rd respondent wrote to the Board requesting for a renewal of his contract. His request was rejected on the grounds that his performance was below par, and the contract was subsequently terminated through a decision dated March 23, 2012.

3. Aggrieved by the Board's decision, the 3rd respondent appealed to the Minister for Planning and National Development and Vision 2030 ("the Minister"). The Minister renewed the 3rd respondent's contract for a period of one year, but the Board declined to allow him back to work. As a result, the 3rd respondent sought the intervention of the 1st respondent, the Commission on Administrative Justice (CAJ).

4. After investigating the matter, CAJ in a report dated October 10, 2013 concluded, *inter alia*, that the Board had "impugned articles 47 and 59 of the *Constitution* and sections 2 and 8(a), (b) and (d) of the *Commission of Administrative Justice Act* on fair administrative action." Consequently, the CAJ made recommendations to the Board to: pay the 3rd respondent an equivalent of twelve months salary and allowances in compensation for the one year period of the reviewed contract; facilitate the 3rd respondent to access his personal effects from his former office; and offer him an unconditional apology for the treatment meted out to him. The Board declined to implement CAJ's recommendations prompting the 3rd respondent to file JR Case No 223 of 2014, *Republic v Kenya Vision 2030 Delivery Board & another ex-parte Eng Judah Abekah*.

5. At the High Court, the 3rd respondent sought an order of *mandamus* to compel the Board to comply with the recommendations of CAJ, compensation, and costs. The High Court identified three issues for determination as follows: Did CAJ have jurisdiction to determine the matter which had given rise to these proceedings? Can the decisions of CAJ be enforced by issuance of an order of *mandamus*? and Who should bear the costs of the proceedings?

6. On February 26, 2015, the High Court (W Korir, J), found that although CAJ had the powers to investigate the 3rd respondent's claim, it could not compel the manner in which such recommendations, findings or reports could be implemented. In the Learned Judge's opinion, in matters involving exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised. Ultimately, the learned Judge found that CAJ does not have coercive powers over the institutions that it investigates. The court found that where an organization refuses to implement the recommendations of CAJ, the only action the Commission can take is to make a report to the National Assembly. Thereafter, the

National Assembly can take appropriate action pursuant to section 44(4) of the *Commission on Administration of Justice Act* (CAJA). With regard to costs, the court ordered each party to bear their own costs on the ground that even though the 3rd respondent's application had failed, it was not frivolous.

7. The Judge concluded that since the Commission cannot compel a state agency to implement its recommendations, it follows that a court cannot compel a government agency to implement such recommendations through an order of *mandamus*. Further that the only exception where a court can compel a public agency to implement a recommendation is where "there is gross abuse of discretion, manifest injustice or palpable excess of authority" equivalent to denial of a settled right which the petitioner is entitled, and there is no other plain, speedy and accurate remedy." The trial court concluded that the 3rd respondent had not invoked that exception to warrant issuance an order of *mandamus*.

8. Aggrieved by the decision of the High Court, CAJ filed Civil Appeal No 141 of 2015, *Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others*. The 3rd respondent also filed a cross-appeal. The learned judges of Appeal (Nambuye, Kiage & Murgor) framed four issues for determination as follows: whether CAJ had the mandate to intervene in the 3rd respondent's complaint; whether the Board is a public entity; whether the CAJ's request to the Board to implement its recommendations in favour of the 3rd respondent fell within the realm of performance of a public duty; and whether in the circumstances of the appeal, the Judge exercised his discretion judiciously when he dismissed the JR proceedings.

9. On September 27, 2019, the Court of Appeal allowed both the appeal and the cross-appeal. The appellate court granted the 3rd respondent's prayer for *mandamus* as was sought in the Judicial Review Application; declared that the 3rd respondent's right to fair administrative action was infringed and awarded him KES 700,000/= as compensation with interest from the date of Judgment of the High Court. The costs of appeal and cross-appeal were also awarded. In doing so, the Learned Judges of Appeal agreed with the trial Judge's finding only to the extent that CAJ had the powers to investigate the 3rd respondent's claim and make recommendations.

10. The court disagreed with the High Court's finding to the effect that the only remedy available to a beneficiary of CAJ's recommendations is limited to reporting of such findings to the National Assembly. The court found nothing in article 254 of the *Constitution* to suggest that such recommendations have no force of law and are therefore not amenable to enforcement by a court of law. It also found that the complaint raised by the 3rd respondent fell within the definition of administrative action as defined in section 2 of the CAJA as it related to the Board's failure to accede to the Minister's renewal of the 3rd respondent's contract, and the failure to accede to CAJ's request to convert the Minister's renewal of the

said contract for one year to twelve (12) months' salary compensation together with other attendant remedies. The court emphasized that the Board's actions fell within the realm of public law and were therefore amenable to Judicial Review proceedings contrary to the findings of the Judge in the impugned decision.

11. Consequently, the court found that the 3rd respondent had demonstrated gross abuse of discretion, and that the Board was bound to implement the recommendations of CAJ.

12. Aggrieved by the finding of the Court of Appeal, the Board filed this appeal as of right pursuant to article 163(4)(a) of the *Constitution*. The Board raises three grounds of appeal summarized as follows:

    a. The appellate court incorrectly concluded that the recommendations of CAJ have the force of law and are binding to public bodies;

    b. The learned judges erred in law in holding that the fact that the Board did not challenge the action of the Minister in extending the 3rd respondent's contract or CAJ's recommendations, then the CAJ's recommendations are binding on it; and

    c. The learned judges erred by assessing damages in favour of the 3rd respondent when the High Court did not make any assessment of damages.

**Parties Submissions**

**(a) The appellant**

13. The Board submits that the Court of Appeal solely relied on article 254(1) of the *Constitution* and overlooked section 42(4) of the CAJA. In that context, the Board submits that article 254(1) of the *Constitution* was not relevant to the matter before the court as it relates to the general obligation of independent commissions to submit a report to the National Assembly at the end of each financial year. The Board contends that, pursuant to section 42(4) of the CAJA, the remedy where there has been non-compliance with the recommendations of CAJ, is for CAJ to prepare a report of the Board's failure to implement the recommendations to the National Assembly for appropriate action. Relying on the authority of *Samson Chembe Vuko v Nelson Kilumo & others* [2016] eKLR, the Board maintains that CAJ ought to have followed the procedure in the CAJA instead of seeking an order of *mandamus*.

14. Learned counsel for the Board further submits that in view of section 43(3) of the CAJA, CAJ's recommendations are not outrightly binding and that an order of *mandamus* will not issue where there is discretion on the public body to act or not to act. Furthermore, that there is no provision in the *Constitution* or in the CAJA that gives CAJ powers to enforce its decisions and recommendations as if they were a court order. In support of this

argument, the Board cites the cases of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR, *R(Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36 (Pages 51 to 110) and *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR (pages 111 to 131). Learned Counsel also relied in the authority of *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)*, and SC Reference 3 of 2019; [2020] eKLR (In Re Council of Governors).

15. The Board furthermore submits that the recommendations of CAJ are not binding and that public bodies have no obligation to implement them and takes issue with CAJ's recommendations to compensate the 3rd respondent despite the Minister communicating to him that the extension of his contract had been declined. In that regard, the Board submits that the Court of Appeal converted what was a normal Judicial Review Application into a Constitutional petition.

16. It is also the board's submission that the 3rd respondent could not overlook or sidestep the laid down dispute resolution institutions such as the courts and go directly to CAJ for a determination of their grievance. Citing sections 8 and 30 of the CAJA, article 159(1) of the *Constitution*, the cases of *Sentiba Gordon & 2 others v Inspector of Government* (Civil Appeal No 06 of 2008) [2010] UGSC 30 and *In Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR, the Board urges that if the dispute between the parties was whether the 3rd respondent was entitled to the renewal of his employment, then the same ought to have been filed before the Employment and Labour Relations Court.

17. Lastly, the Board faults the Court of Appeal for proceeding to assess damages on its own motion instead of referring the matter back to the High Court for assessment of damages. The Board closes its submission by praying that the appeal be allowed with costs.

**(b) The Attorney General**

18. We note that the Attorney General did not file its written submissions. However, Ms Chilaka, appearing in person for the Attorney General on the date of the hearing, did associate herself with the submissions of the Board to the extent that CAJ's recommendations are not binding and therefore have no force of law.

**(c) The 1st respondent**

19. In response, CAJ argues that it can make recommendations to a public body concerned in an alleged violation and that those recommendations are binding by virtue of articles 19, 249(1), 22(1) &(2) and 59(2),(4), (5)(b), (h),(i) & (j) of the *Constitution*. CAJ maintains that in article 59(2)(e) and (j) of the *Constitution*, it does have the mandate to receive and investigate complaints about alleged abuses of human rights and take steps to

secure appropriate redress where human rights have been violated, report on complaints investigated under paragraphs (h) and (i) and take remedial action. CAJ also submits that, under section 8(d) of the CAJA, it has an obligation to report to the National Assembly bi-annually on the complaints investigated under paragraphs (a)and (b) and the remedial action taken thereon.

20. In that regard, CAJ argues that there are several ways through which it can achieve its mandate including recommendations, advisory opinions and proposals. Relying on the cases of *SABC v DA* (393/2015([2015] ZASCA 156, *Economic Freedom Fighters v Speaker of the National Assembly and others Democratic Alliance v Speaker of the National Assembly and others* [2016] ZACC 11, and *Black's Law Dictionary,* CAJ contends that it is empowered by the *Constitution* and the Act to make decisions that are compelling or binding on the public officers or bodies which are concerned in violations. It states that its action was equivalent to a remedial action and not a recommendation.

21. In response to the Board's submissions that the order of mandamus could not issue, CAJ submits that the Board had a public duty to comply with its decision and failure to do so entitled the 3rd respondent to an order of mandamus sought.

22. CAJ contends that it had jurisdiction to handle the 3rd respondent's complaint for renewal of his contract and that the process featured unfairness and irregularities which amounted to a breach of article 47 of the *Constitution* on the right to fair administrative action. CAJ maintains that it was created to compliment the court system and that chapter 4 of the *Constitution* does not set a hierarchy of jurisdiction of the courts *vis a vis* its mandate in dealing with complaints on violation of human rights. Consequently, CAJ prays that this court upholds the Court of Appeal's decision.

**(d) The 3rd respondent**

(23) In opposing the appeal, the 3rd respondent, while citing articles 59, 159(4), 249(1) (2), 252, 22(1) & (2) of the *Constitution* and section 8 of the CAJA submits that CAJ 's recommendations have a binding character unless challenged by a legal process and are duly set aside or varied.

24. The 3rd respondent therefore submits that the Board and other public bodies have an obligation to implement the recommendations of CAJ unless challenged by a legal process and duly set aside or varied.

25. The 3rd respondent urges that CAJ is a part of constitutional dispute resolution mechanisms which are complementary to the court process. Further that the centrality of courts remains unchallenged considering that enforcement of recommendations of CAJ require judicial intervention.

26. Concerning the Court of Appeal's mandate to assess damages in favour of a party on appeal when the High Court did not do so, the 3rd respondent while citing section 3(2) of the *Appellate Jurisdiction Act*, rule 31 of the *Court of Appeal Rules*, and the case of *Selle & another v Associated Motor boat Company & others* [1968] EA 123, submits that the Court of Appeal did not err in assessing damages.

**C. Issues for Determination**

27. From the above submissions, the following issues crystalize for determination:

    i. Whether the recommendations of CAJ are binding on public bodies and if public bodies have an obligation to implement CAJ's recommendations?

    ii. Whether the Court of Appeal had jurisdiction to award damages?

    iii. If the answer to (i) is in the affirmative, what are the appropriate reliefs?

**(i) Whether the Recommendations of CAJ are Binding on Public Bodies?**

28. CAJ is established under section 3 of the CAJA as a successor to the Public Complaints Standing Committee. The CAJA is an Act of Parliament to restructure the Kenya National Human Rights and Equality Commission Justice pursuant to article 59(4) of the *Constitution*. Regarding the powers of CAJ, section 5 of the CAJA specifically provides as follows:

> " In addition to the powers of a Commission under article 253 of the *Constitution*, the Commission shall have power to—
>
> (a) acquire, hold, charge and dispose of movable and immovable property; and
>
> (b) do or perform all such other things or acts for the proper discharge of its functions under the *Constitution* and this Act as may lawfully be done or performed by a body corporate."

Section 5 implies that the powers conferred upon CAJ are in addition to the power of commissions in article 253 of the *Constitution*. Article 253 of the *Constitution* makes provision for incorporation of Commissions, whilst article 254 of the *Constitution* makes provision for reporting by the same.

29. All constitutional Commissions and independent offices have an obligation under article 254(1) of the *Constitution*, "as soon as practicable, after the end of each financial year to submit a report to the President and to Parliament". These reports may be limited to a

particular issue. From the foregoing provisions, it is evident to us that the CAJA was to give effect to article 59(4) of the *Constitution*. CAJ is also bound by the provisions of article 254(1) of the *Constitution*. We therefore find fault in the Court of Appeal's conclusion that the reporting that is anticipated to be done by CAJ to Parliament, is separate or different from the reporting of its investigative report undertaken in discharge of its mandate in any given year. [30] Further, the CAJA is clear on the functions of the CAJ in the following terms:

" [8]. The functions of the Commission shall be to—

(a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;

(b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;

(c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;

(d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehavior, inefficiency or ineptitude within the public service;

(e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;

(f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;

(g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;

(h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;

(i) publish periodic reports on the status of administrative justice in Kenya;

(j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;

(k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;

(l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and

(m) perform such other functions as may be prescribed by the *Constitution* and any other written law."

30. From the foregoing provisions, it is not contested that CAJ is mandated to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector. We therefore agree with both superior courts' finding that CAJ was mandated to entertain and make recommendations with regard to the 3rd Respondent's complaint.

31. Under section 29 of the CAJA, once it has investigated a complaint arising from the carrying out of an administrative action of a public officer or any other public body, CAJ is under mandatory obligation to resolve the matter before it by conciliation, mediation or negotiation. If the matter cannot be resolved, and it determines that the administrative action was carried out unjustly or unreasonably, the CAJ shall make such recommendations as it deems fit.

32. Section 41 of the CAJA also provides for action to be taken by CAJ following an inquiry in the following terms:

> " The Commission may, upon inquiry into a complaint under this Act take any of the following steps—
>
> (a) where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority

or undertake such other action as the Commission may deem fit against the concerned person or persons;

(b) recommend to the complainant a course of other judicial redress which does not warrant an application under article 22 of the *Constitution*;

(c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation, other appropriate methods of settling the complaint or to obtain relief;

(d) provide a copy of the inquiry report to all interested parties; and

(e) submit summonses as it deems necessary in fulfilment of its mandate. "

33. Furthermore, under section 44 of the CAJA, where CAJ concludes that the person or State Organ or public office or organization being investigated is guilty of misconduct, it has an obligation to report the matter to the appropriate authority.

34. The bone of contention, then, is whether these recommendations are binding on such public bodies.

35. *In the Matter of the National Land Commission*, Advisory Opinion Reference 2 of 2014; [2015] eKLR, in her concurring opinion, Ndungu, SCJ, defined the words 'recommend', advise, research, investigate, encourage, assess, monitor and oversight' to mean actions that provide a facilitative role rather than a primary one. In her opinion, the context in which those words are used, presumes that there is another body or organ whom such recommendations, advice, research, investigations, encouragement, and assessment shall be sent to, received by, and in relation to which the proposals shall be implemented. In her opinion, a body with oversight function, and a Body that implements the recommendations of the former, are different, and their roles do not overlap. For this reason, there is need for clear separation of roles between a body providing oversight, and a body upon which the oversight is to be conducted.

36. Also, *In Re Council of Governors*, this court defined a recommendation as follows:

"(52) In our considered opinion, the term "recommendation" is the operational yardstick in this entire debate. In this regard, we agree with those who have submitted that this term should first and foremost, be accorded its literal and natural meaning. Towards this end, generally speaking, a recommendation is a suggestion or proposal, for a certain cause of action. Such proposal does not

> ordinarily bind the person to whom, or entity to which, it is addressed. It is for the recipient of a recommendation, to determine what import he should attach to it. However, the categories of recommendations are never closed. Recommendations may differ, in their meaning, nature and effect, depending on the context in which they are deployed."

37. On the binding nature of the recommendations by the Commission on Revenue Allocation, this court found as follows:

> " 60. Taking all these into account, it is our considered opinion that the recommendations by the Commission on Revenue Allocation are not binding upon either the National Assembly, or the Senate. What the two Houses cannot do however is to ignore or casually deal with such recommendations. To hold otherwise, would elevate the Commission above Parliament in the legislative chain. We therefore agree with both the Speaker of the National Assembly and the Law Society in their submissions to the effect that, it could not have been the intention of the makers of the *Constitution* to supplant the legislative authority of Parliament in matters Finance, by establishing the Commission on Revenue Allocation." [emphasis added]

38. Similarly, *In Re Council of Governors*, this court was persuaded by the High Court decision *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others*, HC Constitutional Petition No 368 of 2014; [2015] eKLR, where Lenaola, J (as he then was) found that the recommendations addressed to all the 47 County Assemblies and County Executives, by the Commission on Revenue Allocation were not binding to the Senate but for good order, reasons for a deviation must be given.

39. From the foregoing Constitutional provisions, the statutory provisions and authorities highlighted, it is our finding that whereas CAJ has the requisite mandate to make recommendations to a public officer or a public body, the same is not binding. A recommendation can only be binding when the same is specifically provided for in the *Constitution* or in law. Neither the *Constitution* nor the CAJA states that CAJ's recommendations are binding. Consequently, the Board had the discretion to determine the manner in which they were to implement CAJ's recommendations. Towards that end, we find and affirm that the CAJ's recommendations to *inter alia*: pay the 3rd respondent an equivalent of twelve months salary and allowances in compensation for a one-year period of the reviewed contract; facilitate the 3rd respondent to access his personal effects from his

former office; and offer him an unconditional apology for the treatment meted out to him, were not binding upon the Board. We therefore fault the appellate court's conclusion that CAJ's recommendations were binding on the Board.

40. We agree with the Board's submission and the High Court's finding that under section 42(4) of the CAJA, the remedy where there has been non-compliance with the recommendations of the CAJ, is for the CAJ to prepare a report of the Board's failure to implement the recommendations to the National Assembly for appropriate action. CAJ ought to have explored the options set out in section 41 of CAJA. Ultimately, we agree with the trial court's finding that not even a court of law can dictate the manner in which a recommendation should be implemented. The only exception, as pointed by the trial court, is where "there is gross abuse of discretion, manifest injustice or palpable excess of authority" equivalent to denial of a settled right which the aggrieved party is entitled, and there is no other plain, speedy and accurate remedy." It is our finding that the circumstances of the appellant's case do not fit the said exception.

41. Even where such exceptional circumstances are pleaded, who then bears the burden of proving abuse of discretion? It is our opinion that where a party is so aggrieved by the exercise of discretion or lack of it thereof, by a pubic office of officer or institution, it is for that party to prove that their case fits within the four corners of the exception set above. In the instant appeal, we agree with the trial court that the 3rd Respondent did not discharge this burden of proof. Mere allegation that the Board declined to comply with the CAJ's recommendation is not enough to prove gross abuse of discretion, manifest injustice or palpable excess authority.

42. We have observed that the question on the implementation of recommendations to public entities from Commissions has been recurring in different cases before this court and other superior courts. As such we are of the opinion that the following guiding principles ought to assist courts when considering a matter concerning the binding nature of recommendations from Commissions or other public bodies:

Guiding Principles on the recommendations from Commission to public bodies:

a. Any power to make a recommendation ought to be specifically provided for in the *Constitution* or in law;

b. Recommendations do not necessarily bind the person to whom, or entity to which, it is addressed;

c. A recommendation from a Commission is only binding upon a public entity where it has been specifically provided for in the *Constitution* or in law;

d. The manner in which a recommendation is to be implemented by a Public entity is discretionary;

e. Exercise of discretion in implementing a recommendation may only be interfered where there is gross abuse of discretion, manifest injustice or palpable excess of authority

f. Any recommendation by a Commission which is not implemented may be reported to Parliament for any further action, if necessary;

43. We need to note at this juncture that Commissions are supposed to act as watchdogs and co-operate and work with government arms. It is the duty of Parliament to implement reports from commissions pursuant to article 254(1) of the *Constitution* and section 8 of the CAJA. Commissions therefore cannot implement their own recommendations nor force a recommendation on a public body lest they usurp the role of Parliament, which is the organ vested with the mandate to enforce implementation. For avoidance of doubt, a public office or body or state organ to whom a recommendation is made need not appeal against such a recommendation for it not to be binding on it.

**(ii) Whether the Court of Appeal had jurisdiction to award damages?**

44. The Court of Appeal allowed the 3rd respondent payment of twelve (12) months' salary as compensation *in lieu* of the one-year renewal of contract which the Board declined to accept; access to the office to collect personal effects, and an apology. Over and above that, the Court of Appeal awarded the 3rd respondent a sum of Kshs 700,000.00 upon its finding that his right to fair administrative action had been infringed by the Board.

45. The Board submits that CAJ did not have the mandate to award any relief to the 3rd respondent as it had declined to renew his contract, a decision communicated to him by the Minister. The Board faults the Court of Appeal for converting what was a normal Judicial Review Application into a constitutional petition and proceeding to award damages instead of referring the matter back to the High Court. The Board also urges that the dispute between the parties was whether the 3rd respondent was entitled to the renewal of his employment and that the same ought to have been taken to the Employment and Labour Relations Court. On the contrary, CAJ and the 3rd Respondent submit that CAJ had the mandate to make the compensation and that the appellate court rightly to awarded damages and compensation where none was made by the trial court.

46. Having found above that CAJ's recommendations did not bind the Board, it is our ultimate finding that there was no basis for the Court of Appeal to award compensation to the 3rd respondent. Although CAJ has the requisite mandate to award compensation under section

8(c) of the CAJA, (which section requires it to report to the National Assembly bi-annually on the complaints investigated and the remedial action taken thereon), it is our finding that section 8 of the Act cannot be read in isolation. It has to be read together with section 41 which provides for action taken by CAJ after an inquiry. Section 41 provides as follows:

> " The Commission may, upon inquiry into a complaint under this Act take any of the following steps—
>
> a. where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;
>
> b. recommend to the complainant a course of other judicial redress which does not warrant an application under article 22 of the *Constitution*;
>
> c. recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation, other appropriate methods of settling the complaint or to obtain relief;
>
> d. provide a copy of the inquiry report to all interested parties; and
>
> e. submit summonses as it deems necessary in fulfilment of its mandate."

47. In view of this, it is our finding that having concluded its investigation or inquiry on the 3rd respondent's claim, CAJ ought to either have referred the matter to the relevant authority (which in our opinion includes the National Assembly); or recommended to the 3rd respondent a course of other judicial redress; or recommend to the complainant appropriate methods of settling the complaint or to obtain relief; provide a copy of the inquiry report to all interested parties (in our opinion including the National Assembly) ; or submit summonses as it deems fit to fulfill its mandate.

48. Therefore, it is our finding that the because the dispute between the 3rd respondent and the Board was an employer-employee dispute, CAJ ought to have recommended to the 3rd respondent the appropriate method of settling the dispute. In our opinion, one of the methods would have been seeking redress at the Employment and Labour Relations Court (ELRC) which is established to hear and determine disputes relating to employment and labour relations and for connected purposes. The ELRC has the power make appropriate remedies for the 3rd respondent pursuant to article 162(2) and 165(5) of the *Constitution* and section 12(3) of the *Employment and Labour Relations Act*

including interim preservation orders; prohibitory order; an order of specific performance; a declaratory order; an award of compensation; an award of damages; an order of reinstatement among other.

49. CAJ cannot usurp the role of the ELRC over employment disputes and award compensation. CAJ, under section 8(g) of the CAJA, can only recommend compensation or other appropriate remedies against a person or bodies to which the Act applies. Having found elsewhere in this Judgement that recommendations can only be binding where specifically provided for, we conclude that CAJ lacks the requisite jurisdiction to award compensation in the circumstances. In other words, even if CAJ recommends compensation after concluding its inquiry, there is an additional step or action to be taken by the entity or person to whom the recommendation has been made. That entity or person may or not implement the same depending on the manner on how they choose to exercise their discretion, unless otherwise provided for in the law. Consequently, we set aside the reliefs awarded by the Court of Appeal.

50. On costs, this court has previously settled the law on this issue, stating that costs follow the event in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012; [2014] eKLR and that a court has the discretion in awarding costs in its decision. This remains the law. In the instant case, we award costs of this appeal to the Board.

51. Consequently, we allow the appeal.

**D. Orders**

52. Ultimately, upon our finding above, the final orders are that:

    1. The Petition of Appeal dated November 6, 2019 and filed on November 7, 2019 be and is hereby allowed.

    2. The Judgment of the Court of Appeal sitting at Nairobi, dated September 27, 2019 is hereby quashed and set aside.

    3. For the avoidance of doubt, the Judgment of the High Court delivered on February 26, 2015, be and is hereby upheld.

    4. Costs of this Appeal to abide the appeal.

    Orders accordingly.

**Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment)**

**Supreme Court of Kenya**

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

Neutral citation: [2021] KESC 34 (KLR)

***Constitution Law*** *- fundamental rights and freedoms - enforcement of fundamental rights and freedoms - socio-economic rights - remedies in human rights litigation - structural interdicts - nature of 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 - what were the factors to consider when issuing structural interdicts - Constitution of Kenya 2010, article 23(3).*

***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).*

***International Law*** *- applicability of international law in Kenya - effect of article 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).*

***Land Law*** *- public land - illegal occupation of public land - whether the illegal occupation of public land created prescriptive rights over the land.*

**Brief facts**

The appellant 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 seven days within which to vacate the premises. Despite the appellant obtaining conservatory orders from the High Court to restrain the demolition of Mitumba Village, the premises were demolished on November 19, 2011. The appellant sought various declaratory reliefs at the High Court including those that asserted their ownership of the premises and also stated that the forceful eviction and demolition without a relocation option was illegal, oppressive, and violative of the appellant's rights.

The respondent explained that Mitumba Village was situated on property belonging to the Kenya Airports Authority (the 1st respondent) and that the 1st respondent was under a statutory duty to ensure air safety by removing any informal settlement which was on a flight path and that given the war in Somalia, the village posed a threat. The High Court held that the appellant did not own the suit premises. The High Court also held that the newspaper notice which was said to be a reminder notice was unreasonable, unconscionable and unconstitutional as there was no other

notice preceding it and it required vacation of the suit premises within seven days. The High Court also 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 materials that had been destroyed during the demolition. The High Court also found that the eviction and demolition of the premises pursuant to a seven-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 of Kenya, 2010 (Constitution). Further, the High Court found that evictions could be necessary but the due process had to be followed. The due process included the issuance of reasonable notice and the conduct of consultations among those affected by the eviction. Additionally, the High Court 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 1st respondent filed an appeal at the Court of Appeal. The Court of Appeal made various findings including findings that were 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 were a limitation on the 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 had no mandate to provide policies and programs on the 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 propriety rights in the land of another and the realization of socio-economic rights did not override the provisions of the Limitation of Actions Act.

Aggrieved, the appellants filed the instant appeal at the Supreme Court.

**Issues**

i. Whether structural interdicts were recognized reliefs in human rights litigation under the Constitution of Kenya, 2010.

ii. What was the nature and factors to be considered when issuing structural interdicts?

iii. 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?

iv. 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.

v. When would the right to housing under article 43(1)(b) of the Constitution accrue?

vi. Whether illegal occupation of public land created prescriptive rights over the land.

**Held**

1. Article 23(1) and (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 was not exhaustive.
2. 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.
3. 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.
4. 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.
5. 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.

6. 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.
7. 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.
8. 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 as understood in international discourse.
9. Article 2(5) of the Constitution referred to general rules of international law and 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.
10. 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.
11. 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 and the International Covenant on Civil Economic Social and Cultural Rights 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.

12. The U.N. Guidelines in question were issued pursuant to article 21 of the International Covenant on Economic Social and Cultural Rights. 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 fulfillment of their obligations thereunder.
13. The Guidelines were not binding upon the state 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.
14. 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 the 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.
15. 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 program initiatives including affirmative action.
16. The right to accessible and adequate housing, just like any other right under article 43 of the Constitution required the State to take legislative, policy and other measures to achieve it. Under article 20(5) of the Constitution, the principles that should guide a court in the enforcement of rights provided for under article 43, 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.
17. 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.

18. 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.

19. 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. On 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 Kenya 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.

20. The right to housing over public land crystallized by virtue of a long period of occupation by people who had established homes and raised families on the land. That right derived from the principle of equitable access to land under article 60(1)(a) of the Constitution.

21. 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 could 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 among others.

22. The trial court's orders for the respondents to furnish it with existing State policies and programs on the 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.

23. 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.

*Appeal partly allowed with no orders as to costs.*

***Orders***

i. *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.*

**Citations**

**Cases**

***Kenya***

1. *Attorney General v Kituo Cha Sheria & 7 others* Civil Appeal 108 of 2014; [2017] eKLR - (Explained)
2. *Ayuma, Satrose & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* Petition 65 of 2010; [2013] eKLR - (Explained)
3. *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* Petition N 14, 14A, 14B & 14C of 2014; [2014] eKLR (Consolidated) - (Explained)
4. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] 3 KLR 718 - (Explained)
5. *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others* Petition Nos 13 A, 14 &15; of 2013 ; [2014] eKLR (Consolidated) - (Explained)
6. *June Seventeenth Enterprises Ltd (Suing on its own behalf & on behalf of & in the interest of 223 other persons being former inhabitants of KPA Maasai Village Embakasi within Nairobi) v Kenya Airports Authority & 4 others* Petition 356 of 2013; [2014] KEHC 6784 (KLR) - (Applied)
7. *JWI v Standard Group Limited & another* Petition 466 & 416 of 2012; [2013] eKLR - (Explained)
8. *Kanzika, Abraham Kaisha alias Moses Savala Keya t/a Kapco Machinery Services & Milano Investments Limited v Governor Central Bank of Kenya & 2 others [2006] eKLR* Misc Civ Appil 1759 of 2004; [2006] eKLR - (Explained)
9. *Kariuki, Susan Waithera & 4 others v Town Clerk Nairobi City Council & 3 others* Petition 66 of 2010; [2013] eKLR - (Explained)
10. *Kipsiwo Community Self Help Group v Attorney General & 6 others* Petition 9 of 2013; 2013] eKLR - (Explained)
11. *Law Society of Kenya v Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties)* Constitutional Petition No 307 of 2018; [2019] eKLR - (Explained)
12. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Application 29 of 2014; [2014] KESC 6 (KLR) - (Explained)
13. *MMM v Permanent Secretary, Ministry of Education & 2 others* Petition 133 of 2013; [2013] eKLR - (Explained)
14. *Moi Education Centre Co Ltd v William Musembi & 16 others* Civil Appeal 363 of 2014; [2017] eKLR - (Explained)
15. *Muruatetu, Francis Karioko & another v Republic* Petition Nos 15 & 16 of 2015; [2017] eKLR (Consolidated) - (Explained)
16. *Mwangi, Peter Njoroge & 2 others v Attorney General & another* Petition 73 of 2010 - (Applied)

17. *Ng'etich, Daniel & 2 others v Attorney General & 3 others* Petition 329 of 2014; [2016] eKLR - (Explained)
18. *Okwanda, Mathew v Minister of Health and Medical Services & 3 others* Petition 94 of 2012; [2013] eKLR - (Explained)
19. *Onjuro, Kepha Omondi & 2 others v Attorney General & 5 others* Petition 239 of 2014; [2015] eKLR - (Explained)
20. *Osman, Ibrahim Sangor v Minister of State for Provincial Administration & Internal Security & 3 others* Constitutional Petition 2 of 2011; [2011] eKLR - (Explained)
21. *PAO & 2 others v the Attorney General; Aids Law Project (Interested Party)* Petition 409 of 2009; [2012] eKLR - (Explained)
22. *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others ex parte Council of County Governors & another* Miscellaneous Application 291 & 314 of 2016; [2017] eKLR (Consolidated) - (Explained)
23. *Republic v Council of Legal Education & another ex-parte Mount Kenya University* Miscellaneous Civil Application 16 of 2016; [2016] eKLR - (Explained)
24. *Speaker of the Senate & another v Attorney General & 3 others* Advisory Opinion Reference 2 of 2013; [2013] eKLR - (Explained)
25. *Stephen, Ndoria v Minister for Education & 2 others* Petition 464 of 2012; [2015] eKLR - (Explained)
26. *Steyn, Hermanus Phillipus v Giovanni Gnecchi Ruscone* Application 4 of 2012; [2013] eKLR - (Followed)
27. *Telkom Kenya Limited v John Ochanda* Civil Appeal 60 of 2013; [2014] eKLR - (Explained)
28. *Trusted Society of Human Rights Alliance v Matemu & 5 others* [2014] 2 KLR 368 - (Explained)
29. *Wachihi, John Mukora v Minister For Lands & 6 others* Petitions 82, 83, 84, 85, 86, 87, 88, 89, 90 & 92 of 2010; [2013] eKLR (Consolidated) - (Explained)
30. *Wachihi, John Mukora v Minister For Lands & 6 others* Petition 82, 83, 84, 85, 86, 87, 88, 89, 90 & 92 of 2010; [2013] KEHC 5938 (KLR) - (Applied)
31. *Waweru, Veronica Njeri & 4 others v City Council of Nairobi & 2 others* Petition 58 of 2011; [2012] eKLR - (Explained)
32. *Wetangula, Moses Masika v Musikari Nazi Kombo & 2 others* Petition 12 of 2014; [2015] eKLR - (Explained)

***South Africa***

1. *All-Pay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency & others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) - (Explained)
2. *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 - (Explained)

3. *Glenister v President of the Republic of South Africa* [2011] ZACC 6;2011 (3) SA 347(CC); 2011(7) BCLR 651 - (Explained)
4. *Irene Grootboom and others v The Government of the Republic of South Africa and others* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 - (Explained)
5. *Johannesburg Metropolitan Municipality v Blue Moollight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) - (Explained)
6. *Madderklip Baerdery (Edms) Bpk v. President Van Die* [2004] ZASCA 47; [2004] 3 All SA 169 (SCA) - (Explained)
7. *Minister of Health v Treatment Action Campaign (No. 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) - (Explained)
8. *Minister of Home Affairs v. National Institute for Crime Prevention and Re-integration of Offenders* (NICRO) 2004 (5) BCLR 455 (CC) - (Explained)
9. *Moderkplip Boerdery (Pty) Ltd v Modder East Squatters* 2003(6) BCLR 638 (T) - (Explained)
10. *Pretoria City Council v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 - (Explained)
11. *S v Manamela & another (Director General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 - (Explained)
12. *Sibiya and others v Director of Public Prosecutions; Johannesburg High Court & others* [2005] (8) BCLR 812 (CC) - (Explained)
13. *Treatment Action Campaign v Minister for Health* [2002] (4) BCLR 356 (T) - (Explained)

***Nigeria***

*Ibidapo v Lufthansa Airlines* [1997] NGSC 6 - (Explained)

***United Kingdom***

1. *Chung Chi Cheung v King* [1939] AC 160 - (Applied)
2. *Hawkes v Eastern Railways Company* [1885] 5 HL 331 - (Explained)
3. *R v Governor of Brixton Prison, ex parte Enahoro* [1969] 2 QB 222, [1969] 2 All ER 347, [1969] 2 WLR 618, - (Explained)
4. *Triquet & others v Bath* (1764) 97 Eng Rep 936 - (Explained)

***India***

1. *Ahemdabad Municipal Corporation v Nawab Khan Gulab Khan* [1997] 11 SCC 123 - (Explained)
2. *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802 - (Explained)
3. *Chameli Singh v State of Utar Pradesh* [1996] 2 SCC 549 - (Explained)
4. *Dharampal Singh v GNCT of Dehli WP (C)* 1978/2011 - (Explained)
5. *Narmada Bachao Andolan v Union of India* AIR 2000 SC 3751 - (Explained)
6. *National Legal Services Authority v Union of India & others* AIR 201 SC 1863 - (Explained)
7. *Olga Telis & others v Bombay Municipal Corporation* [1985] Supp SCR 51 - (Explained)

8. *Sheela Barse v Union of India* [1988] AIR 2211 (SC) - (Explained)
9. *Vineet Narain v Union of India* AIR 1996 SC 3386 - (Explained)

***United States***

1. *Marbury v Madison* 5 US 137 (1803) - (Explained)
2. *Paquete Habana* 20 S Ct 290 (1900) - (Explained)
3. *Reid v Covert* 354, US 1(1997) - (Explained)
4. *Swann v Charlotte-Mecklenberg Board of Education* 402 US 1 (1971) - (Explained)

***Canada***

1. *Doucet-Boudreu v Nova Scotia (Minster of Education)* [2003] 3 SCR 3 - (Explained)
2. *R v Hape* [2007] 2 SCR 292 - (Explained)

***Regional Court***

1. *African Commission on Human and Peoples' Rights v Republic of Kenya* Application 006 of 2012 - (Explained)
2. *Charzow Factory Case* (1928) PCIJ (ser A) No 17 47 - (Followed)
3. *MSS v Belgium & Greece* Application No 30696 of 2009 - (Explained)
4. *Republic of Nicaragua v United States of America* 1986 ICJ 14 - (Applied)
5. *Sir Dawda Jawara v The Gambia* [2000] AHRLR 107 - (Explained)

***Colombia***

*T-760* Decision T-760 (2008) (Colom) - (Applied)

**Statutes**

***Kenya***

1. Civil Aviation Act, 2013 (cap 394) - (Cited) In general
2. Civil Procedure Act (cap 21) - (Cited) In general
3. Civil Procedure Rules, 2010 (cap 21 Sub-Leg) - (Interpreted) order 21
4. Constitution of Kenya - (Interpreted) articles 2(5)(6); 10; 19(1); 20(1)(5); 21; 22; 23; 26; 27(2)(4)(6); 28; 29; 30; 40; 43; 47; 53; 54; 56; 156(4)(a)(b); 159(2)(c); 163(4)(b); 165; 258; 260
5. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Consitution of Kenya ,2010 Sub Leg) - (Interpreted) rule 6
6. Interpretation and General Provisions Act (cap 2) - (Interpreted) section 3(1)
7. Land Act, 2012 (cap 280) - (Interpreted) section 152(b),(c)
8. Land Registration Act (cap 300) - (Interpreted) sections 24, 26
9. Limitation of Actions Act (cap 22) - (Cited) In general
10. Public Service (Values and Principles) Act, 2015 (cap 185A) - (Interpreted) section 4
11. Societies Act (cap 108) - (Cited) In general
12. Supreme Court Act (cap 9B) - (Interpreted) section 3

***South Africa***

Constitution of the Republic of South Africa Act, 1996 (Act No 108 of 1996) - (Interpreted) section 7(2); 38; 172(1)(b); 239

***India***

Constitution of India, 1950 - (Interpreted) article 32, 226

***Canada***

Constitution of Canada - (Cited) In general

**Instruments**

1. African Charter on Human and Peoples' Rights, 1986
   article 27, 112
2. Canadian Charter of Rights and Freedoms, 1998
   section 24(1)
3. Convention for the Protection of Human Rights and Fundamental Freedoms, 1953
   article 13, 41
4. Declaration of Rights and Duties of States, 1949
   article 13
5. International Covenant on Civil and Political Rights (ICCPR), 1966
   article 2(3)
6. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
   article 21
7. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1987

8. Statute of the International Court of Justice, 1945
   article 38
9. Universal Declaration of Human Rights (UDHR), 1948
   article 17
10. Vienna Convention on the Law of Treaties, 1980

January 11, 2021, the Court delivered the following Judgment:

## A Introduction

1. This is a petition of appeal dated February 5, 2018, and filed on even date, pursuant to its certification by the Court of Appeal (Okwengu, Makhandia & Murgor, JJA) in Civil Application Sup No 3 of 2016 as one involving a matter of general public importance under articles 163(4)(b) and 163(5) of the Constitution. The appellants are challenging the entire

judgment and orders of the Court of Appeal; (Githinji, Karanja & Otieno-Odek, JJA) in Civil Appeal No 218 of 2014 delivered on the 1st day of July, 2016.

**B. Background**

**(i) At the High Court**

2. The petition before the High Court was filed on September 21, 2011 by Mitu-Bell Welfare Society, a society registered under the provisions of the *Societies Act cap* 108, which according to its Chairman, one Benjamin Kaunda Gishemba, comprised residents of Mitumba Village, with 3065 households or approximately 15, 325 men, women and children. The petition was filed on behalf of its members and other residents of Mitumba village, (For ease of reference, the members of the society and other residents of Mitumba village are hereinafter referred to as 'the appellants').

3. On the basis of the pleadings, at the time of filing the petition before the trial court, the appellants were all residents of Mitumba Village situated on Plot Number 209/12908, near Wilson Airport, Nairobi; while their children attended school at Mitumba Primary School, situated on Plot Number 209/12921, also located near the Wilson Airport.

4. The appellants' petition was prompted by a notice published in the newspapers on September 15, 2011, by the 2nd respondent giving them seven (7) days within which to vacate the suit land. Together with the Petition, the appellants filed a chamber Summons application seeking among others, conservatory orders against the 1st respondent. On September 22, 2011 Gacheche J granted an order restraining the respondents from demolishing the village pending the hearing *inter partes* and determination of the application for conservatory orders. However, notwithstanding the conservatory order, the respondents proceeded to demolish the appellants' houses in the Village on November 19, 2011.

5. The petition was amended by leave of the court on December 1, 2011 following the demolition and eviction. The amended petition sought the following;

   (i) a declaration that the demolition was illegal, irregular, unprocedural and contrary to art 26, 27(2)(4) & (6) art 28 art 29, art 39 40 art 43, art 47, art 56, of the *Constitution*;

   (ii) a declaration that any forceful eviction and or demolition without a relocation option is illegal, oppressive and violates the rights of the appellants;

   (iii) an order restraining any purported demolition and or forceful eviction by the 2nd Respondent against the appellants;

   (iv) a declaration that the resident of Mitumba Village were legally entitled to plot number 209/12921 under file number 226958 for Mitumba primary school and

plot Number 209/12908 under file number 176952 for the village respectively and in the alternative they were entitled to compensation and reallocation of another land or alternative shelter with access to education facilities, clean water, health care and food at the state's expense;

(v) a declaration that the appellants were entitled to the full protection from discrimination and the same right had been violated hence they were entitled to full compensation for loss suffered during and after the illegal demolition or their structures;

(vi) a declaration that the appellants and other members of the public were entitled to the full enjoyment of the right to economic and social rights that were about to be violated and or already violated; and

(vii) Costs of the petition.

6. The respondents opposed the petition and maintained that there had been no violation of the appellants' fundamental rights. They advanced four main arguments in support of this position; that the land in question did not belong to the appellants but to the 1st respondent; that the 1st respondent was under an obligation in performing its statutory duty under the *Civil Aviation Act*, to ensure air safety by removing any informal settlement which was on a flight path; that the demolition was not carried out by the 1st respondent but by the state in order to remove the threat posed by the village given the ongoing war in Somalia; and that the appellants were claiming social economic rights which were progressive and could not be granted at once.

7. The High Court framed the following issues for determination:

(i) What rights, if any, do the petitioners have over the subject property?

(ii) If the answer to (i) above is in the negative, was their eviction and the demolition of their houses a violation of their rights under the Constitution?

(iii) If the answer to (ii) above is in the positive, what relief should the court grant to the petitioners?

(iv) Rights over the subject property.

8. In a Judgment dated September 11, 2013, the High Court (Mumbi Ngugi J) allowed the petition. She declared that following the demolition of Mitumba village, more so as the demolition was carried out while an order of the court restraining the demolition was in force, the 1st and 2nd respondents had violated the appellants' constitutional rights.

9. The High Court's detailed findings are summarized as follows; on the issue of the appellants' rights, if any, over the subject property, the court found that that the appellants had no legitimate claim to the land, and could not therefore maintain a claim for violation of their right over the property (land) under article 40.

10. On the issue as to whether the eviction was in violation of the appellants' Constitutional rights, the court at the outset addressed the issue of reasonableness of the notice to vacate. In finding the notice unreasonable, the court noted that the same was dated September 15, 2011 requiring the appellants and others to vacate the suit land within seven days. The court also noted that though headed as a 'Reminder Notice', there was nothing before it to indicate that the 1st respondent had issued any other notice to the appellants. The notice was therefore adjudged to be unreasonable, unconscionable, and unconstitutional. Further, the court opined that Kenya was yet to develop legislation and guidelines, for eviction of persons occupying land they are not legally entitled to occupy.

11. It was the court's further view that despite the lack of legislation and guidelines for eviction, as a member of the international community and a signatory to various United Nations treaties and Conventions, Kenya is bound by such international guidelines that are intended to safeguard the rights of persons liable to eviction. To this end, the court invoked article 2(5) and (6) of the *Constitution* and held that the state, state organs and all persons, in carrying out evictions, should do so in accordance with the United Nations Guidelines on Evictions as issued by The United Nations Office of the High Commissioner for Human Rights in General Comment No. 7 "The right to adequate housing (art 11.1): forced evictions: (20/05/97) CESCR General comment 7." (General Comments).

12. On whether the demolition had resulted in a violation of the appellants' rights under the *Constitution*, the court found that the appellants had made out a clear case of violation of their Constitutional rights by the 1st and 2nd respondents. On the violation of the right to property, the court held that the Constitutional right to property under article 40 as read together with article 260 of the *Constitution*, extends to, and must include protection of, goods and personal property. In the opinion of the court, even though the appellants had not given particulars of their goods that had been destroyed during the eviction, it must inevitably follow that such goods as the appellants had in their dwellings, and the materials the houses were made of, were destroyed during the demolition.

13. On violation of the right to housing and other social economic rights, the court found that these rights are protected under article 43 and 21 of the *Constitution*. It proceeded to hold that when the State or a state agency such as the 2nd respondent demolishes the homes of poor citizens such as the appellants following a Seven-day Notice, and without providing an alternative accommodation, it violates not only the rights of the appellants under articles 21

and 43 of the *Constitution*, but also the national values and principles of governance set out in article 10 of the *Constitution*.

14. The court observed that, article 43 of the Constitution imposes on the state a positive obligation to ensure access by its citizens to social economic rights, whose realization is progressive and dependent upon, the availability of resources. By the same token, while placing reliance upon the South African case of *Irene Grootboom and others v The Government of the Republic of South Africa and others* (2001) (1) SA 46, the court held that under article 21(1) the *Constitution*, the state and private individuals have a negative obligation to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms. Further, the court found that the state had an obligation to protect the appellants' existing homes, rudimentary as they were, while doing what it could, to the extent of its available resources, to ensure their progressive access to adequate housing.

15. On the issue of violation of civil and political Rights under articles 26, 27, 28, 29 and 47 of the *Constitution*, it was the court's view that the enjoyment of these rights, was not possible without the social economic rights which the Constitution guarantees under article 43. That a failure by the State to ensure that citizens have access to the rights guaranteed by article 43 directly impacts on the ability of citizens to enjoy all the other rights set out in the *Constitution*.

16. On the issue of Constitutional requirement for consultation and participation, the court recognized that there may be instances when eviction of people may be necessary, but reiterated that even in such instances, there is a need to follow due process: that those to be affected should be given reasonable notice, and that there should be consultation and participation of those to be affected by the removal process. It added that the Principle of consultation and participation of the people is entrenched in the *Constitution* as well as the United Nations Office of the High Commissioner for Human Rights Guidelines. It concluded that the State had in this regard, abdicated its Constitutional responsibilities and obligations under International Law.

17. On the violation of the right to non-discrimination and equal protection of the law, the court found that the selective demolition of the appellants' temporary shacks for allegedly being on the airport's flight path or posing a security threat, while sparing multi- storied buildings which surrounded it, wreaked of discrimination. Such action in the court's view, amounted to a violation of the right to non-discrimination and equal protection of the law guaranteed under article 27(1),(2) and (4) of the *Constitution*.

18. On violation of the rights of children, the court observed that the State has an obligation to protect children in accordance with article 10, on the national values and principles, articles 53 and 54 on protection of children and persons with disabilities respectively, and article

56 on protection of the marginalised. It added that the evidence before it indicated that there was within Mitumba Village, a primary school-albeit an 'informal' primary school, which the children of the village attended. The court added that with no averment by any of the respondents that they took any action to provide for the needs of vulnerable groups particularly children, in the period leading up to and during the demolition, it was uncontested that the actions of the respondents resulted in a violation of the rights of the appellants' children.

19. In considering the appropriate relief, the court opined that under article 23 of the *Constitution*, it has power to grant various reliefs, including declarations of rights, injunctions, conservatory orders, and compensation. It further noted that the appellants were a community deprived of their shelter and rendered homeless; that the State has a constitutional obligation to take appropriate legislative and police measures to ensure access to the rights set out in article 43; that these rights are progressive in nature; that the State, when confronted with a matter such as this, is expected to go beyond the standard objection that the appellants had not demonstrated a right to the land, or how their rights had been violated; and that obligation requires that the state assists the court by showing if, and how, it was addressing or intended to address the rights of citizens in the attainment of the social economic rights, and what policies, if any, it had put in place to ensure that the rights are realized progressively.

20. Before making any further orders with regard to the appropriate relief for the appellants in the matter, the court directed as follows;

    (i) That the respondents do provide, by way of affidavit, within 60 days of Judgment, the current state policies and programmes on provision of shelter and access to housing for the marginalised groups such as residents of informal and slum settlements.

    (ii) That the respondents do furnish copies of such policies and programmes to the appellants, other relevant state agencies, Pamoja Trust (and such other civil society organisation as the appellants and the respondents may agree upon as having the requisite knowledge and expertise in the area of housing and shelter provision as would assist in arriving at an appropriate resolution to the appellants' grievances), to analyse and comment on the policies and programmes provided by the respondents.

    (iii) That the respondents do engage with the appellants, Pamoja Trust, other relevant state agencies and civil society organizations with a view to identifying an appropriate resolution to the appellants' grievances following their eviction from Mitumba Village.

(iv) That the parties report back on the progress made towards a resolution of the appellants' grievances within 90 days from the date of Judgment.

21. Thereafter, the State filed an affidavit appending the government's guidelines on settlement and evictions. Consequently, the learned Judge gave parties 45 days to engage in discussions with a view to finding an amicable solution.

**(ii) At the Court of Appeal**

22. Aggrieved and dissatisfied with the entire Judgment and directions of the High Court, the 1st respondent (the appellant before the Court of appeal) filed, Civil Appeal No 218 of 2014, citing 18 grounds which are summarized hereunder as follows: That the learned Judge erred in law and in fact in;

(i) Finding that the 1st respondent had not filed any response to either the petition or the amended petition hence failed to consider the 1st respondent's response thereof.

(ii) Delegating judicial functions and powers to Pamoja Trust, other unnamed state agencies and civil society organizations and by directing that the parties should engage with those third parties in identifying appropriate remedies.

(iii) Making findings and issuing orders not sought or contemplated by law.

(iv) Failing to appreciate that the 1st respondent had issued earlier notices to the residents to vacate the suit property and holding that the notice issued was short.

(v) Holding that the 1st respondent had a constitutional and legal obligation to make policies and programmes on provision of shelter and access to housing for marginalized groups and further failing to consider that the appellant had a specific statutory mandate that does not include settlement of landless Kenyans.

(vi) Issuing contradictory orders incapable of compliance.

(vii) Issuing composite orders applying to the respondents jointly whereas their actions and obligations differ.

(viii) Failing to appreciate that the appellants had not demonstrated an entitlement to the reliefs sought and shifting the burden to the respondents, contrary to the law.

(ix) Failing to appreciate the progressive nature of social economic rights under the Constitution.

(x) Entertaining the petition filed by Mitu-bell Welfare Society which was not a legal entity hence lacking the requisite locus to represent the residents of Mitumba Village.

(xi) Finding that the eviction in question was carried out by the 1st respondent.

(xii) Making findings which were not supported by the evidence before the court."

23. In a Judgment delivered on July 1, 2016, the Court of Appeal (Githinji, Karanja & Otieno-Odek, JJA) identified eleven(11) issues for determination. These issues are discussed further: On the issue of locus standi of the appellants to institute the petition before the trial court, the court found that the appellants through Mitu-bell Welfare Society, had locus before the trial court. It reasoned that in light of the Certificate of Registration, the provisions of article 22(2)(d), articles 22 & 258 of the *Constitution* and this court's decision on the issue of locus in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR, every person has the right to institute proceedings claiming that the *Constitution* has been contravened; that a person in that regard, includes one acting in public interest and further, that pursuant to article 260 it also includes a company, an association, or other body of persons whether incorporated or unincorporated.

24. On the issue whether the trial court failed to consider the 1st respondent's answer to the petition and or amended petition, the court held that it was manifest from the judgment that all the issues and grounds in opposition to the petition that were raised and urged by the 1st respondent were considered by the trial court.

25. On the liability of the 2nd and 3rd respondents, the court upheld the High Court's finding of the 2nd respondent's liability on grounds that under the provisions of article 156(4)(a) and (b) of the *Constitution*, the 2nd respondent (Attorney General) is the legal advisor to the Government, and is empowered (other than in criminal proceedings) to represent the government in court or in any other legal proceedings to which the national government is a party.

26. The appellate court however set aside any liability against the 3rd respondent, and concluded that the trial court, erred in law in making a composite order and issuing directives against the latter. It reasoned that after an evaluation of the evidence on record, and the Judgment of the learned Judge, the trial court made findings as regards non-culpability and non-liability of the 3rd respondent; that the 3rd respondent as commissioner of lands was under no legal obligation to allocate or alienate land that was already alienated and registered to a third party; that there was no violation of the appellants' constitutional right to property (land) under article 40 of the *Constitution* and that the 3rd respondent neither demolished nor evicted the appellants from the suit property. It thereby set aside in entirety the trial court's

Judgment and decree and any and all consequential orders and directions applicable and enforceable against the 3rd respondent.

27. On whether the trial court abdicated or delegated its judicial function, the appellate court considered the provisions of articles 9, 10 and 23(3) of the *Constitution* as read with the jurisdictional mandate and functions of the court as provided for in article 159(1). It also relied on the holding in *R v Governor of Brixton Prison, ex parte Enahoro* (1963) 2 QB, Supreme Court decision in *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others*, Petition No 12 of 2014 at paragraphs 150-151 and Court of Appeal decision in *Telkom Kenya Ltd v John Ochwada* [2014] eKLR to find that the trial court abdicated its judicial function and bestowed the same to persons and entities (to wit, segment committees, Pamoja Trust, the Social Economics and Geo-Spatial Engineers, Muugano wa Wanavijiji as well as Commissioners from the Kenya National Commission on Human Rights Commission) not vested with the Constitutional mandate of resolving disputes between parties.

28. The appellate court in addressing the issue of reservation of powers to make further orders, faulted the trial court, for delivering a judgment and then reserving outstanding matters to be dealt with by the same court. It further found that, save for the limited exceptions provided for in law, delivery of Judgment marks the end of litigation and the end of jurisdictional competence of the court, hence upon delivery of judgment, a court becomes functus officio; that the concept of partial judgment or interim judgment was unknown to kenyan law; that a court of law in delivering its judgment must determine the rights and liabilities of parties; and that if a court is inclined to grant or make interim orders, it is within its powers to do so, however, a court cannot deliver judgment and invite further pleadings on contested matters for its consideration and determination.

29. It added that by allowing parties to file affidavits and reports after Judgment, the trial court erred in law as the procedure has the potential to introduce secondary litigation and raise new issues that were not in the original pleadings. That such a procedure was not provided for in the Civil Procedure Act and *Rules* and perpetuated and introduced secondary and side litigation; and that it was impermissible to allow parties to file pleadings after Judgment.

30. On the issue as to whether the trial court properly evaluated the evidence on record, the appellate court was of the opinion that the trial court failed to evaluate critical aspects of the pleadings before it. The court held that there had been no finding of fact, regarding the following; whether Mitumba village and the structures thereon were on the flight path to Wilson Airport; no factual determination as to what constituted the flight path to Wilson Airport; no determination whether there was unregulated garbage disposal at the Mitumba village that could attract birds along Wilson Airport's flight path thereby posing security risk to the aerodrome; no evaluation of the public interest in maintaining the safety and security of the aerodromes in Kenya; no evaluation of the evidence to determine if the adjacent high

rise buildings were on the flight path; and no consideration of the Legal Notice No. 59 of May 8, 1998 which prohibited constructions of structures near airports or aerodromes.

31. To justify the need to evaluate the expounded aspects, the appellate court pronounced that there are instances when eviction of people may be necessary hence considerations of national security was paramount. It was of an additional view that 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*. It thereon cited comparative (Indian) judicial authorities to demonstrate that public interest, public policy and national interest or security may justify eviction and demolition of structures. These decisions included *Chameli Singh v State of Utar Pradesh* (1996) 2 SCC 549; *Ahemdabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 123; *Narmada Bachao Andolan v Union of India*, AIR 2000 SC 3751; *Dharampal Singh v GNCT of Dehli WP (C)* 1978/2011,

32. The appellate court agreed with the trial court, that there was no legislation in Kenya meant to regulate forcible eviction and resettlement of persons occupying public or private land. The court held that until such a statute was enacted by the legislature, courts must interpret and apply the law as is.

33. On the statutory mandate of the 1st respondent in relation to the trial court's directive that the 1st to 3rd respondents do provide State policies and programs on provision of shelter and access to housing, the learned Judges of appeal found that the trial court had erred in issuing orders and directions, applicable to the 1st respondent while ignoring its express statutory mandate. In arriving at this finding, the learned judges were guided by the decision in *Hawkes v Eastern Railways Company* (1885) 5HL 331, stating that a statutory corporation, created by an Act of Parliament is limited to the functions and mandate granted by its enabling statute.

34. On the issue as to whether the trial court issued orders not sought or prayed for in the amended petition, the Judges made a finding that the trial court erred in law in issuing orders and directions on un-pleaded issues. It faulted the trial Judge's directions requiring third parties to comment on the policies and guidelines, which it found was not a prayer sought in the amended petition. The court also faulted the learned Judge's directions to the effect that the parties engage Pamoja Trust and other civil societies for purposes of identifying appropriate remedies. The court noted that Pamoja Trust and the civil societies alluded to by the trial court were not parties to the suit neither were they joined as friends to the court. It was however cognizant of the provisions of Rule 6 of the *Constitution of Kenya (Protection of Rights and fundamental Freedoms) Practice and Procedure Rules, 2013*, where cases involving matters of general public interest may occasion a court inviting certain persons with expertise on a particular issue to participate as *amicus curiae*.

35 In considering the issue of post-Judgment implementation and the political question doctrine, the court was alive to the provisions of article 159(2)(c) of the *Constitution*, which enjoins courts to promote alternative dispute resolutions mechanism, but emphasized that these alternative dispute resolution mechanisms must be adopted and effectuated prior to issuance of a Judgment by a court. It also emphasized that the courts had no role to play in policy formulation, which it added, was an executive and legislative function. In arriving at this finding, it was guided by the authority in *Marbury v Madison* – 5 US 137; *Peter Njoroge Mwangi & 2 others v Attorney General & another*, Nairobi Petition No 73 of 2010; *Speaker of the Senate & another v Hon Attorney General & 3 others* (2013) eKLR; *Ndora Stephen v Minister for Education & 2 others*, Nairobi High Court Petition No 464 of 2012.

36. Consequently, the court opined that a court of law should not act in vain and issue orders and directions that it cannot implement. That further, in making orders and directions in relation to article 43(1) of the *Constitution*, the provisions of article 20(5)(c) of the *Constitution*, which stipulates that the court may 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, must be borne in mind. It concluded that post-Judgment supervision is not a function of the court as implementation and execution of Judgments is governed by specific rules and that resort to those rules must be made.

37. The appellate court also considered the comparative jurisprudence on post-Judgement supervision. It considered South African constitutional court decisions in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paragraphs 19 and 69; *Treatment Action Campaign v Minister for Health* 2002 (4) BCLR 356 (T); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); *Madderklip Baerdery (EDMS) BPK v President Van Die* RSA 2003 (6) BCLR 638 (T) where structural interdicts were upheld as an appropriate relief and courts allowed to retain supervisory jurisdiction in Constitutional cases. In *Sibiya v Director of Public Prosecutions* (Johannesburg High Court), (constitutional court) case CCT 45/04; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC); and *Pretoria City Council v Walker* 1998 (2) SA 36, the general principle that 'a *mandamus* and the exercise of supervisory jurisdiction' may be necessary to ensure an effective remedy for a breach of any Constitutional right, including a socio-economic right was strongly embraced by the courts.

38. The court also considered the Supreme Court of Canada decision in *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003]3 SCR 3, the American decision of *Swann v Charlotte-Mecklenberg Board of Education* 402 US 1 (1971) at 16 and Supreme Court of India decision in *Sheela Barse v Union of India* (1988) AIR 2211 (SC) at 221, where the courts in Canada, USA and India have required submission of specific reports on compliance to the court or to a court-appointed assistant after delivery of Judgments. And *Vineet Narain*

*v Union of India*, AIR 1996 SC 3386 and *Bandhua Mukti Morcha v Union of India*, AIR 1984 SC 802 where the concept of continuing *mandamus* enables a trial court to monitor implementation of its orders.

39. Noting the comparative jurisprudence and trends in issuing supervisory orders, the appellate court however faulted the trial court's directives. It noted that the Kenya *Constitution* does not have provisions similar to articles 32 and 226 of the *Indian Constitution* providing for the principle of continuing *mandamus*, or section 24(1) of the *Canadian Charter of Rights and Freedoms* and sections 38 and 172(I)(b) of the *Constitution of the Republic of South Africa Act 108 of 1996*, whereby both contemplate wide remedial powers for courts ; that there was no prayer by the appellants for an order of *mandamus* or continuing *mandamus*; that article 23(3) of the Kenya *Constitution* that permits the High Court to grant an appropriate relief should not be construed to be provision that permits the High Court to borrow legislations from other countries and through judicial interpretation embed them into the laws of Kenya; that under the political question doctrine, a court has no jurisdiction to make orders relating to policy formulation or give guidelines on who should participate in the formulation of government policy; that as regards the specific facts of this case, the orders and directions given by the trial court are policy related and did not take into account the issue of flight path to Wilson Airport and threat to the security of aerodromes; that if properly crafted to avoid vagueness; a supervisory order can be made pursuant to the provisions of article 23(3) of the *2010 Kenya Constitution*.

40. On the issue of reliance on the *Universal Declaration of Human Rights*, the Court of Appeal without faulting the High Court for citing the UN Guidelines, noted that it was imperative to bear in mind the hierarchy of laws in Kenya view. It opined that before a court can invoke article 2(5) of the *Constitution*, it must be satisfied that the rule of international law being invoked is a general rule of international law and not simply a rule of international law; that it must be borne in mind that the United Nations and any other international or multilateral organization is neither a supplementary nor complementary legislature for Kenya; that neither the UN nor any international organization legislates for Kenya; and that it is impermissible to use article 2(5) of the *Constitution* as a basis to justify any or all rules and principles of international law as part of the laws of Kenya.

41. On the right to private property and socio-economic rights the appellate court held that the trial court had correctly decided on the issue of adverse possession and determined that the appellants did not have any legitimate claim to the suit property. However, the court noted that the High Court had failed to consider the tension between socio-economic rights and the right to private property in the Kenyan context. It faulted the trial court for adopting a mechanistic approach to precedent in relying on the Indian case of *Olga Telis & others v Bombay Municipal Corporation* (1985) Supp SCR 51 and the South African Constitutional Court case of *Irene Grootboom & others v The Government of the Republic of South Africa*

*& others* (2001) SA 46. It noted that these cases involved interpretation of Constitutional provisions of the respective countries and that similar provisions are not found in the Kenyan Constitution.

42. In addressing the tension between the realization of socio-economic rights and the right to private property, the appellate court surveyed the emerging jurisprudence as illuminated in various judicial decisions in Kenya; to wit, *Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 2 others* Petition No 66 of 2011; *Satrose Ayuma & 11 others v The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme & 2 others*, Nairobi HC Petition No 65 of 2010, *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security* Constitutional Petition No 2 of 2011; and *Veronica Njeri Waweru & 4 others v City Council of Nairobi & others*, Nairobi Petition No 58 of 2011.

43. The court opined that the enforcement and implementation of socio-economic rights cannot confer propriety rights in the land of another and that the realization of socio-economic rights does not override the provisions of the *Limitation of Actions Act* (cap 22 of the Laws of Kenya). It noted further that in the interpretation of the Constitutional articles on socio-economic right, more so in the absence of a legal framework, it is not the role or function of the courts to re-engineer and redistribute private property rights. Such a role, according to the appellate court, lay squarely in in the province of the executive and legislature.

44. On the issue as to whether the eviction in question was carried out by the 1st respondent, the learned judges of appeal concurred with the trial court in concluding that the uncontroverted presence of security agents meant that the State was responsible for the eviction and demolition. With regard to the 1st respondent, the court found that the trial court erred in holding the latter responsible. The court took the position that the appellants had the burden to prove that the 1st respondent, evicted and demolished their houses and structures. According to the court, the absence of a link between the security agents and the 1st respondent, cast doubt as to the latter's responsibility.

45 After conducting the analysis, the court made the following summarized conclusions and determinations:

(i) That the trial court made correct findings as regards the 3rd respondent but erred in law in making final orders that were applicable and enforceable against the 3rd respondent;

(ii) that the trial court erred in abdicating its judicial function and bestowing the same to persons and entities not vested with the constitutional mandate to identify and determine appropriate relief and resolution to the appellants' grievances;

(iii) that subject to limited exceptions, delivery of Judgment renders a trial court functus officio;

(iv) that the trial court erred in law in reserving for itself outstanding issues to be considered after Judgment;

(v) that the court further erred in allowing affidavits and or pleadings to be filed after delivery of Judgment;

(vi) that whereas a court has jurisdictional competence to issue interim orders, the trial court failed to appreciate that the concept of partial or interim Judgment is not part of the Kenyan legal system;

(vii) that whereas a trial court has the jurisdictional competence to make interim orders, the trial court erred in delivering a Judgment that was not a final Judgment determining the rights and liability of parties;

(viii) that under the political question doctrine and noting the provisions of article 20(2) and 20(5)(c) of the *Constitution*, a trial court should rarely interfere with a decision by a state organ concerning the allocation of available resources for progressive realization of socio-economic rights solely on the basis that it would have reached a different conclusion;

(ix) that the trial court erred in law in issuing orders and directions on unpleaded issues;

(x) that the trial court erred in law and fact when it failed to properly evaluate the pleadings and evidence on record;

(xi) and that the trial court erred in law in issuing orders and directions compelling the 1st respondent to formulate policy and programs for provision of shelter and access to housing for residents of informal and slum settlements while ignoring the appellants express statutory mandate.

46. Aggrieved by the judgment, the appellants on August 11, 2016 sought the certification of the intended appeal as one raising questions of general public importance under article 163(4)(b) of the *Constitution*. In a ruling delivered on February 2, 2018, the Court of Appeal certified the appeal.

**(iii) At the Supreme ourt**

47. The appellants moved this court, citing the following eight (8) broad grounds of appeal. That the learned Judges erred in law and in fact;

(i) In the interpretation and application of the respondents' obligation to observe, respect, protect, promote and the appellants' right to housing, right to dignity, rights of children, right to life as well as equality and freedom from discrimination;

(ii) In unjustifiably interfering with the High Court's discretionary grant of structural interdict as the most appropriate relief under article 23;

(iii) In failing to properly interpret and apply international law on the right to housing/ prohibition of illegal and forceful evictions under article 43;

(iv) In disregarding the court's obligation under article 20(3)(a) and (b) to develop the law to the extent that it did not give protection from forced evictions and adopt the interpretation that most favors the right to housing;

(v) In invoking the foreign 'political question doctrine' to exclude the High Court's jurisdiction under article 10, 19(1), 20(1) and (5), 21(2) and 165 to review state policy on socio- economic rights;

(vi) In failing to conduct the sequential article 24 analysis necessary to justify public interest or national security as a limitation of the petitioners' right to adequate housing through forced eviction and demolitions;

(vii) In failing to interpret the concept of progressive realization of the right to housing under articles 21 and 43; and

(viii) In reversing a High Court Judgment from an admitted forceful eviction in its entirety and failing to grant any appropriate relief;

48 The appellants seek the following reliefs;

(i) This appeal be allowed.

(ii) A declaration that the respondents violated the appellants' constitutional rights under articles 26, 27(2),(4) & (6), 28, 29, 39, 40, 43, 47 & 56 as determined by the High Court.

(iii) A declaration that the appellants are entitled to compensation and or alternative land for loss of their property including land and other property destroyed by the 1st respondent (and its agents) when it carried out an illegal eviction contrary to the orders of the court.

(iv) An order quashing the judgment, orders and decree of the Court of Appeal and affirming the judgment, orders and decree of the High Court.

(v) An order remitting this matter to the High Court (Human Rights and Constitutional Division) with the directions that that court monitor the compliance by the respondents with the orders and directions issued by the High Court on April 11, 2013.

(vi) An order awarding costs to the appellants.

(vii) Any other order the court deems fit.

49 On March 7, 2019, The Initiative for Strategic Litigation in Africa (ISLA) filed a motion dated March 5, 2019, seeking leave to be admitted in these proceedings as *amicus curiae* so as to make submissions on the meaning of the right to remedy in the context of human rights' violations; demonstrate how remedies in human rights have evolved and present comparative jurisprudence on the subject. By a ruling of this court dated November 29, 2019, ISLA was admitted as amicus curiae.

**C. Parties Respective Submissions**

**(a) appellants' case**

50. The appellants' written submissions are dated February 28, 2019, and filed on March 1, 2019. The List of Authorities dated May 15, 2020 was filed on even date. In their written and oral submissions, the applicants have outlined five issues for determination namely:

(i) Whether the 1st and 2nd respondents violated the appellants' rights under articles 26, 27, 28, 29, 40, 43, 47 and 56 of the *Constitution*;

(ii) whether the 1st and 2nd respondents failed to meet their obligations towards the appellants under article 21 of the *Constitution*;

(iii) whether the Court of Appeal erred in its analysis of the application of international law under article 2(5) and 2(6) of the *Constitution* in relation to the United Nations Comments and Guidelines;

(iv) whether the Court of Appeal erred in law in applying the 'political question' doctrine; and

(v) whether the Court of Appeal erred in law in its interpretation of appropriate remedies under article 23(3) of the *Constitution*.

51. On the first issue as whether the 1st and 2nd respondents violated the appellants' rights under articles 26, 27, 28, 29, 40, 43, 47 and 56 of the *Constitution*, the appellants submit that the appellate court erred in law in failing to analyse whether the state actions of forcefully evicting them was in violation of rights and fundamental freedoms under the Constitution.

It is the appellants' case that the High Court was correct in finding that all rights are interdependent and the violation of the social economic rights affected other rights in the Bill of Rights.

52. They submit that their right to fair administrative action under article 47 of the Constitution was violated. It is the appellants further case that the appellate court failed to analyse whether the seven (7) days eviction notice was adequate and reasonable. They submit that the 1st respondent did not tender any evidence of previous Notices, hence the Notice was unreasonable and in violation of article 47 of the *Constitution*. They rely on the decisions in *Ibrahim Sangor Osman v Minister for Provincial Administration and Internal Security & 3 others* [2011] eKLR; *Susan Waithera Kariuki & 4 others v City Council of Nairobi & 2 others* Petition No 58 of 2011, [2012] eKLR and *June Seventeenth Enterprises Ltd v Kenya Airport Authority & 5 others* [2014] eKLR.

53 They urge further that under article 2(6) of the *Constitution*, Kenya being a state party to the *International Covenant on Economic, Social and Cultural Rights, (ICESCR)*, the state obligations under the ICESCR, United Nations Committee, General Comment 7 on forced evictions are binding. That the respondents violated paragraph 15(b) of General Comment 7, which stipulates that a person is entitled to adequate and reasonable Notice before they are evicted.

54. In addition, they urge that Parliament has since legislated on what constitutes Reasonable Notice of Eviction. They cite section 152B and 152C of the *Land Act* requiring at least three (3) months notice before eviction. They urge that while the foregoing provisions were enacted in 2016, the right to adequate notice was constitutionally available to them at the time of eviction as the legislation did not confer a right, but only provided a statutory clarification as to what constitutes an adequate eviction notice.

55. They fault the appellate court's reliance on the decisions of *Veronica Njeri Waweru & 4 others v The City Council of Nairobi & others [supra]* and *Kepha Omondi Onjuro & Others v the AG & 5 others* Petition 239 of 2014, [2015] eKLR. They distinguish these decisions and urge that the Judges failed to consider that sufficient notice had been issued to the project affected persons in the two matters.

56. It is also the appellants' submission that their right to dignity was violated by the 1st respondents and other State agents. Towards this end, they cite the provisions of article 10(2)(b) and article 19(2) of the *Constitution* which recognize the right to human dignity, article 20(4) which binds courts when interpreting the Bill of Rights to promote human dignity and article 28 of the *Constitution*.

57. The appellants rely on this court's decision in *Francis Karioko Muruatetu Another v Republic* Petition No 15 & 16 of 2015, [2017] eKLR; The Preamble of the *United Nations*

*Declaration on Human Rights* and High Court decision of *JWI v Standard Group Limited & another* Petition Nos 466 and 416 of 20122, [2013] eKLR; *Satrose Ayuma* Case and Court of Appeal decision of *Moi Educational Centre Company Ltd v William Musembi & 16 others* Civil Appeal No 363 of 2014,[2017]eKLR in arguing that their right to dignity was violated.

58. The appellants submit that the appellate court erred in its interpretation of the right to property by limiting the said right to land. They urge that the term "property" is accorded a broad meaning under article 260 of the Constitution. They add that the demolition of their houses and destruction of household goods was a violation of their right to property under article 40 of the Constitution.

59. The appellants submit that the forced eviction and demolition rendered them homeless and destroyed schools thus violating their children's rights under article 53(2) of the *Constitution*. They also submit that by virtue of their low income and social status, they are a marginalized group, hence entitled to protection under articles 21(3) and 56 of the *Constitution*. They urge further that General Comment 7 at paragraph 10 recognizes that minorities and other vulnerable groups suffer disproportionately from the practice of forced evictions hence the need for protection.

60. It is the appellants' submission that the respondents' action of selectively demolishing their houses while sparing highrise apartments which were also on the flight path was discriminatory and a violation of their rights under article 27 (4) and article 10 of the *Constitution*.

61. It is the appellants' case that article 21(1) of the *Constitution* imposes both positive and negative obligations upon the State with regard to protection of rights and freedoms in the Bill of Rights. They urge that in this case, the negative obligation is to respect, which requires the state to refrain from interfering directly or indirectly with the right to housing while the positive obligation includes; to protect, which requires the State to prevent third parties from interfering with the right to housing. This entails the adoption of legislative measures to deter potential violations and to provide for appropriate remedies in the event that such violations occur. Then there is the duty to promote, which requires the State to put in place, measures aimed at the promotion of tolerance, awareness raising, and the building of infrastructure to enhance enjoyment of rights; and finally, the duty to fulfil, which requires the state to adopt appropriate legislative, administrative, judicial, promotional and other measures to realize the right.

62. To buttress this submission, the appellants rely on the South African case of *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347(CC); 2011(7) BCLR 651 in which, while interpreting the provisions of section 7(2) of the South African

Constitution, which is similar to article 21(1) of our *Constitution*, (Ncogbo CJ) upheld the negative and positive state obligation to give effect to fundamental rights contained in the Bill of Rights.

63. In addition, the appellants submit that it is incumbent upon the National Government to make policies and take other measures to ensure the protection of human rights under article 21(2) of the *Constitution*. They submit further that, in accordance with the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the *African Charter on Human and Peoples' Rights*, the State has an obligation to put in place, measures to ensure the realization of social, economic and cultural rights.

64. It is therefore the appellants' submission that the Court of Appeal specifically failed to find that the Attorney General being the Government representative, and the one who had initiated the forceful eviction, had not protected, promoted or fulfilled the rights to housing and dignity as enshrined in the Constitution.

65. It is the appellants' main argument that the 1st respondent had a negative obligation to refrain from interfering directly or indirectly with the right to adequate housing by avoiding or refraining from instigating the forced evictions and demolitions. The appellants also submit that although the 1st respondent is a creature of Statute, it remains a State Agency and a public body. As such, it cannot escape the duties imposed upon the State with regard to the right to housing. They rely on section 3(1) of the *Interpretation and General Provisions Act* cap 2, and section 4 of the *Public Service (Values and Principles) Act No 1A of 2015* in furtherance of their argument.

66. Relying on CESCR General Comment No 4, on the Right to Adequate Housing, they urge further that the Court of Appeal failed to address itself to the normative content of the State's obligation attached to the said right in view of an admitted forceful eviction and erred further by not interrogating the State's obligations to the appellants in the circumstances. It is submitted that a critical analysis of the positive obligation imposed upon the State with regard to the right to housing, would have enabled the court to appreciate the fact that the appellants were entitled to certain remedies.

67. On the progressive realization of article 43 rights, the appellants submit that the term "progressive" does not afford the State a carte-blanche to postpone or suspend its obligations. On the contrary, it requires the State to take immediate steps to the maximum of its available resources to realize those rights. They therefore urge that, the State cannot sanction an eviction in the absence of a concomitant duty to ensure alternative housing for the evictees.

68. They further submit that the State must not only begin to take steps towards the realization of the rights under article 43 of the *Constitution*, it must be seen to be taking such through

clear policies and demonstrable measures. In support of this argument, the appellants cite *Okwanda v Minister of Health and Medical Services*, Petition No 94 of 2012 (paragraphs 15-16); *MMM v Permanent Secretary, Ministry of Education & 2 others* [2013] eKLR; and *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles*).

69. The appellants submit that the appellate court completely disregarded article 20(5) of the *Constitution* in applying article 43 rights., In this regard, they urge that it was the responsibility of the State to not only demonstrate that resources were not available, but also to demonstrate priority in allocating, to the widest possible enjoyment of the right to housing, having regard to prevailing circumstances including the vulnerability of the appellants. They submit that the State had an obligation to protect the appellants' existing homes, rudimentary as they were, while doing whatever it could to the extent of its resources, to ensure their progressive access to adequate housing.

70. On the third issue as to whether the Court of Appeal erred in law in its analysis of the applicability of international law, it is the appellants' submission that article 2(5) incorporates general rules of international law while article 2(6) incorporates international treaties ratified by Kenya into Kenyan laws. They urge that the court of Appeal misinterpreted the application of international law by the High Court, more so its reliance on UN General Comment No 7.

71. They add that General Comment No 7 derives its authority from article 21 of the ICESCRand although not binding, is an authoritative interpretation of the State's treaty obligations. That the Comment was rendered by the treaty body and is intended to assist states parties in interpreting and complying with their obligations under the treaty. They therefore urge that the UN General Comments and Guidelines are part and parcel of the ICESCR and are an authoritative interpretative guide on the meaning and the content of the treaty. That since Kenya is a State Party to the ICESCR, the trial court was justified in relying on the UN General Comments.

72. To further justify reliance on General comments No 7, the appellants submit that our courts have time and again relied on UN general comments as persuasive value in interpreting different provisions of the Constitution as was in the cases of; *Attorney General & others v Kituo Cha Sheria & 7 Others*, Civil Appeal No 108 0f 2014 [2017] eKLR, where the Court of Appeal relied on *International Covenant on Civil and Political Rights*, UN Human Rights Committee , General Comment No. 27; *PAO & 2 others v the Attorney General* [2012] eKLR, the High Court applied General Comment Nos 14 and 17 in determining the right to health; *Satrose Ayuma case (supra)* and *Susan Waithera* case (supra).

73. Citing this court's decisions *In The Matter of the Principle of Gender Representation in the National Assembly and Senate,* Advisory Opinion No 2 of 2012, [2012] eKLR ; *In the Matter of the Kenya Commission on Human Rights*, Advisory Opinion No 1 of 2012, [2012] eKLR; and *Communication Commission of Kenya & 5 others,* Petition No 14 of 2014, [2014] eKLR; the appellants urge that in interpreting article 2(5), the Constitution must be read holistically and in a manner that provides the most robust and expansive protection of fundamental rights and freedoms. The appellants submit that the Court of Appeal was required to adopt a more expansive interpretation of the scope of article 2(5) to include sources of law other than customary international law. It is their view that the Judges should have considered the UN General Comment No 7 to arrive at an interpretation that most favours the enforcement of rights. They submit that the appellate court ignored widely adopted international human rights law standards in its interpretation.

74. On the fourth issue as to whether the Court of Appeal erred in law in the interpretation and application of the political doctrine question, more so its characterization of the High Court orders as delving into policy formulation; the appellants submit that the High Court's directives were an attempt to obtain additional information in order to grant the appropriate relief. It is the appellants' contention that in relying on *Marbury v Madison* 5 US 137 and applying the political question doctrine, the Court of Appeal ignored several provisions of the *Constitution* and Supreme Court jurisprudence that establish greater powers for Kenyan courts in upholding, interpreting an applying the *Constitution*.

75. To this end, the appellants submit that in adopting the narrow reasoning, the appellate court had rendered the High Court powerless in its endeavor to determine if, national values and principles articulated in article 10(1)(b) of the *Constitution* were considered by the Executive in public policy formulation and implementation as provided for in article 19(1) of the Constitution. It is their argument that the reliance on the "political question doctrine" by the Court of Appeal had flown in the face of article 20(1) the Constitution, which clearly envisages that courts and tribunals have power to review policy decisions, concerning social-economic rights.

76. They further urge that the application of the "political question doctrine" disregards this court's holding in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*, Petition No 14, 14A, 14B and 14C, 2014 [2014] eKLR, (Communications Commission of Kenya case), where the court cautions against unthinking deference to common law canons of interpretation, and foreign cases; and the decision in *Judges & Magistrates' Vetting Board v Center for Human Rights Democracy* [2014] eKLR, which held that the principles enshrined in articles 23(3)(d) and 165(3)(d) of the Constitution require Kenyan courts to go beyond the USA Supreme Court in the *Marbury v Madison* Decision. It is their further contention that the "political question doctrine" and

the concept of separation of powers cannot oust the jurisdiction of courts to interpret the Constitution to determine whether anything done is in contravention thereof.

77. On the fifth issue as to whether the Court of Appeal erred in its interpretation of appropriate remedies under article 23(3) of the Constitution, the appellants submit that article 23(3) provides the High Court with the discretion to issue remedies including structural interdicts, injunctions, continuing mandamus, supervisory orders or any other appropriate relief. They urge further that as was held by this court in the Communications Commission of Kenya case, the word including in article 23(3) means that the reliefs listed in the provision are not exhaustive and therefore the court can issue others as it deems appropriate. In addition, the appellants submit that in a number of decisions, the High Court has interpreted the term 'appropriate remedy' to mean "effective remedy to a constitutional violation". They cite the following decisions in support of their assertion; *Law Society of Kenya v The Attorney General & another* Constitutional Petition No 307 of 2018, [2019] eKLR; *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & another ex-parte Council of County Governors & another*, Misc App 291 & 314 of 2016 [2017] eKLR; and *Republic v Council of Legal Education & another ex-parte Mount Kenya University*, Misc App 16 of 2016.

78. The appellants are categorical that a structural/supervising interdict is a remedy available in Kenya under article 23(3) of the *Constitution* in a similar manner as was fashioned in the South African case of *Fose v Minster of Safety & Security* [1997] ZACC 6;1997(7) BCLR 851;1997 (3) SA 786, and applied in the High Court decision of *Republic v Council of Legal Education & another ex-parte Mount Kenya University* (*supra*) paragraphs 144-145. The same approach, urge the appellants, was followed in *Daniel Ngetich & 2 others v The Attorney General & 3 others* Petition No 329 of 2014; [2016] eKLR (*Daniel Ngetich* case) where the High Court issued structural interdicts as a remedy to protect the right to highest attainable standards of health, regarding inmates with infectious tuberculosis.

79. The appellants fault the Court of Appeal for disregarding the principle of stare decisis by not following binding precedents set by this court on the use of structural interdicts or other appropriate reliefs in *Communications Commission of Kenya* [*supra*], and *Francis Karioko Muruatetu another v Republic* [*supra*], wherein the Supreme Court granted unspecified reliefs under article 23.

80. In conclusion, the appellants make the case that, where a court makes a structural remedial order, it cannot be said to have become *functus officio*, as it would not have completed its judicial task. They also submit that the appellate court erred in failing to apply article 159 of the *Constitution*, which requires courts to promote the use of alternative forms of dispute resolution. It is the appellant's view that it was perfectly in order for the High Court to

issue an order allowing Pamoja Trust and other relevant stakeholders to participate in finding solutions to forced evictions and violations of the right to adequate housing.

**(b) 1st Respondent's Case**

81. In response to the appeal, the 1st respondent filed Grounds of Opposition dated February 20, 2019, written submissions dated March 8, 2019, and a List of Authorities dated May 19, 2019.

82. It relies on twelve (12) grounds of opposition, summarized as follows, that:

(i) The appellants admit the subject matter is registered in favour of the 1st respondent, that the 1st respondent did not grant its consent for the appellants to occupy the suit land hence the 1st respondent cannot be said to have violated the appellants' rights to property under article 40;

(ii) the realization and enforcement of social economic rights should not be taken as conferring proprietary rights;

(iii) that the appellants were granted adequate notices;

(iv) that the court order issued on September 22, 2011, was never known or served upon the 1st respondent;

(v) by consent, the Court of Appeal set aside a ruling by the High Court that the 1st respondent managing director was in contempt hence the demolitions were not carried out in contravention of any court order;

(vi) the 1st respondent has no power to alienate or grant land to the appellants hence the High Court orders directed to the 1st respondent to find a solution to relocate the appellants was untenable;

(vii) that the appellants illegally occupied and developed the land on a flight path hence the right of the appellants' could be limited under article 24 of the Constitution;

(viii) it was prejudicial for the High Court to issue partial or interim Judgment; that the trial court abdicated its judicial function to third parties;

(ix) there is no evidence the 1st respondent was responsible or carried out the demolition;

(x) the realization of social economic rights is progressive and must be balanced on available resources;

(xi) the appellants have introduced new facts not pleaded before the trial court; and finally,

(xii) the High Court granted orders that had not been prayed for by the appellants.

83. Subsequently in written and oral submissions, the 1st respondent addresses the court on five issues. On whether the learned judges were justified in interfering with the trial court's discretionary grant of structural interdicts under article 23 of the *Constitution*, the 1st respondent, submits that structural interdicts or supervisory Orders are not traditional remedies under common law jurisdiction, that the same are relatively novel concepts developed by innovative judicial officers especially applied in respect to the *Constitution of South Africa*}} and *Canada*.

84. The 1st respondent urges the need for caution in resorting to structural interdicts by considering the context in which such remedies emerged in South Africa. It is the 1st respondents submission that this jurisprudence gained traction in the post-apartheid political and social setup, as illustrated the South African constitutional court reasoning in; *Grootboom v Oostenberg Municipality* 2000(3) BUR 277(C) where the court upheld the High Court grant of structural interdicts as a remedy in the protection of the right to shelter; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) where the Court found that the High Court had jurisdiction to issue structural interdicts against the government but cautioned that the orders should only be made where necessary and the orders should not be construed as preventing the government from adopting its own policy if it was appropriate or if better methods were available; *Fose v Minster of Safety and Security* 1997 (3) SA 786 (CC) where it was held that the court in interpreting and enforcing the bill of rights has jurisdiction to be innovative and to issue an appropriate relief including structural interdict. However, the constitutional court stated that such a remedy must be effective. In *Moderkplip Boerdery (Pty) Ltd v Modder East Squatters* 2003(6) BCLR 638 (T), the constitutional court set aside the High Court orders stating the case was not suitable for structural interdicts.

85. The 1st respondent further argues that the use of structural interdicts is even more restricted, in jurisdictions such as Canada whose Constitutional architecture is similar to South Africa's. For example, it makes reference to the decisions in *Doucet-Boudreu v Nova Scotia (Minster of Education)* [2003] 3 SCR 3 by the High Court, Court of Appeal, and Supreme Court. The trial judge had issued a structural interdict having found that the government had violated the right to provision of minority language facilities. However, on appeal, the Court of Appeal held that the trial judge could not retain jurisdiction by way of structural interdicts, having become *functus officio*. On a further appeal, the Supreme Court of Canada upheld the High Court's jurisdiction to issue structural interdicts, but only in appropriate cases.

86. The 1st respondent submits that structural interdicts are only suitable, where the executive branch of government is shown to be intransigent or incompetent; where there is evidence that declaratory orders may not be of assistance on account of past conduct of the government; where all attempts and efforts at persuasion and assistance to the state have been made and failed; and where the order is not ambiguous, but clear and specific as to what is required of both parties. In this regard, argues the 1st respondent, a constitutional relief must be effective and appropriate as demonstrated by a reasonable prospect of it being successfully implemented and practically complied with as was held in the South African case of *Johannesburg Metropolitan Municipality v Blue Moollight Properties 39 (Pty) Ltd* [2012 2 BCLR 150 (CC). It is therefore the 1st respondent's case that the High Court order in the instant matter was not only vague, it also failed to articulate the normative parameters and guidelines for participating parties and the specific persons to which the desired resolution of the dispute applies. It submits that it has neither the Constitutional mandate, nor the resources to allocate alternative land to the appellants.

87. On the issue as to whether the 1st and 2nd respondents failed to meet their obligations towards the appellants under article 21 of the *Constitution*, the 1st respondent submits that it was not responsible for any forceful eviction from or demolitions of the appellants' premises. In this regard, argues the 1st respondent, the Court of Appeal was in order to vindicate it regarding the demolitions.

88. The 1st respondent submits that it is not a state organ within the meaning of article 260 of the *Constitution*, which defines a state organ as "a commission, office, agency or other body established under the Constitution". As such, it does not have any obligation to provide housing to the appellants. In arguing thus, the 1st respondent distinguishes article 260 of our *Constitution* from article 239 of the *South African Constitution*. The latter, unlike ours, defines a state organ as including all public bodies with an attendant obligation to provide healthcare, adequate food, clean and safe water, housing, and any other social-economic rights.

89. On whether the Court of Appeal erred in law in its analysis of the applicability of international law, the 1st respondent concurs with the appellate court's holding and submits that while applying the general rules of international law, the courts ought to have regard to the hierarchy of laws in Kenya and the supremacy of the *Constitution* as set out in article 2(4) of the *Constitution*.

90. The 1st respondent urges the court to uphold the supremacy of the Constitution in the application of general rules of international law. It submits that the jurisdictions of America, Canada, Nigeria, South Africa and India more often than not, tend to gravitate towards upholding the supremacy of their domestic Constitutions. It cites the American case of

*Reid v. Covert* 354, US 1(1997); the Canadian case of *R v Hape* [2007]2 SCR 292; the Nigerian case of *Ibidapo v Lufthansa Airlines* 4 NWLR (Pt498) 124 and the India case of *National Legal Services Authority v Union of India & others* (AIR 201 SC 1863) in support of this submission. The 1st respondent submits that in a monist system such as Kenya's, the courts have a responsibility to resolve the tension between international human rights treaty obligations and the Constitution in favour of the latter.

91. On whether the Court of Appeal failed to interpret the progressive realization of the right to housing under article 21 and 23, the 1st respondent submits that this court had the opportunity to consider the concept of progressive realization of rights *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*Advisory Opinions Application 2 of 2012, [2012] eKLR and determined that progressive realization simply refers to the gradual or phased-out attainment of a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The court went further to observe that the expression "progressive realization", as apprehended in the context of the human rights jurisprudence, signifies that there is no mandatory obligation resting upon the State to take particular measures, at a particular time, for the realization of the gender-equity principle, save where a time-frame is prescribed.

That any obligation assigned in mandatory terms, but involving protracted measures, legislative actions, policy-making or the conception of plans for the attainment of a particular goal, is not necessarily inconsistent with the progressive realization of a goal. In view of this finding, the 1st respondent submits that it was erroneous for the trial court to have determined that there was a violation of the appellants' economic and social rights under article 43 of the *Constitution*.

92. On the issue as to whether the appellate court erred in its interpretation of articles 24 of the *Constitution* on limitations of rights, the 1st respondent concurs with the appellate court to the effect that public interest, public policy, and national security, may be taken into account to limit individual rights under the Bill of Rights. It relies on the South African case of *S v Manamela & another (Director General of Justice Intervening)* CCT 25/99 to urge that key factors have to be considered in an overall assessment as to whether or not a limitation is reasonable and justifiable in an open and democratic society. The 1st respondent therefore submits that, each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom.

**(c) 2nd and 3rd Respondents' case**

93. The 2nd and 3rd respondents' written submissions and List of Authorities are both dated May 15, 2020 and filed on even date. They submit on four issues. On the issue as to whether

the Court of Appeal erred in failing to find that the respondents violated the appellants' rights under articles 26, 27, 28, 29, 40, 43, 47 and 56 of the *Constitution*, the respondents submit that the 3rd respondent acted in accordance with article 40 as read with article 65 of the *Constitution* and article 17 of the *United Nations Declaration of Human Rights* in protecting the 1st respondent's right to property.

94. They submit further that, the Constitution guarantees rights and freedoms to be enjoyed by all citizens, and that each individual must ensure their enjoyment of rights, does not infringe upon the rights of others. To this end, they submit that it is ironical for the appellants, to claim a right to housing on one hand, and yet trample upon the 1st respondent's right to the use and enjoyment of the suit land on the other hand. It is their argument that to allow the appellants claim, would encourage people to trespass on private or public land with the intention of acquiring "housing rights" over the same.

95. On whether the Court of Appeal failed to properly interpret and apply the concept of progressive realization of the right to housing under article 21 of the *Constitution*, they rely on this court's opinion in The Matter of the Principle of Gender Representation in the National Assembly and Senate [supra] to submit that in the context of human rights jurisprudence, there is no mandatory obligation resting upon the state to take particular measures at a particular time.

96. They submit further that pursuant to articles 21 and 25 of the Constitution, social economic rights are not absolute but are limited and subject to the rights and freedoms of others. They rely on the Court of Appeal decision in *Abraham Kaisha Kanzika alias Moses Savala Keya t/a Kapco Machinery Services and Milano Investments Limited v Governor Central Bank of Kenya & 2 others* Misc Civil Applic 1759 of 2004, [2006] eKLR to buttress this point.

97. The 2nd and 3rd respondents submit that whereas social economic rights are recognizable and justiciable, the enforcement and implementation of the same cannot confer property rights in land. They rely on the persuasive authority as decided in *Moi Education Centre Company Limited v William Musembi & 16 others* [2017] eKLR and urge that prescriptive rights in land cannot be acquired in the name of enforcement of social economic rights.

98. In addition, they urge that the rights claimed by the appellants, are subject to the provisions of article 40 of the *Constitution*, as read with sections 24 and 26 of the *Land Registration Act*, and cannot therefore accrue from an illegal occupation. They submit that there has been no documentary evidence adduced by the appellants, to prove their direct or contingent entitlement to the suit land. They cite the High Court decision of *John Mukora v. Minister of Lands & 6 others*, Petition No 82 of 2010, [2013] eKLR, to urge that the right to property under article 40 can only be enjoyed by registered proprietors of the land in question.

99. On the issue as to whether a self-help group can hold property in its own capacity, the 2nd and 3rd respondents submit that since Mitu-bell Welfare Society was an un-incorporated entity, it had no legal capacity to own land. They rely on the decision in *Kipsiwo Community Self Help Group v Attorney General* Environment and Land Petition No 9 of 2013, [2013] eKLR to support their argument.

100. On whether the appellate court erred in its interpretation of article 24 of the *Constitution* on limitations of rights, the 2nd and 3rd respondents submit that the appellate court was right in upholding public interest and national security as a reasonable ground to limit the appellants' right to housing.

101. On whether the learned judges of appeal were justified in interfering with the High Court's discretionary grant of structural interdicts under article 23, the 2nd and 3rd respondents submit that in the interpretation and application of the Bill of Rights under the *Constitution*, a court has the jurisdiction to be innovative and to issue appropriate reliefs including supervisory orders. They however contend that in the issuance of the supervisory orders, case law has demonstrated that certain principles must be met. They submit further that the South African constitutional court decision in *Fose v Minister of Safety and Security,* 1997 (3) SA 786 (CC) establishes the principle that such remedies must be effective. To this end, the respondents insist that the supervisory order issued by the High Court was neither effective nor appropriate as it could not have benefitted the appellants in any way.

**(d) *Amicus Curiae* Brief**

102. The *amicus* addresses four issues, namely:

(i) the meaning of the right to a remedy in the context of human rights violations;

(ii) the evolution of remedies in human rights litigation under international law and regional human rights systems;

(iii) comparative jurisprudence on issuance of structural interdict as effective and sufficient remedies; and

(iv) applicable Kenyan jurisprudence on the execution of the courts' constitutional mandate to provide appropriate relief under article 23(3) of the *Constitution*.

103. As an introduction to their submissions, they urge that superior courts have an inherent jurisdiction to issue remedies in rights-based cases and in the discharge of this power, courts must ensure that their orders are just and equitable. In issuing such orders, courts must always be alive to the doctrine of separation of powers. They urge further, that states have an

obligation to ensure that human rights violations do not go unpunished and that the victims can seek effective remedies from courts of law.

104. On the meaning of the right to remedy, the *amicus* submits that traditionally, the right to remedy arises from the State's obligation for all wrongs committed in its territory. In such a situation, the consequential remedy was addressed to the victim's state as opposed to the individual. However, with the growth and development of international human rights law, the remedies are now addressed to individuals for violations of their rights.

105. As to the evolution of the right to remedy under international law, the *Amicus* embraces the principle enunciated in the *Charzow Factory* case (1928) PCIJ (ser A) No. 17 page 47, by the Permanent Court of International Justice, wherein, it was stated that, repatriation must remove the consequences of the illegal act, and revert to the situation that would have existed if the act was not committed. It is the opinion of the *amicus* that the foregoing case signals that restitution and compensation, are effective remedies that courts of law should resort to in cases of human rights violations. Under the international sphere, the amicus submits that article 2(3) of the *ICCPR* provides for an effective remedy for violation of the rights and freedoms provided for in the Convention.

106. Turning to the African context, the amicus notes that the *African Charter on Human and Peoples' Rights*, does not have a provision mandating its supervisory bodies, with an express authority to grant remedies for violation of human rights. The amicus however submits that, article 27 of the Charter's Protocol, creating the African Court On Human and Peoples' Rights, mandates it to grant appropriate remedies for violations of human and peoples' rights.

107. In addition, the amicus submits that the African Commission on Human and Peoples' Rights (African Commission) held in *Sir Dawda Jawara v The Gambia* (2000) AHRLR 107 that states are obligated to provide remedies that must be effective, available and sufficient. The Commission has granted remedies crafted with great deference to states concerned, such as ordering the state to take measures to align them to the African Charter.

108. The *Amicus* submits that in line with rule 112 of its rules, the Commission has in a number of decisions, directed States to report to it on the measures undertaken to implement its recommendations. For example, notes the *Amicus*, in the *African Commission on Human and Peoples' Rights Commissions v Republic of Kenya* Application No 006 of 2012, the African Court ordered Kenya to take all appropriate measures within a reasonable timeframe, to remedy the violations and report to the court on the measures taken within six months. The *Amicus* submits that, the African Court has recognized structural interdicts as appropriate remedies for the enforcement, full realization and implementation of court orders and recommendations.

109. Turning to the Inter American Human Rights system, the amicus submits that the Inter American Court on Human Rights has also embraced what can be considered as structural edicts as forms of remedy to redress human rights violations. It adds that the Inter American Court has consistently ordered parties to report back on measures the states parties have taken to comply with the decisions handed down on human rights violation claims.

110. The *Amicus* submits that the European Human Rights System guarantees the right of victims to an effective remedy under articles 13 and 41 of the *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)*. Under this System, submits the *amicus*, a remedy must be effective in practice and in law as decided by the European Court on Human Rights in the *MSS v Belgium and Greece*, Application No 30696 of 2009, and Judgment of 21 Jan, 2011. The *amicus* urges that in addition to restitution and compensation, structural interdicts are increasingly resorted to by courts in human rights cases. Towards this end, the *amicus* cites the decisions by the South African constitutional court in Government of the *Republic of South Africa & others v Grootboom & others 2* Case [*supra*]; *Minister of Home Affairs v National Institute for Crime Prevention and Re-integration of Offenders* (NICRO) 2004 (5) BCLR 455 (CC); *and others v The Director of Public Prosecutions; Johannesburg High Court & others* 2005 (8) BCLR 812 (CC); and most recent decision in *All-Pay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency & Others* [2014] ZACC 12.

111. The *amicus* also cites decision *T-760* from Colombia where, in 22 accumulated cases, the court ordered remedies for 22 individual cases and compelled the government authorities, to modify regulations that cause structural problems in the system. The *amicus* submits that this Judgment has been fully implemented and is significant in granting orders that are geared towards public policy reforms.

112. As for the Kenyan situation, the *amicus* submits that article 23(3) of the *Constitution* allows for resort to structural interdicts as appropriate forms of relief. In the opinion of the *amicus*, an appropriate relief, is a remedy that is sufficient, effective, and able to address the violation in question. The *amicus* submits that the actual content, shape, and form of these remedies are better left to the courts' discretion. In support of this argument, the *amicus* cites the decisions by the High Court in *Republic v Council of Legal Education* Misc Application No 16 of 2016 [2016] eKLR, and *Daniel Ng'etich* [*supra*] wherein the court issued structural interdicts against the Ministry of Health. The *amicus* also cites this court's decision in the *Communications Commission of Kenya* case [*supra*] to urge that article 23(3) of the *Constitution* does not limit the court to the reliefs listed.

113. the amicus submits that emerging jurisprudence from international and regional human rights bodies demonstrates the expanding resort to structural interdicts as appropriate and

effective reliefs in human rights cases. The amicus further submits that article 23(3) of the *Constitution* gives the courts wide powers to fashion appropriate remedies on a case by case basis. Towards this end, argues the *amicus*, a court of law does not become *functus officio* after it delivers a Judgment in the form of a structural interdict.

**D. Analysis**

114. Although this appeal was certified as one involving a matter or matters of general public importance by the Court of Appeal, the appellate court did not identify the issues or points of law, that the Supreme Court ought to pronounce itself upon. In view of this situation, we have no option but to revisit our holding in *Hermanus Phillipus Steyn v Giovanni Gnnecchi-Ruscone*; Sup Ct Appl No 4 of 2012 [2013] (Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ) wherein, we stated, (para 60):

> " For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest."

Further on, we stated:

> " ... a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the court or courts below."

115. Applying these principles to the appeal before us, we hereby identify the following issues/ questions of law as meriting our attention under article 163(4)(b) of the *Constitution*. These are:

1. What is the place of Structural Interdicts (if any) as forms of relief in human rights litigation under the *Constitution*?

2. What is 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?

3. To what extent are Guidelines by UN bodies relevant in the interpretation and application of Socio-Economic Rights by Kenyan courts under the *Constitution*?

4. Under what circumstances may a Right to Housing accrue (if at all) in accordance with the provisions of article 43(1)(b) of the *Constitution*?

As must be apparent from the ratio in *Hermanus* (*Supra*), all the other issues do not pass the threshold envisaged under article 163(4)(b) of the *Constitution*. Other issues, such as, what constitutes the right to property, would have been more appropriately addressed under article 163(4)(a) of the *Constitution*.

**(i) Structural Interdicts**

116. The point of divergence between the High Court and Court of Appeal, regarding the place of structural interdicts as forms of relief in case of alleged human rights violation by the State, is quite stark. On the one hand, the trial Judge had no or little hesitation in granting interim orders requiring the respondents to furnish the court, with information regarding policies and programmes on provision of shelter and access to housing. However, on its part, the Court of Appeal was of the view that the High Court could not reserve for itself, any outstanding issues, since it had become *functus-officio* after delivery of Judgment.

The High Court had ordered thus:

> "(a) That the respondents do provide, by way of affidavit, within 60 days of today, the current state policies and programmes on provision of shelter and access to housing for the marginalized groups such as residents of informal and slum settlements.
>
> (b) That the respondents do furnish copies of such policies and programmes to the petitioners, other relevant State Agencies, Pamoja Trust (and such other civil society organizations as the petitioners and the respondents may agree upon as having the requisite knowledge and expertise in the area of housing and shelter provision as would assist in arriving at an appropriate resolution to the petitioners' grievances, to analyse and comment on the policies and programmes provided by the respondents."

But in setting aside these orders of the High Court, the Court of Appeal stated:

(a) The trial court erred in abdicating its judicial function and bestowing the same to persons and entities not vested with the Constitutional mandate to identify and determine appropriate relief and resolution to the petitioners' grievances.

(b) Subject to limited exceptions, delivery of judgment renders a trial court functus-officio. The trial court erred in law in reserving for itself outstanding issues to be

considered after Judgment. The court further erred in allowing affidavits and or pleadings to filed after delivery of Judgment.

(c) Whereas a court has jurisdictional competence to issue interim orders, the trial court failed to appreciate that the concept of partial or interim Judgment is not part of the Kenyan legal system. ...the trial court erred in delivering a Judgment that was not a final Judgment that determined the rights and liability of the parties.

117. It is clear from the foregoing, that the two superior courts hold diametrically opposed views regarding structural interdicts or interim orders. In considering this issue, we regard article 23(1) and 23 (3) of the *Constitution* to be the launching pad of any analysis into the place and scope of interim orders in our human rights enforcement architecture. Article 23 (1) of the *Constitution* provides that:

> " The High Court has jurisdiction, in accordance with article 165, to hear and determine applications redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights"
>
> (Emphasis added).

Article 23(3) of the *Constitution* provides that:

> " In any proceedings brought under article 22, a court may grant appropriate relief, including:
>
> (a) a declaration of rights
>
> (b) an injunction
>
> (c) a conservatory order
>
> (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;
>
> (e) an order for compensation
>
> (f) an order of judicial review

118. The Supreme Court had occasion to consider the scope of article 23(3) of the *Constitution*, as read with article 165(3)(d) of the *Constitution* in *Communications Commission of Kenya*

*& 5 others v Royal Media Services Limited & 5 others*; Petition No 14, 14A, 14B and 14C of 2014 (Consolidated); The court stated:

> "... a close examination of these provisions (article 23(3) and 165(3)(d) of the *Constitution*) shows that the Constitution requires the court to go even further than the US Supreme Court did in the *Marbury* , and that article 23(3) grants the High Court powers to grant appropriate relief " including" meaning that this is not an exhaustive list."

The court went further to observe as follows: [Para 412]

> "It is emerging already, in this court's path of jurisprudential development, that we have endeavoured to enhance and, as far as possible, stabilize the objective normative yardsticks that assure certainty and predictability in the application of the Constitution and the law to the merits of particular cases."

The court then issued the following orders *inter-alia*:

(d) The 1st appellant shall, in exercise of its statutory powers, and within 90 days of the date hereof, consider the merits of applications for a BSD lisence by the 1st, 2nd, and 3rd respondents, and of any other local private sector actors in the broadcast industry, whether singularly or jointly.

(e) The 1st appellant (CAK) shall, in exercise of its statutory powers, ensure that the BSD lisence issued to the 5th appellant herein, is duly aligned to Constitutional and statutory imperatives.

(f) The 1st appellant (CAK), in exercise of its statutory authority, shall, in consultation with all the parties to this suit, set timelines for the digital migration, pending the International Analogue Switch-Off Date of June 17, 2015.

(g) Upon the course of action directed in the foregoing orders (d & e) being concluded, the 1st appellant (CAK) shall notify the court through the registry; and the registrar shall schedule this matter for mention on the basis of priority, before a full Bench.

119. There can be no doubt, that in issuing the foregoing orders, this court was well aware of their interim nature, and that in doing so, it was giving effect, to articles 23(3) and 165(3)(d) of the *Constitution* pursuant to section 3 of the *Supreme Court Act*. However, the Court of Appeal merely stated, without more, that it was cognizant of our orders in the *Communication Commission* case [*supra*]. The appellate court also took note of two High Court decisions, to wit, *Satrose Ayuma & 11 others v The Registered Trustees of the Kenya Railways Staff Retirment Pension Scheme & 2 others* Nairobi HC Petition No 65 of 2010; (Lenaola, J, as

he then was); and *Kepha Omondi Onjuro & others v Attorney General & 5 others*; Nairobi HCC Petition No 239 of 2014; (Odunga J) wherein orders similar to the ones issued by the trial court, in the instant case had been granted.

In *Muruatetu* (*supra*), this court made the following orders, *inter alia*;

(b) This matter is hereby remitted to the High Court for re-hearing on sentence only, on a priority basis, and in conformity with this judgment

(c) The Attorney General, the Director of Public Prosecutions and other relevant agencies, shall prepare a detailed professional review in the context of this judgment and order made with a view to setting up a framework to deal with sentence-re-hearing of cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this court on the same" (see para 112).

120 By not clearly distinguishing our decisions in the Communication Commission and *Muruatetu* cases, and by finally faulting the High Court's approach in the three cases, we can only conclude that, the Court of Appeal, simply disregarded our signal, concerning interim reliefs that a court may issue to redress the violation of a fundamental right. Instead, the appellate court was categorical that a court of law becomes *functus-officio* once it has delivered Judgment. The court placed critical emphasis on *order 21* of the *Civil Procedure Act*, which can be regarded as the embodiment of the functus- officio doctrine. (see paras 68-72 of the court's Judgment). The court appeared to have shut the door, to the use of interim reliefs or structural interdicts, in human rights and other Constitutional litigation when it declared that:

> " ...the concept of partial Judgment or interim Judgment after hearing of the parties is unknown to the Kenyan law."

121. We are however, in agreement with the submissions of the appellant and *amicus* curiae, to the effect that article 23(3) of the *Constitution* empowers 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. As this court has already made an authoritative pronouncement on this matter, we shall say no more. While we acknowledge the fact that the functus-officio doctrine retains its validity, even vitality, in the majority of cases, both criminal and civil, it is our view that in certain situations, this doctrine ought to give way, albeit on a case by case basis. To subject article 23 of the *Constitution* to the limitations of *order 21* of the Civil Procedure Rules, would stifle the development of court-sanctioned enforcement of human rights as envisaged in the Bill of Rights. Where a court of law issues an order, whose objective is to

enforce a right, or to redress the violation of such a right, it cannot be said to have abdicated its judicial function as long as the said orders are carefully and judicially crafted.

122. Having stated thus, we hasten to add that, interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have 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, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no constitutional or statutory mandate to enforce them. Where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions.

**(ii) Applicability of international law under Articles 2(5) and 2(6) of the Constitution**

123. Article 2 (5) of the *Constitution* provides that?

> " The general rules of international law shall form part of the law of Kenya" While article 2(6) of the *Constitution* provides that?
>
> "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"

124. These provisions have given rise to different and often conflicting judicial interpretations regarding their import and meaning. One school of thought holds the view that by this declarations, article 2(6) of the *Constitution* has transformed Kenya from a dualist to a monist nation as far as its approach towards international treaties, conventions, and protocols, is concerned. Thus, whereas in the past Kenya had to "incorporate" an international treaty to which it was a State Party into its domestic law, before the former could take effect, article 2(6) now makes such a treaty directly applicable in the country's legal system without more. On the basis of this presumption, a number of courts have declared certain treaties and conventions as "binding" upon all our institutions of governance. Apparently, this conclusion derives from the courts' interpretation of the expression, "shall form part of the law of Kenya" to mean shall be directly applicable in Kenya.

125. The other school of thought in our courts, has adopted a more restrictive view of article 2(5) and (6) of the *Constitution* regarding the applicability of international law in our legal system. This school takes the position that, international law is subordinate to the *Constitution*, and as such, can only apply subject to the supreme law of the land. Obviously, the proponents of this view do not support the argument that Kenya is now a monist state, by dint of article 2(5) and (6) of the *Constitution*. Before delving further into the anatomy of this article, for purposes of conceptual clarity, let us re-emphasize the fact that article 2(5) refers to

the general rules of international law while article 2(6) refers to the treaties or conventions ratified by Kenya.

126. Article 2(5) and (6) is better understood by revisiting the relationship between international law and municipal law, and the circumstances under which, one takes precedence over the other. On the international plane, international law is binding on all states, and every state is obliged to give effect to it. While the international obligation is upon the state, and not upon any particular branch, institution, or any individual member of its government, the state is responsible for the violation of international law by any of its organs. It is an established principle that a State cannot plead its own domestic law as an excuse for non-compliance with international law. article 13 of the *Declaration of Rights and Duties of States* adopted by the International Law Commission in 1949 provides:

> " Every State has the duty to carry out in good faith, its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its Constitution, or its laws as an excuse for failure to perform this duty."
>
> This principle later found its way into article 27 of the *Vienna Convention on the Law of Treaties* (specifically regarding treaties).

127. On the domestic scene, since a state's responsibility to give effect to international obligations does not fall upon any particular institution of its government, international law does not require that domestic courts apply and give effect to international obligations. However, states do from time to time, undertake to carry out their obligations by particular means, such as taking legislative and other measures to give full effect to their treaty obligations under international law. For example, the *International Covenant on Civil and Political Rights* requires states to enact laws to protect and ensure respect for rights thereunder; the Genocide Convention commits states to make genocide a crime; the UN Convention against Corruption requires states to undertake a range of legislative and other measures in its domestic sphere so as to effectively combat corruption. Otherwise, States usually differ as to whether their courts are required or permitted, by their domestic law, to give effect to the state's international obligations.

128. So what meaning is to be attributed to the expression "shall form part of the law of Kenya" as provided in article 2(5) and (6)? This phrase was eloquently elaborated in the *Paquete Habana* case; Supreme Court of the United States, 1900 20 S Ct. 290. Considering the place and applicability of customary international law in the United States. Mr Justice Gray stated:

> " International law <u>is part of our law</u>, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right <u>depending upon it are duly presented for their determination</u>. For this

> purpose, ,where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and as evidence of these to the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat..." [Emphasis added].

129. Long before the American revolution, English courts had been applying customary international law, with Lord Mansfield declaring that "the law of nations was part of the law of England" in *Triquet & others v Bath*, 97 Eng Rep 936 1764. In 1938, the Privy Council declared; "The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue, they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals" (see *Chung Chi Cheung v The King*, [1939] AC, 160) [Emphasis added].

130. Where it has been used, as in the judicial pronouncements above, the expression "part of our law" means that domestic courts of law, in determining a dispute before them, have to take cognizance of rules of international law, to the extent that the same are relevant, and not in conflict with the *Constitution*, statutes, or a final judicial pronouncement. The phrase rules of international law, viewed restrictively, and at any rate, in the context in which it was used in the American and English cases quoted above, refers to customary international law.

131. It is already clear that in our context, article 2(5) and (6) of the *Constitution* embraces both international custom and treaty law. This provision can be said to be both outward, and inward looking. The article is outward looking in that, it commits Kenya-the State, to conduct its international relations in accordance with its obligations under international law. In this sense, the article can be considered to be stating the obvious, in view of the fact that, as a member of the international community, Kenya is bound by its obligations under customary international law and its undertakings under the treaties and conventions, to which it is a party. Yet, reference to international law by a domestic *Constitution* is evidence of its progressive nature.

132. On the other hand, article 2(5) and (6) is inward looking in that, it requires Kenyan Courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same are relevant, and not in conflict with, the *Constitution*, local statutes, or a final judicial pronouncement. Where for example, a court of law is faced with a dispute, the elements of which, require the application of a rule of international law, due to the fact that, there is no domestic law on the same, or there is a lacuna in the law, which may be filled by reference to international law, the court must apply the latter, because, it forms part of the law of Kenya. In other words, article 2(5) and (6) of the *Constitution*, recognizes international law (both customary and treaty law) as a source of law in Kenya. By

the same token, a court of law is at liberty, to refer to a norm of international law, as an aid in interpreting or clarifying a Constitutional provision (see for example, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*; SC Advisory Opinion No 2 of 2012, [2012] eKLR).

133. Having dealt with this issue, we must conclude by stating that article 2(5) and (6) of the *Constitution* has nothing or little of significance to do with the monist-dualist categorization. Most importantly, the expression "shall form part of the law of Kenya" as used in the article does not transform Kenya from a dualist to a monist state as understood in international discourse. As already demonstrated, the phrase was in fact first embraced by the pioneer dualist states, i.e. the United Kingdom and the United States. At any rate, given the developments in contemporary treaty making, the argument about whether a state is monist or dualist, is increasingly becoming sterile, given the fact that, a large number of modern-day treaties, conventions, and protocols are Non-Self Executing, which means that, they cannot be directly applicable in the legal systems of states parities, without further legislative and administrative action.

**(iii) The Role of UN Guidelines in the Interpretation and Clarification of the Bill of Rights**

134. The trial Judge in the instant case, relied on the U.N Guidelines on Evictions; General Comment No7, issued by the UN Office of the High Commissioner for Human Rights; to determine the conditions under which forced evictions may be undertaken in Kenya. In *Kepha Omondi Onjuro* (*supra*) and *Satrose Ayuma* (*supra*); the High Court had similarly adopted the said Guidelines as part of the law of Kenya pursuant to article 2(5) of the *Constitution*.

135 But, in taking issue with the High Court for relying on the UN Guidelines, the Court of Appeal opined (at para 115):

> " In the High Court decisions referred to above, reliance upon the UN Guidelines is premised on article 2(5) and (6) of the *Constitution*. The articles stipulate that the general rules of international law and any Treaty or Convention ratified by Kenya is part of the laws of Kenya.
>
> Whereas we do not fault the High Court for citing the UN Guidelines, it is imperative to bear in mind the hierarchy of laws in Kenya. The Supreme law in Kenya is the Constitution and if any general rule of international law or Treaty ratified by Kenya is inconsistent with the Constitution, the Constitution prevails." (Emphasis added).

136. While we agree with the Court of Appeal's statement on the hierarchy of laws as quoted above, we are at pains to understand why the appellate court, faulted the High Court's

reference to the Guidelines, on grounds of inconsistency with the Constitution. Indeed, it is unclear to us, how the principle of hierarchy of laws came into play. What particular stipulation in the Guidelines can be said to have fallen afoul of the Constitution so as to be declared inconsistent? Or put another way, how are the UN Guidelines, General Comment No 7 inconsistent with the Constitution?

137. The Court of Appeal also faulted the High Court's application of the UN Guidelines on grounds that what article 2(5) of the Constitution envisages by the words "general rules of international law" are peremptory norms of international law or *jus cogens* and not all rules of international law. The court stated (para 116):

> " Further, it must be noted that article (2)(5) of the *Constitution* makes general rules of international law to be part of the laws of Kenya. It is the general rules that form part of the laws of Kenya and not all the rules of international law. In this context, rules of international law are not part of the laws of Kenya unless they are part of the general rules of international law. The general rules of international law are those rules that are peremptory principles and are norms of international law; they are the customary rules of international law or jus cogens in international law, they are those rules from which no derogation is permitted; they are globally accepted standards of behavior; they are rules and principles that are applicable to a large number of states on the basis of either customary international law of multi-lateral treaties; the general rules of international law are not based on the consent of the State but are obligatory upon state and non-state actors on the basis of customary international law and peremptory norms."

138. With due respect to the appellate court, we do not find any indication in the wording of article 2(5) of the *Constitution* that the words "general rules of international law" refer only to the peremptory norms of international law or jus cogens. The two main basic sources of international law are International Treaties (either bilateral, multi-lateral or universal) and international custom. International law governs relations between independent states qua states and other subjects of international law. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate their relations or achieve common aims. These two sources have exercised an influential role in the formation of international law. Article 38 of the *Statute of the International Court of Justice* provides that the court is to apply inter alia;

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states; and

(b) International custom, as evidence of a general practice accepted as law.

The Statute is regarded as the most authoritative statement on the sources of international law.

139. *Jus Cogens* is a technical term given to those norms of general international law which are of a peremptory force, and from which, as a consequence, no derogation is permitted. How an international rule gains the status of a peremptory norm is still debatable. The *Vienna Convention on the Law of Treaties* defines a peremptory norm of general international law as one which is "accepted and recognized by the International Community of States as a whole..." A peremptory norm may be derived from a custom or a treaty. There is still considerable uncertainty as to the scope and extent of *jus cogens*. Only a few examples have been identified as falling in to the category of *jus cogens*, such as the Prohibition on the Use of Force in the United Nations Charter (see *The Nicaragua* Case, ICJ Rep, 1986), the Prohibition on Genocide, the Prohibition on Piracy and Slave trading, and the Right to Self-Determination.

140. Therefore, *jus cogens* accounts for a very tiny *corpus* of the general rules of international law as we know them. International custom remains the basic source of general rules of international law (ordinarily referred to as Customary International Law). Is it conceivable then, that the framers of the Constitution, in their use of the words "general rules of international law" could have been referring to the limited and still evolving concept of *jus cogens* as opposed to the whole *corpus* of customary international law? We think not. Even if we were to entertain such a possibility, the same is definitely not apparent on the face of article 2(5) of the *Constitution*. In light of the foregoing, we hold that the words general rules of international law in article 2(5) of the Constitution refer to customary international norms, including *jus cogens*.

141. Having so declared, we must still determine whether the UN Guidelines, Comment No 7 can be regarded as general rules of international law within the context of article 2(5) of the *Constitution*. There exists considerable literature regarding the effect of UN Resolutions, Declarations, Comments, and Guidelines and their norm-generating quality in international law. The consensus emerging from such discourse is that, generally speaking, such resolutions, declarations, and comments do not ordinarily amount to norms of international law. At best they constitute what is called in international jurisprudence, Soft Law. However, it is also accepted that certain UN General Assembly Declarations and Resolutions can ripen into a norm or norms of customary international law, depending on their nature and history leading to their adoption. A striking example is the *Universal Declaration of Human Rights* which was long considered as part of customary international law before the adoption of the *International Covenant on Civil and Political Rights* and the International Covenant on Economic, Social and Cultural Rights}.

142. The UN Guidelines, General Comment No 7 do not in our view qualify as general rules of international law, which have a binding effect on members of the international community. However, the Guidelines are intended to breathe life into the Right to Dignity and the Right to Housing under the ICCPRand the ICESCR respectively. They therefore constitute soft law in the language of international jurisprudence. In the instant case, while the trial Judge cannot be faulted for having referred to the Guidelines per se, being soft law, as opposed to general rules of international law, the learned Judge ought not to have elevated them to the status of article 2(5) of the *Constitution*.

However, given the fact that the learned Judge, was interpreting and giving life to the Bill of Rights, specifically the Rights to Dignity, Property, and Housing under the *Constitution*, she could have been in order to refer to the Guidelines as an aid in fashioning appropriate reliefs during the eviction of the appellants. Rather than offending the *Constitution*, the Guidelines actually do fill the existing lacuna as to how the Government ought to carry out evictions.

143. Of even more significance is the fact that the U.N Guidelines in question were issued pursuant to article 21 of the *International Covenant on Civil Economic Social and Cultural Rights(ICESCR)*. Strictly speaking therefore, they can only be considered under article 2(6) of the *Constitution*, which refers to international treaties and conventions ratified by Kenya. These Guidelines cannot be regarded as being part of the treaty under which they were issued. They are tools or aids directed to states parties to help the latter in implementing the treaty or better fulfilment of their obligations there-under. Each state party is free to make use of the Guidelines, to the extent that is practicable under its legal system. The guidelines are not "binding" upon the states parties, nor are they part of the law of Kenya in the language and meaning of article 2(6) of the *Constitution*, unless they have ripened into a norm of customary international law, as evidenced by widespread usage. Again, we must emphasize that there is nothing wrong in a court of law making reference to the Guidelines as an interpretative tool aimed at breathing life into article 43 of the *Constitution*.

**(iv) The Reality of the Right to Housing under Article 43(1) of the Constitution**

144. This appeal revolves around the right to housing as guaranteed under article 43 (1) of the *Constitution*. The appellants herein, were uprooted from their habitation by the Government, on grounds that their settlements lay on the flight path to Wilson Airport, thus posing danger to the security of the public and air travelers. By this action, the appellants were deprived of their right to shelter (read "housing") for however informal, however decrepit, these settlements had been home to their existence, their aspirations, and their very humanity. The appellants case is that the State, through its duty-bearing organs, had an obligation to respect and protect their right to housing under article 21(1) of the *Constitution*.

145. The respondents, on the other hand, argue that the appellants, had no recognizable title to the land from which they had been justifiably evicted, on security grounds. It is their case that a right to housing, cannot accrue from an illegal occupation of land by the claimants. At any rate, argue the respondents, such right, if any, is subject to the limitations stipulated in article 24(1) of the *Constitution*.

Article 43(1)(b) of the *Constitution* provides that:

> " Every person has the right to accessible and adequate housing, and to reasonable standards of sanitation."

Article 21(1) of the *Constitution* provides that:

> " It is a fundamental duty of the State and every State organ to observe, respect, protect, promote, and fulfill the rights and fundamental freedoms in the Bill of Rights."

Article 21(2) of the *Constitution* provides that:

> " The State shall take legislative, policy, and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under article 43"

146. The crucial question we must consider is; when does the right to accessible and adequate housing accrue? In the language of article 21, the right to housing, being an economic and social right, can only be realized progressively. In determining the import of the expression "progressive realization" *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*; (*supra*), the Supreme Court opined:

> " We believe, that the expression "progressive realization" is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal-a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action." (see para-53)

147. The issue of what constitutes the progressive realization of a socio-economic right has therefore been long settled. The right to accessible and adequate housing, just like any other right under article 43, requires the State to take legislative, policy and other measures to

achieve it. Under article 20, the *Constitution* empowers the Courts and tribunals to apply the provisions of the Bill of Rights effectively by developing the law and adopting the interpretation that most favours the enforcement of the right. Regarding the rights under article 43 of the *Constitution*, article 20(5) provides that:

> "In applying any right under article 43, if the state claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles?
>
> (a) It is the responsibility of the State to show that the resources are not available
>
> (b) In allocating resources, the State shall 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 may 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

148. Article 20(5) clearly empowers a court or tribunal, presiding over a dispute, in which the petitioners are claiming that the State, has either neglected, or failed in its responsibility to effectuate a socio-economic right, to demand evidence that would exonerate the latter from liability. How would a court exercise its powers under this article? By issuing interim orders to that effect. The orders have to be directed at the state organ responsible for the requisite measures. Such orders by their very nature, must be interim, before the court issues final orders. This appears to be what the trial Judge intended by issuing the interim orders, a matter to which we shall return.

149. From the foregoing, the question as to when the right to housing accrues, in our view, is not dependent upon its progressive realization. The right accrues to every individual or family, by virtue of being a citizen of this Country. It is an entitlement guaranteed by the *Constitution* under the Bill of rights. The persistent problem is that its realization depends on the availability of land and other material resources. Given the fact that our society is incredulously unequal, with the majority of the population condemned to grinding poverty, the right to accessible and adequate housing remains but a pipe-dream for many. What with each successive government erecting the defence of "lack of resources? The situation is compounded by the fact that, for reasons incomprehensible, the right to housing in Kenya is predicated upon one's ability to "own" land. In other words, unless one has "title" to land

under our land laws, he/she will find it almost impossible to mount a claim of a right to housing, even when faced with the grim possibility of eviction.

150. This scenario has inevitably led to the emergence of the so called "informal settlements", an expression that describes a habitation by the "landless". In their struggle to survive, many Kenyans do occupy empty spaces and erect shelters thereupon, from within which, they eke their daily living. Some of these settlements sprout upon private land, while others grow on public land. It is these "settlers" together with their families who face the permanent threat of eviction either by the private owners or State agencies. The private owners will raise 'the sword of title', while the State agencies will raise 'the shield of public interest'. So where does this leave the right to housing guaranteed by article 43 of the *Constitution*?

151. While we are in agreement with the submission to the effect that, an illegal occupation of private land, cannot create prescriptive rights over that land in favour of the occupants, we don't think the same can be said of an "illegal occupation" of public land. To the contrary, we are of the considered opinion, that where the landless occupy public land and establish homes thereon, they acquire not title to the land, but a protectable right to housing over the same. Why, one may wonder, should the illegal occupation of public land give rise to the right to shelter, or to any right at all? The retired Constitution did not create a specific category of land known as "public land". Instead, the constitution recognized what is referred to as "un-alienated government land". The radical title to this land was vested in the president, who through the Commissioner of lands, could alienate it, almost at will. The consequences of this legal regime have been adequately recorded for posterity elsewhere. The *2010 Constitution* has radically transformed land tenure in this country by declaring that all land in Kenya belongs the people of Kenya collectively as a nation, communities and individuals. It also now creates a specific category of land known as public land. Therefore, every individual as part of the collectivity of the Kenyan nation has an interest, however indescribable, however unrecognizable, or however transient, in public land.

152. The right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. This right derives from the principle of equitable access to land under article 60 (1)(a) of the *Constitution*. Faced with an eviction on grounds of public interest, such potential evictees have 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. But, under article 23(3) of the *Constitution*, the court may craft orders aimed at protecting that right, such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction (UN Guidelines), the provision of alternative land for settlement, etc.

153. The right to housing in its base form (shelter) need not be predicated upon "title to land". Indeed, it is the inability of many citizens to acquire private title to land, that condemns them to the indignity of "informal settlement". Where the Government fails to provide accessible and adequate housing to all the people, the very least it must do, is to protect the rights and dignity of those in the informal settlements. The courts are there to ensure that such protection is realized, otherwise these citizens, must forever, wander the corners of their country, in the grim reality of "the wretched of the earth".

154. We now turn to the nature of the orders granted by the trial Judge, and with which the appellate court took issue. It is to be recalled that the appellants herein, had already been evicted from their settlements, in an operation they contend was not only illegal, but which violated their right to housing and dignity. This court has no jurisdiction to revisit the factual findings of either the High Court or Court of Appeal on this issue. We have already answered the four critical questions in exercise of our jurisdiction under article 163(4)(b) of the *Constitution*.

155. Applying the principles we have enunciated in our analysis to this appeal, all we can consider is, whether the orders of the trial court were inappropriate as held by the Court of Appeal. Given the fact that the appellants had already been evicted, what reliefs, ought they have sought from the court? Having alleged a violation of their rights to dignity and housing, it is our considered opinion that the most effective relief open to the appellants was a claim for compensation. Had the appellants been still in occupation, all the other possible reliefs we have signaled in paragraph 150 would also have been available to them. Counsel for the appellants has urged us to craft an appropriate remedy for compensation. Such a cause ought to have been urged at the trial court, with the aggrieved party having an opportunity to appeal any award to the Court of Appeal.

156. We do not think that the orders requiring the respondents to furnish the trial court, with the current state policies, and programmes on provision of shelter and access to housing, would have been of any remedial benefit to the appellants. We are also in agreement with the Court of Appeal that, such orders, ought not to have involved non-state actors, who were not parties to the suit. It would be different if the order had been directed to the relevant state agencies, even if they were not parties to the suit. We may however not delve into the factual findings of the trial court and Court of Appeal.

Having said this, it is not lost to us that the eviction that triggered these proceedings was carried out in contravention of a court order. Neither are we oblivious of the fact that, during the eviction, the appellants' houses and property, including schools, were destroyed. This court, cannot close its eyes to these uncontroverted findings on record. Actions by state organs, carried out in flagrant disregard of court orders, do undermine our constitutional

order, more so, if they result in the violation of citizens' rights. If a trial court is so moved, there is no reason why it cannot grant relief to the aggrieved.

**E. Orders**

(i) The appeal dated February 5, 2018 is hereby partially allowed.

(ii) These proceedings are hereby remitted to the trial court, with instructions that appropriate reliefs be crafted and granted in accordance with this Judgment and the pleadings at the High Court.

(iii) We make no orders as to costs.

It is so ordered.

**Geo Chem Middle East v Kenya Bureau of Standards (Petition 47 of 2019) [2020] KESC 1 (KLR) (18 December 2020) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2020] KESC 1 (KLR)

***Jurisdiction*** *- jurisdiction of the Supreme Court - appellate jurisdiction of the Supreme Court - matters of constitutional interpretation and application - whether the Supreme Court could determine whether the Court of Appeal had jurisdiction to hear and determine an appeal from a High Court decision on the setting aside of an arbitral award under section 35 of the Arbitration Act - Constitution of Kenya, 2010, article 163(4)(a).*

***Jurisdiction*** *- jurisdiction of the Court of Appeal - arbitration matters - the extent to which the Court of Appeal had jurisdiction to hear and determine an appeal from a High Court decision on the setting aside of an arbitral award under section 35 of the Arbitration Act - Arbitration Act (cap 49) section 35*

**Brief facts**

The petitioner and the respondent entered into a contract wherein the petitioner was to provide qualitative and quantitative inspection and testing services of imported petroleum products, for a term of three years. The contract could be renewed for a further three years upon expiry. The petitioner alleged that it established a petroleum inspection facility at the Port of Mombasa and despite providing inspection services, the petitioner did not receive payments from marketers.

In a letter dated February 24, 2010, the Kenya Revenue Authority confirmed that it had been appointed to collect inspection fees from marketers on behalf of the respondent. Later, on October 23, 2012, it was acknowledged that the Kenya Revenue Authority had collected the fees and remitted them to the National Treasury. The Permanent Secretary for Industrialization requested the National Treasury to remit that money to the respondent as money due to the petitioner for services rendered. However, the petitioner did not receive the money.

On March 26, 2012, the respondent informed the petitioner that the Government had suspended the contract. The contract for provision of petroleum inspection services provided for a termination notice of six months or for 14 days notice for terminations occurring due to a *force majeure* event. The petitioner filed a claim for the outstanding fees for its services. The matter was referred to arbitration.

The arbitral tribunal made the finding that the suspension of the contract did not constitute termination of the contract as envisaged under the contract and that it was an unlawful termination. The tribunal awarded the petitioner the sum of USD 8, 591, 139/- in respect of the remaining contract period of twenty-nine (29) months as well as USD 3,687,437.21 inclusive of interest and Valued Added Tax for services rendered, and upon deduction of royalties due and owing.

Proceedings for the recognition and enforcement of the arbitral award were instituted by the petitioner at the High Court. On the other hand, the respondent applied for the setting aside of the

arbitral award on grounds that the arbitral award contained decisions that went beyond the scope of the reference to arbitration.

The High Court made the finding that an arbitral award could only be set aside on grounds contemplated under section 35 of the Arbitration Act. The High Court stated that it would therefore decline the invitation to ascertain if there were contradictions in various aspects in the decision of the arbitral tribunal. The High Court also found that there was no basis to set aside the award and allowed the application for recognition and enforcement.

The respondent subsequently filed an appeal at the Court of Appeal which raised three issues. One was about whether the court had the jurisdiction necessary to handle an appeal from the High Court on the setting aside of an arbitral award and the others were on whether the arbitral tribunal had jurisdiction and whether the arbitral award went against public policy.

The Court of Appeal made the finding that the reference to arbitration and the constitution of the arbitral tribunal was done outside of the time limits provided for under the contract. It also found that the arbitral tribunal determined issues that were outside its scope and that the award which required a state corporation to pay funds in excess of 1 billion Kenya shillings went against public policy.

The appeal before the Supreme Court was based on whether the Court of Appeal had jurisdiction in relation to arbitration matters under section 35 of the Arbitration Act and the Court of Appeal's failure to adjudicate on the issue in its judgment. The respondent also raised a preliminary objection on the premise that the Supreme Court had no jurisdiction to entertain the matter under article 163(4).

**Issues**

i. Whether the Supreme Court had jurisdiction to hear and determine a matter which was about the Court of Appeal's jurisdiction on appeals arising from High Court determinations on the setting aside of an arbitral award under section 35 of the Arbitration Act.

ii. To what extent did the Court of Appeal have jurisdiction to hear and determine appeals arising from High Court determinations on the setting aside of an arbitral award under section 35 of the Arbitration Act?

**Held**

1. To determine whether the Supreme Court had jurisdiction to hear and determine the dispute under article 163(4)(a), it was necessary to evaluate whether the contested issues were issues of constitutional controversy that had been determined at the High Court and later at the Court of Appeal. The petitioner raised an issue at the Court of Appeal about whether that court had jurisdiction to hear and determine an appeal from a High Court decision with respect to the award of an arbitral tribunal.
2. The issue about the Court of Appeal's jurisdiction was raised in the petitioner's submissions during the Court of Appeal hearing. However, it mattered not when an objection to

jurisdiction was raised because jurisdiction was everything and without it a court would act but in vain.

3. An appeal could lie to the Court of Appeal from a High Court decision under section 35 of the Arbitration Act where in setting aside an arbitral award, the High Court stepped outside the grounds stated in section 35 of the Arbitration Act and made a decision so manifestly wrong and which had completely closed the door of justice to either of the parties.
4. The only issue that properly arose for the determination of the Supreme Court under article 163(4)(a), after a reading of the judgments of the High Court and the Court of Appeal was the issue of whether the Court of Appeal had jurisdiction to hear and determine an appeal from a High Court decision made under section 35 of the Arbitration Act.
5. Arbitration was meant to expeditiously resolve commercial and other disputes where parties had submitted themselves to that dispute resolution mechanism. The role of courts was greatly diminished notwithstanding the narrow window created by sections 35 and 39 of the Arbitration Act.
6. The High Court declined to exercise jurisdiction to interfere with the arbitral award. Therefore, the only question before the Court of Appeal ought to have been whether the High Court had properly declined to exercise jurisdiction under section 35 of the Arbitration Act.
7. The Court of Appeal made the determination that leave for the appeal had been granted and that leave had not been the subject of appeal. In granting leave, the question of jurisdiction of the Court of Appeal was determined and it was said that section 35 of the Arbitration Act did not expressly provide for a chance to appeal to the Court of Appeal but that did not bar a party from seeking redress at the Court of Appeal. The finding suggested that the chance to lodge an appeal at the Court of Appeal was open-ended and it did not tarry with the position of the Supreme Court. Such appeals, according to the Supreme Court were only permissible in a narrow sense. The Supreme Court's position about that was that an appeal to the Court of Appeal on a determination made by the High Court under section 35 of the Arbitration Act was permissible where in setting aside an arbitral award, the High Court stepped outside the grounds set out in section 35 and made a decision so grave, so manifestly wrong and which completely closed the door of justice to either of the parties.
8. Leave to appeal, whether wrongfully or rightfully granted, empowered the Court of Appeal to determine whether the High Court ought to have interrogated the arbitration award or not. If it were to determine that the High Court had wrongly declined jurisdiction, the proper and indeed only course of action open to the Court of Appeal, was to remit the matter back to the High Court with directions for the latter to hear the substantive application for setting aside the arbitral award on its merits. Instead, the Court of Appeal stepped into the shoes of the High Court and proceeded to determine a matter that had not been substantively decided by the latter. In so doing, the Appellate Court usurped the

jurisdiction of the High Court, as it was not open to it, to take over an arbitration dispute and determined it on its merits when the High Court had not done so.

9. To the extent that the judgment of the Court of Appeal purported to interrogate the merits of an arbitral award, in the absence of the High Court's pronouncement on the same, the judgment was rendered in excess of jurisdiction. The Court of Appeal prematurely, and in excess of its jurisdiction, sat on an appeal that was not ripe, instead of remitting the same to the High Court for determination.

*Appeal allowed*

***Orders***

i. *The judgment of the Court of Appeal dated November 22, 2019, was set aside.*
ii. *Each party was to bear its costs.*

**Citations**

**Cases**

***Kenya***

1. *Macharia, & another v Kenya Commercial Bank limited & 2 others* Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Explained)
2. *Nduttu & 6000 others v Kenya Breweries Ltd & 2 others* SC Petition No. 3 of 2012; [2012] eKLR - (Explained)
3. *Nyutu Agrovet Limited v Airtel Networks Kenya Limited;Chartered Institute of Arbitrators-Kenya Branch* (Petition 12 of 2016) [2019] KESC 11 (KLR) (6 December 2019) (Judgment) (with dissent - DK Maraga, CJ & P) - (Followed)
4. *Synergy Industrial Credit Limited v Cape Holdings Limited* (Petition 2 of 2017) [2019] KESC 12 (KLR) (6 December 2019) (Judgment) - (Followed)

**Statutes**

***Kenya***

1. Arbitration Act (cap 49) sections 10, 17(5); 35; 39 - (Interpreted)
2. Constitution of Kenya articles 25(c); 50; 159; 159(2)(c); 159(2)(e); 163(4)(a); 164(3) - (Interpreted)
3. Supreme Court Act (cap 9B) section 15(2) - (Interpreted)
4. Supreme Court Rules(repealed) (cap 9B Sub Leg) rules 9(1), 33(2) - (Interpreted)

**Instruments**

UNCITRAL Model Law on International Commercial Arbitration, 1985 article 5

**Advocates**

*Mr. Ngatia* - for the petitioner

December 18, 2020, the Court delivered the following Judgment:

## A. Introduction

1. The Petition of Appeal before the Court is dated 17th December, 2019 and lodged on the 18th December 2019. It is brought under the provisions of Article 163(4)(a) of the *Constitution*, Section 15(2) of the *Supreme Court Act*, 2011 and Rules 9(1) and 33(2) of the *Supreme Court Rules*, 2012 (repealed). The Petitioners seek to challenge the Judgment of the Court of Appeal (Karanja, Sichale & Mohammed, JJA) in Civil Appeal No. 259 of 2018 delivered on 22nd November 2019

## B. Background

2. On 5th June 2009, the Petitioner and the Respondent entered into a three (3) year contract, wherein the Petitioner was contracted to provide qualitative and quantitative inspection and testing services of imported petroleum products with effect from 6th July 2009. Upon expiry of the contract, the parties had the option of renewing the contract for a further period of three (3) years. Pursuant to the contract, the Petitioner alleges that, it established a petroleum inspection facility at the Port of Mombasa which was launched on 27th August 2009 and subsequently commenced provision of the contracted services.

3. Despite allegedly providing these services, the Petitioner did not receive any payments from the marketers. The Respondent, it is said, in a letter dated 7th January 2010 through the Minister for Industrialization then wrote to the Minister for Finance and Deputy Prime Minister seeking authority for the Kenya Revenue Authority (KRA), as the competent authority, to collect fees from the oil marketers on behalf of the Respondent. KRA accepted the appointment and confirmed so in a letter dated 24th February 2010. In a further letter dated 25th February 2010, KRA informed oil marketers that, with effect from 1st March 2010, it would be collecting the Petroleum Inspection Fees on behalf of the Respondent. In its letter dated 23rd March 2012 addressed to KRA, the Respondent sought to have the fees which had by then been collected on its behalf remitted to it to meet its obligation with the Petitioner, it is contended.

4. On 23rd October 2012, the Permanent Secretary for Industrialization, by a letter addressed to the Permanent Secretary in the Ministry of Finance, acknowledged that KRA had remitted the amount collected on behalf of the Respondent to the National Treasury. In the letter, the Permanent Secretary requested the National Treasury to remit the monies collected to the Respondent as monies due to the Petitioner for services rendered. The Respondent did not remit the funds to the Petitioner.

5. By a letter dated 26th March 2012, the Respondent informed the Petitioner that the Government had "suspended" the contract until further notice. The contract only provided for termination under Clauses 7.1 – 7.3 thereof with a six (6) months' notice period. In the event of force majeure, the Respondent was obligated to issue a 14 days' notice declaring the occurrence of a force majeure event under Clause 6.6. No notices under any of those Clauses were issued to the Petitioner and on 25th June 2013, the Petitioner therefore made a claim from the Respondent for the outstanding fees for services rendered. In response thereto, the Respondent, on 15th July 2013, informed the Petitioner that the contract stood terminated upon the lapse of sixty (60) days from 26th March 2012 when the "suspension" notice was issued. Arbitration proceedings as envisaged by the contract were then commenced.

**i.Proceedings at the Arbitral Tribunal**

6. The Petitioner, aggrieved by the turn of events, instituted a claim against the Respondent for, inter alia, breach of contract through a letter dated 4th February 2015, and in accordance with Clause I, Part 2 of the contract, which provided for dispute resolution through arbitration. In a letter dated 10th March 2015, the Petitioner then appointed Mr. John Ohaga as its arbitrator, whilst the Respondent appointed Ms. Njeri Kariuki as its arbitrator. Both arbitrators thereafter appointed Mr. Collins Namachanja, in accordance with Clause 3 of the contract, as the Chairperson of the arbitral tribunal.

7. The Petitioner's claim before the arbitral tribunal was for the sum of USD 2,487,784.24 being unpaid invoices for services rendered, USD 468,629.12 incurred in equipping a laboratory, USD 1,207,150.91 in expenses incurred in setting-up operations at the Port of Mombasa, USD 16,989,356.76 in income lost as a result of suspension of the contract and interest on each of the claimed amounts from 1st April, 2010 until payment in full. The Respondent filed a counterclaim for Kshs. 947,640, 169.87 being unremitted royalties of Kshs. 699, 365, 439.2 plus interest at the rate of 5%.

8. Upon considering the claim and counterclaim by the Petitioner and Respondent respectively, the arbitral tribunal in its award dated 29th July 2019 found that the alleged "suspension" of contract "until further notice" did not constitute termination as envisaged under the contract, and neither did the same constitute notice of occurrence of a force majeure event as stipulated in Clause 6.6 of the contract. The tribunal also found that the Respondent had unlawfully terminated the contract and was thus liable for the losses incurred by the Petitioner during the alleged suspension of the contract from 26th March 2012. The tribunal, in determining the dispute, awarded the Petitioner the sum of USD 8, 591, 139/-in respect of the remaining contract period of twenty-nine (29) months as well as USD 3,687,437.21 inclusive of interest and Valued Added Tax for services rendered, and upon deduction of royalties due and owing.

**ii. Proceedings at the High Court**

9. Both parties thereafter filed applications at the High Court. The Petitioner, by Nairobi High Court Misc. Application No. 501 of 2016 dated 17th October 2016 and filed on 7th November 2016, sought to have the Court recognize and enforce the arbitral award. The Respondent on its part, filed Nairobi High Court Misc. Application No. 455 of 2016, dated 30th September 2016 on 3rd October 2016, seeking orders to set aside the arbitral award pursuant to Section 35 of the *Arbitration Act*, 2012. The grounds relied upon by the Respondent were that the arbitral tribunal dealt with a dispute not contemplated by, nor falling within, the terms of the reference to arbitration and further, that the arbitral award contained decisions on matters that were beyond the scope of the reference to arbitration. It also claimed that the award was in conflict with public policy.

10. The two applications were consolidated and determined by Ochieng, J. on 30th May 2017. In his determination, the learned Judge held, inter alia that;

> " [I]t is not the function nor the mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the Court was called upon to determine whether or not to set aside an award...if the Court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the Court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, it would actually be against the said public policy to have the Court sit on an appeal over the decision of the arbitral tribunal." [Paras. 39-41].

11. The learned Judge went on further to pronounce that the Court cannot set aside an award on the grounds that it was unfair, unreasonable or non-feasible, as these grounds are not contemplated by Section 35 of the *Arbitration Act*. With regard to the question of the jurisdiction of the arbitral tribunal, the learned Judge determined that pursuant to Section 17(5) of the *Arbitration Act*, a tribunal may choose to determine that question either as a preliminary issue, or at the award stage. The learned Judge then went on to determine that;

> " Regrettably, this Court does not have the authority to make an assessment on the merits of the arbitral award.
>
> The jurisdiction of the High Court, when called upon to set aside an award, is limited to what is permissible pursuant to Section 35 of the *Arbitration Act*. Any other intervention by the Court is expressly prohibited by Section 10 of the *Act*. I therefore decline the invitation to ascertain if there were any contradictions in the various aspects of the decision made by the arbitral tribunal. In the final analysis, I

find no grounds to warrant the setting aside of the arbitral award dated 29th July 2016." [Paras. 54-56].

12. The learned Judge thus dismissed the Respondent's application to set aside the arbitral award and instead allowed the Petitioner's application and adopted the arbitral award as a Judgment of the Court pursuant to the provisions of Section 36(1) of the Arbitration Act.

**iii. Proceedings at the Court of Appeal**

13. Aggrieved by the ruling of the High Court, the Respondent filed an appeal to the Court of Appeal in Civil Appeal No. 259 of 2018. The substantive appeal was filed pursuant to leave of appeal granted by the appellate Court in Civil Application No. Nai 132 of 2017 (Ouko (P), Warsame & Murgor, JJA) on 31st May 2018. The appellate Court having heard the appeal considered several grounds for appeal, inter alia; (a) that the learned Judge erred in law in failing to set aside the award made by a tribunal without jurisdiction; (b) that exceeded the terms of reference to arbitration; (c) that conflicted with public policy; and (d) that violated the principles of justice and morality and that is inimical to the interests of Kenya. [Paras. 20].

14. The Court of Appeal then concluded that there were three (3) issues before it for its determination, namely; (i) whether or not an appeal lay to the Court from the impugned ruling of the High Court; (ii) whether the arbitral tribunal had jurisdiction; and (iii) whether the award was against public policy, and was therefore one for setting aside. [Para. 47]. With regard to the issue of whether the appellate Court had the jurisdiction to entertain the appeal, the Court reiterated that leave had been granted in Civil Application No. Nai 132 of 2017, and that the same had not been set aside and was therefore still valid.

15. On the other two (2) issues considered for appeal, the Court of Appeal, in allowing the appeal and setting aside the ruling of the High Court in its judgment dated 22nd November 2019, held inter alia; that the reference and the subsequent constitution of the arbitral tribunal was done outside the time limits prescribed in the contract, specifically at Clause 10 which provided that any dispute regarding termination of the contract would be referred to arbitration within twenty-one (21) days. The appellate Court further held that the issues determined by the arbitral tribunal fell outside its scope pursuant to Section 35(2)(iv) of the Arbitration Act and that the award which imposed a liability on the Respondent, a state corporation, to pay from public funds over Kshs.1Billion without proof of liability was against public policy. That decision was received with dissatisfaction by the Petitioner hence the present appeal.

**ivProceedings at the Supreme Court**

16. The Petitioner has come before this Court seeking to challenge the Judgment of the appellate Court on the grounds summarized as follows;

**a.Whether the failure by the Court of Appeal to adjudicate on the constitutional issue of jurisdiction in limine amounts to a violation of the Petitioner's right to a fair hearing enshrined in Articles 25(c) and 50(1) of the Constitution;**

17. The Petitioner contends, on this issue, that the failure by the Court of Appeal to determine the jurisdiction question violated its non-derogable right to fair hearing. They further contend that the Court failed to protect and promote the tenets of limited intervention by judicial processes as decreed by Sections 10 & 35 of the *Arbitration Act*, as read with Article 5 of the *United Nation Commission on International Trade Law, (UNCITRAL) Model Law* as well as Article 159(2)(c) & (e) of the *Constitution*.

**b.Whether the failure by the Court of Appeal to first satisfy itself that it was vested with the requisite jurisdiction to entertain the appeal is a dereliction of duty under Article 164(3) as read with Articles 25(c), 50 and 159(2)(c) & (e) of the Constitution;**

18. The Petitioner contends that the Court of Appeal neglected its constitutional duty under Article 159(2)(c) & (e) and 164(3) of the *Constitution* by failing to determine the question of whether it was vested with the requisite jurisdiction to determine the appeal, and instead concluded that the determination on the issue lay elsewhere. Further, it was the Petitioner's averment that the said Court ought to have either made a determination on the issue, or deferred its decision to abide the outcome of the then pending determination on arbitration matters in this Court. (in reference to *Nyutu Agrovet Limited v Airtel Networks Kenya Ltd & Another* SC Petition No.12 of 2016 [2019] eKLR and *Synergy Industrial Credit Limited v Cape Holdings Limited* Petition No.2 of 2017 [2019] eKLR).

**c. Whether the dispute taken on appeal from the decision under Section 35 of the Arbitration Act falls within the circumscribed and narrow jurisdiction of the Court of Appeal;**

19. It is contended that the Court of Appeal erred in law in proceeding to hear and determine an appeal in respect of which it lacked the requisite jurisdiction in terms of Article 164(3) of the *Constitution*, as read with Articles 50 and 159(2)(c) & (e), as well as Sections 10 & 35 of the *Arbitration Act* and Article 5 *UNCITRAL Model Law*.

**d.Whether a Court in determining a dispute within the context of an application under Section 35 of the Arbitration Act as read with Articles 50(1) and 159(2)(c) & (e) of the Constitution is vested with jurisdiction to revisit the factual findings of an arbitral award.**

20. The Petitioner contends that the Court of Appeal erred in qualifying the arbitral tribunal findings of fact. They further argue that the decision by the appellate Court offends public

policy of Kenya in so far as it aided the perpetuation of unjust enrichment in favour of the Respondent, and in so doing, acted in a manner that is inconsistent with the guiding principles for exercise of judicial authority in Article 159 of the *Constitution*.

21. Conversely, the Respondent contended that this Court lacks jurisdiction to hear and determine the instant appeal brought under Article 163(4) of the *Constitution* as the Judgment by the appellate Court is a pure interpretation and application of a contract between two private parties. They thus argue that there was no determination on any constitutional issue, and therefore nothing can ascend up the judicial hierarchy within the constraints of Article 163(4) of the *Constitution*.

22. It also asserted that there was no cogent or justifiable issue brought before this Court within the constitutional limits of Article 163(4) of the *Constitution* to warrant an invocation of this Court's appellate jurisdiction. In contesting the jurisdiction of this Court to hear and determine this Petition therefore, the Respondent also filed a Preliminary Objection dated 23rd January 2020, in which it was argued that;

    a. This honourable Court lacks the jurisdiction to hear and determine appeals from the Court of Appeal in a decision given under Section 35 of the *Arbitration Act*;

    b. That the instant appeal falls outside and does not meet the clearly defined threshold for invoking the Supreme Court's narrow appellate jurisdiction defined in Article 163(4) of the *Constitution*; and

    c. That the Petition of Appeal raises purely factual issues dating back to the arbitral proceedings, which issues ordinarily have no place in a second appeal filed in the Supreme Court from the High Court decision and which specifically raises no question of constitutional interpretation or application to warrant the Supreme Court intervention in its appellate jurisdiction.

**C. Analysis and Determination**

23. Upon consideration of the parties' respective pleadings and both written and oral submissions, we find that the issues arising for determination are; i) whether this Court is vested with the requisite jurisdiction to hear and determine the instant Petition, ii) whether the Court of Appeal had the jurisdiction to determine the appeal before it. iii) what reliefs are available to the parties? On the first issue, the Petitioner relied on the provisions of Article 163(4)(a) of the *Constitution* as well as Section 15(2) of the *Supreme Court Act* and Rule 33(2) of the repealed *Supreme Court Rules*, 2012 and argued that this Court was vested with the jurisdiction to hear and determine the question of violation of its rights under Articles 25(c), 50(1) and 159(2)(c) & (e) of the *Constitution*, and as such, as specifically pertains to the conduct of the appeal by the Court of Appeal.

24. Conversely, the Respondent argues that this Court lacks the jurisdiction to determine the instant appeal as it has not attained constitutional muster. They aver that the issues raised by the Petitioner have not transmuted from issues that involve private arbitration proceedings and contractual obligations to an issue that involves the interpretation and application of the *Constitution*. They contend that the mere allegation of constitutional impropriety without proper justification and elucidation of the constitutional infringement would not necessitate the intervention of this Court. They thus argue that the Petition of appeal does not satisfy the provisions of Section 163(4) of the *Constitution*, as there is no constitutional issues underpinning the appeal.

25. In determining the twin questions whether both the Court of Appeal and this Court are vested with the requisite jurisdiction to hear and determine the present dispute, we must refer to our earlier decision in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & 2 others* SC Petition No. 3 of 2012; [2012] eKLR where we held, *inter alia* as regards our jurisdiction:

> " Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. It is not the mere allegation in pleadings by a party that clothes an appeal with attributes of constitutional interpretation or application...[The] he appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a) (emphasis ours). If an appeal is challenged at a preliminary level on grounds that it does not meet the threshold in Article 163 (4) (a), the Court must determine that challenge before deciding whether to entertain the substantive appeal or not. But the Court need not wait for a preliminary objection before applying the test of admissibility in article 163 (4) (a). It is the Court's duty as the ultimate custodian of the Constitution to satisfy itself that the intended appeal meets the constitutional threshold." [Paras. 27-28].

26. Further, in *S. K. Macharia, & another v Kenya Commercial Bank limited & 2 others* [2012] eKLR we pronounced ourselves as follows;

> "A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law." [Para. 68]

27. Therefore, and with regard to the question of jurisdiction, we have to first evaluate whether the contested issues in the Petitioner's appeal were issues of constitutional controversy that had been determined by the High Court and later the Court of Appeal. The Petitioner has indeed, and in that context, specifically challenged the Court of Appeal's jurisdiction in hearing and determining the appeal from the High Court's decision with regard to the arbitral tribunal's award.

28. On the question of its jurisdiction to hear and determine the appeal before it, the Court of Appeal in its Judgment in Civil Appeal No. 259 of 2018 stated *inter alia*, that;

> "On the first issue, it is evident from the record that the Appellant herein sought leave of this Court in vide Nairobi Civil Application No. 132 of 2017 in which the Court granted leave to the appellant to lodge the present appeal. Whether the Court was right or wrong in granting the said leave, the same has not been set aside and is therefore still valid. In view of the foregoing, the issue of whether this Court has jurisdiction to entertain the instant appeal or not does not lies for our determination. The determination of that issues lies elsewhere. We acknowledge that it is an issue that has been pending before the Supreme Court for a while but we say no more." [Para. 48, Emphasis added].

29. We note that the issue of the jurisdiction of the Court of Appeal was first brought before that Court through the submissions of the Petitioner at the hearing of the Appeal. In its submissions to this Court at paragraph 55, the Petitioner in that context stated thus:

> "As can be gleaned from Geo Chem's submissions in the Court of Appeal and the impugned Judgment, Geo Chem raised an issue regarding the jurisdiction of the Court of Appeal to entertain the appeal. Pursuant to the provisions of Article 50(1) as read with Article 25(c) of the *Constitution*, Geo Chem had a non-derogable right to have that issue resolved by the Court of Appeal." [Emphasis added].

30. We further note, from a reading of the Judgment of the Court of Appeal and the submissions before us by the Petitioner that, it can be conclusively determined that there was no objection to the decision in the application for leave in Civil Application No. Nai 132 of 2018 by the Petitioner, and therefore, the jurisdiction of the appellate Court to determine the appeal was not initially challenged. It is only at the hearing of the substantive appeal that the Petitioner raised the issue of the jurisdiction of Court of Appeal. It is our view however that it matters not when an objection to jurisdiction is raised because jurisdiction is everything and without it, a Court acts but in vain.

31. What did the Court of appeal then conclude as regards its jurisdiction to hear the appeal before it? At paragraph 48 of its Judgment the Court stated:

> "Whether the Court was right or wrong in granting the said leave, the same has not been set aside and is therefore still valid. In view of the foregoing, the issue of whether this Court has jurisdiction to entertain the instant appeal or not does not lie for our determination. The determination of that issues lies elsewhere".

32. Having declined the invitation to determine whether the Court had the requisite jurisdiction to determine the appeal, leave having been granted by the same Court to file it, the "elsewhere" referred to above, must be this Court. In that regard, in the Ruling delivered on 31st May 2018, granting leave to file the appeal, the Court of appeal (Ouko, (P) Warsame and Murgor JJA) had this to say on jurisdiction:

> "Although unlike Section 39, Section 35 does not specifically provide that an appeal to this Court will lie from a decision of the High Court setting aside an arbitral award, we reiterate that it does not, in the same breadth, expressly bar a party aggrieved by the setting aside to come to this Court for redress. If the intention was to circumscribe the right to appeal, nothing stopped the Legislature from expressly saying so. It is said in Section 12 (8) that a decision of the High

> Court to set aside appointment of arbitrator "shall be final and not be subject to appeal". In Section 15(3), that the decision of the High Court to terminate the mandate of an arbitrator "shall be final and shall not be subject to appeal", in Section 16A where the High Court sanctions the resignation of the arbitrator, that decision will be "final and shall not be subject to appeal", and in Section 17(7) that the decision of an arbitral tribunal regarding a question of its own jurisdiction may be challenged in the High Court whose decision "shall be final and shall not be subject to appeal". On the basis of the foregoing, we hold the view that the effect of the decision of the High Court under Section 35 is just as critical as that made under Section 39 because both Sections deal with an award. An award is the final outcome of an arbitration and when it is confirmed, varied, set aside, or remitted to the arbitral tribunal for re-consideration. Parties are bound to be aggrieved. We do not believe it was intended that aggrieved parties be left without recourse to appeal. With that conclusion, we join those who share the view that nothing stops this Court from granting leave to appeal from a decision of the High Court made under Section 35."

33. The Court of Appeal also made reference to the then existing division within that Court on the above issue and stated that "as a result of this undesirable situation in law, three Petitions, *Nyutu Agrovet Limited* (*supra*), Bia Tosha Distributors Ltd (supra), and *Synergy Industrial Credit Ltd* (*supra*) ... are pending the consideration and final determination of the Supreme Court". This Court, on 6th December 2019 rendered Judgments in both *Nyutu* and *Synergy* thus settling the issue of jurisdiction of the Court of Appeal in Section 35 appeals.

34. In Nyutu, this Court specifically rendered itself thus:

> "(77) In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction."

35. We are aware that the decision in Nyutu was delivered two or so weeks after the Court of Appeal Judgment in the present matter and so that Court did not have the benefit of the guidance provided by this Court in respect of Section 35 appeals to it.

36. In granting leave to appeal however, we note that the Court of Appeal did not interrogate the substance of the intended appeal and whether it fell within the said section. Later, in the Judgment, however, it stated thus:

> " On the issue of jurisdiction, it is a truism that jurisdiction is everything and if a Court or tribunal finds that it lacks jurisdiction to deal with a matter, then it must down its tools. This is why it makes sense for the Court or arbitrator to determine the question of jurisdiction in limine, where jurisdiction is challenged. See *Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Ltd* (1989) KLR 1, and the Supreme Court decision in *S. K. Macharia & Another v Kenya Commercial Bank Limited & 2 others*, Sup. Ct. Appl. 2 of 2011, [2012] eKLR. The learned Judge at page 8 of his Ruling stated that none of the parties had raised the issue of jurisdiction. On the contrary, we note from the award itself that the appellant (respondent in the arbitral proceedings) had raised a Preliminary Objection before the tribunal on grounds that the claim was lodged out of time and was therefore bad in law for being time barred".
>
> [Emphasis added]

In determining the issue of time bar, the Court went on to state thus:

> " In order to determine if the tribunal's appointment/empanelment was time-barred, we need to have a close look at the relevant clauses in the Contract. As stated earlier, under the agreement, there was a requirement of a 14 days' notification of the occurrence of an event of force majeure which would prevent the performance of the Contract. In this case, following the Government suspension of the performance of the Contract, the appellant wrote to the respondent on 26th March, 2010 and informed it of the said decision. There is no dispute that the suspension by the Government was unforeseeable and beyond the appellant's power to remedy. It was an event of force majeure. The appellant argues that pursuant to Clause 7.2 (vii) the contract stood terminated after 60 days of notification of the occurrence of the suspension of the contract by the Government".

And;

> " That would actually appear to be the position but for one small problem; i.e. that the letter in question had said that the suspension was "until further notice". We do not therefore agree that the Contract stood terminated by 26th June, 2009. In our view, time was not running against the respondent until it was informed

> of the termination vide the letter dated 15th July, 2013. From the said date, the respondent, who was disputing termination, had to declare a dispute and refer the matter to arbitration within 21 days pursuant to clause 10 of the Contract. This of course did not happen and the dispute was declared and the matter referred to the tribunal almost two years later. We have no hesitation in finding that the reference and appointment of the tribunal was done outside the time limits prescribed in the Contract. Our finding therefore is that the reference was actually time-barred, and the tribunal had no jurisdiction to entertain it".

37. The Court of Appeal went further to find that:

    i. The arbitral tribunal, by determining the question of the alleged liability of the Respondent to pay 0.2% of fees levied on inspection to the Petitioner, acted outside its scope and contrary to Section 35(2)(iv) of the *Arbitration Act*.

    ii. An award that imposes liability on a State Corporation to pay from public funds over Kshs.1B without proof of liability to pay is clearly against public policy.

38. The Court of Appeal having so held, faulted the High Court for not allowing the setting aside application and stated further, that, as no party had benefitted from the contract, each party should bear its costs.

39. Do the above findings clothe this court with jurisdiction to determine the present appeal under Article 163(4) (a) of the *Constitution*? In Nyutu, we assumed jurisdiction to enable us properly interrogate the question whether a party dissatisfied with a Section 35 Ruling can appeal to the Court of Appeal. We settled that question in the manner expressed above. We also resolved the dichotomy of opinions prevalent at the Court of Appeal, at the time, on that issue. We finally remitted the matter back for determination by the Court of Appeal in line with our guidance. The same position obtained in Synergy. Mr. Ngatia, learned Counsel for the Petitioner, strongly submitted that we should not follow those decisions and remit the matter back for consideration by the Court of Appeal. And that we should instead interrogate the Court of Appeal Judgment and make our own findings on it. The latter course of action presupposes that we have the jurisdiction to do so. Do we?

40. We have read the Judgments of the High Court and the Court of Appeal in the context of Article 163(4) (a) of the Constitution. We have also restated the law on our jurisdiction elsewhere in this Judgment. With respect to the Petitioner, not one issue of constitutional interpretation and application save the jurisdiction of the Court of Appeal to hear and determine the appeal has arisen for our determination. We shall shortly address that issue which we find is grave enough to warrant our assumption of jurisdiction in the present matter. On this basis, we decline the invitation by Mr. Ngatia to delve into the substantive merits of the Judgment of the Court of Appeal. Whether or not the High Court properly

applied Section 35 of the *Arbitration Act* and its findings on the grounds on which setting aside of an arbitral award may be hinged, did not require any interrogation of any constitutional provision.

41. Having so stated, we must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of Courts has been greatly diminished notwithstanding the narrow window created by Sections 35 and 39 of the Act. To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in *Nyutu* and *Synergy* should not be taken as stating anything to the contrary. In this regard, one issue we did not pronounce ourselves on in the *Nyutu* and *Synergy* decisions, is whether a further appeal lies to this Court from a determination by the Court of Appeal. For the avoidance of doubt, we now declare that in conformity with the principle of the need for expedition in arbitration matters, where the Court of Appeal assumes jurisdiction in conformity with the principle established in these two decisions, and delivers a consequential Judgment, no further appeal should ordinarily lie therefrom to this Court.

42. On the face of it, the foregoing conclusions ought to dispose of this matter were it not for the yet to be resolved issue as to whether, the Court of Appeal itself, in the present case, properly assumed and exercised jurisdiction in arriving at the Judgment whose merits we have declined to delve into. This issue arises from the fact that, as opposed to *Nyutu* and *Synergy*, the High Court in the case leading to the present appeal, declined to interfere with the arbitral award. In fact, the learned Judge (Ochieng J) was categorical that the High Court lacked jurisdiction to upset the award, given the strictures of Section 35 of the *Arbitration Act*, pursuant to which applications before him had been filed. The learned Judge rendered himself thus:

> " Regrettably, this Court does not have the authority to make an assessment on the merits of the arbitral award. The jurisdiction of the High Court, when called upon to set aside an award, is limited to what is permissible pursuant to Section 35 of the *Arbitration Act*. Any other intervention by the Court is expressly prohibited by Section 10 of the *Act*. I therefore decline the invitation to ascertain if there were any contradictions in the various aspects of the decision made by the arbitral tribunal. In the final analysis, I find no grounds to warrant the setting aside of the arbitral award dated 29th July 2016." [Paras. 54-56].

43. In granting leave to appeal against this determination by the High Court, the learned Judges of Appeal stated as follows:

> "Although unlike Section 39, Section 35 does not specifically provide that an appeal to this Court will lie from a decision of the High Court setting aside an arbitral award, we reiterate that it does not, in the same breadth, expressly bar a party aggrieved by the setting aside to come to this Court for redress. [Emphasis added]Further on, the learned Judges stated:
>
> " With that conclusion, we join those who share the view that nothing stops this Court from granting leave to appeal from a decision of the High Court made under Section 35."

44. We repeat that, this Ruling was made before the guidance provided by this Court in *Nyutu* and *Synergy* wherein, we pronounced ourselves as follows in *Nyutu*:

> " (77) In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction."

45. This principle as illuminated in the foregoing quote, is now the governing law regarding appeals from the High Court to the Court of Appeal in arbitration disputes, arising from Section 35 of the *Arbitration Act*. Our pronouncement in *Nyutu* and *Synergy*, makes it abundantly clear that such appeals are not as open ended as the Court of Appeal appeared to suggest. We shall advert to this issue later. The critical question at this stage is: having granted leave to appeal from the High Court's decision, what was the fundamental question to be substantively determined by the Court of Appeal?

46. As we have already observed, in this instance, the intended appeal was premiered on the fact that the Petitioner, at that stage, was aggrieved by the refusal of the High Court to exercise jurisdiction and interfere with the arbitral award. In declining to upset the arbitral award, the learned Judge believed that the High Court lacked jurisdiction to do so. Therefore, the only question before the Court of Appeal ought to have been whether the High Court

properly declined to exercise jurisdiction under Section 35 or not. In its Judgment, the Appellate Court was simply content to note that, as the leave to appeal granted on 31st May 2018 had not been set aside, the same was still valid. The Appellate Court also made an oblique reference to the pending decisions at the Supreme Court. The learned Judges stated as follows in that regard:

> "Whether the Court was right or wrong in granting the said leave, the same has not been set aside and is therefore still valid. In view of the foregoing, the issue of whether this Court has jurisdiction to entertain the instant appeal or not does not lies for our determination. The determination of that issues lies elsewhere. We acknowledge that it is an issue that has been pending before the Supreme Court for a while but we say no more." [Para. 48, Emphasis added].

47. In the above context, it is our considered view that, the leave, whether rightly or wrongly granted (an issue to which we shall return) could only have empowered the Court of Appeal to determine whether the High Court ought to have interrogated the arbitral award or not. If it were to determine that the High Court had wrongly declined jurisdiction to so do, the proper and indeed only course of action open to the Court of Appeal, was to remit the matter back to the High Court with directions that the latter, hears the substantive application for setting aside the arbitral award on its merits. Instead, the Court of Appeal stepped into the shoes of the High Court and proceeded to determine a matter that had not been substantively decided by the latter. In so doing, the Appellate Court usurped the jurisdiction of the High Court, as it was not open to it, to take over an arbitration dispute and determined it on its merits when the High Court had not done so. As is the practice in all other disputes, where an Appellate Court holds that a lower Court has wrongly declined to determine a matter in the "mistaken" belief that it lacks jurisdiction to do so, the Court has to remit that matter to the lower Court directing it to exercise its jurisdiction. Only after the lower Court has complied with such an order, would a substantive appeal lie to the Appellate Court.

48. In the premises, we have no option but to hold that the Judgment of the Court of Appeal, to the extent to which it purported to interrogate the merits of an arbitral award, in the absence of the High Court's pronouncement on the same, was rendered in excess of jurisdiction. This means that even if we had found that we had jurisdiction to decide the appeal on its merits, this jurisdictional conundrum would have stopped us in our tracks.

49. In conclusion, having declined to delve into the merits of the Court of Appeal Judgment for the reasons stated, and having also found that the Appellate Court prematurely, and in excess of its jurisdiction, sat on an appeal that was not ripe, instead of remitting the same to the High Court for determination, what course of action is open to us? To answer this question, we must first address the issue as to whether the leave that triggered these proceedings in the

first place, ought to have been granted. Or put another way, had the application for leave to appeal been made after the delivery of *Nyutu* and *Synergy*, would such leave have been likely granted by the Court of Appeal? It is to this question that we must now turn.

50. Towards this end, we have already made two critical observations, firstly, that in granting leave on 31st May 2018, the Court of Appeal did not interrogate the substance of the intended appeal and whether it fell within the said Section (read, Section 35 of the *Arbitration Act*). Secondly, that in granting leave, the Court of Appeal appeared to suggest or must be taken to have been suggesting that such appeals were open-ended. At that time there were two divergent schools of thought at Court of Appeal; the one which argued that appeals lay to the Court from decisions of the High Court and the other which was categorical that no such appeals could lie to the Court. And then came our decisions in *Nyutu* and *Synergy* of which we shall say no more, save that the window to appeal is severely restricted.

51. The applicable law is now settled regarding the vexed question as to whether an appeal lies or not, under Section 35 of the *Arbitration Act* and if so, under what circumstances. We appreciate the fact that at the time leave was granted, the Supreme Court was yet to pronounce itself on the issue. However, the law as enunciated must now henceforth be the yardstick for granting or refusing to grant leave to appeal in such matters. After our pronouncements in *Nyutu* and *Synergy*, it is not possible that the Court of Appeal can grant leave to appeal from a Section 35 Judgment of the High Court without interrogating the substance of the intended appeal, to determine whether, on the basis of our pronouncement, such an appeal lies. A general grant of leave to appeal would not suffice. Yet this is exactly what happened in the instant case before us.

52. In conclusion, having declined to delve into the merits of the substantive Judgment of the Court of Appeal for the reasons stated, and having further determined that the said Judgment was nonetheless rendered in excess of jurisdiction, and finally having determined that the initial leave to appeal was granted without interrogating the substance of the intended appeal, the only course of action open to us is to maintain the Ruling of the High Court.

53. Having so held, what is the appropriate relief to grant the parties? It is our view that the appeal is one for granting but what of costs? Like the Court of Appeal, we deem it fit that each party should bear its costs of the present appeal.

**D. Disposition**

i. The Appeal herein is allowed as prayed and the Judgment of the Court of Appeal dated 22nd November 2019 is hereby set aside.

ii. Each Party shall bear its costs thereof.

54. It is so ordered.

**Popat & 7 others v Capital Markets Authority (Petition 29 of 2019) [2020] KESC 3 (KLR) (11 December 2020) (Judgment)**

**Supreme Court of Kenya**

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

Neutral citation: [2020] KESC 3 (KLR)

***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)(h).*

***Administrative Law*** *– natural justice – impartiality of the decision-maker – legality of the Capital Markets Authority's investigatory and enforcement mandate – 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 were non-executive directors of Imperial Bank Limited (the bank) which had been put under receivership. The respondent, a statutory regulatory authority established under section 5 of the Capital Markets Act and 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 appellants claimed that an inquisitorial hearing presided by CMA's chair took place and a summary ruling was 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 Capital Markets Act 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 that the Capital Markets Act vested in the Capital Markets Authority 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 sections 11(3) (cc) and 11(3)(h) of the Capital Markets Act which authorized the overlapping investigatory and enforcement mandate of the Capital Markets Authority were unconstitutional.

iii. Whether the Capital Markets Authority's attempted enforcement proceedings after the conduct of its investigatory role with respect to a 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 Capital Markets Authority with the 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 11 (3) 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 Capital Markets Authority had 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. The natural justice *nemo judex in causa sua esse* (no one should be a judge in his own cause) principle decreed that no person should be allowed to be a judge in their 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. An important exception to the *nemo judex in causa sua esse* principle raised in the instant case was where the overlap of functions was a creature of statute and as long as the constitutionality of the statute was not in issue.
5. Administrative Commissions (Tribunals) would have repeated dealings, in both administrative or adjudicative capacities, with the same parties. Hence, to achieve the efficiency required in the operations of the securities markets, the legislatures more often than not, allowed for an overlap of functions which in normal judicial proceedings would be kept separate.
6. In assessing allegations of bias, courts must be sensitive to the fact that, in their "protective role", securities commissions have a special character. It was not enough to merely claim bias because a commission, in undertaking its preliminary internal review, did not act like a court. If it was clear from its empowering legislation that certain activities which might otherwise be

considered "biased" form an integral part of its operations and the Commission had not acted outside its statutory authority, the doctrine of"reasonable apprehension of bias" per se could not be sustained. The Commission's structure and responsibilities as well as the manner of the discharge of its mandate must, inter alia, be considered.
7. Administrative tribunals were not supposed to operate like courts of law. That was why they were allowed to be masters of their own procedure although they must act fairly. 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.
8. 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.
9. The court must be guided by the letter and spirit of the provisions of articles 50(1) and 47(1) as read with article 25(c) of the Constitution and give life to Parliament's intention in the enactment of section 11(3) (cc) & (h) of the Capital Markets Act. Courts ought to ensure

that its interpretation of those provisions did not hamper the operations of the CMA and/or those of other regulatory bodies such as the Central Bank of Kenya and the Competition Authority of Kenya. Hence, in promoting public policy and efficient administration of the securities market in Kenya, the right to fair administrative action could not be sacrificed at the altar of efficiency or public interest.

10. The Capital Markets Authority could not be allowed to ride roughshod over the non-derogable constitutional rights of investors. It would be counterproductive to scareo scare away the very prospective investors it sought to entice. 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.

11. 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 be impartial.

12. Reasonable apprehension of bias was a legal standard for disqualifying judges and administrative decision-makers. If there was a real possibility that a reasonable person, properly informed and viewing the circumstances realistically and practically, could conclude that the respondent might be prone to bias, that would be a constitutional violation that could not be overlooked in the name of public interest.

13. In the discharge of its mandate under the CMA Act, the respondent must always first determine whether or not its act or decision was judicial or quasi-judicial and whether or not it was likely to adversely affect the rights of the persons or bodies under investigation. If it is either of the two or both, it must comply with the requirements of impartiality and independence under articles 50 (1) and 47 of the Constitution. Sections 11A(1) and 14(1) of the CMA Act empowered the respondent to delegate its functions and powers to other bodies or persons. As such, the objectives of the CMA Act would still be realized.

14. The respondent merely referring to the enforcement proceeding in the instant matter, euphemistically, as "administrative" did not change its intrinsic character. The nature of the enforcement proceedings sought to be undertaken by the respondent against the petitioners in the matter bespoke a quasi-judicial process. Based on the material evidence placed before it, the respondent would have had to determine the culpability or otherwise of the petitioners. If found culpable, pursuant to section 11(3) (cc) of the CMA Act, the respondent would impose sanctions, including financial penalties against the petitioners.

15. 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 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 Capital Markets Authority 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.

*Appeal partly allowed.*

***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.*

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2. *Aly Khan Satchu v Capital Markets Authority* Miscellaneous Civil Application 220 of 2019; [2019] KEHC 12135 (KLR); [2019] eKLR - (Explained)
3. *Capital Markets Authority v Jeremiah Gitau Kiereini & Attorney General* Civil Appeal 9 of 2014; [2014] KECA 276 (KLR); [2014] eKLR - (Explained)
4. *Commissioner of Income Tax v Menon* Civil Appeal 19 of 1981; [1985] KECA 84 (KLR); [1985] eKLR - (Explained)
5. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR); [2014] eKLR - (Explained)
6. *Dry Associates Limited v Capital Markets Authority & another Interested Party Crown Berger (K) Ltd* Petition 328 of 2011; [2012] KEHC 5568 (KLR); [2012] eKLR - (Explained)
7. *Ernst & Young LLP v Capital Markets Authority & Kenya Reinsurance Corporation Ltd* Petition 385 of 2016; [2017] KEHC 8510 (KLR); [2017] eKLR - (Explained)
8. *Imaran Limited, Reynolds & Company Limited, East Africa Motor Industries (Sales & Services) Limited, Momentum Holdings Limited, Abdulmal Investments Limited & Kenblest Limited v Central Bank of Kenya, Kenya Deposit Insurance Corporation, Diamond Trust Bank Limited, Kenya Commercial Bank Limited, Josephine Awino Ogweno t/a J. Kogweno & Associates & NIC Bank Limited* Miscellaneous Civil Application 43 of 2016; [2016] KEHC 8185 (KLR); [2016] eKLR - (Explained)
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12. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Explained)
13. *Munene v King'ara & 2 others* Petition 7 of 2014; [2014] KESC 37 (KLR); [2014] eKLR - (Explained)
14. *Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya* Judicial Review 63 of 2013; [2014] KEHC 5564 (KLR); [2014] eKLR - (Explained)
15. *Solomon Muyeka Alubala v Capital Markets Authority; National Bank of Kenya Ltd (Interested Party)* Judicial Review Miscellaneous Application 251 of 2018; [2019] KEHC 4895 (KLR); [2019] eKLR - (Explained)
16. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR); [2013] eKLR. - (Explained)

***South Africa***

*President of the Republic of South Africa and others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) - (Explained)

***United Kingdom***

1. *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256; [1923] ALL ER Rep 233 - (Explained)
2. *Regina v Race Relations Board, Ex parte Selvarajan* [1975] 1 WLR 1686; [1976] 1 ALL ER 12 - (Explained)
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2. *Québec Inc. v. Quebec (Régie des permis d'alcool)* 1996 CanLII 153 (SCC), [1996] 3 SCR 919 - (Explained)
3. *Re WD Latimer Co and Attorney-General for Ontario* (1973), 2 OR (2d) 391 - (Explained)
4. *Re WD Latimer Co and Bray* (1974), 6 OR (2d) 129 - (Explained)

***Philippines***

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1. Dr. Jacob K. Gakeri (2012), *Regulating Kenya's Securities Markets: An Assessment of the Capital Markets Authority's Enforcement Jurisprudence* International Journal of Humanities and Social Science Volume 2 Issue No. 20

**Statutes**

***Kenya***

1. Capital Markets Act (cap 485A) - (Interpreted) sections 5; 6(3); 11(3)(cc); 11(3)(h); 11A; 14(1); 33D; 34A(4)
2. Constitution of Kenya - (Interpreted) articles 25(c); 35(1)(b); 47; 50(1); 163(4)(a)
3. Fair Administrative Action Act (cap 7L) - (Cited) In general
4. Kenya Deposit Insurance Act (cap 487C) - (Interpreted) sections 43(1); 43(2); 53(1)
5. Supreme Court Act (cap 9B) - (Interpreted) sections 3(b); 3(c); 3(d); 21(3)
6. Supreme Court Rules, 2012 (cap 9B) - (Interpreted) rule 3(5)

**Advocates**

None Mentioned.

December 11, 2020, the Court delivered the following Judgment:

## A. Introduction

1. This is an appeal brought as of right under Article 163(4)(a) of the *Constitution* against the judgment of the Court of Appeal (Githinji, Musinga and Odek, JJA) which overturned the decision of the High Court in *Capital Markets Authority v. Alnashir Popat & 8 Others*, Constitutional Petition No. 245 of 2016. In that judgment, delivered on 28th June 2019, the Court of Appeal held that the respondent is not in breach of Article 47 of the *Constitution*; the provisions of the *Fair Administrative Action Act*, 2015; or the rules of natural justice; and as such it was not a judge in its own cause as the *Capital Markets Authority Act* expressly authorizes it to perform dual and overlapping, inquisitorial and enforcement functions.

## B. Background

2. The petitioners were non-executive directors of Imperial Bank Limited (now in receivership) (the Bank). The respondent is a statutory regulatory authority established under Section 5 of the *Capital Markets Act* (the CMA Act) and charged with the responsibility of, *inter alia*, promoting, regulating and facilitating the development of orderly, fair and efficient capital markets in Kenya.

3. On 12th August 2015, the respondent approved the Bank's application to issue to the general public a corporate bond of Kes. 2 billion (the bond issue). The record shows that it was only the then Bank's Managing Director, Mr. Abdulmalek Janmohamed, and the

Bank's Chief Finance Officer, Mr. James Kaburu, who were privy to that application and who, together with various external transaction advisors, handled all the correspondence regarding the bond issue.

4. On 15th September 2015, the Bank's said Group Managing Director, Mr. Janmohamed, collapsed and died. Immediately thereafter, one M. Naeem Shah, formerly the Bank's Head of Credit, and the said James Kaburu were appointed Acting Managing Director and Deputy Managing Director respectively.

5. On 21st September 2015, the said Acting Managing Director and his deputy informed Mr. Alnashir Popat, the 1st petitioner, who was the non-executive Chairman of the Bank's Board of Directors (the Board), that the former Group Managing Director had for many years authorized illegal disbursements of vast amounts of the Bank's monies in transactions concealed from the respondent, the Central Bank of Kenya (CBK) and the Bank's Board. Alarmed by that disclosure and having failed to verify the said allegations internally, on 7th October 2015, Popat moved the Board to appoint a consultant, the FTI Consulting Group of London, to carry out a forensic audit of the Bank's financial affairs and report on its accurate financial position. The Board also resolved not to utilize the approved bond issue pending the outcome of the investigations by that consultant.

6. Upon receipt of the consultant's preliminary report on 12th October 2015 revealing that the former Group Managing Director had indeed been running a scheme of fraudulent disbursements resulting in losses running into billions of shillings, the Board reported the matter to CBK. On the basis of the damning revelation in that interim report, pursuant to Sections 43(1) & (2) and 53(1) of the *Kenya Deposit Insurance Act*, on 13th October 2015, CBK placed the Bank under receivership and appointed the Kenya Deposit Insurance Corporation its Receiver/Manager for a period of twelve (12) months. That 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.

7. Pursuant to its regulatory authority, the respondent decided to inquire into the circumstances prevailing in the Bank during the bond application and approval period to determine whether the petitioners, as directors of the Bank had, by their actions or omissions, contravened banking regulatory requirements. Consequently, on 6th May 2016, the respondent served the petitioners with notices to show cause and required them to respond, within 14 days, to seven allegations of negligence in the discharge of their mandate as directors of the Bank. In that regard, the appellants were summoned to appear before the respondent's Board on 24th May 2016 to answer those allegations. No hearing took place on that day. The appellants claim, however, that an inquisitorial hearing, which was presided by the CMA's Chairman of the Board, Mr. James Ndegwa, CMA's Chief Executive Officer, Mr.

Paul Muthaura and CMA's Assistant Manager of the Licensing and Approvals Department, was held on 13th January 2016 and that is what triggered the present dispute.

**C. Petition before the High Court**

8. In response to those notices, the appellants filed a constitutional petition in the High Court in which they challenged the propriety of the respondent's conduct of the enquiry. They claimed that, having approved the bond issue, and its officers, namely, the said Chairman of the Board, Mr. James Ndegwa, the Chief Executive Officer, Mr. Paul Muthaura and the Assistant Manager of the Licensing and Approvals Department, having conducted the preliminary enquiry into the matter and had now constituted themselves as adjudicators in the enforcement proceedings, the respondent was conflicted and could not be impartial in the enforcement proceedings. The petitioners also alleged contravention of a host of their constitutional rights including contravention of their right of access to information under Article 35(1)(b) of the *Constitution*; the right to fair administrative action under Article 47 of the *Constitution*; as well as the right to a fair hearing under Article 50(1) of the *Constitution* and sought a conservatory order to restrain the respondent from proceeding with the enquiry until the respondent had caused the receiver/manager to furnish them with certain documents from the Bank. The petitioners also sought an order of certiorari to quash the notices to show cause as well as compensation for alleged damages they suffered by that attempted enquiry. The respondent opposed that petition terming it not only frivolous but also premature.

9. After hearing that petition, the High Court found that given the respondent's dual inquisitorial and enforcement mandate and the fact that it had admittedly considered and approved the bond issue as merited, a well informed and fair minded observer, given all facts would conclude that there existed a possibility of bias on the part of the respondent against the appellants. Finding, further, that the respondent's regulatory mandate would not be hampered as it could, under Section 11A of the *CMA Act*, delegate its functions to an independent body, the High Court accordingly quashed the notices to show cause issued to the appellants.

**D. Appeal before the Court of Appeal**

10. On the respondent's appeal and the appellants' cross-appeal against that decision, the Court of Appeal held that since the *CMA Act* expressly authorized the overlapping inquisitorial and enforcement functions, the respondent is expected to make unprejudiced judgment on matters it has investigated. It consequently allowed the appeal and dismissed the cross-appeal clarifying that the respondent was at liberty to continue with the administrative proceedings it had commenced against the appellants. The Court of Appeal also awarded costs of the

petition in the High Court and on appeal to the respondent. That decision provoked the present appeal before this Court.

**E. Appeal before the Supreme Court**

11. Upon consideration of the 14 grounds of appeal, it is clear to us that the substratum of this appeal is the propriety of the dual statutory mandate granted to the respondent as the investigator and enforcer of capital markets infractions in Kenya. The appeal thus raises three major issues: whether the overlapping roles that the Capital Markets Act vests in the Capital Markets Authority constitute a violation of Articles 47(1) and 50(1) (as read with Article 25(c)) of the *Constitution*; whether Section 11(3) (cc) and (h) of the *Capital Markets Act* which authorizes the overlapping is and should be declared unconstitutional; and whether the respondent's attempted enforcement proceedings were or were likely to be biased against the petitioners.

**F. Petitioners' Submissions**

12. On the first issue, the petitioners argue that both Articles 50(1) and 47(1) of the *Constitution* espouse the twin tenets of natural justice: nemo judex in causa sua (no man should be a judge in his own cause) and audi alteram partem (no man should be condemned unheard). These twin principles are so jealously guarded that they comprise one of the only two constitutional rights that, pursuant to Article 25(c) of the *Constitution*, cannot be limited.

13. The petitioners argue that by vesting both inquisitorial/investigative and enforcement functions in the respondent, Section 11(3)(cc) & (h) of the *CMA Act* is unconstitutional for being inconsistent with Articles 47(1) and 50(1) of the *Constitution*. They contend that for the officers of the respondent who had been involved in the inquisitorial/investigatory hearings, on the basis of which the respondent formulated the seven allegations (equivalent to charges) against the petitioners, to constitute themselves the adjudication panel in the subsequent enforcement proceedings is tantamount to being the accuser, investigator, prosecutor and judge at the same time. Such act will not only offend the rules of natural justice, but such officers are likely to be biased against the petitioners, thus clearly flouting the petitioners' rights under Articles 47(1) and 50(1) of the *Constitution*.

14. The petitioners further argue that by requiring them to respond to the seven accusations leveled against them within 14 days and proceeding with the hearing of the inquiry on dates the petitioners' counsel was unavailable, the respondent denied them the right to legal representation by counsel of their choice and an opportunity to prepare their defence. To make matters worse, the petitioners argue, the respondent ignored their request to invoke Section 33D of the *CMA Act* and Article 35(1)(b) of the *Constitution* and obtain for them the documents they required from the Central Bank of Kenya's appointed receiver/manager

to enable them prepare their defence. As such, notwithstanding the express authorization by the *CMA Act* of these duality of inquisitorial and enforcement functions, these acts also flout their rights under Articles 47(1) and 50(1) of the *Constitution*. They cite *Imaran Limited & 6 others v Central Bank of Kenya & 5 others* [2016] eKLR in support of that submission.

15. In further support of their case, the petitioners cite several authorities from comparative jurisdictions. The first one is the decision of the Supreme Court of Canada in *Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919, 1996 CanLII 153 (SCC) where it was held that statutory provisions that authorize overlapping of functions are liable to be declared invalid where the exercise of such overlapping functions by an administrative agency would cause an informed person to have a reasonable apprehension of bias. They also cite the decision of the Supreme Court of the United States in *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1910 (2016) where it was held that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. The petitioners further rely on the American Supreme Court decision in *Lyness v. Commonwealth State Bd. of Medicine*, 529 Pa. 535, 548 (Pa. 1992) and argue that any appearance of non-objectivity on the part of an administrative agency renders the agency's proceedings unconstitutional whether or not actual bias exists as a result of the agency acting as both prosecutor and judge.

16. In the circumstances, also relying on this Court's decisions in *Communication Commission of Kenya & 5 Others v. Royal Media Services & 5 Others*, [2014 eKLR; *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*, [2014] eKLR; and *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR, the petitioners urge us to hold that Section 11(3)(cc) & (h) of the *CMA Act*, which grants the respondent authority to adjudicate contested issues arising from matters it had investigated, fouls Articles 47(1) and 50(1) of the *Constitution*.

17. Consequent upon finding that Section 11(3)(cc) & (h) of the *CMA Act* is inconsistent with Articles 47(1) and 50(1) of the *Constitution*, the petitioners urge us to declare it unconstitutional. They in addition dismissed the respondent's contention that a prayer for such declaration was not pleaded and the issue of the unconstitutionality of Section 11(3)(cc) & (h) of the *CMA Act* did not feature in the two Superior courts' proceedings. They argue that this Court can make that declaration suo moto as it did in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR. Further, since the petitioners have raised it, the issue of the unconstitutionality of Section 11(3)(cc) and (h) of the *CMA Act* is squarely before this Honourable Court by virtue of Article 163(4)(a) of the Constitution as well as Sections 3(b), (c) (d) and 21(3) of the *Supreme Court Act*, 2011 and rule 3(5) of the *Supreme Court Rules*. As such, this Court has not only the jurisdiction and the mandate but is also obliged to interpret and apply the Constitution vis-à-vis the offending Section 11(3)(cc) and (h) of the *CMA Act* and make appropriate

declarations, so as to give a high yielding interpretive guidance on the Constitution as was stated in *In the Matter of the Speaker of the Senate & Another*, Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR.

18. The petitioners further submit that by declaring Section 11(3)(cc) & (h) of the *CMA Act* unconstitutional, this Court will simply be enforcing Article 2(4) of the *Constitution* which provides that "any law ... that is inconsistent with this Constitution is void to the extent of the inconsistency ..." and applying Section 7(1) of the Sixth Schedule to the *Constitution* which requires "all law in force immediately before" the promulgation of the *Constitution*, 2010 to "be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution." And on the authority of *Mary Wambui Munene v Peter Gichuki King'ara & 2 Others* [2014] eKLR, they contend that that declaration should apply retrospectively to the date of promulgation of the *Constitution*, the said provisions having predated the promulgation of the *Constitution*.

19. The petitioners furthermore faulted the Court of Appeal for relying on the Canadian Court of Appeal decision in the case of *Brosseau v. Alberta Securities Commission*, [1989] 1 SCR 301 which had been overturned by the Canadian Supreme Court in *Quebec Inc. v. Quebec*, (*supra*) and is, at any rate, inconsistent with those of our High Court in *Solomon Muyeka Alubala v. Capital Markets Authority and Another*, [2019] eKLR, as well as *Aly-Khan Satchu v. Capital Markets Authority* [2019] eKLR.

20. The petitioners also dismissed the respondent's argument that an order to foul the alleged overlapping will thwart the objective of the *CMA Act*. They thus argue that Section 11A of the *CMA Act*, which is a codification of international best practices, read together with Section 14(1) thereof which authorizes delegation of some of the respondent's functions as well as Section 34A (4) which authorizes the respondent to refer some matters to the Capital Markets Tribunal, were meant to take care of unique situations like the one of conflict and possible complicity obtaining in this case.

21. On those submissions, the petitioners pray that this appeal be allowed, the judgment of the High Court be restored and the respondent be ordered to pay, to the appellants, compensation in the sum this Court may deem fit to award for the damage they suffered as a result of the respondent's attempted enquiry. They also seek costs as well as interest thereon.

**G. Respondent's Submissions**

22. In response to the petitioners' above submissions, on the first issue, the respondent admits that under the nemo judex in causa sua esse principle, which applies to administrative proceedings before statutory bodies, members of adjudicatory panels should not be involved in the investigatory stages of a proceeding as that would give rise to a reasonable apprehension of bias. However, statutory authorization for overlapping functions are an exception to

this rule and is meant to achieve the objectives of a statute. The respondent cites the cases of *Judicial Service Commission v Gladys Boss Shollei & Another* [2014] eKLR, and *Ernst & Young LLP v Capital Markets Authority & Another* [2017] eKLR in support of that submission.

23. Citing Jacob K. Gakeri's Article, *Regulating Kenya's Securities Markets: An Assessment of the Capital Markets Authority's Enforcement Jurisprudence*, the respondent further argues that an effective enforcement regime is the bedrock of investor protection and the confidence required in capital markets. To achieve that objective, the respondent submits that Section 11(3) of the *CMA Act* grants wide powers to the CMA to enable it instill discipline upon any errant player with a view to regulating and facilitating development of an orderly, fair and efficient capital market in Kenya. The respondent contends that if the petitioners' prayer is granted and Section 11(3) (cc) & (h) is declared unconstitutional, the efficaciousness of CMA's regulation will be lost spelling doom to the Kenyan capital market. Such an interpretation would also ruin the alternative dispute resolution mechanism under Article 159(2) (c) of the *Constitution* and also hamper the operations of all other regulatory bodies such as the Central Bank of Kenya and the Competition Authority of Kenya tasked with investigating and sanctioning errant market players which would be absurd. Errant financial market players would ride roughshod in Kenya and such interpretation would spell the beginning of a dark period for investors.

24. The respondent furthermore argues that the *CMA Act* is deliberately designed to empower the CMA to perform overlapping roles in the capital market oversight and that does not constitute a violation of Article 50(1) as read with Article 25(c) and/or Article 47 of the *Constitution*. As such, the petitioners' accusation that the respondent, having approved the bond issue, turned around and investigated, with a view to taking enforcement action against the appellants (if found culpable), is tantamount to being the accuser, investigator, prosecutor and judge at the same time, has no basis. As stated, the *CMA Act* expressly authorizes those actions, so submits the respondent.

25. The respondent further argues that in considering the provisions of Article 50(1) as read with Article 25(c) and Article 47 of the *Constitution*, as Mativo J. stated in *Aly Khan Satchu v Capital Markets Authority* [2019] eKLR, the respondent's proceedings under the *CMA Act* should not be equated to a criminal trial. Instead, as was stated in *Dry Associates Limited v. Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* [2012] eKLR, they should be fairly informal, expeditious, efficient, lawful and reasonable.

26. The respondent in addition argues that though the *Quebec Inc. case* is distinguishable from the *George Brosseau case* in that the latter dealt with the liquor licensing permit, the *Quebec Inc. case* actually upheld the ratio in the *George Brosseau case* on the exemption that flexibility

must be shown towards administrative tribunals in the application of the *nemo judex in causa sua esse* principle and that plurality of functions is not necessarily problematic.

27. In the circumstances, the respondent urges that the overlapping mandate granted by the *CMA Act* to the respondent does not constitute a violation of the appellants' constitutional rights under Articles 47(1) and 50(1) (as read with Article 25(c)) of the *Constitution*.

28. On the second issue, the respondent argues that the unconstitutionality of Section 11(3) of the *CMA Act* was not pleaded in the High Court petition and did not feature in the two Superior Courts' proceedings. This Court cannot therefore entertain such a prayer. It is an afterthought and there is therefore no basis for declaring Section 11(3) (cc) & (h) of the *CMA Act* unconstitutional, it submits.

29. On bias, the respondent denies that any inquisitorial hearing, which was presided over by the CMA's Chairman of the Board, Mr. James Ndegwa, CMA's Chief Executive Officer, Mr. Paul Muthaura and CMA's Assistant Manager of the Licensing and Approvals Department or at all, was held on 13th January 2016. What happened, according to the respondent, is that on 24th December 2015, the respondent invited the appellants to a meeting on 13th January 2016 to discuss and provide information on the circumstances prevailing in the Bank from the application to the approval of the bond issue. The appellants with their counsel attended that meeting at which the respondent informed them that the conduct of all the parties in the issuance of the bond would be fully inquired into.

30. Based on the information gathered from the petitioners and that derived from affidavits filed by stakeholders and the CBK's said receiver/manager in various court proceedings, on 6th May 2016, the respondent served the petitioners with a notice to show cause and required them to respond in writing within 14 days and to appear before the respondent on 24th May 2016 to make their submissions on the alleged breaches. However, at the instance of the petitioners and their advocates, the hearing was adjourned twice. And before the hearing that was scheduled for 16th June 2016, the appellants filed Constitutional Petition No. 245 of 2016, which gave rise to this appeal.

31. The respondent also contends that the allegation that the Chairman of the Board, Mr. James Ndegwa, CMA's Chief Executive Officer, Mr. Paul Muthaura and CMA's Assistant Manager of the Licensing and Approvals Department are conflicted has no basis. Other than submitting globally that Article 47(1) of the *Constitution* would be violated, the petitioners did not make out a case, either before the High Court or before the Court of Appeal, for a reasonable apprehension of bias.

32. The respondent submits that under Section 6(3) of the *CMA Act*, the Chairman of CMA is mandated to preside over all meetings of the Board of CMA. Section 8 gives the CEO administrative functions. Ms. Mary Njuguna, the Assistant Manager in charge of

Licensing and Approvals was the most suited person to gather information on the bond issue. However, when the appellants were summoned for hearing on 31st May 2016, as the minutes of that meeting show, Ms. Njuguna did not appear. At any rate, the appellants did not raise any objection or conflict on the composition of the hearing panel.

33. The respondent further contends that this case is distinguishable from the Solomon Alubala case relied upon by the petitioners in that there was a hearing in that case. In this one, the hearing was nipped in the bud. The respondent cited the case of the *Judicial Service Commission v. Gladys Shollei & Another* [2014] eKLR and Lord Denning's statement in English Court of Appeal decision in *Regina v Race Relations Board, Ex parte Selvarajan* [1975] 1 WLR 1686, [1976] 1 ALL ER 12 for the proposition that administrative bodies are the masters of procedure in their proceedings and unless one can prove that there was acute procedural impropriety, the courts should not intervene.

34. On those submissions, the respondent urges us to dismiss this appeal with costs.

**H. Analysis**

35. As stated, the substratum of this appeal is the propriety of the dual statutory mandate granted to the respondent as the investigator and enforcer of capital markets violations in Kenya. The petitioners contend that Section 11(3)(cc) & (h) that vests the respondent with that dual statutory mandate is unconstitutional. They also accuse the respondent of bias for the reason that fair play would frown upon the respondent's investigatory and enforcement mandate in this case.

36. While conceding that under the *nemo judex in causa sua esse* principle the overlapping mandate should ordinarily not be allowed, the respondent on the other hand posits that in the case of bodies regulating securities, the overlap is an exception if authorized by statute and the discharge of that dual mandate is not unconstitutional.

37. As stated, three main issues are raised in this appeal. They are: whether the overlapping roles that the *Capital Markets Act* vests in the Capital Markets Authority constitutes a violation of Articles 47(1) and 50(1) (as read with Article 25(c)) of the *Constitution*; whether Section 11(3) (cc) and (h) of the *Capital Markets Act* which authorizes the overlapping is and should be declared unconstitutional; and whether the respondent's attempted enforcement proceedings were or were likely to be biased against the petitioners.

38. Having considered the parties' written and oral submissions on the three issues, we would like to observe that the importance of capital markets cannot be over-emphasized. The capitals markets are "a fundamental component of the financial sector in achieving a robust and sustaining economic development." They assist governments to close resource gaps by providing "alternative sources of long-term finance for long-term productive investments";

they assist raise "equity and infrastructure development capital via long dated bonds and asset backed securities"; they provide "avenues for investment opportunities that encourage a thrift culture critical in increasing domestic savings and investment ratios that are essential for rapid industrialization" and they encourage" broader ownership of productive assets by retail investors" [including pensioners], a critical aspect of poverty reduction. [1]

Securities also "support corporate initiatives finance the exploitation of new ideas and facilitate the management of financial risk." [2]

39. Due to these fundamental roles that the Capital Markets Authority plays in a country's economy, sound and effective regulation to foster public and investor confidence in the integrity, growth and development of securities markets is imperative.[3] Effective regulation also serves the purposes of

> " protecting investors, reducing systemic risk and ensuring that markets are fair, efficient and transparent."[4] It is for these reasons that capital markets world over are highly regulated.

40. Apart from an effective regulatory framework, an enforcement regime is also critical. "Enforcement determines the efficaciousness of regulation." As Dr. Gakeri further observes,

> " an effective enforcement regime is the bedrock of investor protection and [the] confidence required in capital markets." And the "effectiveness of the regulatory scheme rests upon the nature and scope of enforcement tools"[5] granted to the regulatory body.

41. In most common law jurisdictions, for instance Australia; Uganda; Tanzania, Nigeria; and Ghana, the regulatory and enforcement frameworks are statutory with the relevant statutes also creating the regulatory authorities and spelling out their functions. Though there is no uniform regulatory and enforcement scheme, to achieve the objective of their statutes,

1 See the Capital Markets Authority Handbook: A production of the Capital Markets Authority and a component of Capital Markets' project funded by the UNDP. Available at https:*www.cma.or.ke*

2 The International Organisation of Securities Commission in its "Objectives & Principles of Securities Regulation, May 2003" Available at https:*www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf*

3 Ibid

4 See Dr. Jacob K. Gakeri in his Article, "*Regulating Kenya's Securities Markets: An Assessment of the Capital Markets Authority's Enforcement Jurisprudence*" International Journal of Humanities and Social Science Vol. 2 No. 20 [Special Issue – October 2012].

5 Ibid

most jurisdictions, [including Kenya], expressly authorise an overlap of functions which in normal judicial proceedings would be kept separate.

42. In Kenya, as is clear from its preamble, the objective of the Capital Markets Act is to "establish a Capital Markets Authority for the purpose of promoting, regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya and for connected purposes." This is the objective we are required to keep in view while interpreting the *CMA Act* vis-a-vis the provisions of Articles 47 and 50(1) of the *Constitution*.

43. One of the canons of statutory interpretation, as was stated in the case of *Commissioner of Income Tax v. Menon* [1985] eKLR, is the appreciation of the social and historical background of a legislation. The historical background to this case is that, prior to the enactment of the *CMA Act*, the capital market in Kenya faced multiple challenges running from illicit intermediaries to lack of proper legislative guide hence the need for a firm regulatory regime. To achieve the objective of the *CMA Act* therefore, the Capital Markets Authority (CMA), established under Section 5 of the *CMA Act*, is, under Section 11(1) thereof charged with the responsibility of, *inter alia*, developing "all aspects of the capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for longer term investments in, productive enterprises" to facilitate "wider participation of the general public in the securities commodities market and derivatives market"; and "the protection of investor interests."

44. To achieve this objective, Section 11(3) of the *CMA Act* grants the Capital Markets Authority (CMA) wide powers to enable it instill discipline upon any errant player, with a view to regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya, in line with the preamble to the *Act*.

45. The provisions of the impugned Section 11(3)(cc) & (h) authorize the Authority to:

> "(cc) impose sanctions for breach of the provisions of this Act or the regulations made thereunder, or for non-compliance with the Authority's requirements or directions, and such sanctions may include— levying of financial penalties ...; ordering a person to remedy or mitigate the effect of the breach, make restitution or pay compensation to any person aggrieved by the breach; publishing findings of malfeasance by any person; suspending or cancelling the listing of any securities ... for the protection of investors"; and to
>
> (h) inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence and any public

> company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market."

46. Is this overlap unconstitutional? In other words, does the overlap foul the *nemo judex in causa sua esse* principle and is thus unconstitutional as the petitioners argue?

47. We do not think that the overlap per se is unconstitutional. The rights to fair administrative action and fair hearing are universal. The natural justice *nemo judex in causa sua esse* principle is one of the fundamental principles in literally all common law jurisdictions. It is an exemplification of Lord Hewart, CJ's famous maxim in the case of *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, [1923] ALL ER Rep 233 that justice should not only be done but also be seen to be done.

48 This principle is obviously blurred when one presides in the adjudication of one's cause or in a process one has an interest in. As the US Supreme Court stated in the case of *Re Murchison*, 349 U.S. 133, 136 (1955), cited to us by counsel for the petitioners, no person should be allowed to be a judge in his own cause or in a cause he has an interest in its outcome. Interest here includes a situation where one desires or is keen on obtaining a given result. A prosecutor, for example, has an interest in the conviction of a suspect he hauls into court.

49. Having so stated, we would also agree with counsel for the respondent that there are exceptions to most principles. An important exception to the *nemo judex in causa sua esse* principle raised in this case is where the overlap of functions is a creature of statute and as long as the constitutionality of the statute is not in issue. Enunciating this exception in the Canadian case of *Re W. D. Latimer Co. and Attorney-General for Ontario* (1973), 2 O.R. (2d) 391,affirmed sub nom. *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129, Dubin, JA stated:

> "Where by statute the tribunal is authorized to perform tripartite functions, disqualification [on the ground of bias] must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task."

50. As the Canadian Supreme Court later stated in the case of *Brosseau v. Alberta Securities Commission*, [1989] 1 SCR 301 "Administrative tribunals are created for a variety of reasons and to respond to a variety of needs."

In the case of securities commissions, that courts added,

> "By their nature, such commissions [read tribunals] undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act."

51. Such bodies will therefore have repeated dealings, in both administrative or adjudicative capacities, with the same parties. It is for this reason and to achieve the efficiency required in the operations of the securities markets, that the legislatures more often than not, allow for an overlap of functions which in normal judicial proceedings would be kept separate.

52. In the said case of *Georges R. Brosseau v The Alberta Securites Commission*, Brosseau was a solicitor who prepared the prospectus of a company that later went into bankruptcy. The Alberta Securities Commission launched an investigation into the affairs of the company and in that regard summoned Brosseau to show cause why a cease trading order and/or possible deprivation of certain statutory exemptions would not be made against him. Brosseau raised a preliminary objection that the Commission had no jurisdiction to entertain any such proceedings against him. Upon the Commission overruling that objection, he unsuccessfully appealed to the Alberta Court of Appeal. The major issue in his further appeal to the Canadian Supreme Court was whether there was a reasonable apprehension of bias given that the Commission's Chairperson was involved in investigative stages.

53. In its decision in that case, the Canadian Supreme Court held that in assessing allegations of bias, courts must be sensitive to the fact that, in their "protective role", securities commissions have a special character. As such, it is not enough to merely claim bias because a commission, in undertaking its preliminary internal review, did not act like a court. If it is clear from its empowering legislation that certain activities which might otherwise be considered "biased" form an integral part of its operations and the Commission has not acted outside its statutory authority, the doctrine of "reasonable apprehension of bias" per se cannot be sustained. The Commission's structure and responsibilities as well as the manner of the discharge of its mandate must, inter alia, be considered.

54. We endorse this view. Administrative tribunals are not supposed to operate like courts of law. That is why they are allowed to be masters of their own procedure although they must act fairly. (See Lord Denning's dictum in *Selvara Jan v. Race Relations Board* [1976] 1 ALL ER 12). And that is also why we agree with the respondent that for purposes of efficiency and in the carrying out of the objective of the *CMA Act*, especially in the expeditious disposal of disputes that arise in the operations of the capital markets, the functions set out in Section 11(3)(cc)(h) cannot be performed by separate bodies. To fragment the discharge of those

functions will, in our view, lead to disputes dragging for years on end and thus defeating one of the crucial objectives of the *CMA Act*: efficiency. As such, these functions have, as of necessity, to be discharged by one body hence the overlap in the mandate granted to CMA.

55. In the circumstances, we find and hold that Section 11(3) (cc) & (h) of the *CMA Act* is not unconstitutional. The overlapping mandate does not per se render the Section unconstitutional. What might turn out to be unconstitutional is the discharge of that dual mandate.

56. Is that the case in this matter? Did the respondent, in its attempt to adjudicate over the issues raised in this matter act or was likely to act unconstitutionally?

57. These questions thrust to view the critical qualifications given in both the *Brosseau* and *Latimer Cases* that the exception to the *nemo judex in causa sua esse* principle is on the assumption that "the constitutionality" of the statute is not in issue and in the discharge of its overlapping mandate, a tribunal does not go "beyond the performance of the duties imposed upon it by the empowering legislation."

58. Besides the universal application of the *nemo judex in causa sua esse* principle, in our system, the principle is also entrenched in our 2010 *Constitution*. The rights to fair administrative action and fair hearing are constitutionally underpinned under Articles 47(1) and 50(1) of the 2010 *Constitution*. Consequently, even though we have held that Section 11(3) (cc) & (h) of the *CMA Act* is not unconstitutional, we need to determine if the respondent's discharge of its dual mandate in this matter was itself likely to be unconstitutional. This calls for a critical balancing act in the interpretation of Articles 47(1) and 50(1) of the 2010 *Constitution* as against the dual investigative and enforcement mandate that Section 11(3) (cc) & (h) of the *CMA Act* grants to the respondent when allegations of bias are made in court.

59. In such case, as already observed, one of the canons of statutory interpretation is that the historical background of a legislation must be taken into consideration—*Commissioner of Income Tax v. Menon* [1985] eKLR. As was stated in the case of *Judges & Magistrates Vetting Board & 2 Others v. Centre for Human Rights & Democracy & 11 Others*, [2014] eKLR, the court must be guided by the letter and spirit of the provisions of Articles 50(1) and 47(1) as read with Article 25(c) of the *Constitution* and give life to Parliament's intention in the enactment of section 11(3) (cc) & (h) of the *Capital Markets Act* by ensuring that its interpretation of these provisions does not hamper the operations of the CMA and/or those of other regulatory bodies such as the Central Bank of Kenya and the Competition

Authority of Kenya. As such, in the words of the Canadian Supreme Court in *Brosseau Case*, quoting Wright J's observation in the *Latimer Case*, the court must ensure that a party:

> " ... is not unfairly dealt with or put in a position of potential unjustified peril at the hands of some person or body exercising jurisdiction. It must on the other hand [ensure that] ... bodies seeking to perform their public duty are not unduly hampered in their work and that the purpose of the Legislature, if it be the source of their jurisdiction, is respected and realized as it has been expressed."

60. On these established legal principles, we agree with the petitioners that in the promotion of public policy and efficient administration of the securities market in Kenya, the right to a fair administrative action cannot be sacrificed at the altar of efficiency or public interest. In this regard, we agree with the High Court decision in *Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya* [2014] eKLR that "there can never be public interest in breach of the law ... because public interest must accord to the Constitution and the law as the rule of law is one of the national values under Article 10 of the Constitution." And as the Court of Appeal added in *Capital Markets Authority v Jeremiah Kiereini & Another* [2014] eKLR, individual rights are so fundamental that they cannot be limited even by public interest."

61. In this case therefore, in the discharge of its dual mandate, laudable as it obviously is, the respondent cannot be allowed to ride roughshod over the non-derogable constitutional rights of investors. That will obviously be counterproductive and instead of engendering the confidence required in the capital markets, it will scare away the very prospective investors it is seeking to entice. So, if broader and greater public interest cannot override the right to fair hearing, it follows therefore, that narrow interests such as fostering investor confidence in the securities market cannot be used as an excuse to deprive the petitioners of their constitutional right to a fair hearing of the allegations against them.

62. As such, while we accept the duality of the respondent's mandate under Section 11(3)(cc)(h) of the *CMA Act*, in any matter that can be classified as judicial or quasi-judicial, or one where, in the view of a reasonable man conversant with the matter, there is likely to be bias or a reasonable apprehension of bias, the respondent must observe the *nemo judex in causa sua esse* rule.

63. In the circumstances, and in the words of the High Court in *Ernst & Young LLP v Capital Markets Authority & Another* [2017] eKLR, the respondent "is 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 is required to adhere to the principles of natural justice and comply with the provisions of Articles 50 (1) and 47 of the *constitution*." In other words, the reasonable apprehension of bias test is the key test.

64. Furthermore, reasonable apprehension of bias is a legal standard for disqualifying judges and administrative decision-makers for bias. As such, the simple question which we require to answer in this case is whether there was or is a real possibility that a reasonable person, properly informed and viewing the circumstances realistically and practically, could conclude that the respondent might well be prone to bias. If the answer is in the affirmative, that will be a constitutional violation that cannot be overlooked in the name of public interest.

65. We also agree with the petitioners that enforcement proceedings are not necessarily administrative merely because the enforcement body is an administrative one. In the words of the Constitutional Court of South Africa in *President of the Republic of South Africa and others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11:

> " The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising."

In *Cojuangco v. PCGG*, 190 SCRA, the Supreme Court of Philippines, whilst prohibiting a law enforcer from investigating his own complaint, held that a preliminary investigation, though not a trial, amounted to a judicial proceeding on account of the nature of the function. In that characterization, it said "An act becomes judicial when there is opportunity to be heard and for, the production and weighing of evidence, and a decision is rendered."

.66 So, upon the characterization of the functions of the agency that are in question as judicial or quasi-judicial, the agency becomes a "tribunal" and must, in exercising those functions, comply with the requirements of impartiality and independence.

67. In this case, we find and hold that in the discharge of its mandate under the *CMA Act*, the respondent must always first determine whether or not its act or decision is judicial or quasi-judicial and whether or not it is likely to adversely affect the rights the persons or bodies under investigation. If it is either of the two or both, it must comply with the requirements of impartiality and independence under Articles 50 (1) and 47 of the *Constitution*. And it has no difficulty in doing so as Sections 11A(1) and 14(1) of the *CMA Act* empowers the respondent to delegate its functions and powers to other bodies or persons. As such, the objectives of the *CMA Act* will still be realized.

68. So, by the respondent merely referring to the enforcement proceeding in this matter, euphemistically, as "administrative" does not change its intrinsic character. We are in no doubt that the nature of the enforcement proceedings sought to be undertaken by the respondent against the petitioners in this matter bespeaks a quasi-judicial process because, based on the material evidence placed before it, the respondent would have had to determine

the culpability or otherwise of the petitioners. If found culpable, pursuant to Section 11(3)(cc) of the *CMA Act*, the respondent would impose sanctions, including financial penalties against the petitioners.

69 As the trial Judge found, there was also a possibility of bias in this case. This is because the respondent had approved the Kshs. 2 billion bond issue. Upon information that the management of Imperial Bank Limited had been running a scheme of fraudulent disbursements resulting in losses running into billions of shillings, a factor the respondent should perhaps have discovered in the appraisal of the bond, Central Bank placed the Bank under receivership. An investigation into the propriety of the bond issue, to establish, as stated in the Notices to Show Cause, the petitioners' "culpability for the contravention of the provisions of the Capital Markets Authority Act and determination of the appropriate enforcement action to be taken against" the petitioners, would, no doubt, have cast aspersions upon the respondent's diligence. To shield itself against that eventuality, the respondent was likely not going to approach the decision-making process in the enforcement proceedings with the impartiality appropriate for that decision.

70. Furthermore, from the evidence provided of the processes leading to the issuing of the Notices to Show Cause, the respondent's Board that appraised and approved Imperial Bank's Bond Issue application, is the same Board that initiated and conducted preliminary investigations into the petitioners' conduct in relation to the Bond Issue application and upon satisfying itself that the petitioners may have violated the relevant provisions of the Act and the Regulations made thereunder, made a decision to charge the petitioners and went ahead to formulate the requisite charges. It is this same Board that purported to preside over the hearing of the petitioners' cases. This would obviously lead to an inescapable appearance of partiality on the respondent's part.

## I. Determination

71. For the foregoing reasons, we allow this appeal in part and direct that each party should bear its own costs. The respondent may proceed with its enforcement proceeding subject to what we have stated above.

## J. Final Orders

(a) The petitioners' appeal is allowed to the extent that the respondent may proceed with its enforcement proceedings against the petitioners through its delegated authority under Section 11A(1) and or Section 14(1) of the *CMA Act*;

(b) Each party to bear its own costs.

**Kimani & 20 others (On behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others (Petition 45 of 2018) [2020] KESC 9 (KLR) (Civ) (23 September 2020) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2020] KESC 9 (KLR)

***Jurisdiction*** *– appellate jurisdiction – appellate jurisdiction of the Supreme Court – guiding principle when interpreting law touching on the appellate jurisdiction of the Supreme Court – which appeals lay from the Court of Appeal to the Supreme Court - appellate jurisdiction of the Supreme Court under article 163(4)(a) of the Constitution – where article 163(4)(a) of the Constitution provided that appeals lay from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution – components of a matter that involved application and interpretation of the Constitution - Supreme Court's discretion to determine what matter was appealable to it under article 163(4)(a) of the Constitution – what were the attributes that were imperative for an appeal to the Supreme Court under article 163(4)(a) of the Constitution – whether a decision that a claim was not ascertainable and could not be determined interpreted or applied the Constitution – Constitution of Kenya, 2010, article 163(4)(a).*

**Brief facts**

The petitioners claimed to be poor landless people who had been relocated to Korogocho from various parts of Nairobi. They claimed ownership of the land in Korogocho contending that they were allocated the plots in the 1970s and 1990s and had put up various structures where they resided and had even developed the plots. It was alleged that in 1986, the then President visited the area and ordered roads to be constructed and electricity installed, which directive was implemented. The petitioners averred that they had severally petitioned the Government for titles and on November 22, 2000, in a public rally (baraza), the President directed the respondents together with the City Council of Nairobi to issue them with titles.

That notwithstanding the President's directive, the Provincial Administration started interfering with the petitioners' possession of the plots. On May 11, 2001 they were informed of Government plan to pull down their houses and come up with new permanent houses. They argued that because of the promises made to them, which they believed to be true, they were entitled to be issued with the title deeds for the plots. It was on that basis that they moved to the High Court seeking various orders, including, a declaration that they were entitled to be registered as proprietors/owners of the plots on which their semi-permanent houses stood (suit land).

The High Court dismissed the petition holding, *inter alia*, that it did not disclose any cause of action, hence there was nothing for it to consider in relation to whether the petitioners were to be issued with title deeds for the suit land. Aggrieved by that decision, the petitioners appealed to the Court of Appeal. The Court of Appeal held that their claim was not supported by evidence, was not ascertainable and therefore could not be determined. It dismissed the appeal. Aggrieved,

the petitioners appealed to the Supreme Court arguing, among others, that they had an automatic right of appeal under article 163(4)(a) of the Constitution as the matters involved touched on constitutional interpretation.

**Issues**

i. Which appeals lay from the Court of Appeal to the Supreme Court?
ii. What was the guiding principle when interpreting law touching on the appellate jurisdiction of the Supreme Court?
iii. What were the attributes that were imperative for an appeal to the Supreme Court under article 163(4)(a) of the Constitution?
iv. Whether the decision that a claim was not ascertainable and could not be determined, interpreted or applied the Constitution.

**Held**

1. The Supreme Court in exercise of jurisdiction under article 163(4)(a) of the Constitution had to await and respect the superior courts' exercise of their jurisdictions on the issue. The rationale being that the Supreme Court would only sit on appeal on matters which the other courts had already determined so that as an apex court, it benefitted from the reasoning of those other courts.
2. In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle was to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal, had the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law and only cardinal issues of law or of jurisprudential moment, deserved the further input of the Supreme Court.
3. Article 163(4)(a) of the Constitution had to be seen to be laying down the principle that not all intended appeals lay from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution could be entertained by the Supreme Court.
4. The petitioners moved to the High Court under section 84 of the repealed Constitution seeking to enforce their rights under sections 71, 74, 75, 77, 81 and 82 of the repealed Constitution. At the core of the case was the question whether their right to life under section 71, and right to property under section 75 of the repealed Constitution had been infringed or threatened by the respondents. Consequently, a *prima facie* case touching on the interpretation and application of the Constitution was brought to the Supreme Court. Thus, the appeal had ably invoked the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution.
5. The invocation of the court's jurisdiction was not however a panacea for a finding that a meritorious case had been made before the court. A finding that a court had jurisdiction to hear and determine a matter was a preliminary finding that the matter before the court was one for which the court was, by law, permitted to determine.

6. For a successful and competent appeal to the Supreme Court under article 163(4)(a) of the Constitution, it was not enough for a litigant to allege that his/her case before the superior courts involved interpretation and application of the Constitution. The Supreme Court's appellate jurisdiction under article 163(4)(a) was a qualified one. The Supreme Court was not just another tier of appeal for constitutional matters. A litigant had to categorically outline the various constitutional issues of interpretation and application which were in issue from the High Court and which the Court of Appeal subsequently considered, and erred in its interpretation and application to warrant appeal to the Supreme Court. While the Supreme Court would find that its jurisdiction had been invoked under article 163(4)(a) of the Constitution, it had the discretion on what issue(s) to determine or whether the alleged issues legitimately fell within that jurisdiction.
7. The Supreme Court retained the discretion to determine what matter was appealable to it under article 163(4)(a) of the Constitution. Such a matter had to be founded on cogent issues of constitutional controversy, which issues were to be so determined by the Supreme Court itself. So that, while a litigant would file his/her appeal, it was the Supreme Court which had the sole discretion of determining whether the issues brought before it raised cogent constitutional controversies to warrant its input.
8. The appellate jurisdiction of the Supreme Court under article 163(4)(a) of the Constitution was not just another level of appeal. Thus, even if the original suit in the High Court or lower court invoked specific constitutional provisions, that fact alone was not enough for one to invoke and sustain an appeal before the Supreme Court. A party had to steer his/her appeal in the direction of constitutional interpretation and application. A party needed to directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the Constitution. It could be while a matter invoked specific constitutional provisions, those provisions were never part of the court(s)'determination and the matter turned on purely factual and or statutory issues.
9. The following attributes were imperative for an appeal to the Supreme Court under article 163(4)(a) of the Constitution:
    a. The jurisdiction revered judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court had to have been first raised and determined by the High Court (trial court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.
    b. The jurisdiction was discretionary in nature at the instance of the Supreme Court. It did not guarantee a blanket route to appeal. A party had to categorically state to the satisfaction of the Supreme Court and with precision those aspects/issues of his matter, which in his opinion fell for determination on appeal in the Supreme Court as of right. It was not enough for one to generally plead that his case involved issues of Constitution interpretation and application.

c. A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involved little or nothing to do with the application or interpretation of the Constitution did not bring an appeal within the jurisdiction of the Supreme Court under article 163(4)(a) of the Constitution.

d. Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserved the further input of the Supreme Court under article 163(4)(a) of the Constitution.

e. Challenges of findings or conclusions on matters of fact by the trial Court of competent jurisdiction after receiving, testing and evaluation of evidence did not bring up an appeal within the ambit of article 163(4)(a) of the Constitution.

10. In dealing with an appeal, the Supreme Court's first hurdle was the delimiting of issues that legitimately fell for its determination. That was important since it was an appellate court with a very qualified jurisdiction. Not every issue that was before the superior courts was open for its determination in exercise of its appellate jurisdiction under article 163(4)(a) of the Constitution. Matters of fact that touched on evidence without any constitutional underpinning were not open for the Supreme Court's review on appeal. The same was also true of matters that purely dealt with interpretation and application of statutory provisions.

11. As regards the issues framed by the petitioners for determination, save for the Supreme Court's jurisdictional issue, no other issue lay for determination by the Supreme Court in exercise of its appellate jurisdiction under article 163(4)(a) of the Constitution.

12. Both the Court of Appeal and the High Court agreed that there was no evidence upon which the petitioners had laid their claim to the suit land. That decision was majorly an evidentiary matter. The Court of Appeal had observed that the appeal raised constitutional issues of the right to housing and it was ready to make a determination on the issue. The only hurdle was that there was no evidence by the petitioners to back their claim. On that basis, the appellate court downed its tools and upheld the High Court decision.

13. The Court of Appeal in making the conclusion that the petitioners' claim was not ascertainable and therefore could not be determined, neither interpreted nor applied the Constitution. In no way did the Court of Appeal's conclusion of lack of evidence take any constitutional trajectory that warranted the Supreme Court's intervention. Some of the issues framed for determination by the petitioners touched on matters of fact and statutes. Some issues were being raised before the Supreme Court for the first time. The petitioners were under a duty to frame the issues they considered were of a constitutional nature which the Court of Appeal erred in its interpretation or application but they failed in that duty. No cogent issue of constitutional controversy arose and/or was in issue at the Court of Appeal that warranted the Supreme Court's further input.

14. At the time of filing the matter before the High Court, the petitioners were not facing any eviction threat or order. Before determining whether any of the orders they sought warranted being granted, the petitioners had to first prove their entitlement and right to the

property. As the superior courts found, no evidence was tendered hence the case was not proved. Consequently, the Supreme Court found no basis upon which to delve into the interrogation of the matter whether reliefs such as structural interdicts were available.

15. The petitioners did not marshal a satisfactory case before the Supreme Court for it to exercise its jurisdiction under article 163(4)(a) of the Constitution. The petition lacked merit.

*Petition dismissed with no orders as to costs.*

**Citations**

**Cases**

***Kenya***

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1979] eKLR; [1979] KLR 254 - (Explained)
2. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR); [2014] eKLR - (Explained)
3. *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* Petition 5 of 2012; [2012]eKLR - (Explained)
4. *Gladys Wanjiru Munyi v Diana Wanjiru Munyi* Petition 31 of 2014; [2015] KESC 9 (KLR); [2015] eKLR - (Explained)
5. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] eKLR - (Explained)
6. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] eKLR - (Explained)
7. *Joseph Letuya & 21 others v Attorney-General & 5 others* ELC Civil Suit No 821 of 2012 (OS) [2014] eKLR - (Explained)
8. *Kimani & 20 others v Attorney General & 2 others* Application 17 of 2017; [2018] KESC 12 (KLR); [2018] eKLR - (Mentioned)
9. *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. & Another* Petition 3 of 2012 ; [2012] eKLR - (Explained)
10. *Mitu-Bell Welfare Society v Attorney General, Kenya Airports Authority & Commissioner of Lands* Petition 164 of 2011; [2013] KEHC 6337 (KLR); [2013] eKLR - (Explained)
11. *Mombasa Technical Training Institute v Agnes Nyevu Charo & 106 Others, Commissioner Of Lands & The Registrar Of Titles* Civil Appeal 282 of 2010; [2014] KECA 138 (KLR); [2014] eKLR - (Explained)
12. *Njoya & Others v. Attorney-General* Miscellaneous Civil Application 82 of 2004 (OS); [2004] eKLR; [2004] KLR 259 - (Explained)
13. *Opore v Independent Electoral and Boundaries Commission & 2 others* Petition 32 of 2018; [2018] KESC 5 (KLR); [2018] eKLR - (Explained)
14. *Paul Mungai Kimani & 20 Others v The Attorney General & 2* Civil Miscellaneous Application 1366 of 2005; [2010] KEHC 2972 (KLR); [2010] eKLR - (Mentioned)

15. *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* Petition 2 of 2012; [2012] eKLR - (Explained)
16. *Rashid Odhiambo Aloggoh & 245 others v Haco Industries* Civil Appeal No 110 of 2001 - (Explained)
17. *Royal Media Services Ltd v Commissioner of Customs & Excise* Misc Appli 383 of 1995; [2001] KEHC 47 (KLR); [2001] eKLR - (Explained)
18. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR); [2013] eKLR - (Explained)
19. *Wa'Njuguna v Republic* Miscellaneous Criminal Case 710 of 2002; [2004] eKLR; [2004] KLR 520 - (Explained)

***United Kingdom***

*Ramsden v Dyson* (1866) LR, 1HL, 129 - (Explained)

***Regional Court***

1. *Commissioner of Lands v Hussein* [1968] EA, 585 - (Explained)
2. *Ndyanabo v Attorney-General* (2001) EACA 485 - (Explained)

***Trinidad and Tobago***

*Ramanoop v Attorney-General of Trinidad & Tobago* Civil Appeal No. 52 of 2001; TT 2003 CA 19 - (Explained)

**Texts**

1. Chanan Singh (1991), *Nationalization of Property and Constitutional Clauses Relating to Expropriation and Compensation* East African Law Journal Pages 101 to 102
2. Kevin Gray and Susan Francis Gray (2009), *Elements of Land Law* Oxford University Press;5th Edn pg 825, para 7.1.13

**Statutes**

***Kenya***

1. Constitution of Kenya - (Interpreted) articles 2(4); 29; 40; 43; 62; 135; 163(4)(a); 259(1); Schedule 6
2. Constitution of Kenya (Repealed) - (Interpreted) sections 70; 71; 72; 73; 74; 75; 76; 77; 78; 79; 80; 81; 82; 84
3. Elections Act (cap 7) - (Cited) In general
4. Evidence Act (cap. 80) - (Interpreted) section 112
5. Forest Conservation And Management Act (cap 385) - (Cited) In general
6. Government Lands Act (Repealed) (cap 280) - (Cited) In general
7. Interpretation And General Provisions Act (cap 2) - (Interpreted) section 3
8. Land Act (cap 280) - (Interpreted) section 7
9. Limitation of Actions Act (cap 22) - (Interpreted) section 41
10. Supreme Court Act (cap 9B) - (Interpreted) section 15(2)

11. Supreme Court Rules, 2012 (cap 9B Sub Leg) - (Interpreted) rule 32

**Advocates**

1. Senior Counsel Kamau Kuria, who represented the Petitioners.
2. Counsel Mr. Eredi, who represented the Respondents and was from the Attorney-General's chambers.

September 23, 2020, the Court delivered the following Judgment:

## A. Introduction

1. Via a Ruling of this Court delivered on 20th November, 2018 in *Paul Mungai Kimani & 20 Others v. Attorney-General & 2 Others* [2018] eKLR, the Petitioners sought and were granted leave to file their appeal out of time within fourteen (14) days of the date thereof. This appeal was thus filed on 3rd December, 2018 under Section 15(2) of the *Supreme Court Act*, 2011, Rule 32 of the *Supreme Court Rules* and Articles 2(4) and 163(4)(a) of the *Constitution*. It was supported by the affidavit of Agnes Wanjiru, the 18th Petitioner, sworn on her own behalf and on behalf of the other Petitioners on 30th September, 2018.

2. The Petitioners sought Orders that:

    a. The Petition be allowed with costs.

    b. There be substituted, for the orders of the Superior Court and the Court of Appeal, an order allowing the Originating Summons dated 16th September, 2005 as prayed.

## B. Factual And Litigation Background

### a. At the High Court

3. Through *Civil Miscellaneous Application No. 1366 of 2005*, the Petitioners moved the High Court seeking the following Orders:

    1. A declaration that the right to live under Section 71 of the *Constitution* includes the right to live in dignity and protection of one's shelter and means of a livelihood.

    2. A declaration that a semi-permanent structure is property within the meaning of S 75 of the *Constitution*.

    3. A declaration that the Applicants and all other members of Korogocho Owners Welfare Association (hereinafter referred to as the 'association') are entitled to be registered as proprietors/owners of the plots on which their semi-permanent houses stand.

4. As an alternative to 2 above, a declaration that the Applicants and all other members of Korogocho Owners Welfare Association are entitled to be issued by the 3rd Respondent with leases for 99 years in respect of the parcels of land on which that semi-permanent structures are constructed.

5. An order that the 1st and 3rd Respondents do forthwith issue the Applicants and all other members of Korogocho Owners Welfare Association leases for 99 years over the areas on which the plots stand.

6. A permanent injunction to restrain the 2nd Respondent his servants and/or agents from interfering with the Applicant's and all other members of Korogocho Owners Welfare Association possession of their respective plots on which their semi-permanent structures are situated.

7. An Order that the Respondents pay the costs of the application.

4. The Petitioners claimed to be poor landless people who had been relocated to Korogocho, from various parts of Nairobi, such as Highridge and Grogan. They claimed ownership of the land in Korogocho, on their own behalf and that of 2, 584 members of a society known as Korogocho Owners Welfare Association (KOWA). They contended that they were allocated the plots in the 1970s and 1990s and had put up various structures where they resided and had even developed the plots. It was alleged that in 1986, the then President, Moi visited the area and ordered roads to be constructed and electricity installed, which directive was implemented. The Petitioners averred that they had severally petitioned the Government for titles and on 22nd November 2000, in a public rally (Baraza) the President directed the Respondents, together with the City Council of Nairobi, to issue them with titles. As evidence of this presidential directive, a newspaper article was tabled in Court.

5. That notwithstanding the President's directive, the Provincial Administration started interfering with the Petitioners' possession of the land. On 11th May, 2001 they were informed of Government plan to pull down their houses and come up with new permanent houses. They argued that because of the promises made to them, which they believed to be true, they were entitled to be issued with the title deeds for the plots. It is on this basis that they moved to the High Court under Section 84 of the *repealed Constitution* seeking to enforce their rights under Sections 71, 74, 75, 77, 81 and 82 of the *repealed Constitution*.

6. The Attorney-General opposed the case on grounds that the suit land was Government Land under the *Government Lands Act*, Cap. 280 (Repealed) and there were no records evidencing any allotment of the land to anybody. He urged that there were no formal documents availed to the Lands Office from the President seeking the land to be allocated to the Petitioners, and neither was there any record of the physical removal of the Petitioners

from Highridge and Grogan areas and their relocation to Korogocho. He submitted that when Government decides to upgrade a slum, the same is done formerly through projects like the Mathare and Kibera upgrading projects. The Attorney-General stated that some of the residents of Korogocho were living on power lines or under High Power voltage lines and ought to be removed but their removal had been delayed on humanitarian grounds. He however admitted that the Petitioners were living in an unplanned slum with no adequate social amenities.

7. In its Judgment delivered on 12th March 2010, the High Court delimited three issues for determination, namely:

   (i) whether the Applicants can bring a representative suit;

   (ii) whether the pleadings disclose any cause of action; and

   (iii) whether the Applicants' rights under Sections 71, 74, 75, 77, 81 and 82 have been breached.

   The High Court (Wendoh, J), first found that the Petitioners had not placed before the Court any evidence to prove that the land on which they lived on in Korogocho slum was allocated to them by the Provincial Administration, City Council of Nairobi or any Government official. Secondly, the Court held that under Section 84 of the *repealed Constitution* under which the Originating Summons had been filed, only two classes could bring a matter to Court:

   (i) one whose rights have been, are being or are likely to be contravened, and

   (ii) a person who is detained can have somebody else file suit on his behalf.

   That the Section did not envisage representative or group action, as the rights in Sections 70 to 83 of the *repealed Constitution* were rights personal to each individual. Consequently, the learned Judge dismissed the representative aspect of the motion and only maintained the case of only the 21 Petitioners mentioned in the Court pleadings.

8. As regards whether there was a cause of action disclosed, the Court emphasised that

   > "it is law that he who complains that his rights have been or are likely to be breached, shall state the provision under which he complains, the nature of the complaint, how his rights have been or are likely to be infringed and the manner in which the rights have been infringed."

It then evaluated the Petitioners' plea on all grounds and found that on each Section of the *Constitution* that breach was alleged, they had not pleaded the nature of the complaint, the

manner in which their rights had been infringed and the manner in which they had been infringed. Holding that there was no cause of action disclosed, the learned Judge stated thus:

> " I find and hold that the Applicants pleadings are wanting in particularity of what they complain of, under the various Sections cited and the Respondent would not have known how to respond to these allegations. The Court therefore finds that the pleadings do not disclose a cause of action that the Respondent should be called upon to respond to."

9. Particularly, as regards Section 71 of the *repealed Constitution*, the Court had been asked to adopt a liberal interpretation of the provision as regards the right to life so as to include right to food, shelter and education etc. The Court declined to accede to the request holding that

> " Section 71 of our *Constitution* ... relates to life in the sense of ordinary human existence and must be understood in that context."

Ultimately, it dismissed the case as follows:

> " There being no cause of action there is really nothing for this Court to consider in relation to whether the Applicants should or should not be issued with title deeds for the plots which they occupy or be declared owners of the plots they reside on. Firstly, Courts do not issue orders in vain. It is noteworthy that there is not even a map of Korogocho slums exhibited showing exactly where the Applicants reside if at all and where the land to be allocated is. The Respondent contended that some of the Applicants have built houses on way leaves and under power lines and have to be vacated. This Court would not issue such orders to give title to the Applicants as that area is not set aside for allotment to the petitioners. If this Court were to grant such an order for issuance of title deeds to the Applicants for the plots they live on, it might be an order in futility and may be difficult to implement Korogocho is vast slum with thousands of people living there. Giving such orders as sought without establishing whether the Applicants live there, where exactly in Korogocho would be futile. All those residents are landless poor people. If the 21 Applicants are issued with title deeds for their plots what happens to the rest of the slum dwellers and shouldn't the issuance of titles be done once to all the slum residents"

**b. At the Court of Appeal**

10. Being aggrieved, the Petitioners moved to the Court of Appeal on appeal. Their appeal was anchored on 9 grounds which the Appellate Court summarised as follows:

a. The learned Judge failed to adopt the procedure laid down in the case of *Rashid Odhiambo Aloggoh & 245 Others v. Haco Industries*, Civil Appeal No. 110 of 2001 that laid the procedure of applying Section 84 of the *Constitution*;

b. Failing to appreciate that the applicants have a right, an interest over the suit land capable of protection under Section 75 & 84 of the *Constitution*;

c. Failing to adopt a growth and purposeful interpretation of the constitutional rights, erroneously holding that Section 84 of the *Constitution* did not envisage group rights;

d. Failing to recognise the same Court had given the applicants leave to file a representative suit on their own behalf and on behalf of members of Korogocho Owners Welfare Association;

e. Failing to apply the principle in the case of *Annarita Karimi Njeru v. Republic* [1979] KLR 254 by holding the applicants did not particularise with reasonable precision the infringement of the constitutional provisions complained about;

f. Adopting a gigantic approach and interpretation of the right to life by finding out that the right to life was not likely to be violated by the respondents; and

g. Failing to uphold the fundamental rights and freedoms as provided for in the *Constitution*.

11. The Petitioners reiterated their submissions as before the High Court. While the suit in the High Court was filed during the tenure of the *repealed Constitution*, the appeal before the Court of Appeal was filed and argued during the tenure of the new *Constitution* 2010. Thus, before the Appellate Court, the Petitioners argued that due process must be followed if they are to be relocated from the plots they occupy because Article 43 of the *Constitution* 2010 recognises enforcement of social economic rights. They argued that due to their long and uninterrupted occupation of the suit land, they had acquired proprietary interests that are similar to social economic rights protected under the *Constitution* 2010. That the Court had failed to apply a purposeful interpretation and legal construction of the *Constitution*, and failed to recognise that their right to life is intimately connected with the right to property. That it was thus erroneous to find that no cause of action had been ascertained.

12. The Attorney-General opposed the appeal urging that although the Petitioners have a right to life and to live in dignity, they were seeking to be protected to live in Korogocho area which is an unplanned settlement with no roads or amenities. He reiterated that the suit land remains Government land that has never been alienated for settlement and was intended for future development and the Petitioners were in illegal occupation. They had not acquired

any rights over the suit land. That if the Government were to upgrade the slum area, there is a process by which the Government would verify the authenticity of the Petitioners' interests. He cautioned that if the orders sought were granted, it would set a dangerous precedent and hamper Government programmes.

13. The Attorney-General submitted that while the *Constitution* provides for social economic rights, the same are to be realised progressively. In any event, he urged that the suit that gave rise to the appeal was filed before the promulgation of the *new Constitution*. Further, that the Petitioners had not proved any proprietary rights over the suit land, which disputed land they had not identified or exhibited any documents to prove the proprietary rights. He urged that the land in Korogocho is vast, the size and the exact parcel of land the Petitioners are claiming cannot be determined from the pleadings.

14. In its Judgement delivered on 23rd September 2016, the Appellate Court refrained from addressing the question of locus standi of the Petitioners to file a suit seeking enforcement of fundamental rights for a group of people registered as a society and decided to focus on the substantive legal issues. It delimited 3 issues for determination, namely:

    i. whether the appellants established their rights to ownership of the property known as LR No. 82-85 Korogocho;

    ii. whether the appellants' rights to occupation of the land fell within the frame of constitutional rights and if so, were those rights threatened or contravened by the respondents? And;

    iii. whether the appellants are entitled to the declaratory orders as sought in the originating summons.

15. The Appellate Court held that the case involved a determination of which of the two public interests was greater:

> "occupational rights by the appellants as claimed that the Court should declare them owners of their respective plots, or consideration of planning needs that take into account protection from health wrought by lack of planning?"

The Appellate Court however found and held that the appellants claim was not supported by evidence that can lead to it making a declaration that theirs is a public interest matter that overrides the Government responsibility for future planning. While the Appellate Court appreciated that the appeal raised a constitutional issue of right to housing it was emphatic that the appellants had a duty to establish that their rights, that are identifiable and determinable, had been or were likely to be contravened by the Government. Further that

it must be proved that the rights of the appellants override public interest and if declared, they do not contravene other people's rights.

16. The Court of Appeal found that unfortunately, the appellants had not proved their case. It held in this regard as follows:

> " [21] We have gone through the records in this appeal; it is a matter of great regret that we find the appellants' claim is not ascertainable and therefore cannot be determined. We say so, because the appellants did not annex any document(s) to prove the existence of the land on the ground. They have also not demonstrated whether they made any efforts to obtain copies of such documents relating to the suit land either from the City Council of Nairobi (now Nairobi County Government) or the Government Lands Office. This is public land held by the Government for use by the present or future development needs. Without any official documents such as area maps, survey plans, letters of allotment or any evidence of ownership, it is next to impossible for a Court of law to issue declaratory orders directing the Government to issue title documents to the appellants.
>
> [22] What part of the land, what size and to who should the land titles be issued? Is it the Association or to the persons listed in the suit? Who is occupying which plot and who will plan the roads and other infrastructural necessities? Supposing, some of the houses fall within road reserves and require to be demolished and the Court has directed titles to be issued in respect of particular plots that fall within the road reserve or way leave for power lines, what would be the consequence? ... Needless to state a Court of law cannot issue orders which are not capable of implementation and worse which can give room to confusion and thereby become a recipe for chaos instead of fostering peace and harmony between appellants and the respondents."

17. The Appellate Court also observed that there was no evidence of any threat to evict the appellants, or to demolish their houses that accompanied the suit. Consequently, the Appellate Court upheld the High Court's holding that under Section 84 of the *retired Constitution*, a person whose rights have been or are likely to be contravened, is obliged to state his/her complaint and to identify with exact clarity the manner and extent of infringement. It found that the appellants had failed to prove their case and there was no

legal justification that supported granting of the orders sought before the High Court. The appeal was thus dismissed with no order as to costs.

**c. Petition before the Supreme Court**

18. Before this Court, it was contended that the Petitioners have an automatic right of Appeal under Article 163(4)(a) of the *Constitution* as the matters involved touch on constitutional interpretation. That Sections 6 and 7 of the Sixth Schedule to the *Constitution* 2010 provides that all the rights and obligations subsisting immediately before the effective date shall continue as rights and obligations of the national Government under the 2010 *Constitution*; and further that all law in force immediately before the effective date continue to be in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the 2010 *Constitution*.

19. The Petitioners contended at paragraph 7 of the Petition that the Court of Appeal erred in holding that:

    a. oral evidence was essential despite the fact that there was uncontroverted affidavit evidence on record;

    b. documentary evidence of the Government land known as LR. No. 82-85 Korogocho, was needed despite the fact it was common ground that the Petitioners and all other members of Korogocho Owners Welfare Association were occupying Government land available to them by the Government in the 1970s and 1990s;

    c. the Government license/permission to a citizen to establish a home and the construction of a semi-permanent structure are not constitutional rights;

    d. the rights of the Petitioners were not threatened by the Government;

    e. the Petitioners and all other members of Korogocho Owners Welfare Association have no right to continue living in portions of Korogocho slums assigned to them in 1970s and 1990s.

20. Further at paragraph 35 of the Petition, it is contended that the Court of Appeal erred in upholding the High Court decision, and holding that:

    a. there was no admission of liability on the part of the Government and that it was clear from the affidavit evidence that slum upgrading was done by the Government with co-operation of occupants in a co-ordinated manner;

    b. the Petitioners' claim was not supported by evidence that could lead the Court of Appeal into making a declaration that theirs was a public interest matter that overrides the Government responsibility for future planning;

c. the Petitioners' claim was not ascertainable and could, therefore, not be determined as the Petitioners did not annex any documents to prove the existence of the land on the ground and that the Petitioners had not demonstrated whether they made any efforts to obtain copies of such documents from the City council of Nairobi or the Government Lands Office;

d. without any official documents such as area maps, survey plans, letters of allotment or any evidence of ownership, it was impossible for the Court to issue declaratory orders directing the Government to issue title documents to the Petitioners;

e. there was no evidence of any threat to evict the Petitioners or to demolish their houses that accompanied that suit;

f. the Petitioners claim to be declared owners of the suit property was premature;

g. there was no legal justification of granting the orders sought.

21. By reaching the above conclusions, it was contended that the Court of Appeal wholly ignored the undisputed evidence showing that the Provincial Administration in 1970s and 1980s anticipated the Petitioners' social economic right under Article 43(3) of the *Constitution*. Thus, the Appellate Court failed to provide the Petitioners with an effective remedy, being an order that they be provided with title to assure them of shelter. It ignored the transformative nature of the *Constitution* 2010 which requires that human dignity of all be respected. That the Appellate Court thus fell into error in not allowing the appeal and grant a structural interdict to facilitate the transformation of the Petitioners' lives. That it failed in not holding that the appeal before it concerns the constitutional obligation of the Government in a constitutional democracy to ensure that every citizen has a roof over his/her head.

22. It was further contended that the Court of Appeal ignored the jurisprudence of the consequences of a respondent failing to controvert facts asserted by the other side. That it overlooked the evidence not challenged by the 1st and 2nd Respondents who represented the Provincial Administration that the latter settled the Petitioners who were poor and landless in Korogocho where they were and did construct semi-permanent houses on Government land. That it erred in not holding that the right to life under Section 71 of the *former Constitution*, and the right not to be subjected to inhuman or degrading treatment under Section 74, protected the rights of the Petitioners to live in semi-permanent houses on Government land provided by it. Further, that it overlooked Section 112 of the *Evidence Act* which places a burden of proof on a party within whose knowledge any fact is in its peculiar knowledge: in this case, the circumstances under which Korogocho slum came into existence has always been within the special knowledge of the Respondents.

23. Arguing in support of the grounds, it was urged that this Court in *Lemanken Aramat v. Harun Meitamei Lempaka and 2 Others* [2014] eKLR held that comparative constitutional jurisprudence is to be used in interpreting the *Constitution*. Thus, the Appellate Court erred when it wholly ignored the interpretation of "right to life" given by the Indian Supreme Court, which was a persuasive authority. It thus erred in its interpretation of Section 71 by adopting a narrow interpretation of the *Constitution*.

24. The petition was supported by an affidavit sworn by Agnes Wanjiru, the 18th Petitioner, who swore the same on her own behalf and on behalf of the other Petitioners. That as at the time when she swore the affidavit, the 1st, 2nd, 4th, 6th, 9th, 11th, 12th, 13th, 16th, 17th and 19th Petitioners had passed on. In her affidavit she reiterates the averments of Paul Mungai Kimani, who swore the affidavit in support of the Originating summons in the High Court. Further, she avers that the superior Courts misapprehended of the case before them. That the Court of Appeal ignored the law governing suits tried by affidavit evidence which was not controverted. That a part of the evidence which the Courts below held was missing, could only come from the Provincial Administration which had the burden of furnishing it under Section 112 of the *Evidence Act.* That there is overwhelming evidence to prove the contravention of their rights.

25. The Petitioners set out the following as the questions for determination by this Court:

    a. Whether this Honourable Court has jurisdiction to hear and determine the appeal before it under Article 163(4)(a) of the *Constitution*.

    b. Whether the Petitioners herein have the right to appeal, under Article 163(4)(a) of the *Constitution*, against the Judgment of the Court of Appeal dated and delivered on 23rd September, 2016.

    c. Whether the Petitioners are entitled to the reliefs claimed in their Originating Summons dated 16th September, 2005.

    d. Whether the 1st and 2nd Respondents admitted the facts about settlement of Korogocho as explained in the affidavit of Mr. Paul Mungai Kimani sworn on the 16th September, 2005.

    e. Whether the Court of Appeal imposed, on the Petitioners the burden of proof imposed on the 1st and 2nd Respondents by Section 112 of the *Evidence Act*.

**C. Parties' Submissions**

26. The matter came up for oral hearing and highlighting of submissions on the 5th February, 2020. The Petitioners were represented by Senior Counsel Kamau Kuria, while the

Respondents were represented by Counsel Mr. Eredi. Since they had not filed their list and bundle of authorities, they were granted leave to file the list of authorities they relied on at the hearing and each complied with that Court's direction.

**a. The Petitioners' Submissions**

27. The Petitioners' written submissions are dated 1st December, 2018 and were filed on 3rd December, 2018. They submitted that Article 163(4)(a) of the *Constitution* grants them a right of appeal and that under Article 259(1), the *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 and

(d) contributes to good governance.

They urged that the Appellate Court overlooked this Court's decision in *Speaker of the Senate & Another v Hon. Attorney-General & 3 Others* [2013] eKLR, that the Constitution is a charter for transforming the country.

28. It was submitted the Appellate Court ignored the undisputed evidence that the Provincial Administration in 1970s anticipated the right now provided for under Article 43(3) of the *Constitution*, mandating the State to provide appropriate social security to persons unable to support themselves and their dependents. They cited *Commissioner of Lands v. Hussein* [1968] EA, 585 urging that Harris J, applied to the Government Land the rule in *Ramsden v. Dyson* (1866) LR, 1HL, 129, with the result that the individual promised a lease and following which promise he expended labour and money was declared to be entitled to be a lessee. In this regard, it was urged that the Appellate Court ignored wholly that the reason for the Petitioners to live in Korogocho was the State's own concern for their humanity and took them to its own land. That the Respondents now wish to take away the proprietary right they have acquired to their respective portions of land.

29. That the intended State deprivation of Petitioners shelters in Korogocho without provision of alternative accommodation amounts to breach of Section 82 of the *repealed Constitution* and Article 27 of the *new Constitution*, not to be subjected to an arbitrary and capricious exercise of State power. In support of this contention, they cited the Ruling of Rawal, J (as she then was) in *Royal Media Services Ltd v. Commissioner of Customs & Excise* [2001] eKLR that, any judiciary worth its salt should grasp and uphold the letters and the spirit of the *Constitution* of its country and stand as a strong wall against any action of the officials

of the Government which is either irrational, capricious or arbitrary and term the same as unconstitutional.

30. The Petitioners cited an article by Justice Chanan Singh, "*Nationalization of Property and Constitutional Clauses Relating to Expropriation and Compensation*", in 1991, East African Law Journal Pages 101 to 102, in urging that the word 'property' should be defined broadly. Reference was also made to the definition of 'property' in Section 3 of the *Interpretation and General Provisions Act*, Cap. 2 Laws of Kenya. Also cited is an Article by Thomas Allen,

> "Commonwealth Constitutions and right not to be deprived of property", for the preposition that Section 75 of the *retired Constitution* should be broadly interpreted."

31. On remedies, the Petitioners urged that where a person's rights are contravened, the remedies available under Section 84 of the *repealed Constitution* are those in private law like the declaration of rights, injunction, conservatory order, an order of compensation and an order of Judicial review like certiorari, an order of prohibition and an order of mandamus. Cited in this regard was the Court of Appeal of Trinidad & Tobago's decision in *Ramanoop v. Attorney-General of Trinidad & Tobago* (2004), Law Reports of the Commonwealth, for the preposition that the Court is mandated to do whatever it thinks appropriate for the purpose of enforcing or securing the enforcement of any of the provisions dealing with the fundamental rights. That there is no limitation in what the Court can do.

32. It was thus urged that in view of the peculiar circumstances of their settlement in Korogocho slums, the case before the High Court and the Court of Appeal called for the grant of structural interdict to compel the Government to either grant the petitioners titles to the parcels of land on which their semi-permanent houses stand or provide them with a shelter over their heads. Reliance was placed on the cases of *Njoya & Others v. Attorney-General* (2004) 1 KLR259 where liberal principles of constitutional interpretation were amplified; and the case of *Ndyanabo v. Attorney-General* (2001) EACA 485 urging for purposive interpretation of the Constitution, where in Tanzanian it was held that the Constitution is a living document having a soul and own conscience and which Courts must avoid crippling through narrow or technical construction so that it can become a solid foundation of democracy.

33. As regards the right to life under Section 71 of the *former Constitution*, it was submitted that this right to life has been interpreted in other jurisdictions to include not only physical life but all the limbs through which life is enjoyed, which include the right to live with basic human dignity. It was thus urged that for the State to fail to provide a shelter or roof over the head of the poor and landless in Kenya, is subjecting the individual to torture or other degrading treatment within the meaning of Section 74 of the *former Constitution*

whose equivalent is Article 29 of the *Constitution* 2010. That the poor and landless and their families are condemned to a life uncertainty regarding the basic and elementary need of a roof over one's head.

34. The Court was urged to rely on the finding of Nyamweya, J in *Joseph Letuya & 21 Others v. Attorney-General & 5 Others* [2014] eKLR in interpretation of right to life and dignity as an anticipated Social Economic Right under Articles 26, 42 and 43 of the *Constitution* in respect of the Ogiek People. That it was held that if they were to be driven away they should be given alternative place of abode. The State failure to provide shelter to a poor landless Kenyan is subjecting the individual to torture or other degrading treatment as per Section 74 of the *repealed Constitution* which is equivalent to Article 29 of the *current Constitution*.

35. The Petitioners urge that the doctrine of proprietary estoppel and acquiescence, as stated by Kevin Gray and Susan F. Gray, *Elements of Land Law*, 5th Edition, Page 1196 was applicable to their case. This doctrine recognizes an informal creation of property rights. It is related to that of constructive trust by which certain rights in land may be created informally. As per the authors,

> " a person is prevented from insisting on his strict legal rights whether arising from contract or on his title deeds or by statutes when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties."

It was thus argued that the Court is given power to fashion a remedy to fit a new situation, especially in light of previous dealings between the parties herein in respect of the settlement in the slum. The Respondents had allowed the Petitioners to believe that they had accrued rights to the subject matter which created an assurance to them. They denied the Respondents' allegations that their claim was based on doctrine of adverse possession.

36. It was submitted that Section 112 of *Evidence Act* was improperly applied by the superior Courts by shifting the burden of proof, and by evading the fact that the Petitioners were brought from two different places; some from Grogan and others from Westlands (Highridge), living on a private land. Others were brought in from slums in Garden Estate, City Park, Nairobi River and Kariobangi between 1970-1978 by the Provincial Administration in conjunction with the City Council. The records of implementing that Government policy to settle landless persons was thus in the possession of the 2nd Respondent. That in the Courts below, the burden of proving the documents and the settlements was laid on the Petitioners only. All the Petitioners did was once they reached Korogocho there was a Mr. Wahome to give the plots for which they were now being asked to produce documents. The documents in respect of the establishment of Korogocho were there and also there was a plan and evidence for that.

37. The Petitioner's Counsel faulted Mr. Gordon Ochieng for feigning ignorance of what the Government was doing since 1970s. The Courts should have appreciated that the poor have an equal right to dignity and ought to have a place where they can live. Korogocho slums was identified as the place where these poor would live with dignity. That the State visited the slum in 1986 and 2000, with the visit in 2000 being a visit by the president. Counsel submitted that, as is evident at page 272 of the Record of Appeal, the Petitioners applied for leave to cross examine Mr. Gordon Ochieng at the High Court, but the Court declined to grant leave for production of that evidence. It was thus urged that if a party is served with an affidavit and that party fails to controvert that evidence, he is deemed to have accepted the same and so the State by not replying must be taken to have accepted the facts.

38. Counsel confirmed to the Court that the Petitioners were seeking title to the land they occupy which they were promised by the State, to the exclusion of all others. That among the 6 prayers they sought in the Originating Summons, one was for them to be issued with titles or leases for the land they occupy based on the doctrine of property estoppel which applies to the Government, so as to get security of tenure. Second was an injunction so that they are not evicted. He reiterated that the Courts below ignored the emerging jurisprudence on right to life and also failed to understand the nature of poverty. With these submissions, the Petitioners urged that the appeal to be allowed.

**b. Respondents' Submissions**

39. The Respondents did not file any reply to the Petition. They only filed written submissions dated 15th October 2019 on 16th October 2019 through their Counsel Mr. Eredi of the Attorney-General chambers. In their Submissions, they only addressed one issue: whether the Petitioners acquired proprietary rights to the said land. Submitting that the *Constitution* 2010 has protected the Petitioners' right to life under Article 26(1) and bestowed on every person the inherent dignity and the right to have that dignity respected and protected under Article 28, it was urged that the bone of contention in this matter was whether the Petitioners have any claim against Government Land and whether they have proprietary rights over either by virtue of the *Constitution of Kenya* 2010 and the *Land Act*.

40. It was submitted that while Article 40 of the *Constitution* 2010 provides for the right of a person to acquire and own property of any description in any part of Kenya, Article 62 defined what "Public Land" is. Particularly, that Article 62(1)(a) defines public land which at the effective date was un-alienated Government land as defined by an Act of Parliament in force at the effective date. On this basis, it was urged that the Petitioners do not dispute that the land in which Korogocho slum sits on is Government land. That the High Court and the Court of Appeal not only found that it was Government land but also that the slum sits on an unplanned settlement, which was not defined nor alienated for settlement

as it lacked basic social amenities. That the Courts went further to declare that the land was Government land which the Petitioners had no proprietary rights over as they had not tendered any evidence before this Court proving their case that they have proprietary rights over the land. The only evidence tendered was in the form of a newspaper print allegedly quoting the then President Moi directing that the land in Korogocho be allocated to the residents.

41. It was submitted that Section 7 of the *Land Act* provided for the procedure of acquiring land in Kenya, which position was the law even before the promulgation of the *Constitution* 2010. They urged that a presidential directive is not one of the ways the Petitioners can acquire land, and the same should be regarded as a political statement with no bearing in law. That Article 135 of the *Constitution* provides that a decision of the President in his performance of any function of the President shall be in writing and shall bear the seal and signature of the Republic.

The Petitioners have not adduced any evidence in form of written instructions through an Executive Order from the President directing that the said parcels of land be alienated and allocated to them. They thus urge the Court to uphold the Court of Appeal decision that the Petitioners' claim is unascertainable and cannot be determined for lack of evidence or any official documents.

42. Reference was made to the case of *Joseph Letuya & 21 Others v. Attorney-General & 5 Others* [2014] eKLR where the Court was tasked with a similar set of issues. The Court held as follows:

> "I find that I must agree with the 1st, 2nd, 3rd, 4th and 6th Respondents' arguments. The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependent upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interest in land in the absence of a legal title of ownership. The process of allocation of forest land is further governed by the *Forest Act* that requires a process of excision of forest land before such land can be allocated. The Applicants did not bring evidence of such processes of allocation of titles to land located in the Mau forest and solely relied on their long occupation of the same. In addition, under law, forest land being Government land, cannot be subject to prescriptive rights arising from adverse possession. This Court cannot therefore in the circumstances find that they have accrued any property rights in the Mau Forest that can be the subject of the application of Section 75 of the *old Constitution* or Article 40 of the *current Constitution*."

43. They urged that Courts do not make orders in vain. That the Petitioners are asking the Court to legalize an illegality. That it is not in dispute that the Petitioners are on Government land which at the time of commencement of this suit was not alienated for settlement. The Respondents thus urge the Court to consider the following critical issues, which issues the Court of Appeal also underscored, namely: what part, size and to whom will the title of the land be issued were the Court to grant such orders?

44. The Respondents acknowledged that under Article 43(1)(b) of the *Constitution*, every person has the right to accessible and adequate housing and to reasonable standards of sanitation. They however urged that the Courts have been categorical that as regards the implementation of socio-economic rights, these are progressive rights and have to be realized as time goes by. The Courts have however placed a duty on the state to show steps it has taken towards realization of these rights. In this regard, they cited the High Court decision in *Mitubell Welfare Society v. The Attorney-General & 2 Others*, Petition No. 164 of 2011. This Court takes judicial notice that this case was reversed on appeal to the Court of Appeal and is presently pending determination on a further appeal to this Court. So, the less said the better at this stage.

45. It was urged that the Government had made tremendous progress towards realization of Article 43(1)(b). That with collaboration with Un-habitat and other stakeholders, the Government had initiated the Kenya Slum Upgrading (KENSUP) in 2004, whose objective is to improve lives and livelihoods of people working and living in slums. They thus urged that the orders that were sought by the Petitioners are what the Government has done through the Korogocho Slum upgrading Programme. Thus, that as the Government endeavours on implementation of plans for upgrading Korogocho slum, the same defeats the purpose of this petition.

46. In his oral submissions, counsel for the Respondents submitted that parties were in agreement that the land in contest is a Government Land and that the appellants were living on it. Counsel admitted also that under Articles 258 and 22 of the *Constitution* the Petitioners have a right to bring these proceeding as a Representative Suit. That the Petitioners' right to life and inherent dignity are protected under Articles 26 and 28 of 2010 *Constitution*, was also not contested.

47. Counsel argued that the Petitioners were contradicting themselves. They on one hand said the State has a mandate to give them shelter while on the other hand confirmed the State had given them shelter by admitting they were taken to the place where they abode and given that same land by the State. He did not see the reason they had come to Court if what they were submitting was true. Counsel however, added that he was not to be taken as having admitted that the Petitioners had been taken to the contested land and given plots there

at as submitted, but if at all it had been done, then the State had fulfilled its obligation. When the Court sought to confirm the import of that point, Counsel confirmed that it was the responsibility of the State, if it indicates to its people to stay in a certain land and construct, expend money in constructing, not to be expected to remove those people unless it is providing alternative accommodation.

48. Counsel reiterated that the Petitioners did not have proprietary rights because they had not been given the land. The right to land had thus not crystalized. Relying on the affidavit of Mr. Ochieng deponed on behalf of the Commissioner of Lands, it was submitted that there was no record to show that the Petitioners were given the land. The Petitioners were consequently unlawful squatters on the land. That the Commissioner of Lands was the custodian of public land at the time. That from the affidavit, the land in contest covered sewer lines and electricity wayleaves. Counsel submitted that if the Court was to give a blanket judgment that the Petitioners be given the land, and it turns out there is an electricity way leave, the order will be unenforceable.

49. Counsel urged that whereas the Petitioners stated that their suit was brought under common law principles, instead of proving that allegation, they sought for broader interpretation of the Constitution. He urged that the contention boiled down to property rights which was a statutory issue and argued that when there is a statute governing a particular aspect, Courts should look at that particular legislation.

50. Counsel argued that the Petitioners claim was based on the doctrine of adverse possession, since their claim revolved around their occupation thereof. However, as regards the law on adverse possession on public land, Section 41 of the *Limitation of Actions Act* excludes and limits public land from the operation of adverse possession. That under the *Government's Land Act*, occupation of public land was criminalized, meaning Petitioners were in unlawful occupation, hence committing a crime. Counsel termed it as irregular for a party to occupy Government Land then go to Court to convince the Court to be given the land one occupies. In support counsel relied on the Court of Appeal case of *Mombasa Technical Training Institute v. Agnes Nyevu Charo & 108 Others* [2014] eKLR, where it was held that rights cannot flow from illegal occupation to warrant legitimate expectation over Government Land. To create a precedent that a legitimate expectation for allocation of Government Land can arise out of occupation declared illegal by statute would be opening a Pandora's box encouraging squatter invasion of Government Land, which is contrary to public policy and maintaining social order.

51. The allegation that the City Council had given plans was rejected, since it was not a party to the proceedings. No sufficient evidence had been placed before the Court to support the right to that property. That the only evidence the Petitioners brought was a newspaper print of the president directing they be given titles to land in a public forum. This proclamation

is not part of ways to acquire title to land under Section 7 of the *Land Act*. Presidential proclamation alone is not enough. There was no allotment letter following the presidential declaration. It was a mere political statement. There was no evidence of eviction. They never availed evidence of having applied for a lease. Those requiring titles should have applied in the normal way. The Court needs evidence that the 2,000 people are on the ground so that if it made an order, it applies to a specific land they claim. Without proper evidence the Courts' hands are tied

52. To confirm to the Court the Korogocho slum had been upgraded, Counsel Mr. Eredi submitted that the 2,584 KOWA members with the Seven Villages as well as their dependents had been catered for in the upgrade because the Respondents had not received complaints from them other that when they filed the application. Asked by the Court to explain why the Petitioners were still in Court if they had been settled, his response was that Petitioners were pursuing the cause for academic purposes. This was because the slum had been upgraded with committees formed in every area. That he, Counsel, had participated in several of them together with the Petitioners. He thus urged that the suit had been overtaken by events because the slum has been upgraded and provided with the amenities, roads, sewer lines and so forth.

53. Counsel was asked by the Court to confirm whether the Petitioners' prayers were mute because the slum has since been upgraded and the Petitioners put in main houses. Further, he was asked to substantiate why he opined the suit was an academic pursuit yet the Petition implied that on the ground status was different from what he was submitting in Court. In response, Mr. Eredi admitted before Court that contrary to his filed submissions, there was no evidence or a document like the United Nations Habitat Program on slum upgrading project specifically tailored for the contested land herein identified. That there was no specific document with either parties identified or connected to the litigants in the case. In conclusion he urged that the above stated programs of slums upgrade beats the purpose of the Petitioners suit herein and urged the appeal to be rejected and be dismissed with costs.

**D. Analysis and Determination**

54. On evaluation of this appeal, it is imperative that this Court underscores its jurisprudence on the contours of its Appellate jurisdiction, particularly under Article 163(4)(a) of the *Constitution*. The Petitioners urged that this Court has jurisdiction to hear and determine this case under Article 163(4)(a) of the *Constitution*: that they have appealed to this Court as of right. The Respondents made no submissions on the jurisdictional issue.

55. The law on invocation of Article 163(4)(a) jurisdiction of this Court is replete and settled in numerous decisions of this Court. The jurisprudence spans from *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, *Peter Oduor Ngoge v. Francis Ole Kaparo*

*& 5 Others*, [2012] eKLR and *Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board*, [2012] eKLR where in these earlier cases, the jurisdictional hierarchy of Courts was emphasized that the Supreme Court in exercise of Article 163(4)(a) jurisdiction, has to await and respect the superior Courts exercise of their jurisdictions on the issue. The Rationale being that the Supreme Court will only sit on appeal on matters which the other Courts have already determined so that as an apex Court, it benefits from the reasoning of these other Court. In the *Ngoge case* particularly, it was stated that:

> " [30] In the interpretation of any law touching on the Supreme Court's Appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."

56. Then in *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. & Another*, [2012] eKLR this Court held:

> " 27. With respect, but firm conviction, we disagree with this contention. Such an approach as is urged by Counsel if adopted, would completely defeat the true intent of Article 163 (4) (a) of the *Constitution*. This Article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the *Constitution* can be entertained by the Supreme Court."

57. Turning to the appeal before us, the Petitioners moved to the High Court under Section 84 of the *repealed Constitution* seeking to enforce their rights under Sections 71, 74, 75, 77, 81 and 82 of the *repealed Constitution*. At the core of the case was the question whether their right to life under Section 71, and right to property under Section 75 of the *repealed Constitution* had been infringed or threatened by the Respondents. Consequently, we have no hesitation in finding that a *prima facie* case touching on the interpretation and application of the *Constitution* was brought to this Court. Thus, the appeal has ably invoked Article 163(4)(a) jurisdiction.

58. However, invocation of the Court's jurisdiction is not a panacea for a finding that a meritorious case has been made before the Court. A finding that a Court has jurisdiction to hear and determine a matter is a preliminary finding that indeed the matter before the

Court is one for which the Court is by law permitted to determine. Consequently, having found that the Court was well moved under Article 163(4)(a), we now move to dissect the specific components that entails a matter that involves application and interpretation of the *Constitution*.

59. For a successful and competent appeal to this Court under Article 163(4)(a), it is not enough for a litigant to allege that his/her case before the superior Courts involved interpretation and application of the *Constitution*. The Supreme Court's Appellate jurisdiction under Article 163(4)(a) is a qualified one. The Court is not just another tier of appeal for constitutional matters. Hence a litigant has to categorically outline the various constitutional issues of interpretation and application which were in issue from the High Court and which the Court of Appeal subsequently considered, and erred in its interpretation and application to warrant appeal to this Court. Thus while the Court may find that its jurisdiction has been invoked under Article 163(4)(a) it has the discretion on what issue(s) to determine or whether the alleged issues legitimately fall within this jurisdiction. In *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others* [2014] eKLR the Court thus held:

> " 52. Applying a principled reading of the *Constitution*, this Court responds to the demands of justice by adjudicating upon issues that tend to bring the interpretation or application of the *Constitution* into question. However, it is to be affirmed that any appeal admissible within the terms of Article 163 (4) (a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this Court, in furtherance of the objects laid out under Section 3 of the *Supreme Court Act*, 2011 (Act No. 7 of 2011)."

60. It follows that the Supreme Court retains the discretion to determine what matter is appealable to it under Article 163(4)(a). Such a matter must be founded on cogent issues of constitutional controversy; which issues are to be so determined by the Court itself. So that while a litigant may file his/her appeal, it is the Court which has the sole discretion of determining whether the issues brought before the Court raises cogent constitutional controversies to warrant its input. This is what the Court signaled in the *Gladys Wanjiru Munyi v. Diana Wanjiru Munyi* [2015] eKLR when it stated that:

> " ... This Court has in the past, underlined the necessity of a meritorious theme involving constitutional application or interpretation (*Naomi Wangechi Gitonga & 3 Others v IEBC & 4 Others,* Supreme Court Civil Application No. 2 of 2014; [2014] eKLR and *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd. &*

*Another*, Supreme Court Petition No. 3 of 2012; [2012] eKLR), as the basis of an appeal such as the instant one. Just the bare claim that a question of constitutional interpretation or application is involved, without more, cannot bring an appeal within the ambit of Article 163(4)(a) of the *Constitution*."

61. This point was expounded more in the case of *Zebedeo John Opore v. Independent Electoral and Boundaries Commission & 2 Others* [2018] eKLR. The petitioner in that case, under the impression that any election petition involved an aspect of constitutional interpretation and application since the Court had held that the *Elections Act* was a constitutional derivative, did not, in his petition, set out how the Court of Appeal had misinterpreted and/or misapplied the *Constitution*. The Court stated as follows:

> "55. We are, besides, of the perception that this cause does not raise any cardinal issues inviting the interpretation of any provision of the *Constitution*. And furthermore, we cannot perceive the conclusions of either superior Court as having taken a trajectory of constitutional interpretation or application, in the terms of the *Munya Case*, notwithstanding the petitioner's claim.
>
> 56. We are alive, however, to the broader context of the electoral process: elections in general, draw legitimacy from the broad lines of the *Constitution*, and from the electoral laws. This generality, however, has to be crystallised into clearly-defined normative prescriptions, before the Supreme Court will take up an election appeal as a matter of course, by virtue of the terms of Article 163(4) (a) of the *Constitution*.
>
> 57. Certain principles emerge from the terms of this Judgement, as follows:
>
> a. In election petitions before this Court, a party may not invoke the Court's jurisdiction under Article 163 (4) (a), where the trial Court had found that alleged irregularities and malpractices were not proved, as a basis then does not lie for an application or interpretation of the *Constitution*.
>
> b. The Articles of the *Constitution* cited by a party as requiring interpretation or application by this Court, must have required interpretation or application at the trial Court, and must have been a subject of appeal

at the Court of Appeal; in other words, the Article in question must have remained a central theme of constitutional controversy, in the life of the cause.

c. A party seeking this Court's intervention has to indicate how the Court of Appeal misinterpreted or misapplied the Constitutional provision in question. Thus, the said constitutional provision must have been a subject of determination at the trial Court.

d. As a logical consequence of the foregoing, a party must indicate to this Court in specific terms, the issue requiring the interpretation or application of the *Constitution*, and must signal the perceived difficulty or impropriety with the Appellate Court's decision.

62. We cannot over-emphasize the specialized nature of Article 163(4)(a)'s Appellate jurisdiction of this Court. That jurisdiction is not just another level of appeal. Thus, even if the original suit in the High Court or lower Court invoked specific constitutional provisions, that fact alone is not enough for one to invoke and sustain an appeal before this Court. A party has to steer his appeal in the direction of constitutional interpretation and application. He/she should directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the Constitution. It could be while a matter invoked specific constitutional provisions, those provisions were never part of the Court(s)'determination and the matter turned on purely factual and or statutory issues. Thus, the following attributes are imperative for an appeal to the Supreme Court under Article 163(4)(a) of the *Constitution*:

i. The jurisdiction reveres judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the High Court (trial Court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.

ii. The jurisdiction is discretionary in nature at the instance of the Court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfactory of the Court and with precision those aspects/issues of his matter which in his opinion falls for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of *Constitution* interpretation and application.

iii. A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the

application or interpretation of the Constitution does not bring an appeal within the jurisdiction of the Supreme Court under Article 163(4)(a).

iv. Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under Article 163(4)(a).

v. Challenges of findings or conclusions on matters of fact by the trial Court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of Article 163(4)(a).

63. It is on the foregoing basis that we evaluate the appeal before us. The first hurdle that this Court has to circumvent is the delimiting of the issues that legitimately falls for its determination. This is important since as we have stated above, this is an Appellate Court with a very qualified jurisdiction. Not every issue that was before the superior Courts is open for this Court's determination in exercise of its Appellate jurisdiction under Article 163(4)(a). Matters of fact that touches on evidence without any constitutional underpinning are not open for this Court's review on appeal in exercise of its Article 163(4)(a) jurisdiction. The same is also true of matters that purely dealt with interpretation and application of statutory provisions.

64. The issues framed for determination in the Petition, are:

a. Whether this Honourable Court has jurisdiction to hear and determine the appeal before it under Article 163(4)(a) of the *Constitution*.

b. Whether the Petitioners herein have the right to appeal, under Article 163(4)(a) of the *Constitution*, against the Judgment of the Court of Appeal dated and delivered on 23rd September, 2016.

c. Whether the Petitioners are entitled to the reliefs claimed in their Originating Summons dated 16th September, 2005.

d. Whether the 1st and 2nd Respondents admitted the facts about settlement of Korogocho as explained in the affidavit of Mr. Paul Mungai Kimani sworn on the 16th September, 2005.

e. Whether the Court of Appeal imposed, on the Petitioners the burden of proof imposed on the 1st and 2nd Respondents by Section 112 of the *Evidence Act*.

65. We have already determined issues (a) and (b) and found that the petition correctly invokes this Court's jurisdiction. Issue (c) on reliefs is a consequential issue that may only be determined once a finding is made that the Petitioners have proved their case and are entitled to a remedy. As regards issue (d), it deals with a factual aspect based on affidavit evidence

and how the same was handled. It does not raise a constitutional matter and this Court has no basis of interrogating it. Lastly, issue (e), the question of the burden of proof and the import of Section 112 of the *Evidence Act* is purely a matter dealing with interpretation and application of a statutory provision. The Petitioners have not shown how the same is or was transmuted to a constitutional issue by either the Court of Appeal or the High Court. That is, no allegation has been made that the Section was interpreted contrary to the *Constitution* or its interpretation infringed on a constitutional provision. The upshot is that as regards the issues framed by the Petitioners for determination, save for this Court's jurisdictional issue, no other issue lies for determination by this Court in exercise of its Appellate jurisdiction under Article 163(4)(a) of the *Constitution*.

66. Be that as it may, at the High Court, three (3) issues were framed for determination, namely: whether the Applicants can bring a representative suit; whether the pleadings disclose any cause of action; and whether the Applicants rights under Sections 71, 74, 75, 77, 81 and 82 have been breached. The High Court found that under Section 84 of the repealed Constitution, the Petitioners could not maintain a representative suit and only sustained the suit for the listed Petitioners. Clearly, this was a constitutional interpretation and application question, the issue being the interpretation of Section 84 of the *repealed Constitution*. Another finding of the High Court was on the question of interpretation of Section 71 of the *repealed Constitution*. The Court had been asked to adopt a liberal interpretation of the provision as regards the right to life so as to include right to food, shelter and education etc. It declined to accede to the request holding that

> " S 71 of our *Constitution* ... relates to life in the sense of ordinary human existence and must be understood in that context."

Again this is an issue that touched on the interpretation of the Constitution. Turning to the main question on the infringement of the Petitioners' various constitutional rights, the High Court evaluated the allegations on each Section of the *repealed Constitution* and found that there was no sufficient evidence and particulars to support the same. The case was thus dismissed on the ground that it did not disclose a cause of action.

67. Moving to the Court of Appeal, the Appellate Court framed three issues for determination, namely: whether the appellants established their rights to ownership of the property known as LR No. 82-85 Korogocho; whether the appellants' rights to occupation of the land fell within the frame of constitutional rights and if so, were those rights threatened or contravened by the respondents? and whether the appellants are entitled to the declaratory orders as sought in the originating summons. Before delving into the determination of these issues, the Court of Appeal addressed the issue of locus particularly the High Court's finding

that the Petitioners had no locus to file a representative suit. Rather than interrogate the issue the Court opted for substantive justice stating:

> "The Judge found the appellants lacked locus standi to file a suit seeking enforcement of fundamental rights for a group of people registered as a society. In this appeal, we are inclined to take a different approach and address substantively the legal issues that arose because we are aware that overriding objectives in the administration of justice that requires us to always take a broad and purposeful view in interpreting matters before Courts"

68. Thus, one of the constitutional issues that had been determined by the High Court was not expressly determined by the Court of Appeal. The Appellate Court opted for substantive justice. Did this prejudice the Petitioners' appeal? We do not think so. This must be the reason the issue has not been raised in the appeal before us. In any event, the Appellate Court must have been cognizant of the fact that the question of locus standi in representative suit for enforcement of rights under the Bill of Rights is now settled under Article 22 of *Constitution* which provides:

22.

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

2. In addition to a person acting in their own interest, Court proceedings under clause (1) may be instituted by-

    a. a person acting on behalf of another person who cannot act in their own name;

    b. a person acting as a member of, or in the interest of, a group or class or persons;

    c. a person acting in the public interest; or

    d. an association acting in the interest of one or more of its members.

69. The Appellate Court then dealt with the approach to be adopted in determining matters that deal with enforcement of rights under the Bill of Rights under the *repealed Constitution*. It cited the cases of *Wa'Njuguna v. Republic* (2004) KLR 520, and *Njoya & 6 Others v. Attorney-General & 3 Others* (2004) KLR for the jurisprudence that the *Constitution*

is to be interpreted broadly and liberally. Thereafter, the Appellate Court turned to the determination of the issue at hand which it stated as follows:

> "18. This case involves a determination of rights of a large number of appellants who live in an informal settlement on a piece of land belonging to the Government. They are claiming, rightly so in our view, that they are entitled to protection by the Government. On the other hand, and rightly so too, the Government is contending that it has a duty of ensuring area planning and provision of infrastructure services such as roads, water and other amenities for the present and future generations."

70. Having stated the issue as above, the Appellate Court was now set to delve into the determination of the issue which it framed as

> "the question of which public interest is greater here, occupational rights by the appellants as claimed that the Court should declare them owners of their respective plots or consideration of planning needs that take into account protection from health hazards wrought by lack of planning?"

Unfortunately, the Court of Appeal could not delve further into the issue. For it to have done the balancing of the two interest, it had to first establish the Petitioners' claim and entitlement to the suit land. This is the point where the Appellate Court fell into a dead end. We would like to capture the Court of Appeal's findings at length in this regard. It states:

> "(20) This appeal raises constitutional issues of right to housing which counsel for the appellants very ably connected to right to life because if one has no roof over their head, their life cannot be guaranteed. The standard of proof even for a constitutional matter is on a balance of probabilities. The appellants have a duty to establish that their rights that are identifiable and determinable have been or are likely to be contravened by the Government. Secondly, it must be proved that the rights of the appellants' override public interest and if declared, they do not contravene other people's rights. So have the appellants' rights to occupation of the suit land been contravened?
>
> (21) We have gone through the records in this appeal; it is a matter of great regret that we find the appellants' claim is not ascertainable and therefore cannot be determined. We say so, because the appellants did not annex any document(s) to prove the existence of the land on the ground. They have also not demonstrated whether they

made any efforts to obtain copies of such documents relating to the suit land either from the City Council of Nairobi (now Nairobi County Government) or the Government Lands Office. This is public land held by the Government for use by the present or future development needs. Without any official documents such as area maps, survey plans, letters of allotment or any evidence of ownership, it is next to impossible for a Court of law to issue declaratory orders directing the Government to issue title documents to the appellants.

(22) What part of the land, what size and to who should the land titles be issued? Is it the Association or to the persons listed in the suit? Who is occupying which plot and who will plan the roads and other infrastructural necessities? Supposing, some of the houses fall within road reserves and require to be demolished and the Court has directed titles to be issued in respect of particular plots that fall within the road reserve or way leave for power lines, what would be the consequence? ...

Needless to state a Court of law cannot issue orders which are not capable of implementation and worse which can give room to confusion and thereby become a recipe for chaos instead of fostering peace and harmony between appellants and the respondents.

(23) What compounds the instant matter even further is the fact that there is no evidence of any threat to evict the appellants, or to demolish their houses that accompanied this suit apart from a letter dated 6th June, 2006, addressed to Miss Koch, ABC Church and Tenants. The said letter requested the aforementioned parties to remove structures in the Chief's compound to give room for construction of the Aps houses. Surely the Administration Police need to be housed so as to provide security in the area. It should nonetheless be noted that this suit was filed in May 2005, before the said threat. It is also not clear whether Miss Koch and the ABC Church with their tenants are members of the appellants Association as their names do not seem to be part of the list of members annexed to the suit nor did they swear any affidavit.

(24) For the aforesaid reasons, we agree with the trial judge's observation that under S 84 of the *retired Constitution*, a person whose rights have been or are likely to be contravened, is obliged to state his or her

> complaint and to identify with exact clarity the manner and extent of infringement."

71. With the foregoing finding, the Appellate Court agreed with the High Court that there was no evidence upon which the Petitioners had laid their claim to the suit land. We find that the Court of Appeal decision was majorly an evidentiary matter. The Appellate Court had observed that the appeal raised constitutional issues of the right to housing. It was indeed ready to make a determination on the issue. The only hurdle was that there was no evidence by the Petitioners to back their claim. On that basis, needless to say, the Appellate Court downed its tools and upheld the High Court decision.

72. Did the Court of Appeal in making this conclusion that the Petitioners' claim was not ascertainable and therefore cannot be determined, either interpret or apply the *Constitution*? The answer is an emphatic nay. Equally, in no way did the Appellate Court conclusion of lack of evidence take any constitutional trajectory so as to warrant this Court's intervention. We have already stated that some of the issues framed for determination by the Petitioners touch on matters of fact and statutes. We also note that some issues are being raised before this Court for the first time. For instance, Section 112 of the *Evidence Act* was never an issue before the Court of Appeal. The Petitioners were under a duty to frame the issues they considered were of a constitutional nature which the Court of Appeal erred in its interpretation or application but they failed in that duty. We find no cogent issue of constitutional controversy arose and/or was in issue at the Court of Appeal that warrants this Court's further input.

73. Evaluating the record, it is worth noting that at the time of filing this matter before the High Court, the Petitioners were not facing any eviction threat or order: a fact acknowledged by the two superior Courts. They sought: declaratory orders of their rights under Section 71 and 75 of the *repealed Constitution*; declaration that they are owners of the suit property; and/or in the alternative be granted leases for 99 years, and the Respondents be restrained from any way interfering with their occupation. Before any of these orders could be determined if they warrant being granted, the Petitioners had to first prove their entitlement and right to the property. As the two superior Courts found, no evidence was tendered hence the case was not proved. Consequently, this Court finds no basis upon which to delve into the interrogation of the matter whether reliefs such as structural interdict were available.

74. The upshot is that we find that the Petitioners have not marshalled a satisfactory case before this Court for it to exercise its jurisdiction under Article 163(4)(a) of the *Constitution*. The Petition lacks merit and the same is for dismissal. We would make no orders as to costs.

75. Consequently, we make the following Orders:

(a) The Petition of Appeal dated 30th November, 2018 and filed in this Court on 3rd December, 2018 is hereby dismissed for lack of merit.

(b) Each party to bear its costs.

Orders accordingly.

**Waswa v Republic (Petition 23 of 2019)**
**[2020] KESC 23 (KLR) (4 September 2020) (Judgment)**

**Supreme Court of Kenya**

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

Neutral citation: [2020] KESC 23 (KLR)

***Constitutional Law*** *- fundamental rights and freedoms - enforcement of fundamental rights and freedoms - right to a fair trial – where the advocate of the family of the victim in a criminal trial sought to be allowed to actively participate in the trial - whether an advocate acting for a victim could be permitted to actively participate during criminal proceedings to safeguard the victim's constitutional and statutory rights - guiding principles in determining whether a victim or his legal representative could participate in a criminal trial - manner and extent of the participation - whether in allowing such an advocate to actively participate in the criminal proceedings would violate the accused person's right to a fair trial - what were the benefits of an expeditious trial - Constitution of Kenya, 2010, articles 20(3), 27, 50, 159(2(b) and 259(1) and(3); Victim Protection Act, 2014, sections 9.*

***Constitutional Law*** *– Director of Public Prosecutions – functions – prosecution of crimes - where the advocate of the family of the victim in a criminal trial sought to be allowed to actively participate in the trial - whether a victim or his legal representative could prosecute crimes on behalf of the Director of Public Prosecutions - Constitution of Kenya, 2010, article 157; Victim Protection Act, 2014, 9(2)(a).*

***Criminal Law*** *– appeals – criminal appeals – interlocutory appeals in criminal trials - whether a party in a criminal trial could appeal against an interlocutory ruling, and if so, at what time should the appeal be made - what were the circumstances in which an interlocutory appeal could be allowed – Constitution of Kenya, 2010, article 50(2)(q); Criminal Procedure Code (Cap 75), sections 347 and 379(1).*

***Jurisdiction*** *– jurisdiction of appellate courts – jurisdiction to interfere with the exercise of discretion by a trial court - what were the circumstances in which an appellate court could interfere with exercise of discretion of a trial court.*

**Brief facts**

The appellant was charged with the offense of murder in the trial court. After nine witnesses for the prosecution had testified, counsel for the family of the deceased (the victim) made an oral application for leave to actively participate in the proceedings. The trial court observed that the law had shifted the traditional parameters of a victim in a criminal case and therefore a victims' counsel could no longer be considered a passive observer in criminal proceedings. However, the trial court noted that the counsel for the victim could not be active and parallel to that of the prosecutor.

Consequently, the trial court allowed the participation of the counsel watching brief limited to the following instances: on submission at the close of the prosecution case whether there was a case to answer; final submission should the accused be put on his defence; on points of law should such arise in the course of trial, and upon application at any stage of the trial for the consideration by the court.

Aggrieved by the trial court's ruling, the appellant lodged an appeal to the Court of Appeal. The Court of Appeal being satisfied that the impugned rights given by the trial court to the victim of the offence (the father of the deceased) were in conformity with the Constitution of Kenya, 2010 and the Victim Protection Act, 2014 (VPA), upheld the ruling of the trial court and dismissed the appeal in its entirety. Aggrieved by the decision of the Court of Appeal, the appellant filed the instant appeal.

**Issues**

i. Whether an advocate acting for the victim could be permitted to actively participate in criminal proceedings to safeguard the victim's constitutional and statutory rights.
ii. Whether allowing an advocate acting for the victim to actively participate in the criminal proceedings would violate the accused right to a fair trial by exposing them to double prosecution.
iii. What were the guiding principles in determining whether a victim or his legal representative could participate in a trial and the manner and extent of the participation?
iv. Whether a victim or his legal representative could prosecute crimes on behalf of the Director of Public Prosecutions.
v. Whether a party in a criminal trial could appeal against an interlocutory ruling, and if so, at what time should the appeal be made?
vi. What were the circumstances in which an interlocutory appeal could be allowed?
vii. What were the circumstances in which an appellate court could interfere with the exercise of discretion of a trial court?

**Relevant provisions of the Law**

**Constitution of Kenya**

**Article 20 - Application of Bill of Rights**

*(3) In applying a provision of the Bill of Rights, a court shall—*

*a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and*

*b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.*

**Article 259 - Construing this Constitution**

*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; and*

*d. contributes to good governance.*

*2. .....*

*3. Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...*

**Held**

1. As the overriding element of State control inevitably pit the power of the State against the accused, the necessity of protecting the accused's rights within that power imbalance arose to ensure that there was equality of arms. However, that could inadvertently eclipse the recognition of the victim's inherent interest in the response by the criminal justice system to the crime. Kenya's progressive Constitution had captured and addressed all those scenarios.
2. The right to fair hearing was provided for under article 50(1) of the Constitution and the attendant rights of an accused person were set out in article 50(2). The Constitution also recognized victims of offences. In addition to the constitutional underpinning, the Victim Protection Act (VPA) was enacted deliberately in 2014 to give effect to article 50(9). Thus, the rights of victims in a trial process also had statutory underpinning.
3. Although the adversarial criminal trial process was a contest between the State, represented by the Director of Public Prosecutions (DPP), and the accused, usually represented by defence counsel and the traditional role of victims in a trial was often perceived to be that of a witness of the prosecution, that flowing from both the Constitution and the Victim Protection Act (VPA) and in particular section 9(2)(a) of the VPA, a victim too, had the right to participate in criminal proceedings.
4. The participation of victims in criminal trial proceedings, though a novel trend in Kenyan laws, was in accord with international developments that had embraced the place of victims in the trial process. Kenya's Constitution under articles 2(5) and (6) permitted the court to apply the general rules of international law and also provided that any treaty or convention ratified by Kenya formed part of the law of Kenya.
5. The role of a victim in a criminal trial was recognized in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985). In that Declaration, in the context of the criminal justice system, it was a central obligation of governments to comply with the victim's rights to access to justice and fair treatment, restitution, compensation and assistance.
6. Under article 68(3) of the Rome Statute, of the International Criminal Court (ICC) victims before the ICC were granted far-reaching rights. In light of the large degree of discretion accorded to the judges conducting the trial, the practice of the ICC had developed to allow victims:-
    1. to make an opening and closing statement (that was also in consonance with rule 89(1) of the ICC Rules of Procedure and Evidence);
    2. to attend and participate in hearings and status conferences through written submissions and oral argument;
    3. to introduce evidence and challenge admissibility of evidence with leave of the court; and
    4. to question witnesses and/or the accused under the strict control of the court. Where there were a large number of victims admitted to participate in the proceedings, the

court could limit the number of lawyers representing them pursuant to rule 90(2)-(4) of the ICC Rules of Procedure and Evidence.

7. The emerging picture from other jurisdictions was that the criminal justice processes should empower victims and their voices should be heard, not only as witnesses for the prosecution but as rights holders with a valid interest in the proceedings and the outcome of the cause.

8. Article 259(1) and (3) of the Constitution was instructive on how to construe their rights under article 50(9) of the Constitution. Articles 20(3) and 50(9) of the Constitution read together with the Victims Protection Act (VPA) affirmed that victims had rights in Kenya's criminal justice system. Those rights were stipulated in section 9 of the Victims Protection Act (VPA). Article 27 of the Constitution also provided that every person was equal before the law and had the right to equal protection and equal benefit of the law. Both the Constitution and the Victims Protection Act (VPA) sought to ensure the fairness of justice procedures applied to both the victims and accused particularly on the right to a fair hearing, timeliness, respect, dignity, and neutrality.

9. The trial court being an impartial entity that oversaw the progress of a case had the ultimate function of determining the accused's guilt or innocence. Its aim was to establish the truth. The purpose of criminal proceedings, generally, was to hear and determine finally whether the accused had engaged in conduct which amounted to an offence and, on that account, was deserving of punishment. Thus, the rights of the accused could not be considered in isolation without regard to those of the victim. Victims too had a legitimate interest in the court's exercise of its jurisdiction. The criminal justice system should cultivate a process that inspired the trust of both the victim and the accused.

10. Considering the rights of the accused, the victim and society as a whole in a criminal trial was not only fair, pragmatic but also constitutionally viable. The trial court had to protect the rights of all parties involved in criminal proceedings. There was a public interest in ensuring that trials were fair. That interest could be served by safeguarding the rights of the accused, the objectivity of the prosecution and, by acknowledging the victim's interest. The rights of the accused and the public interest should be secured and fulfilled. The rights of victims did not undermine those of the accused or the public interest. The true interrelationship of the three was complementary. The participatory rights of the victim did not violate the fair trial rights of the accused. A victim could participate in a trial in person or via a legal representative.

11. Once a victim or his legal representative made an application to participate in a trial, it was the duty of the trial court to evaluate the matter before it, consider the victim's views and concerns, their impact on the accused person's right to a fair trial, and subsequently, in the trial court's discretion, determine the extent and manner in which a victim could participate in a trial. Since participatory rights were closely related to the rights of the accused and the right to a fair and expeditious trial, they should be granted in a judicious manner which did not cause undue delay in the proceedings and thus prejudice the rights of the accused.

12. Discretionary pronouncements of a court formed an integral part of a court's jurisdiction and should not be interfered with unless an appellate court was satisfied that the exercise of that discretion was improper and, therefore, warranted interference. A court had to be satisfied that the trial court in exercising discretion misdirected itself and had been clearly wrong in the exercise of the discretion and that as a result, there had been injustice. In the instant case, there was no need to interfere with the trial court's discretionary pronouncements.
13. Article 157(1) of the Constitution established the office of the DPP. The State's prosecutorial powers were vested in the DPP under article 157 of the Constitution. That office, under article 157(10), neither required the consent of any person to institute criminal proceedings nor was it under the direction or control of any person or authority. Those provisions were also replicated in section 6 of the Office of the Director of Public Prosecutions Act, 2013. The office of the DPP was the sole constitutional office with the powers to conduct criminal prosecutions.
14. The victim had no active role in the decision to prosecute, or the determination of the charge upon which the accused would finally be tried. That was the sole duty of the DPP. While the victim of a crime could participate at any stage of the proceedings as deemed appropriate by the trial court, a victim or his legal representative did not have the mandate to prosecute crimes on behalf of the DPP. The DPP had to at all times retain control of, and supervision over the prosecution of the case. As such, the constitutional and statutory power of the DPP to conduct the prosecution was not affected by the intervention of the victim in the process.
15. A victim could not and did not wear the hat of a secondary prosecutor. When victims presented their views and concerns in accord with section 9(2) (a) of the Victim Protection Act (VPA), victims were assisting the trial court to obtain a clear picture of what happened (to them) and how they suffered, which the trial court could decide to take into account. Victim participation should meaningfully contribute to the justice process. However, that did not mean that the court's judgment would follow the wishes of the victim. The trial court would take into account the law, facts, all the different interests, and concerns, including the rights of the defence and the interests of a fair trial to arrive at a sagacious decision.

16. The following guiding principles would assist the trial court when it was considering an application by a victim or his legal representative to participate in a trial and the manner and extent of the participation:-
    a. the applicant had to be a direct victim or such victim's legal representative in the case being tried by the court;
    b. the court should examine each case according to its special nature to determine if participation was appropriate, at the stage participation was applied for;
    c. the trial court had to be satisfied that granting the victim participatory rights should not occasion an undue delay in the proceedings;
    d. the victim's presentation should be strictly limited to the views and concerns of the victim in the matter granted participation;
    e. victim participation should not be prejudicial to or inconsistent with the rights of the accused;
    f. the trial court could allow the victim or his legal representative to pose questions to a witness or expert who was giving evidence before the court that had not been posed by the prosecutor;
    g. The trial court had control over the right to ask questions and should ensure that neither the victim nor the accused were not subjected to unsuitable treatment or questions that were irrelevant to the trial;
    h. the trial court should ensure that the victim or the victim's legal representative understood that prosecutorial duties remained solely with the DPP;
    i. while the victim's views and concerns could be persuasive; and in the public interest that they were acknowledged, those views and concerns were not to be equated with the public interest;
    j. the court could hold proceedings in camera where necessary to protect the privacy of the victim;
    k. while the court had a duty to consider the victim's views and concerns, the court had no obligation to follow the victim's preference of punishment.
17. The right to have a trial commence and conclude without unreasonable delay was an accused person's constitutional guarantee under article 50(2)(e) of the Constitution. A victim also had the right to have the trial begin and conclude without unreasonable delay under section 9(1)(b) of the Victim Protection Act (VPA). In addition, article 159(2)(b) of the Constitution obligated courts not to delay justice. Further, treaties and international instruments that Kenya had ratified such as the African Charter on Human and People's Rights, Rome Statute of the ICC, and the International Covenant on Civil and Political Rights (ICCPR) contained similar provisions, that bound the court in all criminal justice procedures and processes.
18. The benefits of an expeditious trial could not be gainsaid. A speedy trial ensured that the rights of the accused person were secured; it minimized the anxiety and concern of the

accused; it prevented oppressive incarceration; and protected the reputation, social and economic interests of the accused from the damage which flowed from a pending charge. It also protected the interests of the public, including victims and witnesses, and ensured the effective utilization of resources. Additionally, it lessened the length of the periods of anxiety for victims, witnesses, and their families and increased public trust and confidence in the justice system.

19. In conformity with the Constitution, courts should shun situations where an accused's right to a fair trial was prejudiced by virtue of undue delay. Courts possessed the power to take appropriate action to prevent injustice. That power was derived from the public interest that trials were conducted fairly and that as far as possible the accused was tried without unreasonable delay the end goal being to achieve prompt justice in criminal cases.

20. There was no provision in both the Constitution and the Criminal Procedure Code (CPC) for interlocutory criminal appeals. The Constitution under article 50(2)(q) provided that every accused person had the right, if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. Similarly, the CPC under sections 347 and 379(1) only allowed appeals by persons who had been convicted of an offence.

21. The delay of over six years defeated the intention of the framers of the Constitution and of Parliament to have criminal trials concluded expeditiously. The guarantee to have a criminal trial conducted without undue delay related not only to the time by which a trial should commence but also the time by which it should end, judgment rendered and any applicable appeals or reviews completed. Therefore, although criminal trials were not time bound like election petitions, there was need to have them determined expeditiously in line with the constitutional prescriptions.

22. The right of appeal against interlocutory decisions was available to a party in a criminal trial but should be deferred, and await the final determination by the trial court. A person seeking to appeal against an interlocutory decision had to file the intended notice of appeal within 14 days of the trial court's judgment. However, exceptional circumstances could exist where an appeal on an interlocutory decision could be sparingly allowed, these included:-
    1. where the decision concerned the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;
    2. when the decision was of sufficient importance to the trial to justify it being determined on an interlocutory appeal; and
    3. where the decision entailed the recusal of the trial court to hear the cause.

*Petition dismissed.*

***Orders***

i. *For the avoidance of doubt, the determination in Criminal Appeal No. 132 of 2016 was upheld.*

ii. *In view of the inordinate delay of the original murder trial, occasioned by appeals relating to an interlocutory matter, the substantive matter was directed to be heard and determined on the basis of priority.*

**Citations**

**Cases**

***Kenya***

1. *Aukot, Ekuru v Independent Electoral & Boundaries Commission & 3 others* Petition 471 of 2017;[2017]eKLR-(Cited)
2. *Cholmondeley v Republic* [2008] KLR 190 -(Followed)
3. *In re the Matter of the Interim Independent Electoral Commission* [2011] 2 KLR 223-(Cited)
4. *Kamau, John Njengav Republic*, Criminal Appeal No 63 of 2014; [2014] eKLR-(Followed)
5. *Kigula and others v Attorney General* [2005]1 EA132-(Cited)
6. *Loitiptip, Anuar v Independent Electoral &Boundaries Commission & 2 others,* Petition No 18 Consolidated with Petition No 20 of 2018; [2019] eKLR-(Followed)
7. *Maingi, Sheila Kinya v Republic*, Criminal Appeal No 388 of 2008; [2016] eKLR –(Followed)
8. *Maur Abdalla Bwanamaka v Director of Public Prosecutions& another,* Petition no 23 0f 2018; [2019] eKLR-(Followed)
9. *Mong'are, Dennis Mogambi v Attorney General & 3 others,* Civil Appeal No 123 of 2012; [2014]eKLR –(Cited)
10. *Ndegwa v Republic* [1985] KLR 534 –(Cited)
11. *Ndyanabo v Attorney General* [2001] 2 EA 485-(Cited)
12. *Paul Ssemogerere and others v The Attorney General*, Constitutional Appeal No 1 of 2002 [2004] UGSC10 –(Cited)
13. *Republic v Director of Public Prosecutions & 3 others ex-parte Meridian Medical Centre Ltd & 7 others* Miscellaneous Application 363, 362,375 7 405 of 2013;[2015]eKLR –(Followed)
14. *Salat, Nicholas Kiptoo Arap Korir vIndependent Electoral and Boundaries Commission & 7 others* SC. Application No 16 of 2014; [2014] eKLR- (Affirmed)
15. *Tinyefuza v Attorney general of Uganda*, Constitutional Petition No 1 of 1997 (UGCC3)-(Cited)

***Nigeria***

*Bakare v State* 1985 2NWLR- (Cited)

***India***

1. *Hiralal Ratanlal v Sito* 1973 AIR 1034, 1973 SCR (2) 502-(Cited)
2. *Mallikarjun Kodagali (Dead) represented through Legal Representation/Appellants v State of Karnataka & others* Criminal Appeal NOS1281-82 of 2018
3. *Zahira Habibulla H Sheikh & another v State of Gujarat & others* 446-449 of 2004-(Cited)

***Canada***

1. *Ng Ka Ling & another v Director of Public Immigration* (1999) 1HKLRD 315 –(Cited)
2. *R v Big Drug MartLtd.,* [1985] 1 SCR 295 – (Cited)

***United States of America***

1. *Marbury v Madison*, 5 US (1Cranch)137- (Cited)
2. *South Dakotavs North Carolina* 192 US 268 (1940) L ED –(Cited)

***United Kingdom***

1. *Attorney General of the Gambia v Jobe* (1985) LRC – (Cited)
2. *Attorney-General's Reference* (No 3 of 1999) [2001] 2 AC 91 [118]-(Followed)
3. *Direct United States Cable Co v The Anglo-American Telegraph Co* (1877) 2 AC –(Cited)
4. *R v H* [2004] 2 AC 134-(Approved)

***European Human Rights Court***

1. *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163 –(Followed)
2. *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35 – (Followed)

**Statutes**

***Kenya***

1. Constitution of Kenya articles 2(4)(5)(6);10;19;20(1)(2)(3)(4);21;25(c);27;50(1)(2)(j)(7)(9);48;157; 163(4) (a) ;259(1)(3) – (Interpreted)
2. Court of Appeal Rules (cap 9 Sub Leg) rule 75 – (Interpreted)
3. Criminal Procedure Code (cap 75) sections 137, 150,329 A- E, 347,379(1) - (Interpreted)
4. Office of the Director of Public Prosecutions Act (cap 6B) section 6 – (Interpreted)
5. Penal Code (cap 63) sections 203, 204 - (Interpreted)
6. Supreme Court Act (cap 9B) section 3 – (Interpreted)
7. Supreme Court Rules, 2012 (cap 9B Sub Leg) rules 3, 9, 33 – (Interpreted)
8. Victim Protection Act (cap 79A) sections 2 3,4(a)(2)(b); 9(1) (2)(a)(b)(10)(a)(b)(c) – (Interpreted)

***Canada***

Canadian Victim Bill of Rights Act, 2015 sections 14,20 – (Interpreted)

***Germany***

1. Germany's Code of Criminal Procedure 395- 402, 397 – 401 –(Interpreted)
2. Germany's Victim Protection Act (Opferschutzgesetz) 1986

***Rome Statute of the International Criminal Court (ICC)***

1. Rome Statute, 1998 article 68(3) –(Interpreted)
2. International Criminal Court Rules of Procedure and Evidence, 2000 rules 89(1); 90 (2)-(4)- (Interpreted)

**United Kingdom**

Police and Criminal Evidence Act 1984 section 64(3B) –(Interpreted)

**International Instruments**

1. African Charter on Human and People's Rights (Banjul Charter) article 7
2. European Convention on Human Rights (ECHR) 1950 article 6
3. International Covenant on Civil and Political Rights (ICCPR) article 14(3)(c)
4. United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985

**Advocates**

Mr. George Marunga, counsel for the family of the deceased (the victim)

September 4, 2020, the Court delivered the following Judgment:

## A. Introduction

1. This Petition of Appeal is dated 3rd July 2019 and was filed on 9th July 2019.

   The appellant has appealed under article 163(4)(a) of the *Constitution* and rules 3, 9 & 33 of the *Supreme Court Rules*, 2012 challenging the decision of the court of Appeal which upheld the decision of the High Court which permitted the Counsel engaged by the victim of the crime to participate in the trial of the appellant on specified terms. He seeks declarations that the Ruling of the High Court that was upheld by the Appellate Court, is inconsistent with article s 259(1), 10, 20(1), 20(2), 20(3), 20(4) of the *Constitution*; and that the exercise of the full power of a Court as provided by the *Criminal Procedure Code* (CPC) by a victim or his representative is inconsistent with article s 50(1)& (2) and 157 of the *Constitution*.

## B. Background

2. The genesis of this matter is a Ruling of the High Court at Bungoma (Ali-Aroni, J) delivered on 17th August, 2017 in Criminal Case No 34 of 2014, where the appellant is charged with the offense of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. After nine witnesses for the prosecution had testified, Mr. George Marunga, counsel for the family of the deceased (the victim) made an oral application for leave to actively participate in the proceedings. He relied on article 50(7) and (9) of the *Constitution* and the sections 4(2)(b), 9(1) & (2) of the *Victim Protection Act*, 2014 (VPA).

3. The learned Judge considered the oral arguments made by the respective parties, the written submissions, relevant provisions of the *Constitution*, the *VPA* , and case law. She observed that the law has shifted the traditional parameters of a victim in a criminal case and therefore a victims' counsel can no longer be considered a passive observer in criminal proceedings. However, she noted, persuaded by case law, that 'his participation cannot be active and parallel to that of the prosecutor'.

4. Additionally, she observed that the '*VPA* gives the parameters of the victim's involvement during trial to include; the victim's views and concerns at various stages as the court may determine either directly by the victim or his/her representative; at plea bargaining; at the level of sentencing or where a decision is likely to affect the right of the victim and not throughout the trial and parallel to the prosecution'.

5. Consequently, the learned Judge allowed the participation of the Counsel watching brief limited to the following instances: on submission at the close of the prosecution case whether there is a case to answer; final submission should the accused be put on his defence; on points of law should such arise in the course of trial, and upon application at any stage of the trial for the consideration by the court

6. Aggrieved by that ruling, the appellant preferred an appeal to the court of Appeal; Criminal Appeal No 132 of 2016. The appellant faulted the trial Court for: *inter alia*, failing to apply the words "protection", "rights", "welfare" in article 50(9) of the *Constitution* in their proper perspectives, introducing a non-existent right and unrecognized fundamental right and freedom; elevating the position of a Counsel watching brief to a status equal to the constitutional office of Director of Public Prosecution (DPP); acting in ignorance or in subversion of article 157 of the *Constitution* and thereby amending article 157 (6) of the *Constitution*; concluding that powers of the DPP are to be exercised collegially with Counsel watching-brief, and, failing to acknowledge that sections 329 A -329 E of the *CPC* wholly and completely addresses the rights of a victim in the context of a criminal trial.

7. The Judges of Appeal found that the appeal, in essence, concerned the rights of a victim of an offence during the trial process and in particular whether or not the deceased's father and family are entitled to the rights that were granted by the trial judge.

8. The Appellate Court determined that it is the intention of the Constitution, that the constitutional rights of an accused person to a fair trial, should be balanced with the statutory rights of the victim of the offence - as stipulated in *VPA* and further that the rights of the victim of crime should be exercised without prejudice to enumerated rights of an accused person to a fair trial. the court also held that the Constitutional and statutory role of the DPP to conduct the prosecution was therefore not affected by the intervention of the victim in the process.

9. In addition, they held that a victim of an offence or his advocate or representative may exercise the powers of the court under section 150 of the *CPC* with the permission and directions of the trial Court and this was not incompatible with the right of a fair trial of an accused person or with the exercise of the prosecutorial powers of the DPP.

10. Consequently, in their judgment dated 21st May, 2019, the Appellate Judges being satisfied that the impugned rights given by the trial Court to the victim of the offence (the father of the deceased) were in conformity with the Constitution and the *VPA*, upheld the ruling of the trial Court and dismissed the appeal in its entirety.

11. Aggrieved by the decision of the court of Appeal, the appellant filed this Appeal raising six (6) grounds to wit: That the learned Judges of Appeal erred, misapplied and gravely misconstrued the Constitution:

    a. On the rights of an accused person and the victims of an offence in their interpretation and application of article 50 of the *Constitution* to the effect and import that article 50(9) recognized the rights of victims of offences and that the constitutional rights of an accused to a fair trial should be balanced with the statutory rights of the victim as stipulated in the *VPA*;

    b. On the right of an accused and victim of an offence in their interpretation and application of article 50 of the *Constitution* to the effect and import that the *Constitution* and the *VPA* now gives a victim of offence a right to a fair trial and right to be heard in the trial process to assist the court and not the prosecutor, in the administration of justice so as to reach a just decision in the case having regard to public interest; and that the right of the victim to be heard persists throughout the trial process and continues to the appellate process;

    c. In their interpretation and application of article 157 of the *Constitution* to the effect and import that the constitutional and statutory role of the DPP to conduct prosecution is not affected by the intervention of the victim in the process;

    d. In finding that it is not incompatible with the right of a fair trial of an accused person or with the exercise of the prosecutorial powers of the DPP if a victim of an offence, either in person or through his advocate is allowed to exercise the full power of the court in the manner provided by Section 150 of the *CPC*so long as the safeguards in the proviso thereto are observed;

    e. Taking into account matters which they ought not to have and failed to take into account matters which they should have; and

    f. In finding that a victim of an offence or his advocate or representative may exercise the plenitude of powers of the court under Section 150 of the *Code* with the permission and directions of the court, without setting the full parameters of the extent of the victim's participation in the trial process.

**C. Submissions**

**i. The appellant**

12. The appellant's written submissions were filed on 22nd November 2019. The appellant submits that this Court ought to interpret the *Constitution* and statutory provisions in a liberal and progressive manner in accord to article s 259(1), 259(3), 10,19,20, and 21 of the *Constitution*.

13. The appellant urges that no constitutional provision is superior or inferior to another. He submits that each constitutional article is complimentary and must be read as an integrated and cohesive whole. He buttresses this assertion with the decision of the Supreme Court of the United States of America in *South Dakota v. North Carolina* 192 US 268 (1940) L ED, the Kenyan Appellate decision in *Dennis Mogambi Mong'are v. Attorney General & 3 others*, Civil Appeal No 123 of 2012, and *Tinyefuza v Attorney general of Uganda*, Constitutional Petition No 1 of 1997 (UGCC3) by the court of Appeal of Uganda. The appellant, therefore, submits that article s 50(1) and (2), and 50(9) of the *Constitution* must be considered harmoniously as an integrated whole and that the rights of victims do not supersede those of the accused.

14. The appellant contends that the interpretation by the superior Courts of article s 50(1) & (2), 50(9) of the *Constitution* together with the provisions of the *VPA* and Section 150 of the *CPC*produced an absurd result because it presupposes that the victim's rights are more relevant than the accused person's rights.

15. The appellant submits that the rights of an accused person under article 50(1) of the *Constitution* cannot be limited so as to accommodate the interests of victims. He faults the Appellate Court for taking into account matters which they ought not to have, and failed to take into account matters which they should have when they attempted to strike a balance between the rights of a victim and that of an accused in a criminal trial, amounted to limiting the accused's right to fair trial which contravenes article 25(c) of the *Constitution*.

16. It is the appellant's case that the court of Appeal failed to consider the purpose and effect of the *VPA*. To support this argument, Counsel for the appellant relies on the decision by the Supreme Court of Canada in *R v Big Drug Mart Ltd*., [1985] 1 SCR 295 (*The queen v Big M Drug Mart Ltd*, 1986 LRC (Const.)332; *Ng Ka Ling & another v The Director of Public Immigration* (1999) 1HKLRD 315; and *Centre for Rights Education and Awareness Case*. He submits that one of the primary legislative objectives of the *VPA* is to provide for protection, support services, reparation and compensation for victims, and connected purposes.

17. The appellant contends that the Superior Courts' interpretation of Section 9 of the *VPA* contradicts the letter and spirit of article 50(1) & (2) of the *Constitution*, and the purpose of the *VPA*. The appellant cites article 2(4) of the *Constitution*, *Marbury v Madison*, 5 US (1Cranch)137, and *Attorney General of the Gambia v Jobe* (1985) LRC to urge the court to interpret article 50 of the *Constitution* in a manner that reconciles the rights of an accused to a fair trial and the rights of victims in the criminal justice system. It is contended that if the right of an accused to fair trial and the right of a victim to participate in a criminal trial are put side by side, both cannot be given effect at the same time. This Court is urged to uphold and affirm the rights of an accused to fair trial since this does the least damage to the constitutional framework.

18. Learned Counsel for the appellant submits that the learned Judges of Appeal interpreted and applied article 50(9) of the *Constitution* without reference to the guiding principles set out in article s 259(1), 10, 20(1), 20(2), 20(3) and 20(4) of the *Constitution*. Counsel asserts that the court's interpretation failed to give effect to the spirit and purpose of the *Constitution*, especially that of presumption of innocence until proven guilty. To augment his arguments, the appellant cites a decision of the Supreme Court of Nigeria *Bakare v State* 1985 2NWLR, the decision by the court of Appeal in *Ndegwa v Republic* [1985] eKLR 534 and article s 50(7) & (9) of the *Constitution*. The appellant argues that the court of Appeal, in upholding the decision of the High Court, qualifies the victim as a secondary prosecutor therefore undermining the principle of equality of arms and occasioning injustice to the accused.

19. It is the appellant's case that section 150 of the *CPC* does not obligate victims to disclose any evidence in their possession to the defence prior to the trial. This, Counsel urges, prejudices the accused since the victim comes in as an independent party with new evidence and the accused has less time to review the evidence and prepare their defence accordingly.

20. The appellant submits that the learned Judges of Appeal interpreted article 50(9) of the *Constitution* as read together with Section 150 of the *CPC*without reference to article 50(2)(j) of the *Constitution* which provides for the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.

21. Counsel further submits victims are not required to disclose exculpatory evidence in their possession which may be to the detriment of the accused person who might otherwise benefit from it.

22. The appellant submits that the court of Appeal erred in finding that the victim's participation does not in any way interfere with the DPP's powers as conferred under article 157 of the *Constitution*. The appellant asserts that the office of the DPP is well equipped to discharge its mandate to safeguard the interest of a victim. The appellant concludes his

submissions by stating that it will be prejudicial for the court to allow victims to actively participate in criminal trials as co-prosecutors with the ability to file or make submissions in the terms outlined by the trial Judge.

**ii. The Respondent**

23. In response to the Appeal, the DPP filed written submissions on 17th February 2020 opposing the Appeal.

24. The DPP submits that the interpretation and application of the Constitutional and statutory provisions by both the High Court and the court of Appeal regarding the victim's right to a fair trial was in accord with article 259 of the *Constitution* and the prevailing judicial precedents.

25. He urges that both Superior Courts appropriately applied the principles set out in case law namely: *Paul Ssemogerere and Others v The Attorney General*, Constitutional Appeal No. 1 of 2002 [2004] UGSC10; *Ndyanabo v. Attorney General* [2001] 2 EA 485, *Tinyefuze v Attorney General of Uganda* Constitutional Petition No. 1 of 1996 [1997] 3 UGCC; *Ekuru Aukot v The Independent Electoral & Boundaries Commission & 3 others* [2017]eKLR; *Kigula and others v Attorney General* [2005]1EA132; and *Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR.

26. The DPP submits that the High Court rightly considered the provisions of the *Constitution*, particularly article s 27, 50(1), (7) & (9), together with those of the *VPA*, and the prevailing precedents. He contends that the trial Court was satisfied: that the *VPA* was enacted pursuant to article 50(9) of the Constitution; that one of the objectives under section 3 0f the *VPA* was to recognise and give effect to the right of the victims of crime; and that section 4(a) of the *VPA* obligates a Court to ensure that every victim is as far as possible heard before any decision affecting him is made.

27. The DPP contends that the orders by the High Court allowing the victim's counsel to actively participate in the trial were not to operate in a vacuum or open-ended as contended by the appellant. Instead, they were qualified and could only be exercised upon meeting certain conditions including making an application to the court for appropriate consideration and determination.

28. The DPP submits that the court of Appeal properly traced the origin and recognition of the victim's right to a fair hearing to the *United Nations General Assembly Resolution No. A/RES/40/34* of 29th November, 1985 and a decision from the Supreme Court of India: Criminal Appeal Nos.1281-82 of 2018 *Mallikarjun Kodagali (Dead) represented through Legal Representation/appellants v State of Karnataka & others*.

29. Counsel contends that even before the promulgation of the *Constitution*, the victim's rights were recognized under sections 137 and 329 (c) of the *CPC*. Upon promulgation of the *Constitution*, he submits, article 50 (9) of the *Constitution* entrenched the rights of victims of crime pursuant to which Parliament enacted the *VPA*. He, therefore, urges that the Appellate Court properly construed article s 10, 48, 50, 20, 21, 25, 157 and 159 of the *Constitution* as read with the *VPA*, and Section 150 of the *CPC* and was satisfied that the impugned orders were in conformity with the *Constitution*.

30. The DPP submits that the victim's rights are recognized under article 50(1) and 50(9) of the *Constitution* pursuant to which the *VPA* was enacted to ensure an impartial trial while protecting the accused person's right to fair trial. He contends that the courts below interpreted and applied the law on the rights of the victims of crime as expressed in the *Constitution* and statute and did not create or attempt to create non-existent rights as alleged by the appellant.

31. The DPP urges that although article 157 of the *Constitution* creates an independent office with prosecutorial powers, the DPP's office does not enjoy absolute prosecutorial powers. Counsel submits that the exercise of such powers is subject to the court's control with emphasis being on the public interest, the interest of the administration of justice, and the need to prevent abuse of the legal process as is envisaged under article 157(11) of the *Constitution*.

32. Counsel urges that Section 150 of the *CPC*is to the effect that the trial Court is conferred with powers to intervene in certain circumstances as the dictates of justice may require so as to administer justice and ensure that no party suffers prejudice in the proceedings. He asserts that it does not imply that the trial Court will take over the investigations or prosecution of a case as contended by the appellant.

33. Additionally, the DPP contends that the court's powers under Section 150 of the *Criminal Procedure Code* are subject to the proviso therein under which the court ensures that no party is prejudiced should the court intervene. The DPP urges that Section 150 of the *CPC* as read with Section 9(2) (b) of the *VPA* allows the court to ensure that no party suffers prejudice and as such there is no conflict with article 157 of the *Constitution*.

34. The DPP submits that no provision in the *Constitution* has elevated the rights of the accused person to those of the victim of the offense and vice versa. Consequently, the DPP prays for the dismissal of the Petition.

**iii. Victim's/Complainant's Submissions**

35. The victims oppose the appeal. Through their advocate, they filed written submissions on 6th February, 2020. The victims submit that the Superior Courts' interpretation of article

50 of the *Constitution* was in accordance with article s 2 (5) 50 (c), 50 (7) 50 (9) of the *Constitution*, and the provisions of the *VPA*.

36. They also urge that the courts correctly interpreted and applied article s 20(2), 20(3)(b) of the *Constitution* in accordance with existing case law: *Ndyanabo v Attorney General* [2001] EA *Tanzania Court of Appeal; Kigula & Others v Attorney General* (2005) 1EA 132, the Uganda Court of Appeal; *Hiralal Ratanlal v Sito* Air 1973 SC 1034, Supreme Court of India, and *Direct United States Cable Co. v The Anglo-American Telegraph Co.* (1877)2A.C.

37. Learned Counsel for the victims submits that the appellant has not demonstrated how his rights will be prejudiced by the participation of a victim who is equally entitled to a bundle of rights and fundamental freedoms.

38. The Victims submit that by dint of the provisions of Section 9(2) (a) (b), 9(3) and (10) (a) (b) (c) of the *VPA*, the victim has the right to be heard at any stage of the proceedings in a trial and his views taken into account before a decision is arrived at. Counsel contends that the proviso to Section 9(2) (b) of the *VPA* allows safeguards with regards to the participation of the victim.

39. Counsel urges that owing to the uniqueness of disputes that come before the courts, only individual trial Courts can exercise the discretion on the manner and extent to which a victim is supposed to participate in a trial. Counsel argues that to give general parameters on the participation of a victim in a trial will amount to impeding the victims from realizing their rights and fundamental freedoms particularly with regard to the right to a fair trial as contemplated under article 50 of the *Constitution*.

40. The victims submit that they have a right to fair trial too and cite a decision from the Supreme Court of India, *Zahira Habibulla H. Sheikh & another v State of Gujarat & others* 446-449 of 2004 to support this submission. The victims conclude by urging that the impugned rights accorded to them were in conformity with the *Constitution* and the *VPA*.

**D. Issues for Determination**

41. The following issues fall for determination by this Court

    a. What is the extent of a victim's participation in a criminal matter?

    b. What ought to happen when a constitutional issue arises in a criminal trial of which trial ought to be disposed of expeditiously?

## E. Analysis

### a. What is the extent of a victim's participation in a criminal matter?

42. The bone of contention between the parties is whether a victim can actively participate in a criminal trial without prejudicing the accused person's right to a fair hearing and without interfering with the prosecution's prosecutorial powers.

43. Counsel for the appellant urges that the superior Courts both limited the appellant's right to a fair trial as enshrined in article 50 of the *Constitution* by balancing it with the victim's right to participate in a trial. Counsel submits that this is contrary to the purpose and effect of Section 9 of the *VPA*, article 50(1) & (2) of the *Constitution*, existing case law, and disregards the guiding principles set out in article s 259(1), 10, 20(1), 20(2), 20(3) and 20(4) of the *Constitution*.

44. Further, counsel argues that the court of Appeal's interpretation elevated the victim into a secondary prosecutor contrary to article 157(6) of the *Constitution*. Also, the appellant urges that the Appellate Judges erroneously interpreted article 50(9) of the *Constitution* as read together with Section 150 of the *Criminal Procedure Code* without reference to article 50(2)(j) of the *Constitution*. The DPP and the Victim, on the other hand, support the interpretation and application given by the High Court and upheld by the court of Appeal.

45. The appellant's apprehension, no doubt, stems from the fact the State controls the investigation, prosecution and punishment of crime and that it does so in the interests of the public, which include vindication for the victim. A philosophical reason why the State takes over the prosecution and punishment of offenders is the belief that criminal law should serve the interests of society as a whole, and not the individual victim.

46. We observe that because the overriding element of State control inevitably pits the power of the State against the accused, the necessity of protecting the accused's rights within this power imbalance, arises, to ensure that there is 'equality of arms'. However, this may inadvertently eclipse the recognition of the victim's inherent interest in the response by the criminal justice system to the crime. Our very progressive *Constitution* has captured and addressed all these scenarios.

47. The right to fair hearing is provided for under article 50(1) of the *Constitution* and the attendant rights of an accused person are set out in article 50(2) of the *Constitution*. article 50 (1) of the *Constitution* provides:

> "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." [emphasis supplied]

48. The *Constitution* also recognizes victims of offences. article 50(9) of the *Constitution* provides:

> " Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences."

In addition to this Constitutional underpinning, the *VPA* was enacted deliberately in 2014 to give effect to article 50(9) of the *Constitution*. Thus, the rights of victims in a trial process also have statutory underpinning.

49. Section 2 of the *VPA* defines a victim as 'any natural person who suffers injury, loss or damage as a consequence of an offence'. The objects and purpose of the *VPA* as stipulated under Section 3 is to recognize and give effect to the rights of victims of crime. Section 4 sets out the general principles that guide the court in dealing with a question of the rights and welfare of a victim. Section 4(2)(b) provides that a Court must ensure that 'every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken'.

50. Section 9 of the *VPA* is instructive because it provides for the victim's rights during the trial process in the following terms:

9.(1) A victim has a right to-

(a) be present at their trial either in person or through a representative of their choice;

(b) have the trial begin and conclude without unreasonable delay;

(c) give their views in any plea bargaining;

(d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;

(e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;

(f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and

(g) be informed of the charge which the offender is facing in sufficient details.

(2) Where the personal interests of a victim have been affected, the court shall-

(a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court; and

(b) ensure that the victim's views and concerns are presented in a manner which is not-

(i) prejudicial to the rights of the accused; or

(ii) inconsistent with a fair and impartial trial.

(3) The victim's views and concerns referred to in subsection (2) may be presented by the legal representative acting on their behalf.

51. Although the adversarial criminal trial process is a contest between the State, represented by the DPP, and the accused, usually represented by defence counsel and the traditional role of victims in a trial is often perceived to be that of a witness of the prosecution, it is without doubt, that flowing from both the Constitution and the *VPA* and in particular section 9(2)(a) of the *VPA*, that a victim too, has the right to participate in criminal proceedings.

52. The participation of victims in criminal trial proceedings, though a novel trend in our laws, is in accord with international developments that have embraced the place of victims in the trial process. Our *Constitution* under article s 2(5) and (6) permits us to apply the general rules of international law and also provides that any treaty or convention ratified by Kenya forms part of the law of Kenya.

53. The role of a victim in a criminal trial is recognized in the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985). In this Declaration, it is evident that in the context of the criminal justice system, it is a central obligation of governments to comply with the victim's rights to access to justice and fair treatment, restitution, compensation and assistance.

54. Clauses 4-6 of the *Declaration* states:

> "4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
>
> 5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair,

inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims."

55. Under article 68(3) of the *Rome Statute, of the International Criminal Court* (ICC) victims before the ICC are granted far-reaching rights. This article provides:

article 68

" Protection of the victims and witnesses and their participation in the proceedings

.....

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings

> determined to be appropriate by the court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the court considers it appropriate, in accordance with the Rules of Procedure and Evidence."

56. In light of the large degree of discretion accorded to the judges conducting the trial, the practice of the ICC has developed to allow victims:

    (i) to make an opening and closing statement (this is also in consonance Rule 89(1) of the *ICC Rules of Procedure and Evidence*);

    (ii) to attend and participate in hearings and status conferences through written submissions and oral argument;

    (iii) to introduce evidence and challenge admissibility of evidence with leave of the court; and

    (iv) to question witnesses and/or the accused under the strict control of the court.

    Where there are a large number of victims admitted to participate in the proceedings, the court can limit the number of lawyers representing them pursuant to Rule 90 (2)-(4) of the *ICC Rules of Procedure and Evidence*.

57. Of persuasive value is the approach in other jurisdictions that allow victims participation in a criminal matter, such as Canada which has the *Canadian Victim Bill of Rights Act* enacted on July 23rd 2015. This *Act* provides for four principal rights to victims of crime: Information, Protection, Participation and Restitution. A victim can exercise these rights while an offence is being investigated or prosecuted, or while the offender is subject to the corrections or conditional release process.

58. On the right to Participation, section 14 provides that

> " every victim has the right to convey their views about decisions to be made by appropriate authorities in the criminal justice system that affect the victim's rights under the *Act* and to have those views considered".

Section 15 provides that

> " every victim has the right to present a victim impact statement to the appropriate authorities in the criminal justice system and to have it considered".

59. Pursuant to section 20, these rights are to be construed and applied in a manner that is reasonable in the circumstances, and in a manner that is not likely to

    (a) interfere with the proper administration of justice, including

        (i) by causing interference with police discretion or causing excessive delay in, or compromising or hindering, the investigation of any offence; and

        (ii) by causing interference with prosecutorial discretion or causing excessive delay in, or compromising or hindering, the prosecution of any offence;

    (b) interfere with ministerial discretion;

    (c) interfere with the discretion that may be exercised by any person or body authorized to release an offender into the community;

    (d) endanger the life or safety of any individual; or

    (e) cause injury to international relations or national defence or national security.

60. The concept of 'secondary prosecutor' argued by the appellant is popular in Germany, a civil law jurisdiction with an inquisitorial system. According to *Germany's Code of Criminal Procedure*, the State (Public Prosecutor) has to prosecute every criminal offence (Offizialprinzip). However, Germany's *Victim Protection Act (Opferschutzgesetz)* of 18 December 1986, creates an exception to this rule because it provides for a legal institution known as Nebenklager (Private Accessory Prosecution). This allows the victim under stipulated circumstances to participate in criminal proceedings independently of the public prosecutor.

61. Private Accessory Prosecutions are governed under §§ 395- 402 of *Germany's Code of Criminal Procedure*. § 395 outlines who has a right to join as a Private Accessory Prosecutor. For instance, only those who are directly injured by the crime are entitled to join as private accessory prosecutors. In the case of capital crimes, the close relatives of the deceased victim can also join as private accessory prosecutors.

62. A victim can only join the proceedings upon application to the court and only when the Public Prosecutor has preferred charges. A victim can join at any stage of the proceedings. The victim has procedural rights (§§ 397 – 401), which are otherwise assigned to the Public Prosecutor; however, the victim practices them completely independently. Nebenkla?ger only applies to certain criminal offences which are specified by the law. The Nebenkla?ger allows the victim to participate actively in the proceedings, to contribute to solving the crime and to play a role in the prosecution of the perpetrator.

63. It is apparent from *Germany's criminal procedure*, and is to be expected, that where there is an intention to make a victim a secondary or independent prosecutor, the law will unequivocally provide for the same.

64. The emerging picture therefore, is that the criminal justice processes should empower victims and that their voices should be heard –not only as witnesses for the prosecution but as rights holders with a valid interest in the proceedings and the outcome of the cause. How then does our own legal regime recognize victims as rights holders? article 259(1) & (3) of the *Constitution* is instructive on how to construe their rights under article 50 (9) of the *Constitution*. It provides:

> " Construing this Constitution.
>
> 259. (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; and
>
> (d) contributes to good governance.
>
> .....
>
> (3) Every provision of this *Constitution* shall be construed according to the doctrine of interpretation that the law is always speaking...."

65. Furthermore, the *Constitution* provides under article 20(3) that:

> " In applying a provision of the Bill of Rights, a court shall—
>
> (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
>
> (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom."

66. These constitutional provisions read together with the *VPA* affirm that victims have rights in the Kenya criminal justice system. These rights are stipulated in section 9 of the *VPA*. Also, article 27 of the *Constitution* provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Both the *Constitution* and the

*VPA* seek to ensure the fairness of justice procedures applied to both the victims and accused particularly on the right to a fair hearing, timeliness, respect, dignity, and neutrality.

67. The Trial Court being an impartial entity that oversees the progress of a case, has the ultimate function of determining the accused's guilt or innocence. Its aim is to establish the truth. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. Thus, the rights of the accused cannot be considered in isolation without regard to those of the victim. Victims too have a legitimate interest in the court's exercise of its jurisdiction. The Criminal Justice system should cultivate a process that inspires the trust of both the victim and the accused.

68. Considering the rights of the accused, the victim, and society as a whole in a criminal trial is not only fair, pragmatic but also constitutionally viable. This has been acknowledged in various jurisdictions. *In Attorney-General's Reference (No. 3 of 1999)* [2001] 2 AC 91 [118], the House of Lords was dealing with a question of law involving the proper construction of section 64(3B) of the *Police and Criminal Evidence Act* 1984. One of the issues that came for consideration was fairness of a trial. Lord Steyn observed:

> " The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

69. This decision was cited with approval by House of Lords in *R v H* [2004] 2 AC 134. Herein, the Lords made pertinent observations on 'a fair trial'. They noted at paragraph 11 that 'fairness is a constantly evolving concept' and that 'it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another'. They observed that although the focus of article 6 of the *European Convention* is on the right of a criminal defendant to a fair trial, this has to be exercised within the framework of the administration of the criminal law and 'requires that the trial process, viewed as a whole, must be fair'. They noted at paragraph 12 that 'the European Court has repeatedly recognised that individual rights should not be treated as if enjoyed in a vacuum' in its decisions in *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 52, para 69; *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, 191, para 52.

70. We agree with these sentiments. The trial Judge must protect the rights of all parties involved in criminal proceedings. There is a public interest in ensuring that trials are fair. This interest can be served by safeguarding the rights of the accused, the objectivity of the prosecution

and, by acknowledging the victim's interest. The rights of the accused should be secured and fulfilled. So too the public interest. The rights of victims, properly understood, do not undermine those of the accused or the public interest. The true interrelationship of the three is complementary.

71. Therefore, we fail to see how the 'participatory rights of the victim' violate the 'fair trial' rights of the accused. A victim can participate in a trial in person or via a legal representative. So then, who determines the manner and extent of a victim's participation in a trial?

72. Once a victim or his legal representative makes an application to participate in a trial, it is the duty of the trial Court to evaluate the matter before it, consider the victim's views and concerns, their impact on the accused person's right to a fair trial, and subsequently, in the judge's discretion, determine the extent and manner in which a victim can participate in a trial. Since participatory rights are closely related to the rights of the accused and the right to a fair and expeditious trial, they should be granted in a judicious manner which does not cause undue delay in the proceedings and thus prejudice the rights of the accused.

73. Discretionary pronouncements of a Court, as we have stated in several decisions, form an integral part of a Court's jurisdiction and should not be interfered with unless an Appellate Court is satisfied that the exercise of that discretion was improper and, therefore, warrants interference. So, for instance, a Court must be satisfied that the Judge in exercising discretion misdirected herself or himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice. In the instant case, we see no need to interfere with the trial judge's discretionary pronouncements.

74. At this point, we feel compelled to make a few observations on the powers of the DPP. article 157(1) of the *Constitution* establishes the office of DPP. The State's prosecutorial powers are vested in the DPP under article 157 of the *Constitution*. That office, under sub-article 10, neither requires the consent of any person to institute criminal proceedings nor is it under the direction or control of any person or authority. These provisions are also replicated in Section 6 of the *Office of the Director of Public Prosecutions Act*, 2013. This office is the sole constitutional office with the powers to conduct criminal prosecutions.

75. In interpreting how the DPP exercises his powers, Lenaola J (as he then was) in *Republic v Director of Public Prosecutions exparte Meridian Medical Centre Ltd & 7 Others* Petition No. 363 of 2013 expressed himself as follows:

> " I also agree with the submission of Mr. Kilukumi that the decision to prosecute is a quasi-judicial decision which should not be taken lightly given the penal consequences inherent in any criminal proceeding ... There is also no doubt that

> the office of the DPP should exercise its mandate and discretionary power to prosecute within constitutional limits and the independence of his office."

76. We agree with this view and adopt it as the correct position in law. We are of the view that the victim has no active role in the decision to prosecute, or the determination of the charge upon which the accused will finally be tried. This is the sole duty of the DPP. While the victim of a crime can participate at any stage of the proceedings as deemed appropriate by the trial Judge, a victim or his legal representative does not have the mandate to prosecute crimes on behalf of the DPP. The DPP must at all times retain control of, and supervision over the prosecution of the case. As such, the constitutional and statutory powers of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process.

77. Additionally, a victim cannot and does not wear the hat of a secondary prosecutor. When victims present their views and concerns in accord with section 9(2) (a) of the *VPA*, victims are assisting the trial Judge to obtain a clear picture of what happened (to them) and how they suffered, which the Judge may decide to take into account. Victim participation should meaningfully contribute to the justice process. It must be noted, however, that this does not mean that the court's judgment will follow the wishes of the victim. The trial Judge will, of course, take into account the law, facts, all the different interests, and concerns, including the rights of the defence and the interests of a fair trial to arrive at a sagacious decision.

78. Conscious that this is a novel area of law for our criminal justice system and recognizing our mandate, under Section 3 of the *Supreme Court Act* as the court of final Judicial Authority, we are of the view that the following guiding principles will assist the trial Court when it is considering an application by a victim or his legal representative to participate in a trial and the manner and extent of the participation:

    a. The applicant must be a direct victim or such victim's legal representative in the case being tried by the court;

    b. the court should examine each case according to its special nature to determine if participation is appropriate, at the stage participation is applied for;

    c. The trial Judge must be satisfied that granting the victim participatory rights shall not occasion an undue delay in the proceedings;

    d. The victim's presentation should be strictly limited to "the views and concerns" of the victim in the matter granted participation;

    e. Victim participation must not be prejudicial to or inconsistent with the rights of the accused;

f. The trial Judge may allow the victim or his legal representative to pose questions to a witness or expert who is giving evidence before the court that have not been posed by the prosecutor;

g. The Judge has control over the right to ask questions and should ensure that neither the victim nor the accused are not subjected to unsuitable treatment or questions that are irrelevant to the trial;

h. The trial Court should ensure that the victim or the victim's legal representative understands that prosecutorial duties remain solely with the DPP;

i. While the victim's views and concerns may be persuasive; and no doubt in the public interest that they are acknowledged, these views and concerns are not to be equated with the public interest;

j. the court may hold proceedings in camera where necessary to protect the privacy of the victim;

k. While the court has a duty to consider the victim's views and concerns, the court has no obligation to follow the victim's preference of punishment.

**b. What ought to happen when a legal or constitutional issue arises in a criminal trial to avoid delay in the determination of the case?**

79. The appellant was charged with murdering the deceased on 30th August 2013. The trial commenced sometime in September 2014, almost six (6) years ago. The trial was paused at an advanced stage because an oral application was made by the victim's legal representative to actively participate in the matter. The trial judge then made a ruling which resulted in the interlocutory appeal before the court of Appeal and that is now before us.

80. The right to have a trial commence and conclude without unreasonable delay is an accused person's constitutional guarantee under article 50(2) (e) of the *Constitution*. A victim also has the right to have the trial begin and conclude without unreasonable delay under Section 9(1) (b) of the *VPA*. In addition, article 159 (2) (b) obligates Courts not to delay justice.

81. Further, treaties and international instruments that Kenya has ratified such as the *African Charter on Human and People's Rights*, *Rome Statute of the ICC*, and the *International Covenant on Civil and Political Rights* (ICCPR) contain similar provisions, that bind us in all criminal justice procedures and processes.

82. article 7 (d) of the *African Charter on Human and People's Rights* grants individuals the right to be tried within a reasonable time by an impartial Court or tribunal'. article 67 (c)

of the *Rome Statute of the ICC* guarantees an accused person the 'right to be tried without undue delay'.

83. article 14(3)(c) of the *ICCPR* entitles an accused person, as a minimum guarantee to be "tried without undue delay". The Human Rights Committee, in *General Comment No. 32, article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32*, has explained that the right of the accused to be tried without undue delay, provided for by article 14 (3) (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. The *General Comment* further states that what is reasonable has to be assessed in the circumstances of each case.

84. The benefits of an expeditious trial cannot be gainsaid. A speedy trial ensures that the rights of the accused person are secured; it minimizes the anxiety and concern of the accused; it prevents oppressive incarceration; and it protects the reputation, social and economic interests of the accused from the damage which flows from a pending charge. It also protects the interests of the public, including victims and witnesses, and ensures the effective utilization of resources. Additionally, it lessens the length of the periods of anxiety for victims, witnesses, and their families and increases public trust and confidence in the justice system.

85. Therefore, in conformity with the *Constitution*, Courts should shun situations where an accused's right to a fair trial is prejudiced by virtue of undue delay. Courts possess the power to take appropriate action to prevent injustice. This power is derived from the public interest that trials are conducted fairly and that as far as possible the accused is tried without unreasonable delay the end goal being to achieve prompt justice in criminal cases.

86. The question then arises, what happens when a legal or constitutional issue, as in the instant case, arises within a criminal trial? Should the trial Court reserve the issue for determination by an appellate Court? Or should the trial Court determine the interlocutory issue and should any of the parties be aggrieved by such a decision reserve the right of appeal pending final judgment? Or should parties proceed with the interlocutory appeal?

87. There is no provision in both the *Constitution* and the *CPC* for interlocutory criminal appeals. The *Constitution* under article 50 (q) provides that every accused person has the right, 'if convicted, to appeal to, or apply for review by, a higher Court as prescribed by law.' Similarly, the *CPC* under sections 347 and 379 (1) & only allows appeals by persons who have been convicted of an offence. However, pre-constitution 2010, the court of Appeal did allow an interlocutory appeal in *Thomas Patrick Gilbert Cholmondeley v Republic*, Criminal

Appeal no. 116 of 2007 [2008] eKLR but cautioned against an unfettered right of appeal. the court observed:

> " In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the *Criminal Procedure Code* allows only appeals by persons who have been convicted of some offence. The appellant has not been convicted of any offence..... But the basis of this appeal, as far as we are concerned is that the learned Judge made an order in the course of the trial which violated the appellant's fundamental rights guaranteed by section 77 of the *Constitution*... The appellant had two choices. He could have chosen to wait until after the determination of the charge against him and if he was convicted, he would be entitled to appeal on all aspects of the trial. Secondly, he had the option to appeal under section 84 (1) of the *Constitution*. He chose to exercise this option and it is to be noted that the trial Judge readily allowed him to appeal. The Judge must have been aware that his decision touched on the fundamental rights of the appellant guaranteed by the *Constitution* and hence he (i.e. the Judge) readily agreed to stop the trial and allow the appellant to exercise his right of appeal under section 84 (7) of the Constitution. It was for these considerations that we held the appellant had a right of appeal to the court and that we, therefore, had jurisdiction to hear his appeal.
>
> We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section 84 (7) of the *Constitution*. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court. (emphasis ours)"

88. The High Court reiterated the Appellate Court's views in *John Njenga Kamau v Republic*, Criminal Appeal No.63 of 2014 [2014] eKLR where Kimaru J delivered himself thus:

> " The *Criminal Procedure Code* does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial. This court's considered view is that the reason why such appeals are not allowed is deliberate and is not a lacunae in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during trial, there is a possibility that parties to such trials, especially accused persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case."

89. Even when the High Court allows an interlocutory appeal in the interests of justice, the sentiments that interlocutory appeals may occasion unnecessary delay are echoed. In *Sheila Kinya Maingi v Republic*, Criminal Appeal No. 388 of 2008 [2016] eKLR, Kimaru J stated:

> " Although the prosecution justifiably opposed the interlocutory appeal, this court is of the considered opinion that for the interest of justice, the said two witnesses should be recalled for the purpose of the appellant's counsel to cross-examine them. However, this court is concerned that the appellant's trial has been delayed on account of this interlocutory appeal. In criminal cases, it is good practice that an accused person who is aggrieved by an interlocutory decision made during trial should await the conclusion of the trial, and if convicted, challenge that decision in a substantive appeal to the High Court. Interlocutory appeals from decisions of trial courts have justifiably been discouraged because if they were to be entertained, then it would infringe on the accused person's constitutional right to fair trial under article 50(2)(e) of the *Constitution* that behooves the court to begin and conclude the trial of such an accused person without unreasonable delay."

90. In *Maur Abdalla Bwanamaka v Director of Public Prosecutions & another*, Petition no. 23 0f 2018 [2019] eKLR, Ogola J was grappling with a petition that sought to invalidate a statutory provision that limits interlocutory appeals. He noted at paragraphs 21 and 22:

> " 21. The other factor for the court to consider is that of reasonableness of the provision challenged. <u>In the view of this Court, discouraging interlocutory appeals in criminal matters is a positive step towards ensuring strict compliance with the provision of article 50 of the *constitution of Kenya*, 2010 which requires that criminal trials open and conclude without unreasonable delay.</u>

.....

> 22. It is the view of this Court that the said sections do not restrict or reduce access to the court to the point of rendering the right of appeal redundant. Allowing interlocutory Criminal Appeals would unnecessarily clog the system with the resultant effect of delays in conclusion of criminal trials. The petitioner is not without recourse since upon conclusion of the criminal matter he will have an automatic right of appeal to the High Court on matters of both Law and fact."

91. In the instant matter, the delay of over six years in our opinion, defeats the intention of the framers of the *Constitution* and of Parliament to have criminal trials concluded expeditiously. The guarantee to have a criminal trial conducted without undue delay relates not only to the time by which a trial should commence but also the time by which it should end, judgment rendered and any applicable appeals or reviews completed.

92. Therefore, although criminal trials are not timebound like election petitions, there is need to have them determined expeditiously in line with the constitutional prescriptions. In the election petition of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* SC. Application No. 16 of 2014; [2014] eKLR (Nick Salat Case), we affirmed the significance of time as a component in the dispensation of justice, hence the maxim: Justice delayed is justice denied. We emphasized that it is a litigant's legitimate expectation that when they seek justice that the same will be dispensed timeously.

93. We have also stated that the right of appeal against interlocutory decisions is available to a party at a later date when the final decision of an election Court has been delivered. In *Anuar Loitiptip v Independent Electoral & Boundaries Commission & 2 others*, Petition No. 18 as consolidated with Petition No. 20 of 2018; [2019] eKLR, (the Loitiptip case) we held that while there is a right to appeal an interlocutory decision, this right is delayed for good order and in keeping with timelines of election petition matters. We concluded that a person seeking to appeal against an interlocutory decision must file their intended Notice of Appeal within 14 days of the decision, in line with Rule 75 of the *Court of Appeal Rules*.

94. Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred, and await the final determination by the trial Court. A person seeking to appeal against an interlocutory decision must file their intended Notice of Appeal within 14 days of the trial Court's judgment. However, exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly allowed. These include:

a. Where the decision concerns the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;

b. When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal;

c. Where the decision entails the recusal of the trial Court to hear the cause.

**F. Final Orders**

95. Consequently, upon our findings above, the final orders are that;

i. Petition of Appeal No 23 of 2019 dated 3rd July 2019 is hereby dismissed.

ii. For the avoidance of doubt, the determination in Criminal Appeal No. 132 of 2016 (Githinji, Okwengu & J. Mohammed, JJ.A) is hereby upheld.

iii. In view of the inordinate delay of the original murder trial, occasioned by Appeals relating to an interlocutory matter, we direct that the substantive matter be heard and determined on the basis of priority.

iv. Each party shall bear their costs of the Appeal.

96. Orders accordingly.

**Langat v Kericho County Assembly Committee on Appointments & 2 others (Petition 28 of 2019) [2020] KESC 34 (KLR) (6 August 2020) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2020] KESC 34 (KLR)

***Labour Law*** *– employment – public appointments – procedure to be followed – where an applicant sought to be appointed as a county executive committee member - where the county assembly rejected the nominee's name for appointment to the county executive committee for lack of experience and for being related to another nominee - what were the factors to be considered in making county government appointments – whether the decision of the county assembly to reject the nominee violated the Constitution - Public Appointments (County Assemblies Approval) Act (cap 265B) sections 3, 5, 7 and 10; County Governments Act (Cap 265) section 35.*

***Jurisdiction*** *– jurisdiction of the Supreme Court – appellate jurisdiction – where an appellant challenged the decision of a county assembly to reject his name for appointment to the county executive committee for lack of experience and being related to another nominee - whether the Supreme Court had the jurisdiction to determine the appeal – Constitution of Kenya articles 160(1) and 163(4); Supreme Court Act (Cap 9B) sections 15(1) and (2).*

**Brief facts**

The County Government of Kericho by way of an advertisement invited suitable candidates to apply for various positions in the county executive committee. Following the advertisement, the appellant applied to be the member of the education, culture and social services committee. He was successful and his name, alongside nine others, was submitted to the 3rd respondent by the Governor of Kericho County (Governor) for vetting. During the vetting, the appellant's name was rejected for appointment for two reasons: that he lacked the experience for management of ECDE and village polytechnics and that he was related to a nominee for finance and economic planning. Aggrieved by the decision, the appellant filed a petition before the Employment and Labour Relations Court terming the reasons for his rejection as unconstitutional.

The appellant sought for among others a declaration that the proceedings of the 3rd respondent (county assembly) rejecting his appointment was void and prohibitory orders against the Governor from presenting to the Speaker of the county assembly any fresh names of nominees for approval by the county assembly for appointment as members of Kericho County Executive Committee. The Employment and Labour Relations Court granted all the prayers sought by the appellant. Dissatisfied by that decision, the respondents filed an appeal at the Court of Appeal which allowed the appeal and set aside the Employment and Labour Relations Court orders. Aggrieved by the Court of Appeal's decision the appellant filed the instant appeal.

**Issues**

i. Whether the Supreme Court had the jurisdiction to determine an appeal challenging the decision of a county assembly to reject the name of a nominee to a county executive committee?
ii. What was the procedure to be followed in making public appointments?
iii. What were the factors to be considered in making county government appointments?
iv. Whether the decision of the County Assembly of Kericho to reject a nominee to the county executive committee for lack of experience and relation to another nominee violated the Constitution.

**Relevant provisions of the Law**

**Constitution of Kenya, 2010**

**Article 163**

*(4) Appeals shall lie from the Court of Appeal to the Supreme Court –*

1. *As of right in any case involving the interpretation or application of this Constitution; and*
2. *In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)*

*(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.*

**Supreme Court Act, 2011**

**Section 15 - Appeals to be by leave**

1. *Appeals to the Supreme Court shall be heard only with the leave of the Court.*
2. *Subsection (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.*

**Held**

1. The test to evaluate the jurisdictional standing of the court in handling the appeal was whether the appeal raised a question of constitutional interpretation or application, and whether the same had been canvassed in the superior courts and had progressed through the normal appellate mechanism so as to reach the court by way of an appeal as contemplated under article 163(4)(a) of the Constitution. The issue of the constitutionality of the respondents' decision in rejecting the name of the appellant in the County Executive Committee was consistent from the Employment and Labour Relations Court to the Court of Appeal and to the court. Consequently, the appeal fell within the ambit of article 163(4)(a) of the Constitution.
2. Article 176(2) of the Constitution mandated every county government to decentralize its functions and the provision of its services to the extent that it was efficient and practicable to do so. County executive committees thus comprised members appointed by the county

governor, with the approval of the assembly, and who were not members of the assembly as provided for under article 179(2)(b) of the Constitution.

3. The procedure for public appointments was governed by the Public Appointments Act No. 33 of 2011. Section 3 of the Public Appointments Act provided that all appointments under the Constitution or any other law for which the approval of Parliament was required would not be made unless the appointment was approved or deemed to have been approved by Parliament. Section 5 of the Act set the procedure for nominating a candidate for a public appointment, upon nomination, under section 5, a candidate whose position required approval by Parliament had to undergo the approval hearing as set out in section 6 of the Act. Accordingly, section 7 of the Act provided that an approval hearing had to focus on a candidate's academic credentials, professional training and experience, personal integrity and background. When approving a candidate, the House of Parliament had to be guided by the procedure used to arrive at the nominee; any constitutional or statutory requirements to the office in question; and the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities met the needs of the body to which nomination was being made.

4. On rejection of a nomination, section 10 of the Public Appointments Act provided that where the nomination of a candidate was rejected by Parliament, the appointing authority could submit to the relevant House the name of another candidate, and the procedure for approval was specified in the Act. In the context of county government appointments under section 35 of the County Governments Act No. 17 of 2012, the governor should, when nominating members of the executive committee, ensure that to the fullest extent possible, the composition of the executive committee reflected the community and cultural diversity of the county; and took into account the principles of affirmative action as provided for in the Constitution. The county assembly was mandated to ensure that all nominations for appointments to the executive committee took into account two thirds-gender rule, representation of minorities, marginalized groups and communities and community and cultural diversity recognized in Kenya among other considerations.

5. A county assembly could reject the name of a nominee if it failed the test set out in section 35 of the County Governments Act and the provisions of the Public Appointments Act. The appellant did not fault the vetting process (which the constitutional and statutory threshold required) but the outcome. There was no reason to depart from the Court of Appeal's finding.

6. Separation of powers was an integral principle in the Constitution: for instance, chapter 8 was devoted to the Legislature; chapter 9 to the Executive and chapter 10 on the Judiciary provided (article 160(1)) that: in the exercise of judicial authority, the Judiciary as constituted by article 161 was subject only to the Constitution and the law and was not to be subject to the control or direction of any person or authority. If courts decided only those cases that met certain justiciability requirements, they respected the spheres of their co-equal

branches and minimized the troubling aspects of counter-majoritarian judicial review in a democratic society by maintaining a duly limited place in government.

7. The respondent's decision to reject the appellant's appointment did not flout any constitutional or statutory provisions. There was no reason to interfere with the manner in which the county assembly exercised its powers on the issue.

*Appeal dismissed.*

***Orders***

*Each party to bear their own costs of appeal.*

**Citations**

**Cases**

***Kenya***

1. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Application 5 of 2014; [2014] eKLR - (Explained)
2. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] eKLR - (Explained)
3. *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition 4 of 2012; [2014] eKLR - (Explained)
4. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] eKLR - (Explained)
5. *Kericho County Assembly Committee on Appointments & 2 others v Dr. Moses Kiprotich Langat* Civil Appeal No. 109 of 2018 - (Mentioned)
6. *Lawrence Nduttu & 6000 others & Kenya Breweries Ltd & Another* Petition 3 of 2012; [2012] eKLR - (Explained)
7. *Moses Kiprotich Langat v Kericho County Assembly Committee on appointments, Speaker of The Kericho County Assembly, Kericho County Assembly & Attorney General* Petition 12 of 2017; [2018] KEELRC 1969 (KLR); [2018] eKLR - (Mentioned)
8. *Simon Wachira Kagiri v County Assembly of Nyeri, Governor Nyeri County & Attorney General* Petition 7 of 2013; [2013] KEHC 2400 (KLR); [2013] eKLR - (Explained)
9. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR); [2013] eKLR - (Explained)

**Statutes**

***Kenya***

1. Constitution of Kenya articles 10, 27(4); 27(5); 28; 39(3); 41(1); 43; 47(1); 48; 56(c); and 163(4(a) - (Interpreted)
2. County Governments Act (cap 265) sections 16, 17, 35, and 42(2) - (Interpreted)
3. National Assembly (Powers and Privileges) Act (Repealed) (cap 6) section 12 - (Interpreted)

4. Public Appointments (County Assemblies Approval) Act (cap 265B) section 5, 8, and 9 - (Interpreted)
5. Supreme Court Act (cap 9B) section 15(1) - (Interpreted)

**Advocates**

*Mr. Wanyama* - Counsel for the Appellant.

*Mr. Ochieng* - Counsel for the Respondents.

August 6, 2020, the Court delivered the following Judgment:

## A. Background

1. The present appeal arises from a Judgment of the court of Appeal (Githinji. Sichale & Kantai JJA) which overturned the decision of the Employment and Labour Relations Court in *Moses Kiprotich Langat v Kericho County Assembly Committee on Appointments & 3 others* Kericho Petition No 12 of 2017.

### i. Proceedings at the Employment and Labour Relations Court

2. The instant appeal can be traced to an advertisement by the County Government of Kericho dated 26th August, 2017 inviting suitable candidates to apply for various positions in the County Executive Committee. Following the said advertisement, the appellant tendered his application to be considered for member of the Education, Culture and Social Services Committee. He was successful and his name, alongside nine (9) others, was submitted to the 3rd respondent by the Governor for vetting in accordance with sections 35 and 42 (2) of *County Government Act*, 2012. Thereafter, a committee on appointments was set up by the 3rd respondent, in terms of Standing Order No. 188, for vetting nominees by the 1st respondent. During the vetting, the appellant's was rejected for appointment for two reasons: that he lacked the experience for management of ECDE and village Polytechnics and that he was related to a nominee for Finance and Economic Planning.

3. Aggrieved by the said decision, the appellant filed a Petition no. 12 of 2017, *Moses Kiprotich Langat v Kericho County Assembly Committee on Appointments & 3 others*, before the Employment and Labour Relations Court at Kericho. The appellant termed the reasons for his rejection as illegal, unreasonable, irrelevant, discriminative, ludicrous, preposterous, unconstitutional and a blatant violation of *Constitution of Kenya*, 2010, the *County Governments Act* and the *Public Approvals (County Assembly Approvals) Act*, No 5 of 2017.

4. The appellant specifically sought a declaration that the proceedings of the Kericho County Assembly rejecting his appointment to the Kericho County Executive Committee was null and void for: firstly, breaching his constitutional rights under articles 27(4), 27(5), 28, 39(3),

41(1), 43, 47(1), 48 and 56(c) of *Constitution of Kenya*; secondly, breaching Constitutional rights of the residents of Kericho under article 43 of *Constitution*; thirdly, violating the provisions of section 35 of the *County Governments Act* No 5 of 2017; and fourthly, violating the provisions of section 9 of the *Public Appointments (County Assembly Approval) Act* No.5 of 2017. The appellant also sought an order of mandamus to compel the Kericho County Assembly to approve his nomination as a member of the Kericho County Executive Committee. Moreover, the appellant sought prohibitory orders against the Governor of Kericho County from presenting to the Speaker of Kericho Assembly any fresh names of nominees for approval by Kericho County Assembly for appointment as members of Kericho County Executive Committee and if a name had already been presented, the respondents be prohibited from vetting such fresh nominee. Finally, he sought an order directing that he be appointed as a member of the Kericho County Executive Committee and that the grounds contained in page 41 of the Committee of Appointment's report be expunged from the report for being unconstitutional and unlawful.

5. Having listened to all the parties, the learned Judge (Marete, J) granted all the prayers sought by the appellant in his petition.

**ii. Proceedings at the court of Appeal**

6. Dissatisfied by the decision of the Employment and Labour Relations Court, the respondents filed, Nakuru Civil Appeal No. 109 of 2018, the *Kericho County Assembly Committee on Appointments & 2 others v Dr Moses Kiprotich Langat*.

7. Having considered submissions by both parties, the learned Judges of Appeal crystalized the grounds of appeal into two namely, whether the Employment and Labour relations Court could hear and determine a petition raising constitutional issues and whether the Employment and Labour Relations Court arrogated itself powers vested on the respondents by Constitution and substituting the respondent's decision in the vetting process with its own. Consequently, on 11th June, 2019, the Appellate Court found merit in the Appeal and set aside the orders of the trial Court dated 18th May, 2018 in entirety.

8. The appellant, aggrieved by the decision of the court of Appeal, approached this Court to have the court of Appeal's decision overturned.

**Parties' Submissions**

**i. The appellant's submissions**

9. The appellant relied on his written submissions filed on 3rd October, 2019. On whether the court can interfere with the decision of the County Assembly, Mr Wanyama, Counsel for the appellant, submitted that Courts may interfere with the doctrine of separation of powers

when proceedings or decisions contravene *Constitution*. On this point, Counsel relied on the case of *Speaker of the Senate & another v. Attorney General & 4 others*, Reference No. 2 of 2013; [2013] eKLR (Re Speaker of the Senate) where this Court expressed its reluctance to interfere with parliamentary procedures where they did not breach *Constitution*. Mr Wanyama urged that under article 163(4(a) of *Constitution*, the court has jurisdiction to determine the instant appeal as it raises substantial constitutional issues. He cites this Court's decision in *Simon Wachira Kagiri v. County Assembly of Nyeri & 2 others* [2013] eKLR in support of that submission. It was thus the appellant's case that by virtue of being a state organ, the County Assembly is bound by the Bill of Rights and that this Court can interfere with the legislative process when the same violates the Bill of Rights.

10. As to whether the respondents violated articles 10, 27(4), 27(5), 28, 41(1), 43, 47(1), 48 and 56(c) of *Constitution*, the appellant submitted that the reasons advanced by the respondents in rejecting the appellant's nomination were illegal, unreasonable, irrelevant and unconstitutional considering that he underwent a rigorous interview. Counsel furthermore argued that the newspaper advertisement for the position the appellant applied for did not list any qualification with regards to having experience in ECDE and village polytechnics.

    In that regard, Counsel submitted that, by relying on that qualification specifically, experience in ECDE and village polytechnics, the respondents violated constitutional principles and statutory provisions on fair labour practices under article 41(1) of *Constitution*, and his right to human dignity as provided for under article 28 of *Constitution*.

11. With regard to the costs of this appeal, the appellant submitted that the same should follow the event. Consequently, they urged the court to allow the appeal as prayed.

**ii. The respondents' submissions**

12. In opposing the appeal, Mr Ochieng, Counsel for the respondents made his submissions on three limbs; that is, whether the petition has raised sufficient grounds to warrant exercise of the court's jurisdiction; whether the petition offends the doctrine of separation of powers and whether the respondents complied with the legal procedures in vetting the appellant. Counsel submitted that the Petition has not raised any sufficient grounds, on the basis of which this Court should exercise its discretion to grant the orders sought. While citing section 35 of the *County Governments Act*, section 8 of the *Public Appointments Act* and Chapter 6 of *Constitution*, the respondents urged that there is no evidence that the procedure employed by the respondents violated any of the above legislation or cited procedure or any other laid down law.

13. Learned Counsel submitted that nothing in the Appeal challenges the integrity of the process and that the respondents adhered to the law. Indeed, the respondents submitted

that the appellant has only challenged the final decision that rejected his name and not the procedure employed by the respondents. The respondents submitted that the appellant's name was validly rejected for three reasons namely: he lacked basic experience in management of devolved function as provided for by the 4th Schedule Part II of *Constitution* with respect to ECD and village Polytechnics; he was a maternal cousin of Mr Patrick C Mutai, a nominee for Finance and Economic Planning; and that the nominations did not take into account issues of regional balance, gender and persons with disabilities. Counsel concluded his submissions on this issue by stating that there were no fundamental omissions or extraneous or irrelevant matter that would render the whole process unconstitutional.

14. As to whether the petition offends the doctrine of separation of powers and whether the respondents complied with the legal procedures in vetting the appellant, the respondents urged that the doctrine of separation of powers applies with equal measures to County Governments. In that context, they cited sections 16 and 17 of the *County Governments Act*, section 12 of the *National Assembly (Powers and Privileges) Act* and the *Simon Wachira Case* to anchor their submissions. They submitted in that regard that the appellant's appointment was refused for justified reasons that did not amount to serious violations of *Constitution* to warrant any interference by this Court. Accordingly, Learned Counsel urged the court to dismiss the appeal with costs.

**C. Issues for Determination**

15. Having considered the grounds of appeal, the submission of the parties, the authorities in support thereof, it is evident to us that there are only three issues for determination by this Court, namely:

    i. Whether the Appeal before this Court meets Constitutional threshold under article 163(4)(a) of *Constitution*.

    ii. Whether the Kericho County Assembly flouted any Law in rejecting the appellant's name.

    iii. If and when the court interfere with the doctrine of separation of powers.

**D. Analysis**

**i. Does the Appeal before this Court meet Constitutional threshold under article 163(4)(a) of Constitution?**

16. Whereas, the appellant submitted that the court has jurisdiction to hear the Appeal as it raises substantive constitutional issues, the respondents were of the contrary opinion and

argued that this appeal does not raise any substantive issue to warrant exercise of the court's jurisdiction under article 163 (4) (a) of *Constitution*.

17. In that regard, the appellate jurisdiction of this Court is captured in article 163(4) of *Constitution of Kenya* which states as follows:

> " [article 163]
>
> (4) Appeals shall lie from the court of Appeal to the Supreme Court –
>
> a. As of right in any case involving the interpretation or application of this Constitution; and
>
> b. In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)
>
> (5) A certification by the court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

18. Furthermore, section 15 (1) of the *Supreme Court Act* also provides that appeals to the Supreme Court shall be heard only with the leave of the court. section (15)(2) on the other hand provides that Sub-section (1) shall not apply to appeals from the court of Appeal in respect of matters relating to the interpretation or application of *Constitution*.

19. This court has in the above context, outlined the boundaries of its jurisdiction under article 163(4)(a) of *Constitution* in several past decisions, which decisions are still applicable. Specifically, we refer to the *Lawrence Nduttu & 6000 others & Kenya Breweries Ltd & Another*, SC Petition No 3 of 2012; [2012] eKLR, *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others*, Sup Ct Petition No 10 of 2013, and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC App No 5 of 2014; [2014] eKLR (Munya 1).

20. In the case of *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others*, Sup Ct Petition No 10 of 2013 (Joho Case), this Court observed as follows:

> " [37]: In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as

> contemplated under article 163(4)(a) of *Constitution*..." [emphasis added].

21. In applying the above holding to the present appeal, we note that the record at pages 55 and 57 shows that on appeal, the Appellate Court identified two issues as being central in the Appeal before it, namely:

    i. Whether an Employment and Labour Relations Court can hear and determine a petition raising constitutional issues.

    ii. Whether the Employment and Labour Relations Court arrogated itself powers vested on the respondents by *Constitution* and substituting the respondent's decision in the vetting process with its own.

22. We note the issue of Constitutionality of the respondents' decision in rejecting the name of the appellant in the County Executive Committee was consistent from the trial Court to the court of Appeal and now to this court. Consequently, we hold that this appeal, indeed, falls within the ambit of article 163(4)(a) of *Constitution*.

**ii. Whether the Kericho County Assembly flouted any Law?**

23. The appellant urged that the respondent's decision was illegal, unreasonable and unconstitutional and violated articles 10, 27(4), 27(5), 28, 41(1), 43, 47(1), 48 and 56(c) of *Constitution*. Mr Wanyama submitted that the appellant was discriminated due to his relationship with a nominee for the Finance and Economic Planning Docket. He also submitted that the other criteria used to reject the appellant's name, that is lack of experience in ECDE and village polytechnics, violated Constitutional principles and statutory provisions on fair labour practices under article 41(1) of *Constitution*. Quite to the contrary, the respondents submitted that the appellant's appointment was refused for justified reasons which did not amount to serious violations of *Constitution* to warrant any interference by this Court and that the respondents complied with the law.

24. What exactly is the procedure for appointing County Executive Committees? Did the County Assembly of Kericho defy the same? article 176(2) of *Constitution* mandates every County Government to decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so. County Executive Committees thus comprise members appointed by the County Governor, with the approval of the assembly, and who are not members of the assembly as provided for under article 179(2)(b) of *Constitution*.

25. The procedure for public appointments is governed by the *Public Appointments Act* No. 33 of 2011. In that regard, section 3 of the *Public Appointments Act* provides that all

appointments under *Constitution* or any other law for which the approval of Parliament is required shall not be made unless the appointment is approved or deemed to have been approved by Parliament.

26. section 5 of the same *Act* sets the procedure for nominating a candidate for a public appointment. It states as follows:

> "5(1) An appointing authority shall, upon nominating a person for an appointment to which this Act applies, notify the relevant House of Parliament accordingly.
>
> (2) A notification under subsection (1) shall be—
>
> (a) in writing;
>
> (b) be lodged with the Clerk of the relevant House of Parliament.
>
> (3) A notification of appointment shall be accompanied by information concerning the nominee, having regard to the issues mentioned in section 7.
>
> (4) For purposes of this *Act*, a notification of nomination shall be deemed to be duly given on the day on which it complies fully with subsections (2) and (3)."

27. Upon nomination, under section 5 of the *Public Appointments Act*, a candidate whose position requires approval by Parliament shall undergo the approval hearing as set out in section 6 of the Act. Accordingly, section 7 of the same *Act* provides that an approval hearing shall focus on a candidate's academic credentials, professional training and experience, personal integrity and background. When approving a candidate, the House of Parliament shall be guided by the procedure used to arrive at the nominee; any constitutional or statutory requirements to the office in question; and the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made.

28. On rejection of a nomination, section 10 of the *Public Appointments Act* provides that where the nomination of a candidate is rejected by Parliament, the appointing authority may submit to the relevant House the name of another candidate, and the procedure for approval specified in this *Act* shall apply accordingly.

29. In the context of County Government appointments under section 35 of the *County Governments Act* No 17 of 2012, the Governor shall, when nominating members of the

Executive Committee, first, ensure that to the fullest extent possible, the composition of the executive committee reflects the community and cultural diversity of the county; and second, take into account the principles of affirmative action as provided for in *Constitution*. The County Assembly is, on its part, mandated to ensure that all nominations for appointments to the executive committee take into account two thirds-gender rule, representation of minorities, marginalized groups and communities, and community and cultural diversity recognized in Kenya among other considerations. The section specifically states:

> "35. (1) The governor shall, when nominating members of the executive committee—
>
> a. ensure that to the fullest extent possible, the composition of the executive committee reflects the community and cultural diversity of the county; and
>
> b. take into account the principles of affirmative action as provided for in *Constitution*.
>
> 2. The county assembly shall not approve nominations for appointment to the executive committee that do not take into account—
>
> a. not more than two thirds of either gender;
>
> b. representation of the minorities, marginalized groups and communities; and
>
> c. community and cultural diversity within the county.
>
> 3. A person may be appointed as a member of the county executive committee if that person—
>
> a. is a Kenyan citizen;
>
> b. is a holder of at least a first degree from a university recognized in Kenya;
>
> c. satisfies the requirements of Chapter Six of *Constitution*; and
>
> d. has knowledge, experience and a distinguished career of not less than five years in the field relevant to the portfolio of the department to which the person is being appointed.

4. A member of the county executive committee shall not hold any other State or public office."

30. From the foregoing provisions, a County Assembly can reject the name of a nominee if the same fails the test set out in section 35 of the *County Governments Act* and the provisions of the *Public Appointments Act*. In this regard, we take cognizance of the court of Appeal's finding on this issue whereby the court stated as follows:

> " [Page 15] ...in our considered view, we think it was wrong for the trial court to disregard the appellant's findings based on the lack of experience for the advertised position. The other consideration was in respect to regional balance. The respondent hails from Bureti where two other candidates had been selected from and approved. The respondent was of the view, and rightly so in our view, that it was not to offer the position on the basis that one of his relations had been offered one of the positions.
>
> ...it was therefore important for the appellants to adhere to constitutional provisions
>
> ...the issue of balance was important consideration so as to have an all-inclusive county and not a county where the majority of its employees hail from one community"

31. We have carefully considered the reasons put given by the County Assembly of Kericho in rejecting the appellant's name namely, that is lack of experience in ECDE and village polytechnics and being related to a nominee for the Finance and Economic Planning Docket, and agree with the Appellate Court's reasoning that the appellant did not fault the vetting process (which we find meets Constitutional and statutory threshold required) but the outcome. For the above reasons, we see no reason to depart from the court of Appeal's finding.

**iii. When does the court interfere with the doctrine of separation of powers?**

32. This Court has numerously in its previous decisions emphasized on the need to respect and uphold the principle of separation of powers, a doctrine that is entrenched in our *Constitution*. *In the Matter of the Interim Independent Electoral Commission*, Constitutional Application No 2 of 2011; [2011] eKLR, (the Matter of Interim Independent Electoral

Commission) this Court affirmed that separation of powers is an integral principle in Kenya's Constitution, as follows:

> "(53) Separation of powers is an integral principle in *Kenya's Constitution*: for instance, Chapter 8 is devoted to the Legislature; Chapter 9 to the Executive; and Chapter 10, on the Judiciary, provides (article 160(1)) that:
>
> In the exercise of judicial authority, the Judiciary as constituted by article 161, shall be subject only to this *Constitution* and the law and shall not be subject to the control or direction of any person or authority.
>
> (71) ..... the court's preference for judicial restraint: if judges decide only those cases that meet certain justiciability requirements, they respect the spheres of their co-equal branches, and minimize the troubling aspects of counter-majoritarian judicial review, in a democratic society, by maintaining a duly limited place in government."

33. Further *in the Matter of the Speaker of the Senate & another*, Advisory Opinion Reference No. 2 of 2013; [2013] eKLR, we stated as follows:

> "(61) It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of *Constitution*, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that *Constitution* vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in article 94(1) thereof. The said article also imposes upon Parliament the duty to protect *Constitution* and to promote the democratic governance of the Republic. article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with *Constitution*. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of *Constitution*. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of *Constitution*. It cannot operate besides or outside the four corners of *Constitution*. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. the court cannot

> supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another."

34. *In the Matter of Interim Independent Electoral Commission*, we also found that Courts of law may intervene in cases where different state organs may operate outside their mandate:

> "(54) The effect of *Constitution's* detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."

35. Furthermore, this Court *in the Matter of the Speaker of the Senate & another*, Advisory Opinion Reference No. 2 of 2013; [2013] eKLR, stated as follows:

> "(62) However, where a question arises as to the interpretation of *Constitution*, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under *Constitution* which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of *Constitution*. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach *Constitution*. Where however, as in this case, one of the Houses is alleging that the other has violated *Constitution*, and

> moves the court to make a determination by way of an Advisory Opinion, it would be remiss of the court to look the other way. Understood in this context therefore, by rendering this Opinion, the court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under *Constitution* and the *Supreme Court Act*."

36. Having found that the respondent's decision to reject the appellant's appointment did not flout any Constitutional or Statutory provisions, we see no reason to interfere with the manner in which the County Assembly of Kericho exercised its powers on the issue. The effect of this is that the Appeal herein lacks merit and is therefore dismissed.

37. On costs, the appellant prayed that the costs of the appeal be borne by the respondents. In *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others* SC Pet. No. 4 of 2014; [2014] eKLR, we held that we have discretion to award costs in order to ensure that the ends of justice are met. Since the Appeal sought a clarification on the exercise of powers by a public entity, the County Assembly of Kericho, we see no reason to penalize any party on costs. Each party shall bear their own costs.

38. Consequently, the appeal fails and is dismissed.

**Orders**

39. Accordingly, and in view of the foregoing reasons the final orders are:

    i. The petition of appeal dated 19th July, 2019 be and is hereby dismissed.

    ii. Each Party shall bear their own costs of appeal.

40. Orders accordingly.

**In the Matter of Speaker, County Assembly of Siaya County (Reference 4 of 2017) [2020] KESC 40 (KLR) (4 August 2020) (Advisory Opinion)**

**Supreme Court of Kenya**

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

Neutral citation: [2020] KESC 40 (KLR)

***Jurisdiction*** *– jurisdiction of the Supreme Court – advisory opinion jurisdiction - what were the circumstances in which the Supreme Court would exercise its advisory opinion jurisdiction – Constitution of Kenya, 2010 article 163(6)*

**Brief facts**

The County Assembly of Siaya County had faced challenges in discharging its role under the Constitution and the County Government Act with regard to the powers of the County Assembly in approving/vetting members of the County Executive Committees already serving their terms, whenever the Governor decided to move them to a different portfolio. The pertinent issue was whether a County Governor had absolute powers to re-deploy members of County Executive Committees without the approval of the County Assembly. Faced with that issue the applicant approached the Supreme Court for an advisory opinion.

**Issues**

What were the circumstances in which the Supreme Court would exercise its advisory opinion jurisdiction?

**Held**

1. The Supreme Court was not a legal adviser of State organs. The scope of an advisory opinion under article 163(6) of the Constitution did not extend to offering legal advice. The jurisdiction vested in the Supreme Court was to offer advisory opinion, and even then, that jurisdiction was circumscribed.
2. A matter for advisory opinion was one not suitable for the ordinary dispute resolution mechanism; with pleadings, and progressing from the lowest to the highest court. The matter for advisory opinion had to also be urgent and entail the danger of paralysis to the institution concerned. The matter suitable for advisory opinion must be one that did not flow from any contest of rights or claims. The instant matter did not qualify for an advisory opinion.
3. The instant matter was a justiciable live issue in Siaya County on the varied interpretation of the vetting provisions in the Constitution as well as the County Governments Act and the Public Appointments (County Assemblies Approval) Act. The Supreme Court had to guard against improper transformation of normal disputed issues for ordinary litigation into advisory opinion causes, as the court had to be disinclined to take a position in discord with the core principles of the Constitution. Contested justiciable issues should be canvassed before the High Court and should only reach the Supreme Court through the appellate process where it was necessary and appropriate.

*Reference dismissed; each party was to bear its own costs.*

**Citations**

**Cases**

***Kenya***

1. *County Government of Nyeri & another v Ndungu* Civil Appeal 2 of 2015; [2015] KECA 1011 (KLR); [2015] eKLR; [2015] 1 KLR 253 - (Explained)
2. *In the Matter of the National Land Commission* Advisory Opinion Reference 2 of 2014; [2015] KESC 3 (KLR); [2015] eKLR - (Explained)
3. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] eKLR; [2011] 2 KLR 32 - (Explained)
4. *In the Matter of the National Gender and Equality Commission* Reference 1 of 2013; [2014] KESC 42 (KLR); [2014] eKLR - (Explained)
5. *In the matter of the principle of gender representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] eKLR; [2012] 3 KLR 718 - (Followed)
6. *In the Matter of the Speakers of the 47 County Assemblies* Advisory Opinions Application 3 of 2014; [2016] KESC 7 (KLR); [2016] eKLR - (Explained)
7. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR); [2013] eKLR - (Explained)

**Statutes**

***Kenya***

1. Constitution of Kenya - (Interpreted) articles 10; 132(2); 163(6); 179(2)(b); 196(1)(b)
2. County Governments Act (cap 265) - (Interpreted) sections 30(2)(b); 31(d)
3. Public Appointments (County Assemblies Approval) Act (cap 265B) - (Interpreted) section 2
4. Supreme Court Rules, 2012 (cap 9 Sub Leg) - (Interpreted) clause 41(4)

**United States**

Constitution of the United States - (Interpreted) article II section 2, clause 2

Advocates: None Mentioned

August 4, 2020, the Court delivered the following Advisory Opinion:

## A. Introduction

1. By his Reference dated 1st November 2017, the Speaker, the County Assembly of Siaya (the applicant) seeks this Court's advisory opinion under article 163(6) of the *Constitution* on the following two issues:

    a. Whether sections 30(2)(b) and 31(d) of the *County Government Act* and article 179(2)(b) empower the County Governor to redeploy or transfer a sitting member of the County Executive Committee from one portfolio to another; and

    b. Whether, assuming that the answer to the question above is positive, such redeployment/transfer amounts to a fresh appointment and that the Governor is required by law to submit the names of such persons as nominees under sections 30(2)(b) and 31(d) of the *County Government Act* and article 179(2) of the *Constitution* to the County Assembly for approval.

2. The Reference was supported by the affidavit of George Okode sworn on 1st November 2017.

## B. Background

3. The Applicant submits that the County Assembly of Siaya County has faced challenges in discharging its role under the *Constitution* and the *County Government Act* with regard to the powers of the County Assembly in approving/vetting members of the County Executive Committees already serving their terms, whenever the Governor decides to move them to a different portfolio. He submits that this challenge has arisen because both the *Constitution* and the *County Government Act* are silent on such redeployments. That because of this silence/lacuna in law, the County Assembly of Siaya claims it has had cases where the Governor has attempted to redeploy a member of the County Executive Committee from one portfolio to another without presenting such redeployment to the County Assembly for approval.

## C. Applicant's Case

4. The Applicant's case is fairly straight forward. In the current constitutional dispensation, the Applicant argues, power belongs to the People. As such, by article 179(2)(b) of the *Constitution*, as read together with section 30(2)(d) of the *County Governments Act*, requiring the County Governors to appoint members of the County Executive Committees

with the approval of the County Assemblies, the People's power is maintained as is the case in public appointments. And since section 2 of the *Public Appointment (County Assemblies Approval) Act*, defines

> " appointment" to include "re-appointment to the same body whether or not in the same capacity", redeployment of members of the County Executive Committee amount to reappointments."

5. In the Applicant's view, it would therefore be absurd to accept the Siaya County Governor's contention that he has absolute powers to re-deploy members of the County Executive Committee without the approval of the County Assembly as that would deprive the People their power of assessing and determining the suitability and competence of such Executive Committee members to serve in the new portfolios. He contends that accepting the Governor's contention would give room for mischief by Governors who would nominate a person for a particular portfolio that matches the person's knowledge, experience and career only as a stepping stone to land him later at a more sensitive and 'strategic' portfolio that such a person would not qualify for thus negating the necessity of the requirement for vetting in the first place.

6. Asked by the Court where the County Assembly's power to re-vet is drawn from, Counsel for the Applicant, Mr. Omollo, submitted that the power streams from the principle of public participation, one of the national values and principles of governance under article 10 of the *Constitution*. He added that under article 196(1)(b) of the *Constitution*, each County Assembly has to facilitate public participation and involvement in the legislative and other business of the assembly and its committee.

7. The applicant cites this court's decision *In the Matter of the National Land Commission* [2015] eKLR in urging that vetting matches skills with the specific portfolio and ensures integrity, suitability and qualification, which alongside public participation are essential principles of checks-and-balances.

**D. Submissions by the Attorney General**

8. The Attorney General, the 2nd Interested Party, was represented by Counsel Mr Bitta, during the oral "on-line" hearing. While in its written submissions dated 3rd August 2018, the Attorney General aligns his submissions with the Speaker's case, in the oral submissions by his counsel, Mr Bitta, he urges this Court not to exercise its discretion to render the advisory opinion sought as the nature of this matter is well suited for determination by the High Court. Counsel further argues that the matter revolves around the interpretation of Statutes and a ruling was delivered by the Speaker of the County Assembly without the

Supreme Court being told what happened after that. These, it is urged, are matters to be settled by the High Court.

9. Mr. Bitta also urged that the applicant had not sought the opinion of the Attorney General before coming to this Court. Mr Bitta contends that as per this *Court's Rules*, the opinion of the Attorney General is provided for and must be sought before one approaches this court for an advisory opinion. On the basis of all these, counsel urged that the Court should decline to exercise its discretion to render the advisory opinion sought.

**E. Submissions by the Governor of Siaya County**

10. In opposing the Reference, the Governor of Siaya County, the 1st Interested Party, submits that a re-deployment or transfer is a prerogative of the Governor in exercise of his executive powers. It is an internal executive management exercise onto which, under the doctrine of Separation of Powers, the County Assembly is precluded from encroaching. It does not amount to a reappointment.

11. The Governor urges that the appointment envisioned under article 179(2)(b) of the *Constitution*, where the Governor submits the name(s) to the County Assembly for approval, is the one the Governor makes upon his/her election and assumption of office, or a first-time appointment of one as a member of the County Executive Committee upon a vacancy arising in the County Executive.

12. The Governor urges that the vetting tradition is borrowed from the presidential system of the United States where the President's powers to make appointments is limited and he is precluded from riding roughshod over other arms of the government, hence the Appointment Clause (article II section 2, clause 2 of the *United States Constitution*). He urges that this system is replicated at both the national (article 132(2)) and the county (article 179(2)(b) level of government in Kenya. He submits that the Appointment clause has four distinct purposes: prevent one branch from creating and filing the same office; prevent diffusion of the appointment power; enhancing political accountability; and, ensuring that more qualified officers are appointed. It is thus urged that the essence of the Appointment clause is not to load the Senate on the President.

13. Flowing from the foregoing, counsel for the Governor, Mr. Wanyama cited the case of *County Government of Nyeri & another v Cecilia Wangechi Ndungu* [2015] eKLR in urging that the Court of Appeal held that a governor has the residual power to re-shuffle the executive if, in his opinion, the transfer will lead to performing the function in a more satisfactory manner. Counsel urges that in any event, the County Assembly has full power to, at any time, summon a member of the County Executive to account for his or her performance hence re-vetting cannot be accurately argued as the only way of ensuring accountability.

**F. Analysis**

14. We have of late noted a plethora of references by State Organs seeking this Court's Advisory Opinion on all manner of issues. We would, in the circumstances, like to make it clear that the Supreme Court is not a legal adviser of State organs. Further, the scope of an Advisory Opinion under article 163(6) of the *Constitution* does not extend to offering legal advice. As the provision states, the jurisdiction the Article vests in the Supreme Court is to offer Advisory Opinion, and even then, that jurisdiction is circumscribed.

15. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Sup Ct Appl No 2 of 2012, [2012] eKLR [para 25] this Court stated the objective of an Advisory Opinion to be

> " seeking to unravel a legal uncertainty in such a manner as to promote the rule of law and the public interest."

16. In that 2012 Advisory Opinion, this Court identified a matter for Advisory Opinion as being one not suitable for the ordinary dispute-resolution mechanism – with pleadings, and progressing from the lowest to the highest court. The matter for advisory opinion must also be urgent and entail the danger of paralysis to the institution concerned. As this court stated *In the Matter of the Speaker of the Senate & another* [2013] eKLR, it must be a matter of great public importance which

> " bears novelty, and ill-fits the conventional dispute-settlement scheme, which is most appropriate in a matter involving two individuals, or one between State and individual" and calls for expeditious resolution; it must be a matter that "raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement."

*In the Matter of Interim Independent Electoral Commission* [2011] eKLR [para.33], this court added that the matter suitable for advisory opinion must be one that

> " ... does not flow from any contest of rights" or claims

17. This court has also emphasized the need to seek the opinion of the Attorney General before coming to this court for an advisory opinion. *In re the Matter of the Interim Independent Electoral Commission* [2011] eKLR, this court pointed out that;

> " [55] .... By article 156(4) ... of the *Constitution*, the Attorney-General is designated the principal [legal] advisor of the Government .... It can be said that the Attorney- General bears the mantle of the "chief

> lawperson" of Government in its diverse dimensions. The various departments [and levels] of the Government have the liberty to seek the Attorney-General's opinion on any legal question of relevance to their day-to-day operations."

18. That position was reiterated thus *In the Matter of the National Gender and Equality Commission* [2014] eKLR;

> " [40] .... Though there is no mandatory requirement to first seek the Attorney-General's opinion, this Court has held that, as a matter of good practice, such opinion should be sought. Clause 41(4) of the *Supreme Court Rules* provides:
>
> > " The Court may on giving the parties an opportunity to be heard, reject a reference in whole or in part if —
> >
> > ...
> >
> > c. the matter in respect of which the reference is made can in the opinion of the Court be resolved by the advice of the Attorney-General, and such advice has not been sought ... "

**G. Determination**

19. On these established legal principles, does this matter qualify for an Advisory Opinion? We are afraid it does not.

20. In this matter, it is pleaded that the Applicant has had instances where the Governor of Siaya County has attempted to redeploy members of the County Executive Committee from one portfolio to another without presenting the proposed transfer to the County Assembly for approval. In one such instance the County Assembly protested necessitating the Speaker's Ruling issued on 28th August, 2014, in which he declared any such reshuffle without the County Assembly's approval an illegality. Despite that Ruling, the issue persists even in other counties, hence the need for an Advisory Opinion.

21. The County Assembly holds the view that a reshuffle of the County Executive Committee members or redeployment of the County Executive Committee members amounts to a reappointment, according to them, requiring their vetting and approval. The Governor on the other hand understands the vetting process to be limited one's first appointment as a member of the County Executive Committee.

22. This is clearly a justiciable live issue in Siaya County on the varied interpretation of the vetting provisions in the *Constitution* as well as the *County Governments Act* and the *Public Appointments (County Assemblies Approval) Act*. As this Court cautioned in Speaker of Senate and another v The Attorney General and 4 Others, Advisory Opinion No 2 of 2013 eKLR, at paragraph 18:

> "The Supreme Court must guard against improper transformation of normal disputed issues for ordinary litigation into Advisory Opinion causes, as the Court must be disinclined to take a position in discord with the core principles of the *Constitution*."

22. This caution was reiterated in *Speakers of the 47 County Assemblies v Commission on Implementation of constitution & 2 others*; Advisory Opinion Reference No. 3 of 2014 where this Court emphasized that contested justiciable issues should be canvassed before the High Court and should only reach this Court through the appellate process where necessary and appropriate.

23. Further, the Applicants also did not seek the Attorney General's opinion as stated above.

24. For the foregoing reasons we decline to exercise our discretion to assume jurisdiction in this matter and we accordingly dismiss it. Although fairly frivolous, since it hinged on public interest, we find that each party should bear its own costs.

**H. Final Orders**

a. The Reference dated 1st November 2017 and filed on 3rd November 2017 is hereby dismissed;

b. Each party to bear its own costs.

**Njenga v Republic & 3 others (Petition 10 of 2018)**
**[2020] KESC 35 (KLR) (4 August 2020) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2020] KESC 35 (KLR)

*The Supreme Court held that its jurisdiction in appeals that raised issues involving constitutional interpretation and application was not properly invoked. The court held that issues that involved allegations on the violation of the rights to property as recognized under article 40 of the Constitution, were raised for the first time at the Supreme Court and were not the subject of determinations at the High Court or the Court of Appeal.*

***Jurisdiction*** *– jurisdiction of the Supreme Court – jurisdiction to determine an appeal regarding the interpretation of the Constitution - whether the Supreme Court had jurisdiction under article 163(4)(a) of the Constitution to hear an appeal involving constitutional claims raised for the first time at the Supreme Court – Constitution of Kenya, 2010 article 163(4)(a).*

**Brief facts**

The appellant filed for judicial review (*mandamus*) to compel the Minister and Commissioner of Lands to issue her title for land she claimed to have purchased from the Jacob Njenga Muiruri. The land had been transferred to the 4th respondent through what she claimed was unlawful means. Both the High Court and the Court of Appeal dismissed her claims. Dissatisfied, she appealed to the Supreme Court, asserting violations of her constitutional rights under article 40 of the Constitution. During the appeal, Njenga passed away, and her legal representatives took over the case.

**Issues**

Whether the Supreme Court had jurisdiction under article 163(4)(a) of the Constitution to hear an appeal involving constitutional claims raised for the first time at the Supreme Court.

**Held**

1. Whereas judicial review orders were one of the remedies available to a party claiming violation of the Bill of Rights under article 23(3)(f) of the Constitution, the instant dispute was not one in which allegations of violation of fundamental rights were at the centre of the dispute. The judicial review application was filed under order LIII rules 1, 2 and 3 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Rules. Nowhere in pleadings or submissions was the court called upon to interpret any part of the Constitution.
2. The substantive prayers for *mandamus*, general and exemplary damages did not require the trial court, the Court of Appeal nor the Supreme Court to interpret or apply the Constitution as the question whether the title issued to A. S Waweru was unlawful did not require that action on the part of the Superior Courts below nor the Supreme Court.
3. The Supreme Court's jurisdiction under article 163(4)(a) of the Constitution had not been met.

*Appeal struck out; the appellant was to pay costs to the 4th respondent.*

**Citations**

**Cases**

***Kenya***

1. *Bwana, Bwana Mohamed v Silvano Buko Bonaya & 2 others* Election Petition 15 of 2014; [2015] KESC 8 (KLR) - (Explained)
2. *Nduttu & 6000 others v Kenya Breweries Limited & another* Petition 3 of 2012; [2012] eKLR; [2012] 2 KLR 804 - (Mentioned)

**United Kingdom**

1. *Gordon v Metropolitan* (1910) 2 KB 1080 - (Mentioned)
2. *Scott v Brown* (1892) 2 QB 724 - (Explained)

**Statutes**

***Kenya***

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) - (Interpreted) order LIII rules 1, 2, 3
2. Civil Procedure Act (cap 21) - (Interpreted) section 3A
3. Constitution of Kenya - (Interpreted) articles 23(3)(f); 40; 163(4)(a)

**Instruments**

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981
   article 14
2. Pretoria Declaration on Economic, Social and Cultural Rights, 2004
   In general

**Advocates**

*Mr. Ngoge* - for the Appellant.

August 4, 2020, the Court delivered the following Judgment:

## A. Background

1. By High Court Miscellaneous Application No 940 of 2005 (Nairobi), Leah Waithira Njenga applied for orders of *mandamus* directed at the Minister for Lands and Settlement as well as the Commissioner of Lands compelling them to issue her with title documents for Land Reference Number Nyandarua/Ol Kalou Salient/271. She further prayed for general and exemplary damages as well as costs.

2. Her suit was predicated on her claim that she had purchased the said parcel of land from one, Jacob Njenga Muiruri, and had obtained all necessary authorizations and consents in that regard but instead, the land was unlawfully transferred to one, A. S. Waweru, the 4th respondent.

3. Having heard the parties, Sitati J, on 13th May 2011, dismissed the Judicial Review Application with costs. In doing so, she stated inter alia that Leah Waithira Njenga had not proved that she was lawfully entitled to the suit land, had come to Court with unclean hands by failing to disclose that her husband had previously litigated on the same parcel of land, unsuccessfully so, and that without the title deed issued to A. S. Waweru being nullified in separate proceedings, the orders sought were unavailable to her.

4. Dissatisfied, Leah Waithira Njenga filed an appeal to the Court of Appeal, being Civil Appeal No 269 of 2013 which appeal was determined on 4th May 2018. In dismissing the said appeal, the learned Judges of Appeal found that the same was without merit and specifically that, an order of *mandamus* was not efficacious in the circumstances of the case. Further, that there was no basis in law for an award of general and exemplary damages as had been sought by Leah Waithira Njenga. In addition, that the claim for Kshs. 10 Billion being quantum of damages thereof was, as it were, plucked from the air.

5. Leah Waithira Njenga, after the dismissal of her appeal aforesaid, filed the present appeal claiming in 20 grounds of appeal that the learned Judges of Appeal erred in law and fact in failing to grant the order of mandamus thereby sanitizing arbitrary deprivation and unlawful acquisition of matrimonial property by a third party.

**B. Submissions by the Parties**

**i) appellant's submissions**

6. We should note at this point that Leah Waithira Njenga died during the pendency of this appeal and by an order of this Court dated 29th April 2019, Jacob Njenga Muiruri and Mark Kamau Njenga were substituted in her place.

7. In submissions filed on 11th September 2019 the appellants have argued that the decisions of the Superior Courts had the net effect of depriving Leah Waithira Njenga of her matrimonial home and property contrary to the rules of natural justice, article 40 of the *Constitution*, article 14 of the *African Charter on Human and Peoples' Rights* as well as the *Pretoria Declaration on Economic, Social and Cultural Rights, 2004*.

8. In addition, the appellants have urged that both the High Court and the Court of Appeal misunderstood and failed to apply all the evidence tendered by Leah Waithira Njenga showing that she was entitled to the suit land and also erred in declaring that the Land Control Board Consent tendered in evidence was irregular, null and void.

9. Regarding Leah's eviction from the suit land, the appellants argued that the said action contravened the United Nations Sub-Commission Resolution 2003/17 on forced eviction as well as the African Commission Resolution 262 on women's Right to Land and

Productive Resources. Reliance was also placed on *Gordon v Metropolitan* (1910) 2 KB 1080 as well as *Scott v Brown* (1892) 2 QB 724 where it was held that unlawful contracts should not be enforced by any Court.

10. Regarding this Court's jurisdiction under article 163(4)(a) of the *Constitution*, while no written submissions were filed on the issue, Mr Ngoge for the appellant, at the hearing of the Appeal stated that the same was properly before the Court as article 40 thereof was cited in the Memorandum and Supplementary Record of Appeal to support the appellants' case and therefore this Court was properly seized of the Appeal as a matter of right.

**ii) 4th respondent's Submissions**

11. In submission filed on 21st November 2019, the 4th respondent raised only one issue; that the original dispute and appeal, as framed, do not raise any matter involving the interpretation or application of the Constitution and therefore the appeal was erroneously filed as a matter of right under article 163(4)(a) of the Constitution. Reliance thereon was placed on our decisions in Petition No 3 of 2010 *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* as well as Petition No 15 of 2014 *Bwana Mohamed Bwana v Silavano Buko Bonaya* where we addressed appeals as a matter of right under the said article.

12. The 4th respondent thus prays that the appeal be dismissed with costs and as neither the 1st, 2nd nor 3rd respondents participated in the appeal, that is the only response to it.

**C. Analysis and Determination**

13. As the issue of the jurisdiction of this court to hear the appeal as a matter of right under article 163(4)(a) of the *Constitution* has been raised, we must dispose of that issue first. If we find that we have no jurisdiction, the appeal will obviously be struck out and its merits or otherwise will not attract our attention.

14. In the above context and we note that Mr Ngoge, the present advocate for the appellant, also appeared in that matter, in *Lawrence Nduttu*, we stated thus:

> "26) Mr Ngoge has urged that whenever a citizen alleges in his pleading before the Supreme Court that the High Court and Court of Appeal were complicit in facilitating violations of his fundamental human rights, the Supreme Court automatically assumes jurisdiction without the necessity of leave in order to uphold the Constitution, human rights and the rule of law. Anything to the contrary would be unconstitutional and retrogressive. We understand Mr. Ngoge to be arguing that a mere allegation of a violation of human rights automatically brings

an intended appeal within the ambit of article 163(4)(a) of the *Constitution* hence dispensing with the need for leave under article 163(4)(a) of the *Constitution*.

27) With respect, but firm conviction, we disagree with this contention. Such as approach as is urged by Counsel if adopted, would completely defeat the true intent of article 163(4)(a) of the *Constitution*. This article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the *Constitution* can be entertained by the Supreme Court. The only other instance when an appeal may lie to the Supreme Court is one contemplated under article 163(4)(a) of the *Constitution*. [Emphasis ours] Towards, this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.

28) The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the *Constitution*. In other words, an appellant must be challenging the interpretation or application of the *Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the *Constitution*, it cannot support a further appeal to the Supreme Court under the provisions article 163(4)(a) of the *Constitution* [Emphasis ours]. If an appeal is challenged at a preliminary level on grounds that it does not meet the threshold in article 163(4)(a) of the *Constitution*, the Court must determine that challenge before deciding whether to entertain the substantive appeal or not. But the Court need not wait for a preliminary objection before applying the test of admissibility in article 163(4)(a) of the *Constitution*. It is the court's duty as the ultimate custodian of the Constitution to satisfy itself that the intended appeal meets the constitutional threshold".

15. In the present appeal, despite the very clear guidance to Counsel and Litigants in Nduttu, Mr Ngoge still argued that, the fact that in the appeal, article 40 on the right to property was raised for the first time in the Supplementary Record of Appeal filed on this court on 21st

June 2018, the appeal was still properly before us as a matter of right under article 163(4)(a) of the *Constitution*. With respect, we must once again disagree with such a submission.

16. Whereas it is indeed true, as argued by Mr Ngoge, that judicial review orders are now one of the remedies available to a party claiming violation of the Bill of Rights under article 23(3)(f) of the *Constitution*, the present dispute was never and is not now one in which allegations of violation of fundamental rights are at the centre of the dispute between the appellant and the 4th respondent. Indeed, the Judicial Review Application before Sitati J was one filed under Order LIII rules 1, 2 and 3 of the *Civil Procedure Rules* as well as section 3A of the *Civil Procedure Rules*. Nowhere in pleadings or submissions was the learned Judge called upon to interpret any part of the Constitution. And she did not.

17. It is also not in doubt that the substantive prayers for mandamus, general and exemplary damages did not require Sitati J, the learned Judges of Appeal nor ourselves to interpret or apply the Constitution as the question whether the title issued to AS Waweru was unlawful would not have required nor does it now require that action on the part of the Superior Courts below nor ourselves. The test that we set in Lawrence Nduttu and subsequent decisions on our jurisdiction under article 163(4)(a) of the *Constitution* has therefore not been met and we must accede to the 4th respondent's prayer that the present Appeal is one that ought to be struck off for want of jurisdiction.

What of costs? Costs follow the event and therefore the appellants shall pay costs of the Appeal to the 4th respondent.

**D. Disposition**

18. The final orders to be made, for the above reasons, are that;

i) The Appeal herein is struck off.

ii) Costs thereof shall be paid by the appellant to the 4th respondent only.

19. Orders accordingly.

**Mulima & 2 others (Suing as Representatives of Ex-East African Airways Staff Welfare Association) v Attorney General & 8 others (Petition 17 of 2019) [2020] KESC 39 (KLR) (4 August 2020) (Judgment)**

**Supreme Court of Kenya**

**PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2020] KESC 39 (KLR)

***Jurisdiction*** *– appellate jurisdiction of the Supreme Court – appeal on non-payment of emoluments and pensions – whether a claim for restitution of emoluments and pensions under statute were constitutional in nature - whether a claim that non-payment of pensions and emoluments violated a litigant's constitutional rights gave the Supreme Court jurisdiction to entertain the matter - whether the Supreme Court could entertain a claim for restitution of emoluments and pensions – Constitution of Kenya article 163(4)(a).*

**Brief facts**

The petitioners who were former employees of the East African Airways Corporation (EAAC) which fell under the ambit of the East African Community (EAC) had filed a petition in the High Court (trial court). In the petition, they alleged violation of their constitutional rights under the Constitution as a result of non-payment of various amounts of money they alleged were due to them following the disbandment and dissolution of the EAC as well as the winding up of the EAAC. Their claim involved payment of emoluments accruing and owing to them as former employees of the defunct EAAC. They highlighted various provisions of the Constitution as the basis for their claim against the respondents.

The trial court dismissed the petition stating that it was *res judicata*, the issues that it raised having been the subject of consideration by courts of competent jurisdiction. Aggrieved by the decision of the trial court, the petitioners moved the Court of Appeal where the appeal was dismissed on grounds that the matter was time-barred as the real issue in contest was one based on contractual and statutory obligations and not violation of the Constitution *per se*. Aggrieved by that decision, the petitioners filed the instant appeal.

**Issues**

i. Whether a claim for restitution of emoluments and pensions under statute were constitutional in nature.

ii. Whether the Supreme Court could entertain a claim for restitution of emoluments and pensions.

**Held**

1. The trial court and the appellate court in holding that there was no violation of any constitutional rights and that the claim arose from a contract of employment proceeded to interrogate the claims against the East African Community Mediation Agreement Act (EACMAA), a statute, and not any part of the Constitution. None interpreted or applied the Constitution in any substantive manner.

2. Where a matter or claim was for restitution of emoluments and payments under statute, not of violated constitutional rights *per se,* then the Supreme Court would decline to assume jurisdiction under article 163(4)(a) of the Constitution. The instant claim was a civil claim against the respondents for unsettled or unpaid dues following the redundancy of the petitioners. The petitioners had not shown how the issues were of a constitutional nature, and hence, a requirement of them to make a determination on the same.
3. It was the applicability or otherwise of the EACMAA that was at the centre of the dispute and not the interpretation or application of the Constitution *per se*. None of the issues parties submitted on called for such interpretation or application of the Constitution in any substantive or even peripheral manner.
4. Having held that the issues before court were not constitutional in nature, there was no reason to delve into the other issues set out for determination. As long as EACMAA remained valid, the petitioners were at liberty to pursue their emoluments and pensions under that Act. The petitioners would as well pursue the trial court's order directed at the National Bank of Kenya to pay retired staff of the EAC from funds it was holding.
5. A simple, otherwise straight forward claim for emoluments and pensions should never have taken almost 40 years to commence and prosecute.
6. Since the court had no jurisdiction, it would not address the place of the principle of *res judicata* in constitutional matters as well as the retrospectivity or otherwise of the Constitution.

*Petition dismissed.*

***Orders***

*No orders as to costs.*

**Citations**

**Cases**

***Kenya***

1. *Alfred Asidaga Mulima, Charles Mararo Njoroge & Peter Kiio Kituku v Attorney General, Barclays Bank International Ltd, Barclays Bank Trust Co Ltd, Barclaytrust Channel Island Ltd, Barclaytrust International Ltd, Barclays Bank Kenya Ltd, Ministry of Finance, Ministry of Transport & Registrar General* Appeal 179 of 2015; [2017] KECA 766 (KLR); [2017] eKLR - (Mentioned)
2. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR); [2014] eKLR - (Explained)
3. *Charles Murugi Muriithi & 2 others v Attorney General* Petition 113 of 2009 Consolidated with Petition 44 of 2009 and Petition 48 of 2012; [2015] eKLR - (Explained)
4. *Christopher Maloba & William Nasubo v Attorney General* Civil Case No 743 of 2002 - (Explained)

5. *Emmanuel Mwakisha Mjawasi and Others v Attorney General* Cause 43 of 2010; [2012] KEELRC 171 (KLR); [2012] eKLR - (Explained)
6. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Explained)
7. *Midland Finance & Securities Globetel Inc v Attorney General & another* ? 359 of 2007; [2008] KEHC 3905 (KLR) - (Explained)
8. *Mulima, Alfred Asidaga & 2 others v Attorney General & 8 others* (Petition 113 of 2013) [2014] KEHC 930 (KLR) (Civ) (9 December 2014) (Judgment) - (Mentioned)
9. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] eKLR - (Explained)
10. *Nicholas Njeru v Attorney General & 8 others* (Civil Appeal 110 of 2011) [2013] KECA 217 (KLR) (14 October 2013) (Objection) - (Explained)
11. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] eKLR - (Explained)
12. *Samuel Amugune,William Mwangi Kaibere,Michael Ndungu Kibuku,Paul Mutee,William Majani (on Behalf of Themselves and Other Former Employees of the Former East African Community Number 105 Persons),Christopher Maloba & William Nasubo(Suing on Behalf of Themselves and Over 1000 Former Employees of the Defunct East African Community and Its Institutions) v Attorney General* (Civil Suit 1879 of 1997) [2013] KEHC 891 (KLR) (Civ) (29 November 2013) (Ruling) - (Explained)
13. *Wycliffe Gisebe Nyakina v Attorney General, Selection Panel for appointment of Chairperson & Members Teachers Service Commission* (Petition 403 of 2014) [2014] KEHC 8201 (KLR) (Constitutional and Human Rights) (29 August 2014) (Judgment) - (Explained)

***United Kingdom***

*Henderson v Henderson* (1846-60) All ER 378 - (Explained)

***India***

*Swamy Atmanda v Sri Ramakrishna Tapovanam* [2005] 10 SCC 51 - (Explained)

***Regional Court***

*Emmanuel Mwakisha Mjawasi and 748 others v Attorney General of Republic of Kenya* Civil Appeal 4 of 2011; [2012] RC 4 (KLR); [2012] eKLR - (Explained)

**Statutes**

***Kenya***

1. Civil Procedure Act (cap 21) - (Interpreted) section 7
2. Constitution of Kenya - (Interpreted) articles 20(1); 27; 28; 29(f); 35; 40; 41; 43; 47; 48; 57; 163(4)(a); Schedule 6; 7
3. Constitution of Kenya (Repealed) - (Cited) In general
4. East African Community Mediation Agreement Act (cap 4) - (Interpreted) sections 4; 5; 10
5. Limitation of Actions Act (cap 22) - (Interpreted) section 4
6. Pensions Act (cap 189) - (Cited) In general

**Advocates**

1. Mr. Lubullelah - Counsel for the Petitioners.
2. Mr. Allen Gichuhi - Representing 2nd to 6th Respondents.

August 4, 2020, the Court delivered the following Judgment:

## A. Introduction

1. The Petition of appeal dated 9th May 2019 is against the Judgment of the court of Appeal in *Civil Appeal No. 179 of 2015* (Githinji, Karanja & Musinga JJA) dated 24th February 2017, in which the appellate Court upheld the dismissal of the petitioners' claims in HC *Constitutional Petition No. 113 of 2013* (Mumbi, J). In the Petition aforesaid, the petitioners had alleged violation of their constitutional rights under articles 20 (1), 27, 28, 29 (f), 35, 40, 41, 43 47, 48 and 57 of the *Constitution* as a result of the non-payment of various amounts of money they allege were due to them following the disbandment and dissolution of the East African Community (EAC) as well as the winding up of the East African Airways Corporation (EAAC).

2. The petitioners state that they were all former employees of the EAAC, which fell under the ambit of the EAC. The EAAC ceased operations on 13th January 1977, and the petitioners were on 15th February 1977 declared redundant following a Board meeting resolution on 31st January 1977. Both the EAAC and the East African Airways Corporation Staff Provident Fund were subsequently wound up. Winding up proceedings had in that regard been commenced in Winding Up Cause No. 1 of 1977. Subsequently, the *East African Community Mediation Agreement Act* 1984, EACMAA, was enacted and which addressed the issue of provident funds due to all former employees of the defunct EAC.

3. The petitioners further claim that, as a consequence of their being made redundant, they were entitled to terminal benefits including payment from their provident fund, redundancy payment and other cessation of service benefits, including unpaid leave, payments in lieu of notice, outstanding or accumulated leave days and repatriation expenses. They thus filed *Petition No. 113 of 2013* aforesaid and in her Judgment, Mumbi, J dismissed the Petition. In making her determination, the learned Judge stated *inter alia* as follows;

> "I am therefore constrained to agree with the respondents that this petition is *res judicata*, the issues that it raises having been the subject of consideration by courts of competent jurisdiction. Although the petitioners in this matter were not party to the previous suit, the subject matter in this suit is the same as in the previous litigation, which was brought by parties suing on their own behalf and

> on behalf of other employees of the defunct East African Community and its corporations. The essence of *res judicata* is that litigation must come to an end, and this would not happen in respect of the former East African Community were all former employees of the Community and its corporations allowed to bring separate claims over the same issues." [Para. 103]

4. Aggrieved by the decision of the High Court, the petitioners moved the court of Appeal in *Civil Appeal No. 179 of 2015* where the court (Githinji, Karanja & Musinga JJA) upheld the Judgment of the High Court and subsequently dismissed the appeal. In doing so, the court of Appeal partly stated as follows;

   i. That the matter was *res judicata* in view of previous decisions by the High Court and the Industrial Court.

   ii. That the matter was time-barred as the real issue in contest was one based on contractual and statutory obligations and not violation of the *Constitution* per se.

   iii. That the rights that the petitioners were pursuing were not available in the *former Constitution* and therefore the *Constitution* 2010 could not be applied retrospectively.

   iv. That the learned Mumbi, J could not be faulted for not delving into the merits of the petitioners' claim since on the three issues above, she did not find in their favour.

5. The petitioners thereafter moved to this Court to seek its intervention in the matter by way of this appeal.

**B. Parties' Submissions**

**a. petitioners' submissions**

6. The petitioners have based their submissions on the following grounds set out in the Petition ie;

**a. Whether the East African Community Mediation Agreement Act of 1984 comprehensively addressed the issue of provident funds due to the petitioners**

7. The petitioners submit that the High Court and the court of Appeal failed to take into account the findings and pronouncements of a mediator, who had been appointed by the EAC States, upon dissolution of their Community on whose findings and pronouncements the *EACMAA* was based on. They add that their claims were not to be paid exclusively in accordance with the *EACMAA* and that therefore the said *Act* did not comprehensively

address the issues of their provident fund which they insist still had monies that they were entitled to.

**b. Whether the Appellate Court completely disregarded the evidence tendered before it**

8. The petitioners contend that the Superior courts below failed to take into consideration the Kenya government's admission in Parliament that it was indeed indebted to former EACC employees and that the existence of the EAC fund, with the Treasury as at 31st May, 2009, was testimony to that fact. They further submit that the courts ignored the fact that the petitioners had relied on the assurances made in Parliament by the 1st, 2nd & 9th respondent that they would be paid their dues before filing their suit. They further rely on the persuasive decision in *Midland Finance & Securities Inc. v. The Attorney General & Another* [2008] eKLR to urge that the State should not be allowed to change its mind on an issue where assurances have been made and parties have placed reliance on such pledges.

**c. Whether the High Court and Appellate Court erred in finding that the suit was res judicata**

9. The petitioners urge that the courts were wrong in finding that their suit was *res judicata* for the following reasons; that none of them were party to the previous suits, a fact acknowledged but disregarded by both courts; that the issues in their case were not substantially nor directly in issue in the previous suits; that the issues arising have not been fully determined in any of the previous suits; that the courts below failed to analyze the Judgments in the previous decisions to be able to correctly separate the issues raised before them. The petitioners further submit that the issues raised in the earlier suits must be distinguished with their claim. To this end, they urge that *Emmanuel Mwakisha Mjawasi & 748 others v Attorney General East African Court of Justice* Civil Appeal No 4 of 2011; *Samuel Amugune and 7 others v The Attorney General*, Civil Suit No 1879 of 1997 consolidated with *Christopher Maloba & William Nasubo v. The Attorney General* Civil Case No 743 of 2002; and *Emmanuel Mwakisha Mjawasi and others v The Attorney General*, Industrial Court of Kenya Cause No 43 of 2010, concerned other employees of the defunct EAC and not themselves.

**d. Whether the matter is time-barred**

10. The petitioners submit that their suit is not time-barred as there is a continuing trust between them and the respondents that is not subject to a time limit; that there are allegations of fraud and corruption which the 7th respondent has tasked the Ethics & Anti-Corruption Commission, EACC, to investigate including the allegation that the 2nd to 6th respondents effected only part payment to the petitioners. In addition, that the two Superior courts found there was a constitutional breach of the right to information and therefore the

*Limitation of Actions Act* cannot override constitutional dispositions and contentions. The petitioners further allege that since the obligations imposed by the *EACMAA* have not been discharged to the satisfaction of all the petitioners, then the cause of action is still live, regardless of the duration before which the claim is brought before the courts.

**e. Whether the Constitution 2010 applies retrospectively**

11. The petitioners submit that transitional provisions of the *Constitution*, in particular sections 6 and 7 of the Sixth Schedule of the *Constitution* provide that existing obligations and existing laws should be modified to conform with the *Constitution*, 2010. Furthermore, it is submitted that the courts have applied the provisions of the *Constitution* 2010, to situations arising prior to its promulgation, to give a remedy to historical and transitional injustices.

**b. 1st respondent's submissions**

12. The respondents filed their submissions in response to the allegations made by the petitioners and argued as follows:

**a. Whether the court was bound by the East African Community Mediation Agreement Act of 1984**

13. The 1st respondent submits that the *EACMAA* and the appropriate *Pensions Act* provided for the emoluments and pensions of former employees of the EAC, including the petitioners. It is further submitted that the preamble to the *EACMAA* provided that the *Act* would be deemed to have come into operation retrospectively in 1984 even though it was enacted in 1987. This, it was submitted, there was evidence that *EACMAA's* objective was to facilitate the division of assets and liabilities across the three EAC countries.

14. It was also submitted that sections 4 and 5 of the *EACMAA* and the schedules therein are applicable to the instant matter, as they both relate to the making of financial provisions for payment, out of the Consolidated Fund, of such sums as the Government was required to pay out under the terms of the *EACMAA*.

**b. Whether the East African Community Mediation Agreement Act of 1984 comprehensively addressed the issue of provident funds due to the petitioners**

15. The 1st respondent submits and agrees with the findings of the Superior courts that section 10 of the *EACMAA* addresses the issue of pensions and provident funds. He thus submits that the court of Appeal was correct in finding that the *EACMAA* addressed all issues relating to pensions and that the trial Court was not exclusively bound by it neither was that court bound to consider, which it did not, the other material and documents relating to the petitioner's claim, having determined all other relevant and substantive issues.

**c. Whether the Appellate Court erred in finding that the suit was res judicata**

16. The 1st respondent relied on the provisions of section 7 of the *Civil Procedure Act*, and particularly at Explanations 4 & 6 on the issue of *res judicata*. In submitting that the matter presently before this Court had been heard and determined by other courts of competent jurisdiction, the 1st respondent relied on the determination of Lenaola J (as he then was) in *Wycliffe Gisebe Nyakina v. The Attorney General* [2014] eKLR where the learned Judge issued a caution against litigants seeking to re-litigate civil and other issues disguised as constitutional matters.

17. Further, the 1st respondent submitted the cases of *Henderson v Henderson* (1846-60) All ER 378, *Swamy Atmanda v Sri Ramakrishna Tapovanam* [2005] 10 SCC 51 and *Nicholas Njeru v Attorney General & 8 others* [2013] eKLR where courts had considered and expressed themselves with regard to the issue of *res judicata*, and went on to submit that the present matter falls within the ambit of the holdings in these decisions.

**d. Whether the matter was statutorily time-barred**

18. The 1st respondent submits that the petitioner was time barred pursuant to section 4 of the *Limitation of Actions Act*, having been filed some 30 years after the cause of action arose.

**e. Whether the Appellate Court failed to determine all the issues raised before it**

19. It is submitted by the 1st respondent that, once a Court makes a pronouncement on a preliminary issue that determines a matter, as was the case presently, the court need not determine any of the other issues raised. He thus urges that, once the court decided that the suit was *res judicata*, the other issues framed for determination stood moot. However, they submit that the other issues raised were in any event adequately dealt with in Winding Up Petition No 1 of 1977 as well as under the *EACMAA*.

**f. Whether the Constitution 2010 applies retrospectively**

20. The 1st respondent submits that the Superior courts below rightfully found that the *Constitution* cannot have a retrospective application. They relied on this courts' decision in SC Application No 2 of 2012 *SK Macharia v The Kenya Commercial Bank Limited & 2 others*; [2012] and *Charles Murugi Muriithi & 2 others v Attorney General* (2015) eKLR where in the latter case, the High Court held, *inter alia* that;

> " ...this Court cannot enforce new rights created under the new Constitution unless those rights are recognized and protected under the previous Constitution."

**c. 2nd – 6th respondents' submissions**

21. The above respondents filed their submissions in response to the allegations made by the petitioners and on the issues raised by the latter, they stated as follows:

**a. Whether the East African Community Mediation Agreement Act of 1984 comprehensively addressed the issue of provident funds due to the petitioners**

22. The 2nd – 6th respondents submit on this issue that Section 10 of the *EACMAA* deals extensively with pensions and provident funds. They therefore agree with the findings by the Superior courts below that the *EACMAA* addresses the issue of provident funds' payments, including to the petitioners, contrary to their assertion in that regard. To conclude on this issue, they urge that the petitioners received pension and provident payments as is required by the *Act* and have failed to produce evidence in support of their assertions that they have never been paid.

**b. Whether the High Court and the Appellate Court erred in finding that the suit was res judicata**

23. The 2nd – 6th respondents highlight parallel cases that have been decided by courts on the same issues and between the respondents and/or parties 'suing for themselves and on behalf of all the corporations' ex-staff'. They urge in that regard that, it is a well laid principle in law that no party can be allowed to re-litigate where a court of competent jurisdiction has determined a matter. They thus refute the petitioners' submission that the principle of *res judicata* does not apply to constitutional petitions and argue that courts must apply the principle sparingly in constitutional petitions while guarding against litigants who are clearly evading the application of the doctrine by introducing new causes of action by filing constitutional matters as was stated by Lenaola J (as he then was) in *Wycliffe Gisebe Nyakina v The Attorney General* [2014] eKLR.

**c. Whether the matter is time-barred**

24. The 2nd – 6th respondents submit that the EACC ceased to operate on 15th February, 1997, and therefore at the time of filing the Petition at the High Court, 36 years had lapsed from the time the cause of action had arisen and therefore the *Limitation of Actions Act* properly applied and the proceedings herein ought to be declared time-barred.

**d. Whether the Appellate Court failed to determine all the issues raised before it**

25. It is submitted by the 2nd – 6th respondents that once a Court makes a pronouncement on a preliminary issue that determines the case, as was the case in this matter, the court need

not determine any of the other issues raised. They thus urge that, once the court made a determination that the suit was *res judicata*, the other issues framed for determination stood moot.

**e. Whether the Constitution 2010 applies retrospectively**

26. The 2nd – 6th respondents submit that the courts have rightfully and routinely found that the *Constitution* cannot have a retrospective application. They relied on this courts' decision in SC Application No 2 of 2012 *SK Macharia v The Kenya Commercial Bank Limited & 2 others*; [2012] in support of that contention.

**C. Analysis and Determination**

27. From the pleadings and submissions five (5) issues emerge for our determination. The issues are highlighted as follows;

    (a) Whether the issues before the court are constitutional in nature;

    (b) Whether the matter was *res judicata*;

    (c) Whether the matter is time barred

    (d) Whether the *Constitution* applies retrospectively; and

    (e) What reliefs are available to the Parties?

**Whether the issues before the court are constitutional in nature**

28. The claim by the petitioners involves primarily the payment of emoluments accruing and owing to them as former employees of the defunct EAAC. They allege in that regard that the said emoluments are unpaid, or were partly paid, and that they remain due and outstanding to many former employees of the EAAC. They further allege that the withholding of these funds amounted to a violation of their constitutional rights as pronounced in articles 20(1), 27, 28, 29(f), 35, 40, 41, 43 47, 48 and 57 of the *Constitution*.

29. In that context, this court has, on various occasions, had the onus of determining whether the issues presented before it have attained the requisite constitutional muster as provided under articles 163(4)(a) of the *Constitution*. But what issues were in contest in the present case?

30 In *Petition No 113 of 2013*, the petitioners highlighted various provisions of the Constitution paras. [1] and [6] thereof as the basis for their claim against the respondents. The petitioners specifically claimed that non-payment of their pensions and emoluments

violated their constitutional rights, and that they were entitled to the reliefs sought. The High Court in determining the dispute partly stated as follows (per Mumbi, J):

> "I must express some disquiet about the petitioners lodging this matter as a constitutional petition at this point time. What is at the core of their petition, as I understand it, is certain unliquidated claims that they had in respect of their employment with the defunct East African Airways Corporation. With regard to the pensions and provident funds, the court in *Samuel Amugune & 109 others v The Attorney General* (*supra*) addressed itself to the issue and found that the issue of pensions and provident funds had been addressed in the *East African Community Mediation Agreement Act*, a finding that I agree with in the analysis above." [Para. 106] [Emphasis added]

31. The learned Judge went on to find that the claim by the petitioners emanated from the *EACMAA* and its provisions with regards to the settlement of emoluments of former EAAC employees. the court also held that these issues could have been adequately settled and determined under statutory provisions, and any monies due would have been recoverable under Winding Up Cause No 1 of 1977. [See para 107]. The Judge added that there was therefore no constitutional question that the court would have been alluded upon to settle. In any event, that, other former employees of EACC had sought determination of similar questions for in *Emmanuel Mwakisha Mjawasi & others v The Attorney General* [2012] eKLR at the Industrial Court. In that case, allegations of breach of articles 27, 41, 43, 47 and 57 of the *Constitution* had been made. the court of Appeal on its part, rendered itself as follows:

> "It is doubtful whether there was any violation of any constitutional rights as was alleged by the Appellants as the appellants' claim arose from [a] contract of employment".

35. Both Superior courts below on making the above findings then proceeded to interrogate the appellants' claims against the *EACMAA*, a statute, and not any part of the *Constitution* and none interpreted or applied the *Constitution* in any substantive manner.

32. On our part, we have had occasion, previously, to deliberate on the constitutionality of matters before us, as well as our jurisdictional scope and sphere, and make a determination on the same. Thus in SC Petition No 5 of 2014 *Lemanken Aramat v. Harun Meitamei*

*Lempaka & 2 others*; [2014] eKLR (Aramat) this Court considered its jurisdictional nature and held that;

> " From the principles thus stated, it is clear to us that this Court ought to maintain constant interest in the scheme and the quality of jurisprudence that it propounds over time, even where it is constrained to decline the jurisdiction to deal with any particular questions. Whatever option it takes, however, this Court ought always to undertake a methodical analysis of any issues it is seized of, and ought always to draw the whole dispute to a meaningful conclusion, bearing directions and final orders, in the broad interests of both the parties, and of due guidance to the judicial process and to the courts below."
>
> [Para 111] [Emphasis added]

33. Further, in SC Petition No 3 of 2012 *Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & Another*; (2012) eKLR (Nduttu), we noted on the true intent of article 163(4)(a) of the *Constitution* thus:

> " This article must be seen to be laying down the principle that not all intended appeals lie from the court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the *Constitution* can be entertained by the Supreme Court ....
>
> Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application." [Para 27]

34. Furthermore, we went on to state that on article 163(4)(a);

> " ... appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the *Constitution*. In other words, an appellant must be challenging the interpretation or application of the *Constitution* which the court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the *Constitution*, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a)." [para 28]

35. Also, in *Nduttu*, it was stated:

> " What then is a case involving the interpretation or application of the *Constitution*? Does the mere allegation by an intending appellant that a question of

constitutional interpretation or application is involved automatically, without more, bring an appeal within the ambit of article 163(4)(a) of the *Constitution*? A two-judge bench of this Court had occasion to deal with this issue in the case of *Erad Suppliers & General Contractors Limited National Cereals & Produce Board* SC Petition No 5 of 2012. In disposing of this issue among others, the court opined as follows and we quote:

> "In our opinion, a question involving the interpretation or application of the *Constitution* that is integrally linked to the main cause in a superior Court of first instance is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court"". [Para 25] (Emphasis added)

36. It is therefore, from the foregoing, manifestly clear that, where a matter or claim is for restitution of emoluments and payments under statute, not of violated constitutional rights per se then this Court would decline to assume jurisdiction under article 163(4)(a). The present claim is certainly but a civil claim against the respondents for unsettled or unpaid dues following the redundancy of the petitioners. The learned Judges of the superior courts were thus most erudite in their deliberation when they stated that the petitioners had not shown how the issues were of a constitutional nature, and hence, a requirement of them to make a determination on the same. They were equally perturbed, as we are, as to why the petitioners would seek constitutional reprieve for issues that were and are clearly about statutory application, and have no nexus whatsoever with violation of constitutional rights. We thus reiterate the fact that it was the applicability or otherwise of the *EACMAA* that was at the centre of the present dispute and not the interpretation or application of the *Constitution* per se. Indeed, of the four issues that parties submitted on, none calls for such interpretation or application of the *Constitution* in any substantive or even peripheral manner.

37. Having held as above, we do not see any reason to delve into the other issues set out for determination save the following:

38. Firstly, it is obvious to us that, as long as *EACMMA* remains valid, the petitioners are at liberty to pursue their emoluments and pensions under that *Act*.

39. Secondly, we heard Mr. Allen Gichuhi for the 2nd – 6th respondents to be saying that documents relating to the dispute have been destroyed but he, again stated that in Emmanuel Mwakisha Mjawasi, Mumbi, J directed the National Bank of Kenya to pay retired staff of the EAC presumably, including the petitioners, from funds it was holding. Mr Lubullelah for the petitioners conceded that point but submitted that

> " the State has not acted on this order".

The petitioners may well pursue that order to obtain relief. For avoidance of doubt, the learned Judge ordered as follows:

> " For the sake of petitioners and others who may have an entitlement to the funds realized from the realization of the assets of the East African Airways Corporation currently held in the Official Receivers account with National Bank, I direct the office of the Attorney General within ninety days (90) days of today to publish, in a newspaper with wide circulation nationally:
>
> 1. The names and addresses of former employees of the defunct East African Airways Corporation who received dividends seven times from the office of the Official Receiver;
>
> 2. The names and addresses of former employees of the defunct East African Airways Corporation who have not yet received/collected their monies from the Official Receiver;
>
> 3. The total amount lying in the Official Receiver's account with National Bank in respect of such persons."

44. Thirdly, the issue of delay in filing and prosecuting the present proceedings caused us discomfort. Mr Lubullelah submitted that 40 years (or 36 years') delay is excusable in the circumstances. We disagree. A simple, otherwise straight forward claim for emoluments and pensions should never have taken that long to commence and prosecute.

41. Lastly, we have been persuaded that, having found that we have no jurisdiction, we should not address the place of the principle of *res judicata* in constitutional matters as well as the retrospectivity or otherwise of the *Constitution* 2010.

**D. Costs**

42. On the issue of costs, this court has previously settled the law on award of costs, deeming that costs follow the event. Further, that a Judge has the discretion in awarding the same. This

was our decision in the case of Petition No 4 of 2012 *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*; [2014] eKLR where we stated:

> "It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation."
>
> ...[Although] there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant."

43. We have, in applying the above principle, considered that the petitioners retired in 1977 and all evidence points to the fact that they have not been paid their emoluments and pensions for reasons that were all explained in previous litigation on the same issue. Our view is therefore that, to punish them with an award of costs in favour of the respondent would not be efficacious. In that event, we shall exercise discretion and order that each party should bear its costs of this appeal.

**E. Disposition**

44. Consequent upon our findings above, the final orders are that;

    i. The Petition of Appeal No 17 of 2019 dated 9th May 2019 is hereby dismissed;

    ii. Each party shall bear its costs.

45. Orders accordingly

**In the Matter of Speakers, County Assemblies of Nandi, Kericho & Meru Counties (Reference 2 of 2019) [2020] KESC 41 (KLR) (4 August 2020) (Advisory Opinion)**

**Supreme Court of Kenya**

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

Neutral citation: [2020] KESC 41 (KLR)

***Jurisdiction*** *– jurisdiction of the Supreme Court – advisory opinion jurisdiction - what were the circumstances in which the Supreme Court would exercise its advisory opinion jurisdiction – Constitution of Kenya, 2010 article 163(6)*

**Brief facts**

The Speakers of the County Assemblies of Nandi, Kericho and Meru (the applicants) sought the Supreme Court's advisory opinion on whether the Constitution had the power to limit the possible grounds for removal of the speaker of a County Assembly.

**Issues**

What were the circumstances in which the Supreme Court would exercise its advisory opinion jurisdiction?

**Held**

1. A matter for advisory opinion had to be one of great public importance which bore novelty, and ill-fits the conventional dispute-settlement scheme and called for expeditious resolution; or it had to be a matter that raised a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. The matter must therefore be urgent portending a paralysis to the institution concerned unless it was resolved immediately.
2. The Supreme Court had to guard against improper transformation of normal dispute issues for ordinary litigation into advisory opinion causes, as the court had to be disinclined to take a position in discord with the core principles of the Constitution.
3. There was a contested justiciable issue that had been canvassed before the High Court although it was not clear if it had been substantially determined by the court. As such the issue could only come to the Supreme Court through the appellate process if appropriate and necessary. If the High Court could not provide relief, the parties should seek legislative intervention. The instant matter was not only justiciable fit for trial in the lower courts in the normal way but also *res judicata*. It was incompetent and an abuse of the court process.

*Reference dismissed; each party was to bear its own costs.*

**Citations**

**Cases**

***Kenya***

1. *Council of Governors & 47 others v Attorney General & 6 others* Reference 3 of 2019; [2019] KESC 65 (KLR); [2019] eKLR - (Explained)

2. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] eKLR; [2011] 2 KLR 32 - (Explained)
3. *In the matter of the principle of gender representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] eKLR; [2012] 3 KLR 718 - (Explained)
4. *In the Matter of the Speakers of the 47 County Assemblies* Advisory Opinions Application 3 of 2014; [2016] KESC 7 (KLR); [2016] eKLR - (Explained)
5. *Secretary Isiolo County Assembly, Deputy Speaker Isiolo County Assembly & Chief Whip (Majority) Isiolo County Assembly v Speaker (Mohammed Tubi) Isiolo County Assembly* Petition 418 of 2014; [2014] KEHC 2192 (KLR); [2014] eKLR - (Explained)
6. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR); [2013] eKLR - (Explained)

**Statutes**

***Kenya***

1. Constitution of Kenya article 47, 50(1); 50(2)(c); 50(2)(f); 50(2)k); 50(2)(l); 61; 159(2); 163(6); 176(1); 177; 178; 181; and 185 - (Interpreted)
2. County Governments Act (cap 265) section 3(d); 7(b); 11 - (Interpreted)
3. Fair Administrative Action Act (cap 7L) In general - (Cited)
4. Supreme Court Act (cap 9B) section 3, and 13 - (Interpreted)
5. Supreme Court Rules, 2012 (cap 9B) rule 41 - (Interpreted

**Advocates**

None mentioned

August 4, 2020, the Court delivered the following Advisory Opinion:

## A. Introduction

1. In their Reference dated 10th June 2019, the Speakers of the County Assemblies of Nandi, Kericho and Meru (the Applicants) seek this Court's advisory opinion under Articles 163(6) of the *Constitution* and Sections 3 & 13 of the *Supreme Court Act*, 2011. The Reference is premised on the provisions of articles 6(1), 159(2), 176(1), 177, 178, 181 & 185 of the *Constitution* as well as Sections 3(d), 7(b) & 11 of the *County Government Act* 2012 and is supported by the affidavit of Joshua Kiptoo, the Speaker, Nandi County Assembly.

2. The advisory opinion is sought on the following issues;

   (a) Whether the *Constitution* limits the possible grounds for removal of the Speaker of a County Assembly;

(i) If it does, are the grounds similar to those for the removal of a Governor under Article 181 of the *Constitution* or other state officers?

(ii) Therefore, what are the grounds for removal of the Speaker of a County Assembly?

(b) Whether there are fair hearing and administrative measures and/or procedural safeguards to secure the process of the removal of a Speaker of a County Assembly in accordance with article 47 as read with article 50(1) & (b), (c), (f), (k) and (l) of the *Constitution* and the *Fair Administrative Action Act* 2016.

**B. Applicants Case**

3. On jurisdiction, the Applicants contend that under Article 163(6) of the *Constitution* as read with rule 41 of the *Supreme Court Rules* 2012, this court has the requisite jurisdiction to render an Advisory Opinion in this matter. In support of that submission, the Applicants rely on this court's decisions *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR; *In the Matter of Interim Independent Electoral Commission* (2011) eKLR; *Council of Governors v Attorney General & 7 others* [2019] eKLR; and *In the Matter of the Speaker of the Senate & another* [2013] eKLR

4. On the merits of the matter, the Applicants' case is that unlike other appointive or elective positions of State officers where there are provisions providing grounds for the removal from office stated in either the *Constitution* or statute, there are no express provisions in the *Constitution* or in any statute on the grounds for the removal of a Speaker of a County Assembly. Section 11 of the *County Governments Act* only provides for the removal procedure but not the grounds for removal. They further submit that this lacuna leaves room for abuse of the County Assemblies' authority hence the need for an Advisory Opinion in this matter to provide for a unified system to govern the process of the County Speakers' impeachment.

**C. Attorney General's Submissions**

5. In response, the Attorney General submitted that this Reference is incompetent as the matter is *res judicata*, the same issues raised herein having been determined by this Court in *Speakers of the 47 County Assemblies v Commission on Implementation of the Constitution & 2 others* (2016) eKLR. Like in this matter, one of the issues in that Reference was what constitutes valid grounds and the procedure for the removal of a Speaker of a County Assembly under section 11 of the *County Governments Act*. Again, like in that Reference, the issue in this one is not only justiciable but it does not raise any novel constitutional question

that merits this court's intervention. On those submissions, the Attorney General urged this court to decline to render the Advisory Opinion sought.

**D. Analysis**

6. The jurisdiction that Article 163(6) vests in the Supreme Court to offer Advisory Opinion is circumscribed. As this Court stated *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Sup Ct Appl No 2 of 2012, [2012] eKLR [para 25] the objective of an Advisory Opinion is

> " ... to unravel a legal uncertainty in such a manner as to promote the rule of law and the public interest." This Court added *in the Matter of the Speaker of the Senate & another* [2013] eKLR, that the matter for Advisory Opinion must be one of great public importance which "bears novelty, and ill-fits the conventional dispute-settlement scheme" and calls for expeditious resolution; or it must be a matter that "raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement." The matter must therefore be urgent portending a paralysis to the institution concerned unless it is resolved immediately."

**E. Determination**

7. Flowing from these established legal principles, we find that this matter does not qualify for an Advisory Opinion. This is because *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR Advisory Opinion No 2 of 2012, this court warned at paragraph 18 that:

> " The Supreme Court must guard against improper transformation of normal dispute issues for ordinary litigation into Advisory Opinion causes, as the Court must be disinclined to take a position in discord with the core principles of the Constitution."

8. This Reference seeks an Advisory Opinion on the grounds and procedure for removal of the Speaker of a County Assembly. That issue was raised in the said matter of *Speakers of the 47 County Assemblies v Commission on Implementation of the Constitution & 2 others*; Advisory Opinion Reference No 3 of 2014 where this Court held that the issue having been raised in High Court Constitutional Petition No 418 of 2014—[*The Secretary Isiolo County Assembly & Others v. The Speaker Isiolo County Assembly*]—it was a contested justiciable issue that should and had been canvassed before the High Court although it was not clear if it had been substantially determined by the court. As such the issue could only come to this Court through the appellate process if appropriate and necessary. If the High Court cannot

provide relief, the parties should seek legislative intervention. This matter is therefore not only justiciable fit for trial in the lower courts in the normal way but also *res judicata*. It is accordingly incompetent and an abuse of the court process.

9. In the circumstances, we decline to exercise our discretion to assume jurisdiction in this matter and we accordingly dismiss it. Although the matter is justiciable and already *res judicata*, since it is grounded on public interest, we hold that each party should bear its own costs.

**F. Final Orders**

(a) The Reference dated 10th June 2019 and filed on 17th June 2019 is hereby dismissed;

(b) Each party to bear its own costs.

**Bellevue Development Company Ltd v Gikonyo & 3 others (Petition 42 of 2018) [2020] KESC 43 (KLR) (15 May 2020) (Judgment)**

**Supreme Court of Kenya**

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

Neutral citation: [2020] KESC 43 (KLR)

***Judicial Officers*** *– judicial immunity – rationale and purpose – judicial immunity vis-à-vis impunity – where it was claimed that judicial officers acted fraudulently and dishonestly - what was the distinction between judicial immunity and impunity - what was the nature of judicial immunity - Constitution of Kenya, 2010, article 160(5).*

***Judicial Officers*** *– judicial immunity – factors to consider in determining the existence of judicial immunity – acting in good faith, acting in excess of jurisdiction and seizure of absent jurisdiction - acting in good faith vis-à-vis bad faith - acting in excess of jurisdiction vis-à-vis seizure of absent jurisdiction - when would a person be considered to have acted in bad faith – what was the distinction between acting in excess of jurisdiction and seizure of absent jurisdiction - Constitution of Kenya, 2010, article 160(5).*

***Judicial Officer*** *– judges – judges' conduct – where a litigant made claims of fraud, dishonesty and perversity against a judge - what was the procedure to be followed - Constitution of Kenya, article 168.*

***Words and Phrases*** *- good faith – definition of good faith - a state of mind consisting in honesty in belief or purpose, faithfulness to one's duty or obligations, observance of reasonable commercial standards of fair dealing in a given trade or business, or absence of intent to defraud or to seek unconscionable advantage - Black's Law Dictionary, Ninth Edition at page 713.*

**Brief facts**

There was a dispute between the petitioner and the 4th respondent, and an arbitrator was appointed to determine the dispute. The arbitrator issued directions as to when the statement of claim was to be filed. The 4th respondent failed to comply with the directions and instead, filed an application seeking extension of time to file its statement of claim. The arbitrator did not issue any directions or orders on that application. The 4th respondent later on served the arbitrator and the petitioner with its statement of claim. The arbitrator issued a ruling stating that he had the jurisdiction to determine the dispute. Aggrieved by that decision, the petitioner filed a suit at the High Court which held that there was no valid claim before the arbitrator. No appeal was preferred against that judgment. Later on, the 3rd respondent was appointed as the sole arbitrator to handle the dispute. The petitioner subsequently filed an application at the High Court seeking to stop the arbitration proceedings.

The 1st respondent issued a ruling determining that the arbitration proceedings before the previous arbitrator were distinct from those pending before the sole arbitrator and that they could proceed. In June 2014, the petitioner filed an application for review of the decision of the 1st respondent. The 2nd respondent, presiding over the review application dismissed the application. Aggrieved by the decisions of the 1st and 2nd respondents, the petitioner filed a petition at the High Court which

held that it lacked the jurisdiction to hear and determine the matter as it sought to enquire into decisions of courts of equal status. The petitioner filed an appeal at the Court of Appeal, however, it did not pursue the appeal despite being issued with a hearing notice. The petitioner also filed an appeal from the judgment of the High Court contending that the 1st and 2nd respondents had acted in bad faith and breached its rights to fair trial. The Court of Appeal dismissed the petitioner's appeal thus leading to the filing of the instant appeal.

**Issues**

i. What was the procedure to be followed by a litigant who made claims of fraud, dishonesty and perversity against a judge?
ii. What was the nature, rationale and purpose of judicial immunity?
iii. What was the distinction between judicial immunity and impunity?
iv. When would a person be considered to have acted in bad faith?
v. What were the factors to consider in determining the existence of judicial immunity?
vi. What was the distinction between acting in excess of jurisdiction and seizure of absent jurisdiction?

**Relevant provisions of the Law**

**Constitution of Kenya, 2010**

**Article 160(5)**

*A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.*

**Held**

1. Article 160(5) of the Constitution entrenched the immunity of judicial officers who acted in good faith. The immunity granted by article 160(5) encapsulated protection from legal proceedings founded on acts committed or omissions made by judges in the lawful performance of their judicial functions.
2. The concept of judicial immunity was not without foundation. Judicial immunity was an important tenet in the delivery of justice and the maintenance of the rule of law. For the proper administration of justice, judges should freely express themselves in matters brought before them. A judge, as well as other judicial officers, were required to have confidence in carrying out their judicial functions without the fear that they would be prosecuted or harassed for their acts or omissions.
3. The rationale for judicial immunity was the preservation of independent decision-making capabilities of judicial officers; immunity for judicial acts was thus necessary so that judicial officers could make the sometimes controversial decisions that were their judicial obligation and mandate to make, independent of personal considerations, including fear of personal liability. The concept of judicial immunity was also an important aspect of judicial independence under the doctrine of the separation of powers. The protection offered to

judicial officers in article 160(5) of the Constitution was inherent in the independence of the Judiciary as a state organ within the doctrine of separation of powers.

4. It would be repugnant to the cause of justice if judges acted in fear of legal actions being brought against them for decisions they made in the course of discharging their mandate. The immunity granted by article 160(5) of the Constitution was not necessarily for the benefit of the judicial officer concerned. It was for the public and in particular for litigants appearing before the courts.

5. Besides freedom of thought, expression and action, the other cardinal factor encapsulated in judicial immunity was finality. It would be a travesty of justice if disgruntled litigants were permitted to sue judges who ruled against them thus prolonging litigation unnecessarily and personalizing matters that judges ought not to have had a personal interest in.

6. There was a clear distinction between judicial immunity and impunity, and it was important that judicial officers understand that they needed not find themselves on the side of latter. Article 160(5) of the Constitution drew the line between immunity and impunity; the line crossed where acting lawfully and in good faith met willful and negligent abandonment of the oath of office to uphold the integrity and independence of the Judiciary and to dispense justice without fear or favour. Article 160(5) was not blind to that inherent distorted character between judicial immunity and impunity, and thus provided a resonating standard for judicial officers to act according to the tenets enunciated under the Constitution; to ensure that there was rule of law, protection of fundamental rights and freedoms in the Bill of Rights and to do justice to all. The latter point spoke to the lawful action qualification as it did to the good faith expectation.

7. Judicial immunity was meant to provide protection to judicial officers from third parties' interference, influence or obstruction. Judicial immunity was also necessary to protect the reputation and perception of the Judiciary, to maintain the trust of the public and to ensure transparency and accountability. A judge acting in his official judicial capacity thus enjoyed immunity from liability for judicial acts performed within the scope of their jurisdiction.

8. Article 160(5) of the Constitution granted judicial officers immunity if they acted in good faith. The antithesis to acting in good faith would be to act in bad faith, with a willful intent to act dishonestly or unfaithfully in the performance of judicial acts. Bad faith included malicious or fraudulent, dishonest or perverse conduct as well as gross illegality. Bad faith existed only when the office-bearer acted with the specific intent to deceive, harm or prejudice another person or by proof of serious or gross recklessness that revealed a breakdown of the orderly exercise of authority so fundamental that absence of good faith could be reasonably inferred and bad faith presumed.

9. Besides acting in good faith there was a two-tiered approach to determining whether judicial immunity applied:-

   a. whether the acts were judicial acts; and
   b. whether the acts were acts performed by the judge in his judicial capacity.

10. Regardless of any alleged violation of due process, procedural errors did not deprive a judge of immunity because due process necessarily attached to any act performed in a judicial capacity.
11. There was a distinction between excess jurisdiction and clear and deliberate seizure of absent jurisdiction; the former connoted that the judicial officer did not apprehend his jurisdictional limits, and the latter elaborated the deliberate corrupt or malicious seizure of jurisdiction by judicial officers, with obvious consequences on the latter.
12. Save in a clear case of deliberate and unlawful usurpation or seizure of jurisdiction where none existed or some other glaring impropriety, if a judge acted in the honest belief that his act was within his jurisdiction, he was protected. While acting in that belief, the protection continued notwithstanding any error in his reason for doing the act or his method of doing it. As such, if a judge acting in his capacity as a judge, acted in good faith in the lawful performance of his duties, he had absolute immunity even when he acted in excess of his jurisdiction. The protection or immunity of a judge also went into administrative acts. The immunity accorded to a judge was absolute in the meaning attributed to the expression by article 160(5) of the Constitution.
13. Fraud was a serious quasi-criminal imputation, a judge whose conduct was fraudulent, dishonest or perverse, was a disgrace to the cause of justice. A judge's act of bad faith undermined his or her integrity and fidelity to the judicial oath of office. Under the law, the remedy for a litigant making allegations of fraud, dishonesty and/or perversity lay, not in a suit against such a judge but in a petition to the Judicial Service Commission for removal from office under article 168 of the Constitution. Article 168 had an elaborate procedure which entitled both a complaining party and the subject judge the opportunity, both at the Commission and in a tribunal set up under article 168(5) thereof, to a fair hearing. A suit directly against a judge for alleged misconduct or misbehavior was never an expectation of the drafters of the Constitution.
14. A judge remained unquestionably immune as long as he did not take actions that intentionally and plainly prevented litigants from enjoying their constitutional and statutory rights. The duty imposed on a judge was only to recognize that his own decisions could sometimes be in error and to ensure that orders affecting important constitutional rights could be reviewed or appealed in another court. However, the conduct of a judge who acted *mala fides* or unlawfully could trigger proceedings before the Judicial Service Commission and could ultimately lead to his removal thus the need for extreme care in the enjoyment of immunity.
15. It could not be said that the petitioner was denied an opportunity to seek appellate or alternative relief from what it considered an affront to its constitutional right to a fair hearing under article 50 of the Constitution. Other than legal proceedings against the 1st and 2nd respondents, various avenues were available to it, and it was up to it to decide which avenue best suited its interests. The petitioner proffered an appeal to the Court of Appeal. For

reasons unknown or unexplained, it chose not to pursue that appeal but instead filed another cause. The petitioner thus knew and initially chose the appeal mechanism as a means of seeking relief but later abandoned it. It could not therefore be heard to claim that it was denied an opportunity to be heard and that there was a violation of its constitutional rights under article 50.

16. No evidence was provided to support the claim that in dismissing the petitioner's applications, the 1st and 2nd respondents acted in bad faith and without jurisdiction thus violating the petitioner's rights to a fair trial in its dispute with the 4th respondent. That was not the act of a serious litigant or complainant even if the 1st and 2nd respondents had no judicial immunity.

17. Suing a judicial officer for rendering an unfavourable decision rather than appealing or seeking a review was a misconception and a step in the wrong direction on the part of the petitioner. At times, litigants could feel aggrieved by some of the decisions that judicial officers made. However, that was not in any way an exoneration of the petitioner in its actions. To seek relief by apportioning an unwarranted attack on the 1st and 2nd respondents, who were lawfully exercising their judicial function, was not only tantamount to harassment and intimidation of the judicial officers, but also a red herring that the petitioner conceived to deny or delay the 4th respondent's right to a remedy under their contract.

18. To amount to impunity, a judge's act had to be a clear and deliberate seizure of absent jurisdiction. If proved, such acts would not only be an attack on the integrity and conduct of the 1st and 2nd respondents, but also a reprehensible affront to the cause of justice and the independence of the Judiciary. Such acts were tantamount to tarnishing the image of the Judiciary, violating its integrity and putting all judicial officers into disrepute. A mere statement that the 1st and 2nd respondents acted with impunity did not suffice. The petitioner had not brought forth any iota of evidence, let alone credible evidence that the 1st and 2nd respondents acted in bad faith or against the law.

19. The 1st and 2nd respondents as judges of the High Court acted in accordance to and within their jurisdictional limits under article 165 of the Constitution. They could have rendered decisions which were unpalatable to the petitioner, but that too was within their judicial function. The petitioner chose to challenge those decisions through an unorthodox approach that could not be lauded but ought instead to be condemned.

*Petition dismissed; petitioner to bear the costs of all the respondents, both in the court and the superior courts below.*

**Citations**

**Cases**

***Kenya***

1. *AOO & 6 others v Attorney General & another* Petition 570 of 2015; [2017] KEHC 6022 (KLR); [2017] eKLR - (Explained)

2. *Bellevue Development Company Limited v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties)* Civil Suit 371 of 2016; [2017] KEHC 8344 (KLR); [2017] eKLR - (Mentioned)
3. *Bellevue Development Company Limited v Vinayak Builders Limited & another* Civil Case 571 of 2011; [2014] eKLR - (Mentioned)
4. *Bellevue Development Company Ltd v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties)* Civil Appeal 239 of 2018; [2018] KECA 330 (KLR); [2018] eKLR - (Mentioned)
5. *Civicon Limited v Kenya Revenue Authority & Kivuwatt Limited* Petition 4 of 2014; [2014] KEHC 4064 (KLR); [2014] eKLR - (Explained)
6. *Douglas Kipchumba Rutto v Kenya Anti-Corruption Commission, Attorney General, Peter Gabriel Muteti Mutisya, Thomas Mwiwa, Francis Kipchojo Kidogo, Christine Bahati, Juma Musi, Salesio Kinyua Mugo & Bernard Opiyo* Civil Suit 356 of 2011; [2013] KEHC 5464 (KLR); [2013] eKLR - (Explained)
7. *Francis Gitau Parsimei & 2 others v National Alliance Party & 4 others* Constitutional Reference 356 & 359 of 2012; [2012] KEHC 2603 (KLR); [2012] eKLR - (Explained)
8. *GBM Kariuki v Fred Kwasi Apaloo* Civil Appeal 122 of 1994; [1994] eKLR - (Explained)
9. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2012; [2014] eKLR - (Explained)
10. *Kanorero River Farm Ltd & 3 others v National Bank of Kenya Ltd* Civil Suit No 699 of 2001; [2002] 2 eKLR 207 - (Explained)
11. *Maina Gitonga v Catherine Nyawira Maina & Resident Magistrates Court, Nyeri* Petition 10 of 2014; [2015] KEHC 1656 (KLR); [2015] eKLR - (Explained)
12. *Malike Co Ltd v Attorney General* Civil Application 3739 of 1995; [2000] eKLR - (Explained)
13. *Martin Nyaga Wambora,County Government of Embu,Council of Governors & Margaret Lorna Kariuki v Speaker of the Senate,Clerk of the Senate,Attorney General,Deputy Governor of Embu County,Speaker of the County Assembly of Embu,County Assembly of Embu & Commission for the Implementation of the Constitution* Civil Appeal 21 of 2014; [2014] KECA 377 (KLR); [2014] eKLR - (Explained)
14. *Mate & another v Wambora & another* Petition 32 of 2014; [2017] KESC 1 (KLR); [2017] eKLR - (Explained)
15. *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya,Judicial Service Commission,Kenya Magistrates and Judges Association, Law Society of Kenya,Principal Judge, the High Court of Kenya & Ahmednasir Abdulahi* Petition 167 of 2016; [2016] KEHC 8374 (KLR); [2016] eKLR - (Explained)
16. *Moses Wamalwa Mukamari v John Makali & 3 Others* Civil Suit 42 of 2012; [2012] eKLR - (Explained)

17. *Ngaya v Judicial Service Commission & 3 others* Cause 398 of 2014; [2015] KEELRC 218 (KLR); [2015] eKLR - (Explained)
18. *Peter Ng'ang'a Muiruri v Credit Bank Ltd & 2 others* Civil Appeal 203 of 2006; [2008] eKLR - (Explained)
19. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR); [1992] eKLR - (Explained)

***South Africa***

*Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019) - (Explained)

***United Kingdom***

*Sirros v Moore & Others* [1974] 3 All ER 776 - (Explained)

***United States***

1. *Bradley v Fisher* 80 U.S (13 Wall.) 335 20 L. Ed 646 (1871) - (Explained)
2. *Floyd v Baker* 12 Co Rep, 23, 24, 77 Eng. Rep. 1305 (Star Chamber 1607) - (Explained)
3. *Harlow v Fitzgerald* 457 US 800 (1982) - (Explained)
4. *Pulliman v Allen* 466 US 522 (1984) - (Explained)
5. *Randall v Bingham* 74 US (7 Wall) 523 (1868) - (Explained)
6. *Stump v Sparkman* 435 US 349, 98 S Ct 1099, 55 L. Ed 2d 331 (1978) - (Explained)

***Regional Court***

*Kombo v Attorney General* [1995-98] 1 EA 168 - (Explained)

**Texts**

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn
2. Stephen Craig Voris (1978), *A Judge Can Do No Wrong: Immunity is Extended for Lack of Specific Jurisdiction – Stump v Sparkman* DePaul Law Review Volume 27 Issue 4 1978

**Statutes**

***Kenya***

1. Arbitration Act (cap 49) - (Interpreted) sections 14(6); 1617(7); 32A; 35
2. Constitution of Kenya - (Interpreted) articles 10; 20(1); 20(2)(3)(4); 27(1); 40; 50(1); 160(5); 163(4)(a); 259(1)
3. Judicature Act (cap 8) - (Interpreted) section 6
4. Judicial Service Act (cap 8A) - (Cited) In general
5. Supreme Court Act (cap 9B) - (Interpreted) section 15(2)
6. Supreme Court Rules, 2012 (cap 9B Sub Leg) - (Interpreted) rules 3; 9; 33

**Advocates**

None mentioned

May 15, 2020, the Court delivered the following Judgment:

## A. Introduction

1. On 5th November 2018, the petitioner filed the instant Petition pursuant to the provisions of article 163(4)(a) of the *Constitution*, Section 15(2) of the *Supreme Court Act* and Rules 3, 9 & 33 of the *Supreme Court Rules*. In the Petition, the petitioner seeks a number of prayers viz;

    a) That the Judgment and decision of the Court of Appeal (Waki, M, M'Inoti & Kiage, JJA) dated 21st September 2018 be set aside;

    b) A declaration that members of the Judiciary do not enjoy absolute immunity under article 160(5) of the *Constitution*;

    c) A declaration that the decisions made by the 1st and 2nd Respondents violated, denied, infringed upon or contravened the petitioner's rights under articles 27(1), 40 and 50(1) of the *Constitution*;

    d) A declaration that the 3rd Respondent in purportedly presiding in a dispute between the petitioner and the 4th Respondent denied, infringed upon or contravened the petitioner's rights under article 40 of the *Constitution*;

    e) A declaration that the actions by the 4th Respondent after the conclusive determination of HC Civil Suit No 571 of 2011 (OS) denied, violated, infringed upon or contravened the petitioner's rights under articles 27(1), 40 and 50(1) of the *Constitution*.

2. The petitioner made a further prayer for costs in the instant Petition, as well as those in the High Court in *Civil Suit No 571 of 2011* (O.S) and *Civil Suit No 371 of 2016* (formerly HC Petition No 377 of 2016) and the appellate Court in *Civil Appeal No 239 of 2017*.

3. The petitioner alleges that the main issue in contention is the jurisdiction of the High Court to hear and determine an application by the petitioner against sitting Judges of the High Court with respect to allegations of denial, violation or infringement of the petitioner's rights and fundamental freedoms under the *Constitution*. Additionally, the petitioner has argued that the interpretation and application by the Superior Courts of articles 160(5) and 165(6) of the *Constitution* in relation to judicial immunity of Judges and judicial officers in the exercise of their judicial mandate was contentious and flawed, and further, failed to accord with the principles under article 259(1) of the *Constitution*.

4. It is further contended that through the actions and decisions of the 1st and 2nd Respondents, there was a gross violation of the petitioner's rights and fundamental freedoms as pronounced under articles 10, 20(1), 20(2), 20(3) & 20(4), as well as article 259(1) of the *Constitution*.

5. The petitioner furthermore alleges that the appellate Court erred, misapprehended and misconstrued the provisions of the Constitution, particularly regarding the independence of the Judiciary and the tenets of judicial immunity in its interpretation of articles 160(5) and 165(6) thereof. The petitioner also avers that the appellate Court considered matters that it ought not to have, and conversely, failed to consider matters that it ought to have in its deliberation and final determination of the appeal before it.

**B. Background and Summary of Facts**

6. Although the petitioner contends that the issues for determination before this Court revolve around the violation, infringement and contravention of various Constitutional rights and fundamental freedoms, particularly involving the interpretation and application of the provisions of articles 160(5), 165(6) and 259(1) of the *Constitution*, it would nonetheless behove this Court to recapitulate on the salient facts leading to the filing of the Petition of appeal under consideration.

7. On 15th December 2009, the petitioner, Bellevue Development Company Limited, entered into a contract with the 4th Respondent, Vinayak Builders Limited, in the nature of a standard form contract wherein the petitioner was the employer whilst the 4th Respondent was the contractor. Under the contract, there was an arbitral clause which provided that any dispute which may arise between the contracting parties ought to be resolved through an arbitration process.

8. Subsequently, there arose a dispute between the petitioner and the 4th Respondent, following which the 4th Respondent issued a 'Notice of Suspension of Works' on 15th March 2011. This was followed by a 'Notice of Dispute' by the 4th Respondent on 29th March 2011 pursuant to the provisions of the contract. On 6th April 2011, the petitioner wrote a letter to the 4th Respondent effectively terminating the contract.

9. On 6th May, 2011, the 4th Respondent wrote to the Chairperson of the Architectural Association of Kenya seeking the appointment of an arbitrator. On 9th May, 2011, the Chairperson responded to the 4th Respondent's letter and appointed QS Norman Mururu as the sole arbitrator. Pursuant to his appointment, the arbitrator on 30th August 2011 commenced the arbitral proceedings and issued various directions to the parties, including time as to when the statement of claim would be filed by the 4th Respondent.

10. The 4th Respondent failed to comply with the directions of the arbitrator to file its Statement of Claim on or before 14th September 2011. Instead, it filed an application on 15th September 2011 seeking extension of time to file its Statement of Claim—to 22nd September 2011. The arbitrator did not issue any direction or orders on the said application by the 4th Respondent.

11. On 22nd September 2011, the 4th Respondent served the arbitrator and the petitioner's advocates on record with its Statement of Claim and supporting documents. However, on 13th October 2011, the petitioner, through Counsel, challenged the jurisdiction of the arbitrator. On 15th November 2011, the arbitrator issued a ruling on the challenge to his jurisdiction, stating that he had the proper and requisite jurisdiction to hear and determine the dispute between the petitioner and the 4th Respondent. The dispute thereafter moved to the Superior Courts.

**C. Pleadings**

**(i) At the High Court**

**(a) Civil Suit No. 571 of 2011 (O.S)**

12. On 15th December 2011, the petitioner filed High Court *Civil Suit No. 571 of 2011* (O.S) contesting the ruling of the arbitrator on the issue of jurisdiction. On 21st March 2012, Odunga J entered Judgment in favour of the petitioner, holding that there was no valid claim before the arbitrator that was capable of being heard and determined. In his determination, the learned Judge set out that;

> "Judicial and quasi-judicial proceedings are matters of record hence the need to expressly make a specific order extending time when the same has been done. I therefore find that in the absence of such specific order extending time, the time for complying with the directions given by the arbitrator on 30th August 2011 was in fact not extended.
>
> Without extension of the said orders, I find that the arbitrator had no jurisdiction to take any step in the matter since there was no valid statement of claim before him. The only thing he could validly do was to invoke the provisions of Section 26(a) of the Arbitration Act and terminate the proceedings. Any other order made by the arbitrator after the expiry of the period stipulated for filing and service of the statement of claim and supporting documents are, accordingly, invalid, null and void."

13. No appeal was preferred against this Judgment.

14. Subsequently, on 23rd January, 2013, the 4th Respondent, relying on the letter by the arbitrator dated 18th June 2012 and invoking the provisions of Section 16 of the *Arbitration Act*, wrote to the Chairperson of the Architectural Association of Kenya, seeking a substitute arbitrator. Being aware of this request, the petitioner also wrote to the Chairperson informing him of the Judgment dated 21st March, 2012. The Chairperson aforesaid, notwithstanding the petitioner's objection, proceeded to appoint the 3rd Respondent as the sole arbitrator in a letter dated 14th February 2013. The petitioner alleges that he was not made aware of this appointment until 6th March, 2013.

15. On 13th May 2013, the petitioner, dissatisfied with the appointment aforesaid filed an application in High Court *Civil Suit No. 571 of 2011* (O.S) under a certificate of urgency, seeking to injunct the 3rd and 4th Respondents from proceeding with the arbitration. Havelock J (as he then was) certified the matter as urgent and directed that the application be heard inter partes on 16th May 2013. No conservatory orders were issued at that point. The hearing of the application was later adjourned to 14th June 2013, and further to 24th October 2013.

16. Despite the pending application, the arbitration proceedings commenced with the sole arbitrator issuing directions to the parties for a number of mentions before him. Being apprehensive by the actions of the arbitrator, the petitioner filed another application dated 29th July 2013 seeking a priority date for the hearing and determination of its application dated 13th May 2013. The application was certified urgent but could not be heard earlier than 24th October 2013. In the meantime, the arbitrator set the hearing dates for the arbitration as 26th and 27th November 2013.

17. The petitioner then filed another application dated 13th November 2013 seeking a priority date for the hearing of its application dated 13th May 2013. On 8th April 2014, Gikonyo J, the 1st Respondent herein, issued a ruling whereby he determined that the arbitration proceedings before the previous arbitrator were distinct from those pending before the later appointed arbitrator, and that therefore, the arbitration could proceed to its conclusive end.

18. On 13th June, 2014, the petitioner filed an application for review of the Judgment by Gikonyo J. The petitioner contemporaneously filed a motion before the arbitrator seeking to stay the proceedings and/or an extension of the time to file its Statement of Defence out of time.

19. Kariuki J, the 2nd Respondent herein, presiding over the review application by the petitioner determined inter alia, that there were no substantial grounds to allow a review and dismissed the application. The arbitrator in the meantime proceeded with the arbitral proceedings,

rendering a final arbitral award on 17th December 2014, which award was adopted by the Court on 8th April 2016.

**(b) Civil Suit No. 371 of 2016 (earlier Constitutional Petition No. 377 of 2016)**

20. Being aggrieved by the decisions of the 1st and 2nd Respondents, the petitioner filed a Petition at the Constitutional and Human Rights Division of the High Court at Nairobi in Petition No. 377 of 2016. The Petition was mentioned before Onguto, J on 9th September 2016 and directions were issued that the matter be moved to the Commercial and Admiralty Division of the High Court. The matter was thereafter renamed and renumbered *Civil Suit No. 371 of 2016*.

21. The matter was heard by Ochieng J, who in determining the issues raised in the Preliminary Objection filed by the 1st and 2nd Respondents on the issue of judicial immunity of Judges and judicial officers, held that the Court lacked the requisite jurisdiction to hear and determine the matter as it sought to have him enquire into decisions of or otherwise supervise the decisions of Judges of equal status and jurisdiction. He therefore upheld the Preliminary Objection and dismissed the Petition.

**(ii) At the Court of Appeal**

22. Being aggrieved by the decision of the Court in Civil Suit No. 577 of 2011 (O.S), the petitioner filed a Notice of Appeal at the Court of Appeal on 9th April 2014, but did not pursue the appeal in Civil Appeal No. Nai 127 of 2014 despite being issued with a hearing notice by the appellate Court.

23. Also being aggrieved by the decision of Ochieng J in *Civil Suit No. 371 of 2016,* the petitioner moved to file an appeal from the Judgment in *Civil Appeal No. 239 of 2017*. The petitioner, in that appeal, contended that the 1st and 2nd Respondents had, in rendering their decisions dated 18th March 2014, 8th April 2014 and 8th April 2016, acted in bad faith and breached its rights to fair trial in its dispute with the 4th Respondent.

24. In the memorandum of appeal before the appellate Court, the petitioner's grounds of appeal were summarized as follows— that the learned Judge of the High Court (Ochieng J) erred in law and in fact, by;

    a) Misinterpreting and misapplying the Constitution in relation to his jurisdiction, the Petition before him and the Preliminary Objection;

    b) Failing to uphold that the rights and freedoms in the Bill of Rights can only be subject to limitations contemplated in the Constitution;

c) Impairing the supremacy of and failing to defend and uphold the Constitution in letter and spirit over other law;

d) Limiting and impairing the nature and scope of his jurisdiction to entertain the Petition;

e) Determining that judicial immunity is absolute even when Judges act dishonestly; and

f) Awarding costs to the Respondents and Interested Parties.

25. In rendering their Judgment on the appeal, the Court of Appeal held *inter alia*, that the contentious issue emerging succinctly out of the appeal was that of judicial immunity of Judges and judicial officers in the exercise of their mandate as Judges and judicial officers as well as the supervisory role of the Courts in relation to Judges and judicial officers of concurrent jurisdiction.

26. In the lead Judgment, Kiage JA held that there was absolutely no doubt that the superior Court Judge had no jurisdiction to enquire into or review the propriety of the decisions of Judges who were of concurrent jurisdiction as himself, and that therefore, he did not possess supervisory jurisdiction over the 1st and 2nd Respondents under article 165(6) of the *Constitution*.

27. On the issue of judicial immunity, the learned Judge held that under article 160(5) of the *Constitution*, Judges and judicial officers are immunized from any suits arising from their performance or decisions made in good faith and within the law. In so doing, he went further to pronounce thus:

> "I think that even though Judges are fallible human beings like everybody else, a mechanism does exist in our laws for correcting whatever errors they may commit in the discharge of their juridical functions. Aggrieved parties are at liberty to appeal as a matter of course and that appellate system suffices to deal with ordinary errors of law and fact so that at the end of the day justice is served. I also harbor no doubts that where a Judge's conduct consists of egregious illegalities, violation of the judicial oath or outright illegalities and criminality, a mechanism for removal does exist and can be triggered in the appropriate cases. I am satisfied that those mechanisms suffice to guard the integrity of the judicial process and to protect the rule of law and the rights of the litigants. They ensure that judicial immunity, which is laudable and necessary for the protection of judicial independence does not morph into judicial impunity or some form of Frankenstein tyranny against the law and the people."

28. Both Waki and M'Inoti, JJA concurred with the Judgment of Kiage, JA and unanimously dismissed the appeal. Aggrieved by that decision, the petitioner proffered the current appeal to this Court.

**(iii) At the Supreme Court**

29. In presenting its Petition before this Court and invoking the provisions of article 163(4)(a) of the *Constitution*, the petitioner is seeking to set aside the decision of the appellate Court and the declarations made therein as regards the provisions of articles 160(5) and 165(6) of the *Constitution*. The petitioner's grounds of appeal are as set out in paras. 119 – 123 thereof, are *inter alia* that;

a) The learned Judges of the Court of Appeal erred, misapprehended and gravely misconstrued the Constitution on independence of the Judiciary in their interpretation and application of article 160(5) of the *Constitution* to the effect and import that the said article 160(5) grants absolute immunity to members of the Judiciary generally;

b) The learned Judges of the Court of Appeal erred, misapprehended and gravely misconstrued the *Constitution* on independence of the Judiciary in their interpretation and application of article 160(5) of the *Constitution* as asserting and granting an absolute immunity from personal liability to members of the Judiciary even where they acted in bad faith or omitted to act in good faith, acted unlawfully or omitted to act lawfully in the exercise or performance of a judicial function vis-à-vis the application of the Bill of Rights as set out in articles 20(1), 20(2), 20(3) & 20(4) of the *Constitution* and the pursuit of the aspirations to national values and principles of governance set out in article 10 of the *Constitution*;

c) The learned Judges of the Court of Appeal erred, misapprehended and gravely misconstrued and misapplied the *Constitution* in their interpretation and application of articles 160(5) and 165(6) of the *Constitution* to the circumstances of the case and failed to observe the unequivocal edicts of the *Constitution* at articles 10, 20(1), 20(2), 20(3), 20(4) and 259(1) as pertains to the role, place and exercise of judicial authority and its implications thereof on the enforcement of fundamental rights and freedoms in light of article 165(3) as read with article 23(1) of the *Constitution*;

d) The learned Judges of the Court of Appeal erred in both law and fact, misapprehended and gravely misconstrued and misapplied the applicable law being

the Arbitration Act and article 165(3)(e) of the *Constitution* when per Kiage JA at page 16, they found that

> "being of that persuasion, I cannot accept, less still lend approval to the appellant's ill-advised path of dragging the Judges into Court by way of litigation against them in their personal capacities for their rulings delivered in the course and in the context of their lawful discharge of judicial functions. The alleged particulars of ill will and illegality were not supplied and would have been of no moment as the objections raised are bound to succeed.";

and

e) The learned Judges of the Court of Appeal in arriving at their decision, took into account matters which they ought not to have, and failed to take into account matters which they should have.

**D. Parties' Submissions**

**(i) The petitioner's Submissions**

30. The petitioner reiterated seriatim the averments and grounds adduced in support of its Petition in submissions dated 13th August 2019 and filed on 14th August 2019. In further extrapolation of grounds (a) and (b) thereof, the petitioner contends that the appellate Court interpreted and applied article 160(5) narrowly and restrictively without reference to the guiding principles set out in articles 10, 20(1), 20(2), 20(3), 20(4) and 259(1) of the *Constitution*. It further argues that the learned Judges of the appellate Court failed to appreciate that they were bound by the *Constitution* to give effect and meaning to the Bill of Rights by elevating and setting apart members of the Judiciary from submission to the *Constitution*.

31. The petitioner, in addition, submits that the Judges of the appellate Court failed to apply the stated precepts outlined in articles 20(1), 20(2), 20(3) & 20(3) of the *Constitution* with regard to the denial, violation, contravention and infringement of the petitioner's fundamental rights and freedoms through the actions of the 1st and 2nd Respondents.

32. The petitioner also submits that the appellate Court as well as the High Court had made a curious finding that the petitioner had not particularized the elements of bad faith or ill will in the impugned decisions by the 1st and 2nd Respondents and instead contends that the willful and persistent disregard by the Respondents of the conclusive determination by Odunga J is definitive and a substantial demonstration of the blatant ill will and bad faith contemplated in the Petition.

33. The petitioner furthermore contends that contrary to the assertion made in the Judgment of the appellate Court, absoluteness of judicial immunity is not settled law, and that different superior Courts have given different interpretations to the provisions of article 160(5) of the *Constitution*. In this context, the petitioner has cited the cases of *Martin Nyaga Wambora & 3 Others v Speaker of the Senate & 6 Others* [2014] eKLR, *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & 5 Others* [2016] eKLR in addressing this point.

34. The petitioner went on to argue that the tenets of good faith as interpreted and applied by the superior Courts (citing *Malike Co. Ltd v Attorney General* [2000] eKLR and *Douglas Kipchumba Rutto v Kenya Anti-Corruption Commission & 8 Others* [2013] eKLR) have formed the basis from which a challenge to the judicial immunity of a judicial officer could emanate and is therefore an integral element in the present matter where it is contended that the 1st and 2nd Respondents failed to act in good faith in the exercise of their judicial functions as is the expectation of article 259(1) of the *Constitution* on Constitutional interpretation.

35. With regard to matters appurtenant to the provisions of articles 1(1), 1(3)(c), 159(1), 159(2), 160(1), 161 and 260 of the *Constitution*, the petitioner argues that independence of the Judiciary is subservient to the provisions of the *Constitution* and that any judicial officer who exercises judicial authority in contravention or in violation of the Constitution and the law and without good faith or abiding and adhering to the law, acts unlawfully and unconstitutionally. It thus argues in that regard that no arm of Government is above the law and relying, in that context, on *Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another* [2017] eKLR. Further that, members of the Judiciary are not, and should not, be elevated to be above the purpose and intent of the *Constitution*.

36. The petitioner concludes its submission by arguing that the appellate Court considered issues that it ought not to have considered, and failed to consider those that it ought to have in arriving at its determination. That the appellate Court Judges in that regard only considered the status of the 1st and 2nd Respondent as Superior Court Judges above all else, and therefore failing in their interpretation of article 160(5) of the *Constitution* by declaring absolute immunity on the said judicial officers despite their alleged bad conduct.

**(ii) 1st and 2nd Respondents' Submissions**

37. In their submissions dated 5th September 2019 and filed on 9th September 2019, the 1st and 2nd Respondents submit that the appellate Court properly interpreted and determined that the petitioner's appeal was devoid of merit, and correctly dismissed the same as it was in violation of articles 160(5) and 165(6) of the *Constitution*.

38. They also submit that article 160(5) as read together with Section 6 of the *Judicature Act* provide that judicial officers enjoy judicial immunity in the exercise of their judicial functions executed lawfully and in good faith, and that judicial immunity as a legal principle, is an important tenet in judicial independence. In that regard, they rely on *Maina Gitonga v Catherine Nyawira & Another* [2015] eKLR, *Moses Wamalwa Mukamari v John Makali & 3 Others* [2012] eKLR, *G.B.M Kariuki v Hon. Fred Kwasi Apaloo* [1994] eKLR and *George Ngaya v Judicial Service Commission & 3 Others* [2015] eKLR.

39. On the issue of supervisory powers of the High Court, the 1st and 2nd Respondents submit that there are pending execution proceedings in *Civil Suit No. 571 of 2011* (O.S) and that by filing *Civil Suit No. 371 of 2016*, the petitioner had sought to invoke the High Court's supervisory powers under article 165(6) of the *Constitution* over a court of concurrent jurisdiction and equal status which is a fundamental error in law. In this context, the 1st and 2nd Respondent rely on the cases of *Civicon Ltd v Kenya Revenue Authority & Another* [2014] eKLR, *Peter Ng'ang'a Muiruri v Credit Bank Ltd & 2 Others* [2008] eKLR and *Kombo v Attorney General* [1995-98] 1 EA 168 where it was held that a Superior Court cannot override the decisions of a court with concurrent jurisdiction.

**(iii) 3rd Respondent's Submissions**

40. On his part, the 3rd Respondent in his submissions dated 22nd October 2019 and filed on 23rd October 2019, contends that article 160(5) clothes judicial officers with absolute immunity in the exercise of their judicial functions, and is intended to safeguard such judicial officers from civil or criminal proceedings while performing their judicial functions within the law. In relying on the case of *Bradley v Fisher* 80 U.S (13 Wall.) 335 20 L. Ed 646 (1871), he argues that the principle of judicial immunity exempts Judges from liability in civil action for acts done by them in the exercise of their judicial functions and is an internationally accepted norm and principle recognized in article 16 of the *United Nations Basic Principles on the Independence of the Judiciary*.

41. He further contends that the interpretation of Constitutional provisions, unlike statutory ones, should be holistic (referring to the decision in, *In the Matter of Kenya National Commission on Human Rights*, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR) and as contemplated in article 259(1) of the Constitution, and must also be read together with the principles and tenets of independence of the Judiciary (referring to the decision of *A.O.O & 6 Others v Attorney General & Another* [2017] eKLR).

42. The 3rd Respondent concludes his submissions by arguing that the law provides adequate mechanisms and frameworks where judicial errors and mistakes may be rectified and resolved, including judicial review and appeals to appellate Courts. He also submits that

disciplinary mechanisms are also available for aggrieved litigants through article 168 of the *Constitution*, as read together with article 172 thereof as well as the *Judicial Service Act* in situations where judicial officers act outside the law.

**(iv) 4th Respondent's Submissions**

43. In its submissions, the 4th Respondent submits that the instant Petition contravenes article 165(6) of the *Constitution* by seeking to invoke the exercise of supervisory jurisdiction of the High Court over a court of equal status or/and of concurrent jurisdiction, and that the issues raised in the Petition are *res judicata* as they were finally and conclusively determined by the 1st and 2nd Respondents by dint of Sections 14(6), 17((7), 32A and 35 of the *Arbitration Act*.

44. The 4th Respondent further goes on to submit that the Petition offends known and lawful mechanisms of dispute resolution especially under the Arbitration Act and as settled in *Francis Gitau Parsimei & 2 Others v National Alliance Party & 4 Others* [2012] eKLR.

45. On the issue of judicial immunity vis-à-vis judicial independence and accountability, the 4th Respondent submits that in so far as an independent Judiciary is indispensable to the administration of justice and founded on public interest considerations, it should also aspire to certain standards of competence, integrity, accountability and transparency. It was submitted in that regard that judicial immunity is a guarantee that judicial officers would be accorded protection from liability in the exercise of their judicial mandate (relying on *Pulliman v Allen* 104 S. Ct, 1970) and that if judicial matters were drawn into question by frivolous and vexatious actions, there would never be an end to litigation causes (referring to *Floyd v Baker* 12 Co. Rep, 23, 24, 77 Eng. Rep. 1305 (Star Chamber 1607)) (Floyd).

46. The 4th Respondent furthermore submits that judicial immunity is absolute for Judges performing judicial acts (quoting *Stump v Sparkman* 435 U.S 349, 98 S. Ct 1099, 55 L. Ed. 2d 331 (1978)) (Stump) in their judicial capacity and that a Judge or judicial officer would still be immune from liability if he acted or carried out a judicial act within, or in excess of, his jurisdiction, but not in the clear absence of jurisdiction.

47. In its submissions, the 4th Respondent has also stated that the petitioner did not exhaust the mechanisms provided under the Constitution or statutory provisions, and that where there were clear procedures for redress, then that procedure should be strictly followed. Reliance in that regard was placed on *Speaker of the National Assembly v James Njenga Karume* C.A Civil Appeal No. 92 of 1992.

48. On the supervisory role of the High Court under article 165(6) of the *Constitution*, the 4th Respondent submits that this jurisdiction cannot be exercised over other superior courts, and that the claim expressed by the petitioner that the 1st and 2nd Respondents were precluded from determining the matter as it was *res judicata* is unfounded as the matter

before them was predicated on different facts, and were nonetheless, not bound by the holding of a court of equal status (quoting *Kanorero River Farm Ltd & 3 Others v National Bank of Kenya Ltd* [2002] 2 eKLR 207).

**E. Analysis and Determination**

49. Having carefully considered the pleadings filed by the parties in this appeal, we find that the main issue arising for determination by this Court revolves around judicial immunity of Judges and judicial officers in the exercise of their judicial functions as the issue of the High Court supervising other Courts of concurrent jurisdiction is no longer contested. We shall in this Judgment use the terms "Judges" and "judicial officers" interchangeably.

50. The 1st and 2nd Respondents in this Petition are serving Judges of the High Court of Kenya. The petitioner's main plea against them in this matter is for a declaration that

> " members of the Judiciary do not enjoy absolute immunity under article 160(5) of the *Constitution*."

In other words, the petitioner urges in that regard that judicial immunity is not absolute and does not apply to judicial officers who act without jurisdiction, or in bad faith and in contravention of the law and rules of natural justice. If this Court grants that plea, the petitioner's further plea is for this Court to go ahead and issue a further declaration that

> " the decisions made by the 1st and 2nd Respondents [in Nairobi High Court *Civil Suit No. 571 of 2011* (O.S)] violated, denied, infringed upon or contravened the petitioner's rights under articles 27(1), 40 and 50(1) of the *Constitution*"

and in effect reverse the decisions of the High Court and Court of Appeal thus holding that the 1st and 2nd Respondents liable to the petitioner for damages.

51. All the Respondents are of a contrary opinion, urging that the absoluteness of judicial immunity is paramount, as it is an integral component to the tenets of an independent, transparent and accountable Judiciary as well as the administration of justice. They thus argue that judicial immunity is a guarantee that judicial officers are protected or deemed immune from liability in the discharge of their judicial mandate whether or not they act in excess of their jurisdiction.

52. With this rivalry, it is therefore imperative for this Court to evaluate the tenets of judicial immunity of judicial officers in the exercise of their Constitutional and statutory functions; the purpose or objective of judicial immunity; whether or not judicial immunity is absolute; and the recourse for a party aggrieved by an unlawful act or omission of a judicial officer.

**(i) The Tenets of or What Judicial Immunity Entails**

53. The concept of judicial immunity started as a common law principle which is debatably traced to Lord Coke's decision in Floyd. In his Judgment in that case, Lord Coke stated that the principle was a public policy based on the need for protecting the independence of the courts and thus maintaining public confidence in the system of justice and the need for finality in litigation. In its decision in *Randall v Bingham* 74 US (7 Wall) 523 (1868) (Randall), the US Supreme Court adopted the principle of judicial immunity into the United States legal system.

54. In his article "*A Judge Can Do No Wrong: Immunity is Extended for Lack of Specific Jurisdiction – Stump v Sparkman* DePaul Law Review Volume 27 Issue 4 1978", Stephen Graig Voris, writing on the development of judicial immunity in the United States, observed that in its Judgment in the said case of *Randall*, the US Supreme Court;

> " qualified the doctrine [of judicial immunity] in dictum by stating that Judges of Courts of superior jurisdiction were not liable in civil actions ...."

In its later decision in *Stump*, the US Supreme Court asserted that

> " The governing principle of law [on judicial immunity] is well established and is not questioned by the parties."

As such, it added,

> " Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."

55. Further, in *Harlow v Fitzgerald* 457 US 800 (1982) (Harlow), the United States Supreme Court qualified the principle and stated that immunity could be granted to government officials and specifically judicial officers only if;

(1) an official believed in 'good faith' that his conduct was lawful and

(2) that the conduct was objectively reasonable.

The test in *Harlow*, in addition to the good faith test and lawfulness, was that of objective reasonableness, in that the conduct of the officials is evaluated to ascertain whether they acted reasonably under the circumstances thus warranting immunity. This objective reasonableness test was defined by the court to allow protection for judicial officials performing discretionary functions, so long as those functions did not violate clearly

established Constitutional or statutory rights of which a reasonable person would have been aware of.

56. In our realm, article 160(5) of the *Constitution* also entrenches the immunity of judicial officers who act in 'good faith'. It reads;

> " A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function."

57. The immunity granted by this provision therefore encapsulates protection from legal proceedings founded on acts committed or omissions made by Judges in the lawful performance of their judicial functions.

**(ii) The Objective of the Principle of Judicial Immunity**

58. The concept of judicial immunity is not without foundation. Judicial immunity is an important tenet in the delivery of justice and the maintenance of the rule of law. For the proper administration of justice, it is a well-established public policy that Judges should freely express themselves in matters brought before them. A Judge, as well as other judicial officers, require to have confidence in carrying out their judicial functions without the fear that they shall be prosecuted or harassed for their acts or omissions. As the US Supreme Court reaffirmed in *Stump* it is

> " a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself."

59. The rationale for this judicial immunity is the preservation of independent decision-making capabilities of judicial officers; immunity for judicial acts is thus necessary so that judicial officers can make the sometimes controversial decisions that are their judicial obligation and mandate to make, independent of personal considerations, including fear of personal liability.

60. The concept is also an important aspect of judicial independence under the doctrine of the separation of powers. In *Moses Wamalwa Mukamari v John Makali & Another* (*supra*), the High Court thus underscored this point by stating thus:

> " The protection offered to judicial officers in article 160(5) of the *Constitution* is inherent in the independence of the Judiciary as a state organ within the doctrine of separation of powers."

61. It would, in our view, therefore be repugnant to the cause of justice if Judges would always act in fear of legal actions being brought against them for decisions they make in the course of discharging their mandate.

62. We must hasten to add at this point that the immunity granted by article 160(5) of the *Constitution* is not necessarily for the benefit of the Judge or judicial officer concerned. It is for the public and in particular for litigants appearing before the Courts of law. As M'Inoti, JA stated in the decision giving rise to this appeal;

> " The immunity is not for the personal benefit of Judges; ... it was never intended for the ego or personal interest of Judges. The true intention is protection of the administration of justice."

63. Besides freedom of thought, expression and action, the other cardinal factor encapsulated in this immunity is finality. It would be a travesty of justice if disgruntled litigants are permitted to sue Judges who rule against them thus prolonging litigation unnecessarily and personalizing matters that Judges ought not to have personal interest in. In the words of Mativo J in *Maina Gitonga v Catherine Nyawira Maina & Another* (*supra*) if we allow court decisions to be

> " drawn into question by frivolous and vexatious actions, there will never be an end of causes, ... controversies will be infinite."

The Court of Appeal said as much in its Judgment giving rise to this appeal: each losing litigant would sue a Judge even for mere ego and/or wounded pride.

64. The petitioner has also accused the two Judges of impunity. To our minds, there is a clear distinction between judicial immunity and impunity, and it is important that judicial officers understand that they need not find themselves on the side of latter. article 160(5) draws the line between immunity and impunity; the line crosses where acting lawfully and in good faith meets willful and negligent abandonment of the oath of office to uphold the integrity and independence of the Judiciary and to dispense justice without fear or favour. article 160(5) is not blind to this inherent distorted character between judicial immunity and

impunity, and thus provides a resonating standard for judicial officers to act according to the tenets enunciated under the *Constitution*; to ensure that there is rule of law, protection of fundamental rights and freedoms in the Bill of Rights and to do justice to all. The latter point speaks to the lawful action qualification as it does to the good faith expectation.

65. Judicial immunity, we reiterate, is meant to provide protection to judicial officers from third parties' interference, influence or obstruction. Judicial immunity is also necessary to protect the reputation and perception of the Judiciary, to maintain the trust of the public and ensure transparency and accountability. A Judge acting in his official judicial capacity thus enjoys immunity from liability for judicial acts performed within the scope of his or her jurisdiction and in the manner explained above.

**(iii) Whether or not Judicial Immunity is Absolute**

66. article 160(5) grants judicial officers immunity if they act in "good faith". What therefore, is 'good faith'? According to the *Black's Law Dictionary*, Ninth Edition at pg. 713, 'good faith' is defined as;

> " A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligations, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."

67. The antithesis to acting in good faith would be to act in bad faith, with a willful intent to act dishonestly or unfaithfully in the performance of judicial acts. The Constitution does not define bad faith. In *Public Protector v South African Reserve Bank* [2019] ZACC 29 Mogoeng, CJ however defined bad faith as including malicious or

> " fraudulent, dishonest or perverse conduct ... [as well as] gross illegality."

In other words, he added,

> " bad faith exists only when the office-bearer acted with the specific intent to deceive, harm or prejudice another person or by proof of serious or gross recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be reasonably inferred and bad faith presumed."

68. Besides acting in good faith, in *Stump*, the Court also enunciated a two-tiered approach to determining whether judicial immunity applied:

(1) whether the acts were judicial acts and

(2) whether the acts were acts performed by the Judge in his judicial capacity.

The Court also determined that regardless of any alleged violation of due process, procedural errors do not deprive a Judge of immunity because due process necessarily attaches to any act performed in a judicial capacity.

69. It was indeed observed in *Bradley* that there was a distinction between excess jurisdiction and clear and deliberate seizure of absent jurisdiction; the former connoting that the judicial officer did not apprehend his jurisdictional limits, and the latter elaborating the deliberate corrupt or malicious seizure of jurisdiction by judicial officers, with obvious consequences on the latter. Justice Field in that context held that;

> "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the Judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the Judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his Judgments may depend."

70. With this principle in mind, save in a clear case of deliberate and unlawful usurpation or seizure of jurisdiction where none exists or some other glaring impropriety, as Lord Denning observed in *Sirros v Moore & Others* [1974] 3 All ER 776, if a Judge acts in

> "the honest belief that his act was within his jurisdiction",

he is still protected. While acting in that belief, Buckley LJ added that the protection continues

> "notwithstanding any error in his reason for doing the act or his method of doing it."

As such, if a Judge acting in his capacity as a Judge, acts in good faith in the lawful performance of his duties, he has absolute immunity even when he acts in excess of his

jurisdiction. We therefore endorse Mativo J's statement in *Maina Gitonga v Catherine Nyawira Maina & Another* (*supra*) that:

> " It is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from criminal or civil suit arising from acts taken within or even in excess of his jurisdiction.

71. In his rendition of that absoluteness in the appellate Court Judgment, Kiage JA was even more emphatic;

> " I have no difficulty whatsoever in holding that judicial officers are under article 160(5) immunized from any action or suit on account of their performance of a judicial function. I do not apprehend that the words 'good faith' and 'lawful' in sub-article are a qualification or limitation of the immunity for the rather obvious reason that so long as a Judge is acting in a judicial capacity and exercising his usual jurisdiction, there is the commonsensical presumption that he is acting lawfully and in good faith. There exists an implicit covenant of good faith binding Judges. This has to be a priori position for, to hold otherwise would lead to the absurd position of good faith bases of Judges' actions being debatable points and open to intolerable deluge of litigation, each unhappy litigant suing Judges left, right and center as wounded pride dictates."

72. For avoidance of doubt, the protection or immunity of a Judge also goes into administrative acts. As in *Stump*, in *G.B.M Kariuki v Hon. Fred Kwasi Apaloo* (*supra*), it was held that;

> " The respondent, a Judge, holding [the] administrative office of Chief Justice while executing his judicial duties in Court or in execution of his administrative duties within the jurisdiction, enjoys absolute privilege from being sued civilly for his expressions either in writing or verbally. This is so under the common law and under the provisions of Section 6 of the *Judicature Act*, Cap 8."

73. We agree and would only conclude by stating that the immunity accorded to a Judge is absolute in the meaning attributed to the expression by article 160(5) of the *Constitution* and as analysed in this Judgment. But that is not the end of the matter. We must still address the remedy available to a party alleging misconduct on the part of a judicial officer in decision making.

**(iv) Recourse for a party aggrieved by an Unlawful Act or Omission of a Judicial Officer**

74. Suppose there are allegations that a Judge has acted in bad faith or unlawfully and thus imputations of judicial impunity are made? Is such a Judge to be left scot free? Is a party injured by the "fraudulent, dishonest or perverse" conduct of a Judge without remedy?

75. Fraud is a serious quasi-criminal imputation. A Judge whose conduct is "fraudulent, dishonest or perverse", is a disgrace to the cause of justice. A Judge's act of bad faith undermines his or her integrity and fidelity to the judicial oath of office. Under our law, the remedy for a litigant making allegations of fraud, dishonesty and/or perversity lies, not in a suit against such a Judge but in a petition to the Judicial Service Commission for removal from office under article 168 of the *Constitution*. That article has an elaborate procedure which entitles both a complaining party and the subject Judge the opportunity, both at the Commission and in a Tribunal set up under article 168(5) thereof, to a fair hearing. A suit directly against a Judge for alleged misconduct or misbehavior was never, in our view, an expectation of the drafters of the *Constitution*.

76. This view was indeed succinctly captured in the appeal decision by Kiage JA when he stated, and we agree that;

> "I think that even though Judges are fallible human beings like everybody else, a mechanism does exist in our laws for correcting whatever errors they may commit in the discharge of their juridical functions. Aggrieved parties are at liberty to appeal as a matter of course and that appellate system suffices to deal with ordinary errors of law and fact so that in the end, justice is served. I also harbor no doubts that where a Judge's conduct consists in egregious illegalities, violation of the judicial oath or outright illegalities and criminality, a mechanism for removal does exist and can be triggered in appropriate cases. I am satisfied that those mechanisms suffice to guard the integrity of the judicial process and to protect the rule of law and the rights of litigants. They ensure that judicial immunity, which is laudable and necessary for the protection of judicial independence does not morph into judicial impunity or some form of Frankenstein tyranny against the law and the people."

77. A Judge, in our view, thus remains unquestionably immune as long as he does not take actions that intentionally and plainly prevent litigants from enjoying their Constitutional and statutory rights. The duty imposed on a Judge, then, is only to recognize that his own decisions may sometimes be in error and to ensure that orders affecting important Constitutional rights can be reviewed or appealed in another Court. But the conduct of a Judge who acts mala fides or unlawfully may thus trigger proceedings before the Judicial

Service Commission and may ultimately lead to his removal thus the need for extreme care in the enjoyment of immunity.

**(v) The petitioner's Appeal in context**

78. Having so held, was the present petitioner denied an opportunity by the 1st and 2nd Respondents to pursue an appellate remedy to the decisions made by them, or could it be deduced from the pleadings that there was violation and infringement of the petitioner's Constitutional right to be fairly heard under article 50 or through an alternative resolution mechanism? If the response to any of these questions is in the affirmative, would it also be considered that the 1st and 2nd Respondents acted in deliberate and unlawful excess of their jurisdiction, and could not therefore be afforded judicial immunity as prominently propounded in *Bradley* and *Stump*?

79. From the facts before us, it cannot be said that the petitioner was denied an opportunity to seek appellate or alternative relief from what it considered an affront to its Constitutional right to fair hearing under article 50. Other than legal proceedings against the two Judges, various avenues were available to it, and it was up to it to decide which avenue best suited its interests.

80. We note in the above regard that, the petitioner proffered an appeal to the Court of Appeal in Civil Appeal No. Nai 127 of 2014. For reasons unknown or unexplained, it chose not to pursue that appeal but instead filed another cause in *Civil Suit No. 371 of 2016* (formerly Petition No. 377 of 2016). This is the matter that led to the instant Petition. The petitioner thus knew and initially chose the appeal mechanism as a means of seeking relief but later abandoned it. It cannot therefore be heard to claim that it was denied an opportunity to be heard and that there was a violation of its Constitutional rights under article 50.

81. As stated above, the petitioner's claim against the two Judges is simply that in dismissing its applications, the two Judges acted in bad faith and without jurisdiction thus violating its rights to a fair trial in its dispute with the 4th Respondent. No evidence beyond that mere statement was tendered in proof thereof. That is not the act of a serious litigant or complainant even if the above-named Judges had no judicial immunity.

82. Suing a Judge or judicial officer for rendering an unfavourable decision rather than appeal or seek a review, was in our opinion, a misconception and a step in the wrong direction on the part of the petitioner. As a court, we are cognizant of the fact that at times, litigants may feel aggrieved by some of the decisions that Judges and judicial officers make. But this is not in any way an exoneration of the petitioner in its actions. To seek relief by apportioning an unwarranted attack on the 1st and 2nd Respondents, who were lawfully exercising their judicial function, was not only tantamount to harassment and intimidation of the judicial

officers, but also clearly a red herring that the petitioner conceived to deny or delay the 4th Respondent's right to a remedy under their contract. This Apex Court will not countenance such action.

83. The petitioner has also described the 1st and 2nd Respondents' dismissal of its applications as acts of impunity. As was observed in *Bradley*, to amount to impunity, a Judge's act must be a clear and deliberate seizure of absent jurisdiction". If proved, such acts would not only be an attack on the integrity and conduct of the 1st and 2nd Respondents, but also a reprehensible affront to the cause of justice and the independence of the Judiciary. Such acts are tantamount to tarnishing the image of the Judiciary, violating its integrity and putting all judicial officers into disrepute. We reiterate that a mere statement that the 1st and 2nd Respondents acted with impunity does not suffice. As we have pointed out, the petitioner ignored the express route of a petition under article 168 of the *Constitution* if he thought the Judges misconducted themselves and instead chose the unacceptable route of a suit against the Judges. We therefore reiterate that immunity of a Judge can only be stripped in our realm, by proceedings through the Judicial Service Commission and not by a civil suit as argued by the petitioner.

84. Without belabouring the point, save for an obvious displeasure at their decisions, the petitioner has not brought forth any iota let alone credible evidence that the 1st and 2nd Respondents acted in bad faith or against the law. We therefore see no reason to uphold its complaint in that regard.

**F. Determination**

85. Having held as above, it is our finding that the 1st and 2nd Respondents as Judges of the High Court, in our view, acted in accordance to and within their jurisdictional limits under article 165. They may have rendered decisions which were unpalatable to the petitioner. This too was within their judicial function. That the petitioner chose to challenge those decisions through a rather unorthodox approach cannot be lauded but ought instead to be condemned.

86. It is for the above reasons that we dismiss this Petition. What of costs? The petitioner was represented throughout the judicial proceedings. It certainly ought to have been properly guided on the risks it was taking when it launched itself upon a most unorthodox path. It must now reap the consequences of that risky venture. It must be ordered to pay costs to all the Respondents both in the Courts below and in this Court.

**G. Disposition**

87. For the above reasons, we hereby make the following final orders;

a) The Petition is hereby dismissed; and

b) The petitioner shall bear the costs of all the Respondents, both in this Court and the Superior Courts below.

88. It is so ordered.

**In the matter of Council of Governors & 47 others (Reference 3 of 2019)**
**[2020] KESC 65 (KLR) (Civ) (15 May 2020) (Advisory Opinion) (with dissent)**

**Supreme Court of Kenya**

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

Neutral citation: [2020] KESC 65 (KLR)

***Constitutional Law*** *- public finance – revenue allocation - role of the Commission on Revenue Allocation (CRA) - nature of the recommendations of the CRA in the legislative process relating to the annual Division of Revenue Bill and the Appropriation Bill - whether the recommendations of the CRA in the legislative process were binding on both the National Assembly and Senate - Constitution of Kenya 2010, articles203(1), 204(4), 205,216(1)and 218.*

***Constitutional Law*** *- legislature - role of the Senate in the passage of a Division of Revenue Bill - where the National Assembly and the Senate failed to agree on a Division of Revenue Bill - whether the High Court could be asked to give orders whose basis was the recommendations of the Commission on Revenue Allocation on the proposed legislation and whether Parliament would be dissolved - Constitution of Kenya 2010, articles 222 and 261(7).*

***Constitutional Law*** *- interpretation of the Constitution – transfer of equitable shares of revenue to county governments - time within which money should be released from the National Treasury to the county governments for each financial year - meaning of the constitutional requirement that the money should be released without undue delay - whether the court could set a precise timeline within which the money should be released - Constitution of Kenya 2010, article 219.*

***Constitutional Law*** *- public finance - division and allocation of revenue Bills - whether the National Assembly could enact an Appropriation Act before enacting a Division of Revenue Act - Constitution of Kenya 2010, articles 218(1) and 221; Public Finance Management Act, No 18 of 2012, section 39.*

**Brief facts**

The applicants were the Council of County Governors and all the 47 County Governments of Kenya. They sought an advisory opinion pursuant to article 163(6) of the Constitution from the Supreme Court with respect to four main issues. All the issues revolved around division of revenue.

**Issues**

i. Whether the recommendations of the Commission on Revenue Allocation were binding on both Senate and the National Assembly when they deliberated on the Division of Revenue Bill and the Appropriation Bill.
ii. What was the effect of a failure between the Senate and the National Assembly to agree on a Division of Revenue Bill?
iii. Whether there ought to be precise timelines within which the National Government should release equitable shares of revenue to county governments.
iv. Whether the National Assembly could enact an Appropriation Act before enacting a Division of Revenue Act.

**Held**

1. The Commission on Revenue Allocation (CRA) was established under article 215 (1) of the Constitution. Under article 216(1) of the Constitution, its principal function was to make recommendations for the equitable sharing of revenue raised by the National Government between the national and county governments and among the county governments.
2. The term recommendation as used in article 216 of the Constitution should first and foremost be given its literal and natural meaning. A recommendation was a suggestion or proposal for a certain cause of action. Such a proposal would not ordinarily bind the person or entity that it addressed. However, categories of recommendation differ in their meaning, nature and effect, depending on the context in which they were deployed.
3. It would be inappropriate to categorize the recommendations of the CRA on the sharing of national revenue as mere suggestions or proposals. The recommendations had to be accorded serious consideration by both Houses while debating the Division of Revenue Bill.
4. A reading of articles 205, 204(4) and 218 of the Constitution left no doubt that the Constitution placed a very high premium on the recommendations of the CRA. Once those recommendations were tabled in Parliament, they had to be accorded due consideration before voting took place in either of the Houses, on the Division of Revenue Bill and the County Allocation of Revenue Bill. Therefore, if either of the two Houses passed a Bill envisaged under article 205 of the Constitution without considering the recommendations of the CRA, the resultant legislation would be unconstitutional.
5. Article 218(2) of the Constitution provided that both the Division of Revenue Bill and the County Allocation of Revenue Bill, had to be accompanied by a memorandum setting out, *inter alia*, a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation. Therefore, there was no doubt that Parliament could deviate from the recommendations of the CRA while debating any of the two revenue sharing Bills. Not every deviation from those recommendations had to be explained; only the significant deviations had to be explained.
6. The recommendations of the CRA were not binding on the National Assembly or the Senate. However, the two Houses could not ignore or casually deal with the recommendations.
7. The Constitution ensured that Parliament would benefit from the technical insights of the CRA when debating revenue sharing and allocation Bills by requiring Parliament to consider the CRA's recommendations without being bound. That ensured that the entities involved in the budget making process were able to critically apply their collective mind to the process. Parliament and the CRA could fail to agree on revenue allocation but they had to be guided by the objective criteria set in article 203(1) of the Constitution.
8. In *the Matter of the Speaker of Senate & Another v the Attorney General & Another & 4 Others*; Ref. No 2 of 2013, the Supreme Court opined that the Senate had a clear role to play, in the processing of the Division of Revenue Bill. The Speaker of the National Assembly

invited the court to depart from that decision in order to clear an impasse between Senate and the National Assembly on a Division of Revenue Bill by excluding Senate from the process of passing the Bill into law. For the Supreme Court to depart from a prior decision, there had to be a clear and well-reasoned justification.

9. A litigant could not urge the Court to depart from its previous decision simply because he disagreed with it, or that the decision, militated against his case. The application would have to be served on all respondents who would then respond to it. None of the parties were given an opportunity to respond to the invitation by the Speaker of the National Assembly for the court to depart from its previous decision and an application was not made. The court was moved in a perfunctory manner and it was unable to consider the merits of the Speaker's invitation in circumstances where the other parties were not heard on the same.

10. The preposition that in order to resolve the impasse, an application be made to the High Court under article 165 (3) (d), for orders compelling the National Assembly to provide for the equitable share of revenue due to the counties on the basis of the recommendations by the Commission on Revenue Allocation, was untenable for two reasons:- adopting such a course of action would defeat the finding that the recommendations of the CRA were not binding; and, it would fundamentally shift the revenue allocation function from the legislature to the judiciary, thus radically upsetting the doctrine of separation of powers.

11. The preposition of using the Revenue Allocation Act of the previous Financial Year as a fallback position to solve the impasse appeared practical and logical but it did not have its basis on any principle or provision of the Constitution.

12. The Constitution contemplated a scenario where the National Government would be unable to access funding due to the absence of enabling legislation. Article 222 of the Constitution provided that the National Assembly had power to authorise the withdrawal of money from the Consolidated Fund. It would be for purposes of meeting expenditure necessary to carry on the services of the National Government during that year until such time as the Appropriation Act was assented to. The withdrawal would not exceed one-half of the amount included in the estimates as expenditure for that year that had been tabled in the National Assembly and be included under separate votes for the several services in respect of which they were withdrawn, in the Appropriation Act.

13. While the withdrawal of money for the purpose of the National Government expenditure under article 222 of the Constitution was based on a percentage of the estimates of expenditure for that year, the same method could not apply to the County Government, since the estimates did not include the equitable revenue share due to counties. Logic would require that the percentage of the money to be withdrawn would be based on the Division of Revenue Bill; yet this would be legally untenable, given the fact that the Bill, was not only the subject matter of controversy, but was also yet to pass into law. In the circumstances, in the event of an impasse, the percentage of the money to be withdrawn would be based on the

equitable allocation to counties in the Division of Revenue Act of the preceding financial year. The legislature should pass legislation to give normative form to that arrangement.

14. Legislation for the implementation of the national budget and allocation of revenue to both the National Government and county governments had specific and rigid timelines within which they should be enacted because they operationalized the financial existence of the country. Failure by Parliament to discharge such a critical legislative function, in the absence of an emergency, or any other disaster that disrupted parliamentary business, would not only violate the Constitution, but also expose the country to existential danger. Such a Parliament had to be considered to have run its course and be dissolved.

15. Under article 261(7) of the Constitution, Parliament could be dissolved for failure to enact certain legislation within a specific period of time. That provision would not only apply to legislation listed in the Fifth Schedule to the Constitution but also to other legislation such as the Division of Revenue Act. Failure to enact such legislation by Parliament, in the absence of an emergency or other disaster, would invite the enforcement of sanctions envisaged under article 261 of the Constitution. Therefore, if Parliament failed to agree on division of revenue during a second mediation under article 113 of the Constitution, any person could petition the High Court for a declaration to the effect that Parliament had violated the Constitution.

16. Under article 219 of the Constitution, a county's share of revenue raised by the National Government had to be transferred to the county without undue delay and without deduction, except when the transfer had been stopped under article 225 of the Constitution. Unless there were timelines set by the Constitution or the law, a court had to consider each case on its own merits to determine whether there had been undue delay in the performance of an act by the concerned entity.

17. By not prescribing a specific time limit, article 219 of the Constitution allowed for a degree of flexibility on the part of the National Treasury in effecting monetary transfers to counties. The court was not the appropriate forum for a determination on precisely when monies due to counties should actually be transferred to the counties. However, the fact that the Constitution had not prescribed a specific timeline did not give the National Treasury the latitude to capriciously decide when to disburse funds to the counties.

18. Counties operated within rigid budgetary cycles and any delay in releasing funds to counties had to be justifiable and explained in good time. Releasing funds at a time when they could not be realistically utilized in the implementation of county projects in accordance with their budgets constituted a violation of the Constitution.

19. A reading of article 218(1) and 221 of the Constitution did not provide for which of the two bills, namely the Division of Revenue Bill and the Appropriation Bill, should be enacted before the other. It was clear that once enacted the Division of Revenue Act divided the revenue raised nationally between the two levels of Government while the Appropriation

Act authorized the withdrawal and application of monies from the Consolidated Fund by the National Government.

20. Both the Division of Revenue Bill and the County Allocation of Revenue Bill were to be introduced in Parliament at least two months before the end of each financial year. The estimates of revenue and expenditure of the National Government were also to be submitted to the National Assembly, at least two months before the end of each financial year. That sequence of events would lead to the following conclusions:-

21. The Appropriation Bill was incapable of being introduced unless the estimates of revenue and expenditure had been approved and passed by the House.

22. The Appropriation Bill came into life after the Division of Revenue Bill since the latter would already have been introduced into Parliament at least two months before the end of the financial year.

23. The estimates of revenue and expenditure had to logically be based on or at the very least be in tandem with, the equitable share of revenue due to the National Government as provided for in the Division of Revenue Bill.

24. The Appropriation Act had to be based on the equitable share of revenue due to the National Government as provided in the Division of Revenue Act.

25. In an ideal situation, the enactment of an Appropriation Act could not precede the enactment of a Division of Revenue Act. The Cabinet Secretary responsible for finance would submit the estimates of revenue and expenditure to the National Assembly, in his capacity as the Chief Budget Officer of the Executive. In that capacity, the Cabinet Secretary had to base his/her estimates on the National Government's share as provided for in the Division of Revenue Bill. Additionally, section 39 of the Public Finance Management Act left no doubt that the National Assembly, could not enact an Appropriations Act before enacting the Division of Revenue Act.

***Per DK Maraga CJ [concurring]***

1. Under article 259(1) of the Constitution, the Constitution was to be interpreted 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. Under article 259(3) of the Constitution, the Constitution would also be interpreted in accordance to the doctrine that the law was always speaking.

2. A holistic interpretation of the Constitution meant that the entire Constitution had to be read as an integrated whole with no one particular provision destroying the other but each sustaining the other.

3. Under article 93(1) of the Constitution Parliament consisted of the National Assembly and the Senate. The discharge of legislative functions was shared by the two Houses. Under article 95(1) and 95(2) the members of the National Assembly represented the people of the constituencies and special interests and deliberated in the National Assembly and resolved issues of concern to the people. Under article 96(1) of the Constitution, the

Senate represented the counties and served to protect the interests of the counties and their government. Article 96(2) of the Constitution clearly stated that Senate would participate in the law-making function of Parliament by considering, debating and approving Bills concerning counties as provided in articles 109 to 113 of the Constitution.

4. Under article 217 of the Constitution the passing of legislation on division of revenue was a shared mandate between the National Assembly and the Senate. Further, the principles of public finance set out in article 201 of the Constitution included the equitable sharing of national revenue and consultation on financial legislation and they related to both Houses of Parliament. Therefore, there was a joint role shared between the National Assembly and the Senate in the annual division and allocation of revenue Bills.
5. The Division of Revenue Bill and the County Allocation of Revenue Bill were not money Bills within the definition of article 114(3) of the Constitution. They were therefore not within the exclusive competence of the National Assembly.
6. A purposive interpretation of articles 95(4)(a) & 95(4)(b), 96(2), 110(1)(c), 114(3), 205 and 218(1)(a) of the Constitution read together with sections 38 to 41 of the Public Finance Management Act, made it quite clear that both the National Assembly and the Senate played a role in the division of revenue between the two levels of Government.

**Dissenting opinion**

***Per NS Ndungu [dissenting]***

1. A formal application for the court to depart from a previous decision was not a requirement where the matter at hand was an advisory opinion. In advisory opinions there were no interests at stake as would normally be the case in adversarial proceedings. Advisory opinions did not arise from any contests of rights or claims disposed of by regular process. In exercising advisory opinion jurisdiction, the court should not be constrained by procedures required in ordinary proceedings.
2. The Constitution under article 167(3) anticipated that there would be occasional need for the Supreme Court to depart from its previous decisions. The Supreme Court was not bound by its decision in the *Senate Matter 2013*.
3. While rendering an advisory opinion, under article 163(6) of the Constitution, the Supreme Court could undertake any necessary interpretation of the Constitution. The court's revision of its prior decision relating to a similar matter to the one under consideration, would not occasion prejudice to any party. It would clarify and outline a harmonious and comprehensive picture of the requirements for the legislative process and roles for the two Houses as provided under the Constitution.
4. The request to depart from the decision in *Senate Matter 2013* was not casually made. A lot of thought, real interest and effort went into making that proposition.
5. The decision of the Majority in the *Senate Matter 2013* ought to be reviewed especially because it did not take into account the architectural design of the Constitution and the

legislative processes that arose from that design, with regard to the roles of the two Houses of Parliament as set out in articles 95 and 96 and part 4 of Chapter 12 of the Constitution. That design was intended to avoid situations where disputes between the two Houses of Parliament defeated or delayed important aspects of public finance and potentially threw the country into chaos by rendering operations by either level of government impossible or impractical.

6. The design as drawn by the drafters of the Constitution, established which House would originate the Division of Revenue (DOR) Bill, as a money bill and what was to happen when there was an impasse over a money bill. In most jurisdictions, where there was a deadlock between two Houses, the resolution was to allow the final determination to be made by the house with veto powers, which was the house that originated the Division of Revenue Bill. Further, in other democratic and bicameral jurisdictions, the Division of Revenue Bill was considered to be a money bill and therefore legislative processes that applied to money bills applied to it.

7. The Division of Revenue Bill was a money bill that could only be introduced by the National Assembly in accord to article 109 (5) of the Constitution. Article 95(4)(a) of the Constitution reinforced that position. It stated that the National Assembly determined the allocation of national revenue between levels of Government as provided in part 4 Chapter 12.

8. The National Assembly as the people's representative budgeted, collected, shared between the levels of government and audited revenue and it was knowledgeable on the finances of the country. The National Assembly was best placed to originate the Division of Revenue Bill as it financed the revenue share and proposed revenue collection forecasts in the requisite division. In the event of a deadlock between the Senate and National Assembly, then the National Assembly as the originating house should have final say or even veto powers.

9. Article 203(2) of the Constitution guaranteed county governments an equitable allocation of a minimum of fifteen percent of all national revenue collected by the National Government. That amount ought to be readily available to county governments as it was already allocated under the Constitution. Obtaining those funds ought not to be a bicameral legislative process. All that was required, pursuant to article 206(4) of the Constitution was to seek the approval of the Controller of Budget to authorize the withdrawal of that amount from the Consolidated Fund. Hence, in the event of a delay in the passage of the Division of Revenue Bill, article 206(4) of the Constitution provided a tidy and efficient solution.

10. The proposal of the majority with respect to how to deal with the impasse on revenue allocation was untenable as it constituted a major breach of the doctrine of separation of powers. Allocation of revenue was a task that fell squarely on the Executive and the Legislature. Any proposal from the court, directing or recommending action to be taken by Parliament and what percentage should be allocated to the counties, was not only an attempt to amend the Constitution but was tantamount to supervising the work of parliament

and endangering the institutional comity between the three arms of government. The core function of the Judiciary was to interpret and apply laws and not to make them.

11. Although the majority were of the view that they were protecting the Constitution, they were in fact re-writing the Constitution or meddling with a political and budgetary process in which they had no expertise. The simple solution for the issue was to point out to Parliament that they needed to solve it with finality by enacting relevant legislation including amending the Constitution if necessary.

12. Under the circumstances Parliament had the option of making necessary constitutional and legislative amendments to clarify whether the Division of Revenue Bill was a money bill and what legislative processes should apply to its passage including the resolution of disagreements between the two Houses.

13. Under section 191(1) of the Public Finance Management Act, each year when the Budget Policy Statement was introduced, the Cabinet Secretary had to submit to Parliament a Division of Revenue Bill and County Allocation of Revenue Bill prepared by the National Treasury. The Budget Policy Statement, under section 25 of the Public Finance Management Act would be introduced to Parliament by February 15. Under article 218 of the Constitution, a Division of Revenue Bill and a County Allocation of Revenue Bill, had to be introduced in Parliament at least two months before the end of each financial year. Effectively, there was a conflict between the Public Finance Management Act and the Constitution in that the statute altered constitutional timelines set for the introduction of Division of Revenue Bill and a County Revenue Allocation Bill in Parliament.

14. In an ideal situation where the two Houses agreed on a Division of Revenue Bill and a County Allocation of Revenue Bill, the process ought to end by June 30. Where the two Houses of Parliament failed to agree on an ordinary Bill, the Bill would be referred to a Mediation Committee under article 113 of the Constitution. The Committee would be comprised of an equal number of members form each House and it would create a version of the Bill that was acceptable to both Houses. If the Committee failed to agree on the Bill then that Bill would be defeated. That also meant that even after a single mediation process, Parliament would not meet the constitutional timelines of passing the two Bills.

15. There were a number of conflicting timelines that existed within the legal framework that needed to be brought to the attention of Parliament for corrective action. There was need to clarify on the exact timelines within which the Division of Revenue Bill and the County Allocation of Revenue Bill could be introduced to Parliament. That would call for amendments to articles 218 and 221 of the Constitution, and section 190 and 191(1) of the Public Finance Management Act.

*The Advisory Opinion, as rendered by the Majority of the Bench, conclusively disposed of the following four issues in the manner determined;*

***Orders***

i. *the recommendations of the Commission on Revenue Allocation are not binding on Parliament;*
ii. *in the event of an Impasse over the Division of Revenue Bill, the solution prescribed in paragraphs 81 to 91 of this Opinion shall apply;*
iii. *the Supreme Court or any other court for that matter, is not the appropriate forum for setting timelines as to when the National Treasury must transfer the equitable share of revenue to counties; and*
iv. *Parliament could not enact the Appropriation Act before the enactment of the Division of Revenue Act.*

**Citations**

**Cases**

***Kenya***

1. *Commission on Administrative Justice v The Kenya Vision 2030 Delivery Board and others* Civil Appeal 141 of 2015; [2019] eKLR – (Explained)
2. *Communication Commission of Kenya & others v Royal Media Services Limited & others* [2015] 2 EA 104 –(Explained)
3. *In re Speaker, County Assembly of Embu* Reference 1 of 2015[2018] eKLR – (Followed)
4. *In the Matter of Kenya National Human Rights Commission* Reference 1 of 2012;[2014] eKLR - (Followed)
5. *In the Matter of the 47 County Assemblies and others;* Petition No 368 of 2014; [2015]eKLR – (Applied)
6. *In the Matter of the National Land Commission* Advisory Opinion Reference 2 of 2014; [2015] eKLR – (Explained)
7. *In the Matter of the Speaker of the Senate & another* Advisory Reference No 2 of 2013 – (Followed)
8. *Law Society of Kenya v Attorney General & 2 others* Constitutional Petition 3 of 2016;[2016] eKLR -(Followed)
9. *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* Appeal 92 of 2015;[2017] eKLR - (Explained)
10. *Rai & 3 others v Rai & 4 others* [2014] 2 KLR 253 – (Followed)
11. *Re the Matter of the Interim Independent Electoral Commission* [2011] 2 KLR 32 - (Explained)
12. *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others* Civil Appeal 196,195 & 203 of 2015 (Consolidated); [2015] eKLR – (Explained)

***Uganda***

*Major General David Tinyefuza v Attorney General* (Constitutional Petition No. 1 of 1996) [1997] UGCC 3 (25 April 1997) - (Followed)

***United Kingdom***

*Hadkinson v Hadkinson* [1952] 2 ALL ER 567 – (Applied)

**Texts & Journals**

Kangu, M., (Ed) (2015) *Constitutional Law of Kenya on Devolution*, Strathmore University Press p 346

**Statutes**

***Kenya***

1. Constitution of Kenya, articles 6(2); 10; 20(3)(a); 47; 93(3); 94(1); 95(4)(a)(b)(5); 96(1)(2)(3)(4); 105; 109(5); 110(1)(c); 113; 114(3); 116; 128(1)(b); 131; 149; 159(1); 163(6); 165(3)(b)(c)(d)(iii); 174; 175; 183; 185(1); 189(1)(a)(3); 190(1); 201; 202(1); 203(1)(2); 204(4); 205; 206; 207(1); 215(1); 216; 217;(3)(4)(5); 218(1)(a)(b)(2)(c); 219; 221(6); 222(2)(b); 224; 225; 230(4)(b); 249; 258; 259(1)(8); 260; 261(5)(6)(7)(8)(9) –(Interpreted)
2. Appropriation Act, 2019 (Act No 10 of 2019) In general – (Cited)
3. Division of Revenue Act, 2019 (Act No 18 of 2019) In general – (Cited)
4. Public Finance Management Act, 2012(Act No 18 of 2012) sections 8(1)(b); 17; 25(2)(7)(9); 38; 39(3)(4); 41; 42; 190; 191(1) - (Interpreted)
5. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 41(4)(c) - (Interpreted)

***South African***

1. Constitution of Republic of South Africa, 1996 sections 73(2)(b); 214 - (Interpreted)
2. South African Money Bills Amendment Procedure and Related Matters Act, Act No 9 2009 (as amended by Act No 13 of 2018: Money Bills Amendment Procedure and Related Matters Amendment Act, 2018) section 9 – (Interpreted)

**Japan**

Constitution of Japan 1947, articles 59,60 – (Interpreted)

**Australia**

Commonwealth of Australia Constitution Act 1900 (Imp) sections 53, 57 – (Interpreted)

**India**

Constitution of India articles 198, 199 – (Interpreted)

**United States of America (US)**

US Constitution, article I, section 7, clause 1- (Interpreted)

**United Kingdom**

Parliament Act 1911 sections 1(1)(2) – (Interpreted)

Advocates:

Mr Kaluma for the 2nd respondent

Mr Wanyama & Mr Ngatia assisting counsel for the Applicants

Mr Kiragu, counsel for the Attorney General

Mr Kitonga SC appearing for the Law Society of Kenya

May 15, 2020, the Court delivered the following Advisory Opinion:

**A. Introduction**

1. On 15th July 2019, the Council of County Governors and all the 47 County Governments, (the Applicants herein) moved this court under Certificate of Urgency, via a Reference dated on even date, seeking an Advisory Opinion pursuant to article 163(6) of Constitution. The Reference was supported by an affidavit sworn by Hon. Wycliffe Ambetsa Oparanya, the Chairman of the Council of Governors and Governor of Kakamega County, on 26th July 2019. The Applicants initially sought an opinion on 25 issues, which were later reframed and reduced to eight on 29th July 2019. These would be further reduced to four, after the intervention of this court, following a Preliminary Objection filed by the 2nd Interested Party.

   The Preliminary objection was premised on the following grounds:

   i. That the Applicants were not seeking an Advisory Opinion but the interpretation of various Constitutional and statutory provisions. Thus, argued the 2nd respondent, the Applicants should have invoked the jurisdiction of the High Court under article 165(3)(b) and (c) of Constitution;

   ii. That the issues raised in the Reference were subject matters of pending proceedings before the High Court;

   iii. That the Applicants had not exhausted the dispute resolution mechanisms set out in article 189(3) of Constitution, before resorting to court; and

   iv. That the Applicants had not demonstrated that they had sought the advice of the Attorney-General, as stipulated in rule 41(4)(c) of the Supreme Court Rules, 2012.

2. In a Ruling delivered on 8th October 2019, the court dismissed the Preliminary Objection holding that, not only did it have jurisdiction, it would actually exercise its discretion to render the Opinion sought. Subsequently on 16th October 2019, the Court issued directions in which it delineated the four issues pursuant to which it would deliver an Advisory Opinion.

   i. Whether the recommendation by the Commission on Revenue Allocation, is binding upon both Houses during deliberations concerning the Division of Revenue Bill and the Appropriation Bill;

ii. What happens when the National Assembly and the Senate fail to agree on a Division of Revenue Bill, thereby triggering an impasse?;

iii. Whether there should be timelines within which the National Government should release the equitable share of revenue to County Governments;

iv. Whether the National Assembly can enact an Appropriation Act prior to the enactment of a Division of Revenue Act?

All the Parties were therefore invited to address the Court on the four issues as framed.

**B. Submissions By Respective Parties**

**a. The Applicants' Submissions**

**i. On whether the recommendation by the CRA is binding upon both Houses during deliberations concerning the Division of Revenue Bill and the Appropriation Bill**

3. Both in their written and oral submissions, the Applicants maintain that the recommendations by the Commission for Revenue Allocation, regarding the equitable sharing of revenue between the National and County Governments, and among the County Governments, are binding upon the National Assembly and the Senate. Mr Ngatia for the Applicants argues that the functions of the CRA are clearly set out in article 216 of Constitution. The same Constitution, submits counsel, provides for objective criteria in article 203(1) by which the Commission must be guided in making its recommendations for the equitable sharing of revenue to both houses. According to counsel, the consideration of these objective criteria is deliberately located outside the Parliament and the National Treasury while being reserved for the CRA. Therefore, as long as the CRA is guided by these criteria in arriving at its recommendations, the same binds both the Senate and National Assembly. Counsel submits that contrary to the letter and spirit of Constitution, the National Assembly has been disregarding the recommendations of CRA, not on the basis of the objective criteria set out in article 203(1) of Constitution, but on extraneous considerations.

4. Mr Wanyama, assisting counsel for the Applicants, supports Mr Ngatia in this view. Counsel submits that the recommendations by the CRA are obligatory because they are highly technical in nature. As such, argues Mr Wanyama, any deviations therefrom by Parliament, must be rationalized on the basis of the objective criteria set out in article 203(1) of Constitution. Counsel for the CRA, Mr Waiganjo is also categorical that the recommendations by his client are binding on both houses. Counsel submits that the CRA was established by Constitution for the purpose of ensuring the effective allocation of resources to the Counties. If the National Assembly and Treasury, can whimsically ignore

the recommendations of the CRA, argues counsel, then the whole purpose of devolution as envisaged by Constitution will be defeated.

5. Of a contrary view is the 2nd respondent (National Assembly), which strenuously contends that the recommendations by the CRA cannot be binding. Mr Kaluma for the 2nd respondent is categorical that, the CRA cannot supplant the legislative authority of the National Assembly, by issuing binding recommendations. Counsel submits that a careful reading of articles 95 and 96 of Constitution, leaves no doubt as to where legislative authority lies in the present context, as between the National Assembly and the Senate. According to counsel, the non-binding nature of the recommendations by the CRA is clearly highlighted in article 218(2)(c) of Constitution, which permits deviation from the said recommendations by the National Assembly. Counsel argues that if the recommendations of the CRA were to be considered as binding, this would render the National Assembly a mere conveyor belt, in the allocation of resources between the National Government and County Government.

6. Counsel further submits that the Senate has no role to play in the deliberations concerning the Division of Revenue Bill. Recognizing that such a contention runs contrary to the decision of this court, in the Advisory Reference No 2 of 2013 Speaker of the National Assembly v. The Honourable the Attorney General & 4 others, Mr Kaluma urges the Court to depart therefrom as the same, in his view, was rendered per incuriam. For good measure, counsel urges this court to adopt the dissenting opinion of Lady Justice Njoki Ndungu as the correct statement of the law. In support of Mr Kaluma's submissions regarding the non-binding nature of the CRA recommendations, is Mr Kiragu, counsel for the Attorney General. Towards this end, counsel submits that the word "recommendation" must be accorded its natural meaning. Mr Kiragu argues that if the recommendations by CRA were binding, there would be no need for any debates in the National Assembly regarding the Division of Revenue Bill.

7. The Amicus Curiae advises the court that the recommendations by the CRA are not binding. Mr Kitonga SC, appearing for the Law Society of Kenya, submits that the recommendations are weighty and persuasive, but not binding. It is the view of Senior Counsel that both the National Assembly and the Treasury must pay due regard to the recommendations in their deliberations before arriving at the final allocation.

8. On their part, Katiba Institute and the Institute for Social Accountability, jointly submit that this issue must be considered within the context of the legal regime of Independent Commissions under Chapter 15 of Constitution. They cite this court's pronouncement in the Matter of the National Land Commission[2015] eKLR on the place of Chapter 15 commissions, wherein the Court stated that the said commissions "ought to protect the sovereign power of the people, from which the Executive, the Judiciary and the Legislature

derive their authority: hence their depiction as 'peoples' watchdogs' or Constitutional watchdogs".

9. Reference is also made to the case of Teachers Service Commission (TSC) v. Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR, wherein the Court of Appeal considered the nature of recommendations of the Salaries and Remuneration Commission (SRC), and held that such recommendations setting the remuneration and benefits of all public officers under article 230(4)(b) are binding upon whichever state organ that sought them. Also cited is the High Court's decision in The Commission on Administrative Justice v The Kenya Vision 2030 Delivery Board and others, [2019] eKLR, wherein the Court held that the recommendations of the CAJ have the force of law.

10. On this basis, the amici therefore submit that as a general rule, the recommendations of the CRA are binding on all State organs without exception. The National Treasury cannot therefore depart therefrom. However, they concede that, Parliament may depart from such recommendations in terms of article 218(2) of Constitution. Such deviation by Parliament, submit the Amici, if significant must be accompanied by a memorandum of explanation on the basis of the criteria set out in article 203 of Constitution.

11. They further argue that a deviation must also obtain the concurrence of both the National Assembly and Senate, as they undertake their respective roles in the division of revenue process under articles 95 and 96 of Constitution. In their view, where there is no concurrence by both Houses on any deviation by the National Treasury, then the CRA recommendations prevail. It is urged that such an interpretation sustains the respective roles of the CRA, National Assembly and the Senate in a holistic reading of articles 95, 96, 203, 205, 216 and 218.

**ii. What happens when the National Assembly and the Senate fail to agree on a Division of Revenue Bill thereby triggering an Impasse?**

12. The Applicants submit that while this court In the Matter of the Speaker of Senate & Another v. Hon. Attorney-General & Another & 4 Others, Reference No. 2 of 2013 [2013] eKLR, signaled that the Speakers of the two Houses must consult and resolve any differences regarding the Division of Revenue Bill through mediation as provided for under article 113 of Constitution, the Court was silent on what happens if the mediation did not yield results and the impasse persisted. Mr. Issa, counsel for the Applicants, contends that there cannot be a vacuum in the business of Government. If the two Houses fail to agree on the Division of Revenue Bill at the mediation stage, urges counsel, extraordinary measures must come into play to avoid a Constitutional crisis.

13. Counsel submits that in the event the mediation fails, there are two feasible solutions. Firstly, that the High Court would be called upon to resolve the impasse, under article 165(3)(d)

(iii) and make a declaration as to the allocation to be made to each level of Government as recommended by the CRA. The High Court would thus give directions, on how the Controller of Budget would for a limited time, authorize the allocations to the National and County Governments pursuant to the recommendation by the CRA, until such a time when the contents of the Division of Revenue Bill would be agreed upon by the two Houses.

14. Secondly, counsel submits that the Supreme Court should adopt the proposition that, pending the agreement and passing of the Division of Revenue Bill, the Division of Revenue Act, passed by the two Houses in the preceding year, forms the basis for allocation of revenue to the two levels of Government subject to a certain limitation, to ensure that the impasse is not prolonged. In this regard, urges counsel, a minimum of 25% of the previous year's Appropriation Act would be a reasonable sum. In support of this proposal, counsel cites this court's decision in Communication Commission of Kenya & Others v. Royal Media Services Limited & Others [2015]2 EA 104 (SCK), to the effect that failure by the Legislature to enact legislation ought not to paralyze the business of Government. Counsel however cautions that this second option, should not be confused with the Vote on Account contemplated under article 222 which can only be triggered after the Division of Revenue Act has been passed and the National Government's share of revenue confirmed under article 218.

15. On its part, the CRA contends that a plain reading of articles 112 and 113 leaves no doubt that Constitution, envisages the possibility of an impasse occurring between the two Houses of Parliament. Such impasse is to be resolved through a mediation process as provided for in article 113. Mr. Waiganjo for the CRA submits that where mediation fails to resolve a dispute between Senate and the National Assembly, the responsibility lies on the Judiciary, to device means of protecting and ensuring compliance with Constitutional purposes, values and principles.

16. Counsel further submits that article 261(5), (6), (7), (8) and (9) of Constitution, makes provision for what should happen, if the National Assembly fails to enact particular legislation within a specified time. The High Court was granted jurisdiction to make specific Orders in the event of failure to enact legislation specified in the Fifth Schedule. It is counsel's argument that article 261, though limited to legislation prescribed in the Fifth Schedule, is a pointer to how the Courts should view any other failure by Parliament, to enact such critical legislation as the Division of Revenue Act. Counsel therefore urges this court, to adopt an "impasse breaking" interpretation that not only compels both the Senate and National Assembly to discharge their Constitutional responsibilities, but also protects the spirit, values and purposes of Constitution.

17. Counsel urges that in view of the current impasse between the National Assembly and Senate over the Division of Revenue Bill, the dispute should be referred to the High Court,

for resolution within the framework of articles 261(5), (6), (7), (8) and (9) of Constitution, as a basis for sustaining the design and purpose of Constitution.

18. In opposition to the foregoing arguments, the National Assembly is categorical that it has the exclusive mandate to consider, deliberate upon, and enact all Money Bills in accordance with the relevant provisions of Constitution. Mr Kaluma identifies such Money Bills as the Appropriation Bill under article 221, the Division of Revenue Bill under article 95 (4) (a) and 218 (1), and the Finance Bill, among others. Counsel submits that such Money Bills are insulated by Constitution from the vagaries of the processes of ordinary legislation. It is counsel's view that the National Assembly enacts laws under article 95 of Constitution while the Senate merely "participates" in the law-making function of Parliament under article 96 of Constitution.

19. Counsel argues that the Senate has legislative authority over the enactment of the County Allocation of Revenue Bill, which determines the sharing of revenue between the Counties. On the other hand, submits counsel, the National Assembly has the exclusive mandate to determine the allocation of National revenue between the two levels of Government as provided in Part Four of Chapter Twelve of Constitution. It is his contention that, the drafters of Constitution, could not have intended that the Senate would override, the resolution of the National Assembly regarding the Division of Revenue Bill. In his opinion, if that were the intention of the drafters, they would have provided a safeguard, requiring a two-thirds majority vote in the Senate, for any amendment to the Division of Revenue Bill to have effect. This kind of safeguard, submits counsel, can be seen in Constitutional provision which requires a two-thirds majority vote in the National Assembly for any amendments to the County Allocation Bill to have effect.

20. Based on the foregoing, the 2nd Interested Party invites the Court to depart from its previous interpretation of articles 218 and 224 of Constitution in the Matter of Speaker of the Senate and Another v. The Honourable Attorney-General & 4 Others, in so far as it held that the Senate has a role in the enactment of the Division of Revenue Bill. Mr Kaluma submits that it would be in the public interest, for this court to depart from that decision since the mediation process envisaged under article 113 of Constitution, is not applicable to the Division of Revenue Bill. According to counsel, there ought not to be any impasse given that the National Assembly has the exclusive mandate to deliberate upon the Division of Revenue Bill, while the Senate has no role to play in those deliberations.

21. On his part, the Speaker of Senate submits that Constitution does not envisage a situation where Parliament fails to pass the Division of Revenue Bill, a lacuna he submits was acknowledged by Rawal DCJ in the Matter of the Speaker of the Senate & Another [2013] eKLR. However, as devolution is one of the principles of governance under article 10 of Constitution, he urges that Constitution under Chapter 12 requires that Parliament must

ensure that the devolved Governments have sufficient resources allocated to them. The Speaker of the Senate urges the Court to exercise its jurisdiction under article 163(6) of Constitution to set Constitutional framework to ensure that the County Governments get their equitable share as required by Constitution. Ms. Thanji, counsel for the Speaker of the Senate, emphasizes the need for the National Government to release the allocated resources to the County Governments in a timely manner.

22. Both Katiba Institute and the Institute for Social Accountability submit that the Division of Revenue Bill is a time-bound legislation aimed at ensuring reliability, stability and predictability of revenue allocation to County Governments. It is their view that the content and timing of the Division of Revenue Bill, are provided for in article 218 of Constitution. In support of their argument, they recall the Advisory Opinion by this court in The Speaker of the Senate v. The Attorney General [2013] eKLR, wherein it was emphasized that the Division of Revenue Bill is a sine qua non and mandatory part of the legislative process. The Court also reminded both houses of Parliament about their solemn duty to resolve any disagreement over the Bill through mediation as mandated by Constitution.

23. The amici submit that frustration of the mediation process by any of the two houses is a violation of Constitution. Towards this end, they invoke article 6(2) of Constitution which obligates the two levels of government, to conduct their mutual relations on the basis of consultation and cooperation. They submit that Constitution does not contemplate a failure of the mediation process in relation to the Division of Revenue Bill as the Bill is a mandatory and time-bound part of revenue sharing between the National and County Governments.

24. It is therefore submitted that one way of eliminating the stalemate is elevating the recommendations of Commission on Revenue Allocation to a binding status, in the event of an impasse between the two Houses. This, they urge, would incline the two houses to pursue the mediation process to its logical conclusion.

25. However, they also submit that where for any reason, a stalemate cannot be unlocked through a singular cycle of mediation, then the duty devolves to the Supreme Court or the High Court to resolve the stalemate, as was set out in paragraph 146 of the Advisory Reference No.2 of 2013, In the Matter of Speaker of the Senate (Supra).

**iii. Whether there should be timelines within which the National Government should release the equitable share of revenue to County Governments**

26. The Applicants submit that the National Treasury has persistently failed to release the equitable share of revenue to the County Governments in a timely manner, as required by article 219 of Constitution. They argue that the unpredictability of releasing the allocated funds can only defeat the noble objectives of devolution. There is no way, submit the

Applicants, County Governments can discharge their Constitutional responsibilities, if the funds allocated to them are released, not in accordance with Constitution, but at the behest of the National Treasury. It is impossible to implement the county budgets, when the allocated funds are released at the end of the Financial Year.

27. The Applicants urge that in conformity with the clear language of article 259(8) of Constitution, the funds allocated to Counties should always be released "without unreasonable delay and as soon as the occasion arises." Consequently, they submit that under article 219 of Constitution, the equitable share of revenue for County Governments ought to be released within a period of fourteen (14) days, which is the reasonable Constitutional period as held by the High Court in Law Society of Kenya v. Attorney General & 2 Others [2016] eKLR. The Applicants submit that the 14-day timeline begins to run immediately after the Division of Revenue Act and the Appropriation Act have been assented to by the President. The disbursement of the funds should be strictly in accordance with Section 17 of the Public Finance Management Act.

28. The Applicants also take issue with the administration and application of IFMIS to their financial management processes by the National Treasury. They argue that the System violates articles 6(2) and 189(1a) of Constitution, as it infringes upon their institutional autonomy in the execution of their budgets.

29. The CRA on its part submits that the sustainability of devolved governance depends on predictable and timely expenditure releases. As such, the release of funds must be made within reasonable time, in order to facilitate the effective execution of County Governments' recurrent and development budgets. The CRA also proposes a timeline of 14 days in support of the Applicants.

30. Katiba Institute and the Institute for Social Accountability submit that, article 219 of Constitution requires a county's share of revenue to be transferred to the county without undue delay and without deduction, except when the transfer has been stopped under article 225. The amici submit that while delay is a question of degree, based on the facts and circumstances of each case, a purposive interpretation of articles 47, 174, 175, 206, 207, 219 and 259(8) would lead to the conclusion that once the Division of Revenue Act and County Allocation of Revenue Act have been passed, then the amounts become due and should be transferred from the Consolidated Fund as a direct charge under article 206.

31. In the alternative, the Amici submit that since the division of revenue is based on accrued income and projections, the National Treasury could agree with the National Government on payment schedules, dividing the amounts due to reasonable periodic tranches, taking into account all relevant factors, including the need to ensure that County Governments are

able to perform their functions. They argue that unexplained departures from the agreed schedule would amount to undue delay contrary to Constitution.

**iv. Whether the National Assembly can enact an Appropriation Act prior to the enactment of a Division of Revenue Act?**

32. The applicants submit that the National Assembly can only enact the Appropriation Act, after the enactment of the Division of Revenue Act. Towards this end, they contend that the design and structure of Chapter 12 Part 4 of Constitution, envisages a scenario where agreement upon the Division of Revenue Bill, must precede the tabling of the annual estimates of revenue and expenditure by the Cabinet Secretary of the National Treasury. Therefore, the Applicants submit that as a matter of prudence and Constitutional imperative, the Division of revenue Bill has to be agreed upon and passed before the National Assembly can approve the budget or authorize a vote on account or withdrawal from the Consolidated Fund under article 222 of Constitution.

33. The Applicants further contend that a County Allocation of Revenue Bill in terms of article 218(1)(b) of Constitution, cannot be enacted to "divide among Counties", revenue which is not only yet to be allocated, but whose quantum is unknown. They submit that under article 224 of Constitution, Counties can only prepare their respective budgets and appropriation Bills, on the basis of the Division of Revenue Bill passed by Parliament under article 218. It is the contention of the Applicants that the sequencing of the budgetary processes means that the enactment of the Division of Revenue Bill must precede the Appropriation Act.

34. The CRA supports the proposition that the enactment of the Division of Revenue Bill must precede any appropriation by the National Government. Mr. Waiganjo, counsel for the CRA, submits that on basis of articles 218(1) and 221, the introduction of the Division of Revenue Bill, and the tabling of the Estimates of the Revenue and Expenditure of the National Government for the next financial year, in the National Assembly, takes place at the same time. The same timing, according to counsel, is provided for by Section 8(1)(b) of the Public Finance Management Act. Counsel argues that it was the intention of the drafters of Constitution, that both the Division of Revenue Bill and the Appropriation Bill be enacted before the commencement of the next financial year.

35. Counsel makes reference to article 221(6) of Constitution, which provides that the Appropriation Bill is to be presented after the estimates of National Government expenditure, and the estimates of expenditure for the Judiciary, and Parliament have been approved by the National Assembly. Reference is also made to article 224, which provides that each County Government, based on the Division of Revenue Bill passed by Parliament under article 218 of Constitution, shall prepare and adopt its own annual budget and

appropriation Bill in the form, and according to the procedure prescribed in an Act of Parliament.

36. Counsel urges the Court to adopt a contextual interpretation of the foregoing Constitutional provisions. Such an approach in the view of counsel, would lead to the inescapable conclusion that, the Division of Revenue precedes appropriation. In support of this proposition, counsel cites as persuasive authority, the High Court decision in the case of National Assembly of Kenya & Another v. Institute for Social Accountability & 6 Others [2017] eKLR wherein it was held that, the enactment of the Division of Revenue Act precedes all other statutory allocations and appropriations.

37. The Speaker of Senate, in support of the Applicants, submits that Constitution does not envisage a situation where, County Governments would be deprived of their share of revenue, from the revenue raised nationally. This being the case, urges the Speaker, there must first be a National Division of Revenue, before the National and County Governments, can proceed to appropriate their respective shares. Mr. Omogeni, counsel for the Speaker of Senate, submits that it is mandatory that there first be a vertical division of revenue, before the National and County Governments can proceed to pass their respective appropriation Bills. He observes that article 222 of Constitution insulates the National Government in the event that the Appropriation Act is not assented to, by providing for emergency withdrawal of funds from the Consolidated Fund. Counsel submits that there being no similar provision with regard to County Governments, it follows that the Division of Revenue Bill must be agreed upon and enacted into law before the end of each Financial Year, to pave way for appropriation by the counties. Counsel argues that given the wording of article 224 of Constitution, the National Assembly cannot pass the Appropriation Act before there is a Division of Revenue Act.

38. Counsel submits that this court's pronouncement in Advisory Opinion No.2 of 2013, Speaker of the Senate and Another v. The Attorney General, leaves no doubt that there cannot be a Division of Revenue Act, without the input or concurrence of the Senate. Given the current impasse, counsel urges the Court to render a similar authoritative Advisory Opinion regarding issues raised in the Reference.

39. On the other hand, the Speaker of the National Assembly argues that it is perfectly in order, for the Assembly to enact the Appropriation Bill into law before the enactment of the Division of Revenue Act. Counsel for the Speaker submits that the revenues contained in the Division of Revenue Bill, are mere estimates or forecasts, the basis upon which, the National Treasury prepares and submits to the National Assembly, the estimates of expenditure for the National Government. The National Government's budget process is allowed to proceed with the indicative amounts of revenue and approve the Appropriation Bill under article 221(1) of Constitution.

40. Counsel submits that the enactment of the Appropriation Act, does not affect the figures set aside for the counties in the Division of Revenue Bill, since the same cannot be altered as stipulated in article 219. Counsel therefore contends that the failure to approve the Division of Revenue Bill, occasioned by disagreements during the Mediation Process, should not stop the enactment of the Appropriation Act by the National Assembly. In addition, counsel submits that the failure to agree on the Division of Revenue Bill does not trigger a Vote-on-Account as the same is not an Appropriation Instrument. The Bill is exclusively a proposal for division of revenue between the two levels of Government.

41. Counsel faults the argument that the courts have jurisdiction, to determine allocations of resources to the two levels of Government. He submits that the authority to determine the allocation of national revenue is an exclusive preserve of the National Assembly, under article 95 (4) (a) of Constitution. In his view, the budget making and legislative processes should be allowed to continue in the State organ mandated to undertake the said tasks by Constitution. Counsel contends that the suggestion that courts can involve themselves in the allocation of national revenue is based on the false assumption that the only disagreement that can occur between the two Houses, during deliberations on the Division of Revenue Bill, is limited to the equitable share of revenue due to Counties.

42. On their part, Katiba Institute and the Institute for Social Accountability jointly submit that, the vertical division of revenue must precede any appropriation by the two levels of government. They urge that otherwise, enabling the National Assembly to appropriate for National Government while holding the share of the County Government would distort the reliability, stability and predictability of County Government revenue. Such a situation, they argue, is not the one contemplated by article 222 of Constitution. The amici therefore urge that either level of government can only prepare and pass its own budget and appropriation Bill on the basis of the Division of Revenue Bill enacted by Parliament.

## C. Analysis

### i. The Context

43. The genesis of this Reference lies in a dispute between the National Assembly and Senate, regarding the Division of Revenue Bill for the Financial Year 2019/2020. Had this Bill been enacted into law, in accordance with Constitution and the Advisory Opinion of this court in The Speaker of Senate and Another v. The Attorney General & 4 Others, Advisory Reference No. 2 of 2013, it is highly unlikely that the Applicants herein, would have approached this court, seeking yet another Advisory Opinion.

44. In exercise of the powers conferred upon it under article 216 of Constitution, the Commission for Revenue Allocation made recommendations concerning the basis for

the equitable sharing of revenue, between the National and County Governments for the Financial Year 2019/2020. Towards this end, the Commission proposed inter alia that, the equitable sharable revenue for the counties would be Kshs. 335.7 Billion. These recommendations were submitted to the Senate, National Assembly, the National Treasury, County Assemblies and Executives.

45. The Cabinet Secretary responsible for the National Treasury on his part, published the Budgetary Policy Statement in which he set the equitable sharable revenue for Counties at Kshs. 310 Billion. The BPS was tabled in the National Assembly on 14th February 2019, pursuant to Section 25(2) of the Public Finance Management Act. According to the Affidavit sworn by Wycliffe Ambetsa Oparanya, the Applicants were seriously aggrieved by the National Treasury's proposal, which if adopted, would result in a significant reduction of the equitable revenue for Counties. They therefore rejected the proposal and urged both the Senate and National Assembly, to go by the CRA's recommendation, which had set the county equitable share for 2019/20 at Kshs. 335.7 Billion. However, while the Senate was in full agreement with the Applicants' position, both the National Treasury and National Assembly would have none of it. The negotiations that followed between the Houses of Parliament and the Applicants were long and protracted. With both houses adopting hardline positions regarding the equitable share due to counties, the impasse persisted well into the beginning of the Financial Year 2019/2020. At a meeting held on 28th June 2019, the Applicants resolved to seek an Advisory Opinion from this court pursuant to article 163 (6) of Constitution.

46. In the intervening period, the National Assembly enacted the Appropriation Act based on the estimates of revenue and expenditure that had been tabled in Parliament by the National Treasury. It is worth noting, that the Appropriation Act was passed before agreement upon, and enactment of the Division of Revenue Bill into law. An earlier version of the Division of Revenue Bill approved by the National Assembly based on the Budget Policy Statement had been lost, having been rejected by the Senate, and the resultant mediation having failed to produce concurrence between the two Houses. Between the 16th and 17 of July 2019, when the Court was already seized of this matter, two different versions of the Division of Revenue Bill were published by the two Houses namely, the Division of Revenue Bill No. 2 of 2019 published by the National Assembly on 16th July 2019, and the Division of Revenue Bill of 2019, Published by the Senate on 17th July 2019. The National Assembly version of the Bill set the equitable share for Counties at Kshs. 316.5 Billion while the Senate version set the equitable share for Counties at Kshs. 335.67 Billion.

**(d) Issues For Determination**

47. this court therefore, in its Ruling dated 8th October 2019, derived the four issues from the foregoing scenario. In its version of the Bill, the National Assembly did not go by the recommendation of the Commission on Revenue Allocation, while the Senate went by the said recommendation, in setting the equitable share of revenue for the Counties. This divergence between the two Houses, gave rise to the issue as to whether the recommendations of the CRA, are binding on the former in the determination of the equitable share of revenue for the Counties. The failure of the mediation process under article 113 of Constitution, during the deliberations regarding the earlier National Assembly version of the Division of Revenue Bill, resulted in an unprecedented impasse that almost ground the operations of the Counties to a halt. This gave rise to the second issue with which we are faced, namely, what happens in the event of such an impasse? Likewise, the National Assembly enacted the Appropriation Bill into law, while the Division of Revenue Bill was stuck in the disagreements between the two Houses of Parliament, giving rise to the issue as to whether it was Constitutional for the National Assembly to enact the Appropriation Act before the Division of Revenue Bill. The Applicants also submitted that the National Treasury, more often than not, held them at ransom by delaying the exchequer releases of their share of revenue, thus negatively impacting upon their Constitutional responsibilities. This gave rise to the issue as to whether there should be fixed timelines within which the National Treasury must release the allocated funds to the counties.

48. Although in the end, there would finally be an agreement between the two Houses following this most confounding standstill, the four issues had already crystallized, hence this Advisory Opinion.

**i. Whether the recommendations by the Commission for Revenue Allocation are binding on both the National Assembly and Senate**

49. We have set out in adequate detail, the arguments by the parties regarding the issue as to whether the recommendations by the CRA are binding or not. The starting point for our consideration of this question must be Constitutional text, which establishes the Commission in the first place. Towards this end, article 215 (1) of Constitution establishes the Commission for Revenue Allocation. article 216 of Constitution provides that:

> (1) "The principal function of the Commission on Revenue Allocation is to make recommendations concerning the basis for the equitable sharing of revenue raised by the National Government-
>
> a. between the national and County Governments ; and

b. among the County Governments

(2) The Commission shall also make recommendations on other matters concerning the financing of, and the financial management by, County Governments, as required by this Constitution and national legislation.

(3) In formulating recommendations, the Commission shall seek-

(a) to promote and give effect to the criteria set out in article 203 (1)

(b) when appropriate, to define and enhance the revenue sources of the national and County Governments; and

(c) encourage fiscal responsibility."

Sub-article 5 of article 216 provides that:

> " The Commission shall submit its recommendations to the Senate, the National Assembly, the national executive, County Governments, and county executives."

50. On the one hand, we have been urged to consider and adopt the position that recommendations by the Commission for Revenue Allocation are binding. The proponents of this line of reasoning, have predicated their argument on the ground that, being a Constitutional organ, the Commission was established for a reason and hence, its recommendations can neither be whimsically disregarded nor wished away. Further, they argue that the Commission's recommendations are of a highly technical nature, and as such, have to be accorded obligatory attention by Parliament. In their view, as long as the Commission is guided by the objective criteria outlined in article 203 (1) of Constitution in arriving at its recommendations, the same cannot be disregarded.

51. On the other hand, are those who insist that the recommendations by the Commission, are not binding on the National Assembly. The proponents of this position maintain that if the Commission's recommendations were binding, there would be no need for the National Assembly, to debate the Division of Revenue Bill before its enactment into law. Such a situation would be anachronistic to the legislative authority vested upon the National Assembly by Constitution. In their view, to hold that the Commission's recommendations are binding would supplant the legislative authority of Parliament.

52. In our considered opinion, the term "recommendation" is the operational yardstick in this entire debate. In this regard, we agree with those who have submitted that this term should first and foremost, be accorded its literal and natural meaning. Towards this end, generally

speaking, a recommendation is a suggestion or proposal, for a certain cause of action. Such proposal does not ordinarily bind the person to whom, or entity to which, it is addressed. It is for the recipient of a recommendation, to determine what import he should attach to it. However, the categories of recommendations are never closed. Recommendations may differ, in their meaning, nature and effect, depending on the context in which they are deployed.

53. In the matter before us, it is to be appreciated that we are dealing with recommendations emanating from a Chapter Fifteen Commission. Constitution accords Commissions under this Chapter, an important place in the country's governance. article 249 provides that the objects of the Commissions and Independent Offices are to-

    a. protect the sovereignty of the people;

    b. secure the observance by all State organs of democratic values and principles; and

    c. promote Constitutionalism.

54. Since the principal function of the Commission on Revenue Allocation is to make recommendations concerning the equitable sharing of revenue between the National Government and County Governments, it would be inappropriate in our view, to categorize such recommendations as "mere suggestions or proposals". There can be no doubt therefore, that the Commission has a central role to play in the Division of Revenue Bill, the latter being the legislative instrument, that actualizes the equitable revenue sharing of revenue between the two levels of Government. Such recommendations are to be accorded serious consideration by both Houses while debating the Division of Revenue Bill. However, the question as to whether the Commission's recommendations are binding upon the National Assembly still remains unresolved. Are the said recommendations so weighty as to be binding?

55. In order to determine the nature of the Commission's recommendations, reference must be made to the relevant provisions of Constitution. Of immediate note, is article 205 of Constitution, which provides that:

    1. When a Bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning County Governments is published, the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate. (Emphasis added)"

    2. Any recommendations made by the Commission shall be tabled in Parliament, and each House shall consider the recommendations before voting on the Bill. (Emphasis added)"

article 204 (4) of Constitution provides that:

> "The Commission on Revenue Allocation shall be consulted and its recommendations considered before Parliament passes any Bill appropriating money out of the Equalization Fund. (Emphasis added)"

article 218 of Constitution provides that:

1. At least two months before the end of each financial year, there shall be introduced in Parliament-

    a. A Division of Revenue Bill, which shall divide revenue raised by the National Government among the national and county levels of government in accordance with this Constitution; and

    A County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government on the basis determined in accordance with the resolution in force under article 217

2. Each Bill required by clause (1) shall be accompanied by a Memorandum setting out-

    a. an explanation of revenue allocation as proposed by the Bill;

    b. an evaluation of the Bill in relation to the criteria set out in article 203 (1); and

    c. a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation. [Emphasis added].

56. A critical reading of the provisions cited above, leaves no doubt that Constitution places a very high premium on the recommendations by the Commission for Revenue Allocation. Such recommendations once tabled in Parliament, must be accorded due consideration before a vote takes place in either of the Houses, on the Division of Revenue Bill and the County Allocation of Revenue Bill. This is the unequivocal prescription in article 205 of Constitution. Even where the National Government intends to appropriate money from the Equalization Fund, the Commission must still be consulted, and if following such consultation, it makes recommendations, the National Assembly must consider the same before passing an Appropriation Bill.

57. In view of the foregoing, it is our considered opinion that, where either of the two Houses passes a Bill envisaged under article 205 of Constitution, without considering the recommendations of the Commission on Revenue Allocation, the resultant legislation would be unconstitutional. By the same token, where the National Government

appropriates money from the Equalization Fund without consulting the Commission, the resultant legislation would suffer a similar fate. The same result would obtain were the National Assembly passes legislation authorizing the National Government to appropriate money from the Equalization Fund without considering the recommendations, if any, by the Commission on Revenue Allocation.

58. Having determined that the recommendations by the Commission for Revenue Allocation are no ordinary suggestions or proposals, we must consider whether, they are binding upon all the entities to which they are addressed. Simply put, can an entity to which the Commission of Revenue Allocation's recommendations are addressed deviate from them? What meaning is to be ascribed to the term "consider"? In other words, does "consider" mean the same as "to be bound?" article 218 (2) of Constitution provides that both the Division of Revenue Bill and the County Allocation of Revenue Bill, must be accompanied by a memorandum setting out-

    a. an explanation of revenue allocation as proposed by the Bill;

    b. an evaluation of the Bill in relation to the criteria set out in article 203 (1); and

    c. a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation. [Emphasis added].

59. From the wording of article 218 (2), it is not in doubt that Parliament can indeed deviate from the recommendations of the Commission on Revenue Allocation while debating any of the two revenue sharing Bills. In fact, not every deviation from the Commission's recommendations has to be explained. Only a significant deviation has to be accompanied with a memorandum explaining the deviation. Both Houses of Parliament are given considerable latitude by Constitution to not only explain the revenue allocation in the Bill(s), but also to critique the Bill(s) in the context of the objective criteria set out in article 203 (1). Even the Commission of Revenue Allocation itself has to be guided by the said criteria in making its recommendations.

60. Taking all these into account, it is our considered opinion that the recommendations by the Commission on Revenue Allocation are not binding upon either the National Assembly, or the Senate. What the two Houses cannot do however is to ignore or casually deal with such recommendations. To hold otherwise, would elevate the Commission above Parliament in the legislative chain. We therefore agree with both the Speaker of the National Assembly and the Law Society in their submissions to the effect that, it could not have been the intention of the makers of Constitution to supplant the legislative authority of Parliament in matters Finance, by establishing the Commission on Revenue Allocation.

61. By the same token, we affirm as a correct statement of the law regarding this issue, the pronouncement by the High Court in its decision, In the Matter of the 47 County Assemblies and Others; Petition No. 368 of 2014. Faced by the question as to whether the recommendations addressed to all the 47 County Assemblies and County Executives, by the Commission on Revenue Allocation were binding upon the former, Lenaola J, (as he then was) having extensively considered the applicable law on the subject matter, rendered himself thus at paragraph 53:

> "...the 1st respondent (Commission on Revenue Allocation) is the body charged with the responsibility of making recommendations inter alia to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives on the basis upon which revenue would be shared equitably between the National and County Governments... None of the Parties disputed these facts but the point of disagreement is whether those recommendations on all the organs to which they are made."

At paragraph 57, the learned judge held, and we quote:

> "The import of these provisions (article 218 (2)) is that a recommendation made by the 1st respondent to the Senate is not binding but for good order, reasons for a deviation must be given."

62. We agree with this statement of the law save to add that, the non-binding nature of the Commission's recommendations is not limited to the Senate but is also applicable to the National Assembly, and indeed, to any other entity to which they may be directed. Additionally, as already stated in paragraph 48 of this Opinion, not every deviation from the Commission's recommendations is to be explained away in a memorandum, only a significant deviation. What constitutes a significant deviation is a matter to be determined on a case-to-case basis.

63. In conclusion, we note that Constitution, through several of its provisions, professionalizes and democratizes the budget making process. On the one hand, it ensures that Parliament benefits from the technical insights of the Commission's recommendations, while debating the revenue sharing and allocation Bills. On the other hand, it safeguards the legislative authority of Parliament by requiring that both Houses, pay due regard to the recommendations without necessarily being bound. This flexibility ensures that both entities are able to critically apply their collective minds to the very crucial yet complex process of budget making. It is against this background, that one must appreciate the fact that, Parliament and the Commission may not always agree inter alia, on the equitable share of revenue due to County Governments. What is critical is that all the parties in this process,

including the Applicants herein, must be guided by the objective criteria set out in article 203 (1) of Constitution. Given this reality, it cannot always be assumed that the Commission on Revenue Allocation will always recommend a higher figure of equitable revenue for the Counties than that recommended by either the National Assembly or the Senate. A time may very well come, when the Applicants would rather go by the National Assembly's proposals than the Commission's. What would happen for example, if the Commission, guided by the prevailing circumstances at the time, recommends a much lower figure, than what the National Assembly eventually proposes in the Division of Revenue Bill? Would the proponents of the binding nature of the Commission's proposals still stand their ground? We hardly think so.

**ii. What happens when the National Assembly and the Senate fail to agree on a Division of Revenue Bill thereby triggering an Impasse?**

64. The question as to what happens in the event of an impasse between the two Houses of Parliament over a Division of Revenue Bill is not a theoretical one. It is the reality that informed the Applicants' decision to seek this Advisory Opinion under article 163 (6) of Constitution. Never before, since the promulgation of the 2010 Constitution, had there occurred such an ugly and protracted stalemate between the National Assembly and the Senate over proposed legislation as crucial as the Division of Revenue Bill.

65. It is worth repeating that the first Division of Revenue Bill passed by the National Assembly on 26th March of 2019 and transmitted to the Senate, was eventually lost following its rejection by the latter. The Mediation process that was triggered by the said rejection pursuant to article 113 of Constitution did not yield any concurrence between the Houses, hence the impasse. This impasse was to last until July 2019, when both the Assembly and Senate republished their versions of the Bill. For good measure, the Senate's version of the Bill was also rejected by the National Assembly on 8th August 2019, thus triggering yet another Mediation, and not before this court had issued an Order directing the protagonist chambers, to activate and exhaust Constitutional process under article 113. It was not until the 16th of September 2019 that the Court was informed that the two Houses had finally agreed on a mediated version of the Division of Revenue Bill that was eventually passed into law.

66. By the time the impasse was resolved, the Country was three months into the Financial Year of 2019/2020. Needless to say, the stalemate not only led to delayed exchequer releases to the Counties, but also seriously affected their budgetary and programme implementation cycles. Indeed, the effects of this gridlock are still being felt in the entire financial system of County Government. It is unsettling to imagine what would have happened, had the impasse defied

the second mediation process. Thus, we must still grapple with the issue as to what happens in the event of a failed mediation.

67. In navigating the issue at hand, we have taken cognizance of the arguments by both the Attorney General and the Speaker of the National Assembly, urging this court to exercise restraint, and avoid delving into political and budgetary disputes. They submit that it is not for the Courts to make allocations of revenue to Counties, neither is it for this court to re-write Constitution and the law, under the guise of rendering an Advisory Opinion. While these arguments cannot be casually dismissed, it is not lost to us that what we are confronted here with, is not a case of judicial over-reach, but a real Constitutional crisis, which if not resolved judicially, has the potential to cripple the operations of the entire County Government. It would be remiss of this court to look on helplessly, in the face of a legislative paralysis that not only subverts Constitution, but also threatens the sovereignty and security of the Country. It could not have been lost on a keen observer of these proceedings, that when the Court became seized of this Reference, it initially exercised extreme restraint, by urging the two Houses to undertake their Constitutional responsibilities through mediation under article 113 of Constitution.

68. The Applicants and the Speaker of Senate, submit that the business of Government should not come to a standstill, because of disagreement between the two Houses over the Division of Revenue Bill. Towards this end, the Applicants urge that two options are feasible in resolving the problem. The first option is for this court to refer the matter to the High Court for resolution under article 165 (3) (d) of Constitution. The High Court once so moved, would then issue directions for the allocation of the equitable revenue due to counties, on the basis of the recommendations by the Commission on Revenue Allocation. The second option is for this court to fall back on the Division of Revenue Act of the preceding Financial Year and order that 25% of the equitable revenue due to the Counties in that Year, be immediately released to the Counties pending resolution of the impasse. The Speaker of Senate supports the Applicant's first option of seeking binding Orders from the High Court on the basis of recommendations by the Commission on Revenue Allocation. The Commission on its part, urges the Court to devise what we have characterized as "an Impasse bursting Opinion", which safeguards the principles and values of Constitution.

69. The Speaker of the National Assembly invites the Court to depart from its decision in In the Matter of the Speaker of Senate & Another v. the Attorney General & Another & 4 Others; Ref. No 2 of 2013, wherein the Court held that Senate has a role to play in the Division of Revenue Bill. Once the Court departs from its decision as invited by the Speaker, there would be no impasse in the future, as the National Assembly would have the exclusive legislative mandate to pass the Bill, un-encumbered by the input of Senate.

70. We consider it necessary to address at the outset, the Speaker's invitation to us to depart from our decision. It follows that if we should agree with the Speaker's proposition, then there would be no need to consider the submissions by the Applicants regarding what should happen in the event of an impasse. In that Advisory Opinion, after extensive analysis, this court, in a majority decision, pronounced itself thus:

> "It is clear to us that the Senate had a clear role to play, in the processing of the Division of Revenue Bill. The Speaker of the National Assembly should have complied with the terms of article 112 of Constitution; and the National Assembly should have considered the deliberations of the Senate on record and, failing concurrence on legislative choices, the matter should have been brought before a mediation committee, in accordance with the terms of article 113 of Constitution"

71. The above pronouncement remains the law as far as the question in reference to which it was made is concerned. While it is not in doubt that the Supreme Court may depart from its previous decisions as per article 163 (7) of Constitution, such departure must be premised upon a clear and well-reasoned justification. The circumstances that may inform this court's departure from its previous decisions were well articulated in Jasbir Singh Rai v. Tarlochan Singh Rai & Others. Asking the Court to depart from its previous decision is not a cause of action to be pursued casually.

72. A litigant cannot urge the Court to depart from its previous decision simply because he disagrees with it, or that the decision, militates against his case. Departing from a previous pronouncement of the law is a momentous course of action, which by its very nature must fundamentally upset pre-existing legal relations. As such, any party intending to steer the Court in that direction, ought to ideally make a formal application in which he states the reasons in justification of such a motion. The Application has to be served upon all the respondents who in turn will urge their case either in support or opposition thereto. At the end of the day, the Court will have benefitted from the reasoned submissions of counsel before rendering a decision.

73. In the instant matter, we are being asked to depart from a previous decision, not in the manner signaled above, but in the course of a response to the Reference. None of the parties herein, including the Amicus Curiae, had the opportunity to respond to the submissions of counsel for the Speaker of the National Assembly on this issue. The Speaker was content, both in the written and oral submissions by counsel, to invite the Court to depart from its previous decision on grounds that the same was rendered Per Incuriam. The Speaker also invites the Court to adopt the dissenting opinion of Lady Justice Njoki as the correct statement of the law. The perfunctory manner in which the Court is being moved to depart

from a previous decision does not commend itself to us. Consequently, we are unable to consider the merits of the Speaker's arguments in circumstances where none of the other parties were heard on the same.

74. Having taken the foregoing stand, we must now turn to the propositions made by the Applicants as possible resolutions following an impasse between the two Houses of Parliament. As a first option, the Applicants submit that following such a stalemate, an application be made to the High Court under article 165 (3) (d), for Orders compelling the National Assembly to provide for the equitable share of revenue due to the Counties on the basis of the recommendations by the Commission on Revenue Allocation. Having considered the submissions of counsel in this regard, we find this proposition untenable on two grounds. Firstly, adopting such a course of action would defeat our holding to the effect that recommendations by the Commission on Revenue Allocation are not binding. Secondly, to approach the High Court in this manner would fundamentally shift the revenue allocation function from the legislature to the Judiciary, thus radically upsetting the doctrine of separation of powers. Budget making and allocation of revenue, are functions essentially reserved for the executive and the legislature. Courts of law should only come in to protect the authority of Constitution and the law where necessary.

75. This leads us to the second option suggested by the Applicants, and that is, to use the Revenue Allocation Act of the previous Financial Year as a fallback position. Counsel for the Applicants submitted that in the event of an impasse, 25% of the equitable share of revenue under that Act should immediately be released to counties pending the enactment of the Division of Revenue Bill. On the face of it, this proposition appears not only practical but also logical; however, the proponents of this idea did not derive it from any Principle or deeming provisions of Constitution. Conscious of the fact that even an Advisory Opinion, must be anchored within the general value system and architecture of Constitution, we must seek direction from the relevant Constitutional provisions as we navigate this vexed question.

76. The starting point in this regard is article 259 (1), which provides that 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; and

d. contributes to good governance.

77. With regard to the budget making process and appropriation of money from the Consolidated Fund, Constitution itself envisages a scenario where, the National

Government may not be able to access funding due to the absence of enabling legislation. In the event of such an eventuality, article 222 of Constitution provides that-

> 1. "If the Appropriation Act for a financial year has not been assented to, or is not likely to be assented to by the beginning of that financial year, the National Assembly may authorize the Withdrawal of money from the Consolidated Fund;
>
> 2. Money Withdrawn under clause (1) shall-
>
> a. be for the purpose of meeting expenditure necessary to carry on the services of the National Government during that year until such time as the Appropriation Act is assented to:
>
> b. not exceed in total one-half of the amount included in the estimates of expenditure for that year that have been tabled in the National Assembly; and
>
> c. be included under separate votes for the several services in respect of which they were withdrawn, in the Appropriation Act."

78. It is therefore clear from the foregoing provisions that if for whatever reason, the President does not assent to an Appropriation Act passed by the National Assembly, the business of the National Government must none-the-less continue. Constitution does not countenance a paralysis in Government, hence the interim measures set out in article 222. Is it conceivable that the same Constitution would condone the crippling of the affairs of County Government, occasioned by a gridlock in the two Houses over the Division of Revenue Bill? article 224 of Constitution provides that-

> " On the basis of the Division of Revenue Bill passed by Parliament under article 218, each County Government shall prepare and adopt its own annual budget and appropriation Bill in the form, and according to the procedure, prescribed in an Act of Parliament."

79. It follows therefore that, in the absence of a Division of Revenue Act, County Governments cannot prepare and adopt their own budgets and appropriation laws. Where does such an eventuality leave the Counties? A total freeze of the functions of the entire level of County Government. Such a freeze must of necessity, in turn lead to a serious disruption of the business of National Government, given the fact that the two levels of Government are inter-dependent. All the County Government functions set out in the Fourth Schedule

of Constitution would have to be suspended. The consequential effect upon the business of the National Government would equally be devastating. The purpose of Constitution of preserving the continuity in Government business as envisaged in article 222 would be subverted. Yet as consistently asserted by this court in a long line of its decisions, Constitution cannot subvert itself. Therefore, although there appears to be a lacuna in Constitution as to what should happen, in the event of an impasse in Parliament such as the one we have witnessed, article 222 provides albeit by implication, a practical way forward. It shall be remembered that not so long ago, in In the Matter of the Speaker of the County Assembly of Embu, when confronted by a similar question, as to what should happen in the event of the resignation, impeachment, or death of a Deputy Governor, in view of the absence of a specific provision in Constitution, this court fashioned its Advisory Opinion, not in a vacuum, but on the basis of the analogous provisions in article 149 of Constitution.

80. It is therefore our considered opinion that should an impasse occur due to the failure of the mediation process, occasioned by the lack of concurrence between the two Houses over the Division of Revenue Bill, the National Assembly shall, for the purpose of meeting the expenditure necessary to carry on the services of the County Government during that year until such time as the Division of Revenue Act is assented to, authorize the withdrawal of money from the Consolidated Fund. The monies so withdrawn shall be included, under separate vote(s) for the several services in respect of which they were withdrawn. It is to be expected that each County Assembly, would have to re-adjust their respective budgets and appropriation bills accordingly.

81. This leaves us with the question regarding the percentage to be withdrawn from the Consolidated Fund. While the withdrawal of money for the purpose of the National Government under article 222 is based on a percentage of the estimates of expenditure for that year, the same method cannot apply to the County Government, since the estimates do not include the equitable revenue share due to Counties. Logic would require that the percentage of the money to be withdrawn be based on the Division of Revenue Bill; yet this would be legally untenable, given the fact that the Bill, is not only the subject matter of controversy, but is also yet to pass into law. In the circumstances, it is our view that in the event of an impasse, the percentage of the money to be withdrawn be based on the equitable allocation to Counties in the Division of Revenue Act of the preceding financial year. In keeping with the spirit of article 222 (2) (b) of Constitution, the money to be withdrawn shall be 50% of the total equitable share allocated to the Counties in the Division of Revenue Act.

82 Assuming for purposes of argument, that 50% of the total equitable share allocated to Counties in the preceding year exceeds the total equitable share proposed in the Division of Revenue Bill, then the percentage to be withdrawn from the Consolidated Fund shall not be less than 15% of all revenue collected by the National Government. The 15% recommended

in case of such an eventuality is derived from article 203 (2) of Constitution which provides that-

> " For every financial year, the equitable share of the revenue raised nationally that is allocated to County Governments shall not be less than fifteen percent of all revenue collected by the National Government."

83. It is our perception that this way forward, safeguards the functionality of County Governments, while affording Parliament an opportunity to resolve the impasse through a second mediation under article 113 of Constitution. It preserves the authority of Constitution by protecting its principles and values. Finally, it promotes the doctrine of separation of powers by locating the solution to a potential impasse squarely within the arena of Parliament. Our opinion in this regard, is inspired by a contextual reading of the provisions of Constitution as a living Charter.

84. Towards this end, we would urge the Speakers of Parliament, to initiate requisite legislative action so as to give normative form to this arrangement. Such legislative action clearly finds favour with article 190 (1) of Constitution, which provides that "parliament shall by legislation ensure that county governments have adequate support to enable them to perform their functions". While we are cognizant of the fact that the initial legislation envisaged under this article is what can be termed "a Fifth Schedule Legislation", with a time limit of 3 years after the promulgation of Constitution, the article is not necessarily spent, taking into account the fact that, the architecture and functionality of Counties is always an ongoing process. We hasten to add that the absence of such legislation shall not act as a bar or postponement of the implementation of this Opinion.

85. What then should happen if, even after this painstakingly constructed route, the two Houses of Parliament fail to reach an agreement thus reigniting the stalemate? In The Speaker of the Senate & Another v. Hon. Attorney General & 4 Others [2013] eKLR; having held that the Senate had a role to play in the processing of the Division of Revenue Bill, we stated that failure to agree upon the Bill by the two Houses, should be resolved through the mediation process prescribed under article 113 of Constitution. It was our assumption that Parliament would not fail in the discharge of one of its most solemn legislative responsibilities i.e., the passage of the Division of Revenue Bill. Indeed, the mediation process appears to have unlocked any disagreements between the two Houses over the years, until the Financial Year 2019/2020, hence this Reference for an Advisory Opinion.

86. The main function of Parliament, which consists of the National Assembly and the Senate, is to enact legislation in the manner provided for by Constitution. The legislative authority

of the Republic is derived from the people and, at the national level is vested in and exercised by Parliament (article 94). article 94 (5) of Constitution provides that-

> "No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation."

87. The main reason Parliament exists as one of the arms of Government is to represent the people in matters of public interest, and to legislate on diverse questions of national interest. Every five years, the electorate gets an opportunity to pass judgment on the performance of Parliament through democratic, free and fair elections. But elections are not a barometer for the collective measurement of the performance of Parliament. They afford citizens an opportunity to re-elect or reject individual members at the ward, Constituency and County levels. Elections cannot offer a way out when Parliament fails in its responsibilities during its five-year term. It is not every failure or dereliction of duty on the part of Parliament that triggers a motion to end its life before its five-year term elapses. Indeed, under Chapter Eight, Constitution does not contemplate a scenario where the life of Parliament may be cut short before the end of its term. However, article 261 as read with the Fifth Schedule of Constitution clearly provides that the life of Parliament may be discontinued due to failure to enact specific legislation within a specified time.

88. Given the exigencies of national life, it should not be expected that Parliament will always enact legislation in time. The 2010 Constitution has transformed law making from a technical exercise to a democratic and participatory process. It is therefore possible that some pieces of proposed legislation may straddle between two terms of Parliament before being passed into law. NOT SO with legislation for the implementation of the national budget and allocation of revenue to both National and County Government. In this category are to be found, the Division of Revenue Act, the County Allocation of Revenue Act, and the Appropriation Act, among others. Constitution sets specific and rigid timelines within which these pieces of legislation must be enacted, since they operationalize the financial existence of the country. Without a budget and consequent financial appropriation, there would be no Executive, Legislature, Judiciary, or County Government. Budget processing and the enactment of consequential legislation are some of the most solemn responsibilities vested upon Parliament in any given financial year. Failure by Parliament to discharge such a critical legislative function, in the absence of an emergency, or any other disaster that disrupts parliamentary business, not only violates Constitution, but also exposes the country to existential danger. Such a Parliament must be considered to have run its course, hence its dissolution.

It is in this spirit that article 261 of Constitution provides that-

> 1. "Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date."
>
> 5. If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.
>
> 6. The High Court in determining a petition under clause (5) may-
>
>  a. make a declaratory order on the matter
>
>  b. transmit an order directing Parliament and the Attorney General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.
>
> 7. If parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament."

89. It may be argued that article 261 only applies to legislation specified in the Fifth Schedule, or that once such legislation is indeed enacted, then the said article ceases to have effect. But what happens if a specified legislation in the Fifth Schedule is not enacted within the specified time? The answer lies in article 261 (6) and (7) of Constitution. It means that neither article 261 nor the Fifth Schedule becomes spent by the inaction of Parliament. Indeed, there are certain pieces of legislation under the Fifth Schedule that remain un-enacted to this day. However, the High Court retains residual jurisdiction, which may be activated by a petition under article 261 to ensure that the specified law is enacted.

90. By implication, it could be argued that, where Constitution sets strict timelines for the enactment of any other legislation not included in the Fifth Schedule, such as the Division of Revenue Act, failure to enact such legislation by Parliament, in the absence of an emergency or other disaster, must invite the same enforcement sanctions as envisaged under article 261. Such a conclusion would therefore mean that where the two Houses of Parliament fail to agree during a second mediation under article 113 of Constitution, any person may petition the High Court for a declaration to the effect that Parliament has violated Constitution. Upon the transmittal of such declaration, the Chief Justice would advise the President to dissolve Parliament and the President would dissolve Parliament.

91. Yet as logical and attractive as the suggested course of action above may be, we are not unmindful of the limitations of the caution required while exercising our advisory opinion jurisdiction. While this jurisdiction is not an idle one, as emphasized in our earlier decisions, its exercise must be contextualized within the deeming provisions of Constitution and the law. In this regard, we would have had no hesitation to invoke the provisions of article 261 of Constitution, had the Division of Revenue Act, been one of the legislations unequivocally or at least tangentially included in the Fifth Schedule. This leaves us with the need to signal Parliament, which we hereby do, to urgently seal this lacuna, in exercise of its legislative authority of which it has a monopoly. We hasten to add that in the absence of remedial parliamentary action as recommended, any future resurgence of an impasse, is capable of activating the provisions of article 258 of Constitution, thus exposing Parliament to court proceedings in the High Court.

**iii. Whether there should be set timelines within which the National Government should release the equitable share of revenue to the County Government**

92. Apart from the disruption in their operations occasioned by disagreements between the two Houses over the Division of Revenue Bill, the Applicants also decry the inordinate delay in releasing the equitable revenue by the National Treasury. They submit that so serious are the delays, that they at times receive their exchequer releases at the end of the financial year, when for all practical purposes, they can hardly utilize the funds. It is their contention that this unpredictable and discretionary release of funds by the Treasury violates article 219 of Constitution.

93. The Applicants argue that in order to resolve this recurrent problem and so as to give effect to article 219 of Constitution, the Court should set strict timelines within which the National Treasury must release funds to County Governments. Unless strict timelines are set, submit the Applicants, the entire devolution enterprise will be sabotaged. The Applicants therefore propose that funds should be released within 14 days after the Division of Revenue Act and the County Allocation of revenue Act have been assented to. They cite as authority in support of their submission, the principle established by this court in electoral disputes, to the effect that Constitutional timelines are neither negotiable nor alterable. Also cited as persuasive authority is the decision by the High Court in Law Society of Kenya v. Hon. Attorney General & 2 Others [2016] eKLR in which the Court held that a 14-day time limit would be in concordance with the term "reasonable".

article 219 of Constitution provides that-

> "A county's share of revenue raised by the National Government shall be transferred to the county without undue delay and without deduction, except when the transfer has been stopped under article 225".

94. The uncontestable requirement of article 219 is that the transfer of equitable revenue to Counties shall be affected "without undue delay" [Emphasis added]. Constitution does not set a specific timeline within which the National Government must transfer the funds to Counties. Yet in their submissions, the Applicants contend that without a specific timeline, the National Government has largely disregarded this Constitutional edict. In our view, it all depends on what in this context, constitutes "undue delay". In this regard, unless there are set timelines in Constitution or the law, a Court has to consider each case on its own merits to determine whether there has been undue delay in the performance of an act by the concerned entity.

95. By stopping short of prescribing a specific time limit, article 219 allows for a degree of flexibility on the part of the National Treasury in effecting monetary transfers to Counties. We would be hesitant to interfere with this arrangement, given the complexity and elasticity of the subject matter. We don't think that this court is the appropriate forum to determine with precision, when monies due to counties, should be actually transferred. However, the fact that Constitution has not prescribed a specific timeline, does not give the National Treasury the latitude to capriciously decide when to disburse funds to the counties. Just like the National Government, Counties operate within rigid budgetary cycles. Any delay in releasing funds to Counties, has to be justifiable and must be explained in good time at a forum convened for that purpose by the National Government. To release funds at a time when the same cannot be realistically utilized in the implementation of county projects as per their budgets constitutes a violation of Constitution.

**iv. Whether the National Assembly can enact an Appropriation Act prior to the enactment of the Division of Revenue Act**

96. The issue as to whether the National Assembly can enact an Appropriation Act before the enactment of a Division of Revenue Act, arose from the fact that before the resolution of the Impasse between the two Houses of Parliament over the Division of Revenue Bill, the National Assembly nonetheless proceeded to enact the Appropriation Act pursuant to article 221 (6) of Constitution. The enactment had the potential of unlocking funds from the Consolidated Fund for expenditure by the National Government while the Counties remained in limbo as long as the impasse over the Division of Revenue Bill persisted.

97. The arguments by the parties regarding this issue are comprehensively set out in paragraphs 32-42 of this Opinion. It is important to note at the outset that these two pieces of legislation are inextricably linked to the budget making process as provided for by Constitution and the Public Finance Management Act. Thus, any determination of which of them takes priority over the other, must keep track of the sequencing of the budget making process. The actual budgeting is itself a consultative process, involving the National Treasury, Parliament, County Assemblies and the Public. articles 201 and 202 of Constitution provide that revenue raised nationally shall be shared equitably among national and County Governments. article 218 (1) of Constitution provides that-

> " At least two months before the end of each financial year, there shall be introduced in Parliament-
>
> a. a Division of Revenue Bill which shall divide revenue raised by the National Government among the national and county levels of government in accordance with this Constitution; and
>
> b. a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government on the basis determined in accordance with the resolution in force under article 217".
>
> article 221 0f Constitution provides that-
>
> 1. "At least two months before the end of financial year, the Cabinet Secretary Responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the National Government for the next financial year to be tabled in the National Assembly
>
> 2. .....
>
> 3. The National Assembly shall consider the estimates submitted under clause (1) together with the estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary under articles 127 and 173 respectively
>
> 4. ....
>
> 5. ....
>
> 6. When the estimates of National Government expenditure, and the estimates of expenditure for the Judiciary and Parliament have been

> approved by the National Assembly, they shall be included in an Appropriation Bill, which shall be introduced into the National Assembly to authorize the withdrawal from the Consolidated Fund of the money needed for the expenditure, and for the appropriation of that money for the purposes mentioned in the Bill."

98. It is not overtly clear from the foregoing provisions as to which of the two Bills, takes precedence in the enactment order. What is not in doubt however is that once enacted, the Division of Revenue Act divides the revenue raised nationally between the two levels of Government, while the Appropriation Act authorizes the withdrawal and application of monies from the Consolidated Fund by the National Government. Both the Division of Revenue Bill and the County Allocation of Revenue Bill are to be introduced in Parliament at least two months before the end of each financial year; while the estimates of revenue and expenditure of the National Government are also to be submitted to the National Assembly, at least two months before the end of each financial year.

99. On the basis of the sequencing outlined in the foregoing paragraph, we can derive a number of conclusions. Firstly, the Appropriation Bill cannot be introduced into the National Assembly, unless the estimates of revenue and expenditure have been approved and passed by that House. Secondly, the Appropriation Bill comes into life after the Division of Revenue Bill since the latter would already have been introduced into Parliament at least two months before the end of the financial year. Thirdly, the estimates of revenue and expenditure must logically be based on or at the very least be in tandem with, the equitable share of revenue due to the National Government, as provided for in the Division of Revenue Bill. Fourthly, the Appropriation Act must be based on the equitable share of revenue due to the National Government as provided for in the Division of Revenue Act. Otherwise, what would the National Government be appropriating, if not its share as determined by the latter? It is for this reason that even respective County Governments, must prepare and adopt their annual budget and Appropriation Bills, on the basis of the Division of Revenue Bill passed by Parliament under article 218 of Constitution.

100. It follows in our view that in an ideal situation, the enactment of an Appropriation Act cannot precede the enactment of a Division of Revenue Act. This view is based on the premise that the cabinet Secretary responsible for finance submits the estimates of revenue and expenditure to the National Assembly, in his capacity as the Chief Budget Officer of the Executive. In that capacity, the Secretary must surely base his/her estimates on the National Government's share as provided for in the Division of Revenue Bill. The National Assembly on its part has to approve the estimates of National Government expenditure and the estimates of expenditure for the Judiciary and Parliament on the basis of the Division of

Revenue Act. We are fortified in this position by our reading of Section 39 (3) and (4) of the Public Finance Management Act 0f 2012. Towards this end, sub-section 3 provides that-

> The National Assembly may amend the budget estimates of the National Government only in accordance with the Division of Revenue Act and the resolutions adopted with regard to the Budget Policy Statement ensuring that-
>
> a. an increase in expenditure in a proposed appropriation is balanced by a reduction in expenditure in another proposed appropriation; or
>
> b. a proposed reduction in expenditure is used to reduce the deficit. [Emphasis added]

Similarly, sub-section of 4 provides that-

> Where a Bill originating from a member of the National Assembly proposes amendments after passing the budget estimates and the Appropriations Bill by Parliament, the National Assembly may only proceed in accordance with-
>
> a. the Division of Revenue Act
>
> b. article 114 of this Constitution; and
>
> c. any increase in expenditure in a proposed appropriation is balanced by a reduction in expenditure in another proposed appropriation or any proposed reduction in expenditure is used to reduce the deficit. [Emphasis added]

101. Thus, Section 39 of the Public Finance Management Act leaves no doubt that the National Assembly, cannot enact an Appropriations Act before enacting the Division of Revenue Act. This conclusion therefore dispenses with any submissions to the contrary. Does this determination mean that the current Appropriations Act is unconstitutional? To this, our response is that, in view of the not very precise provisions of Constitution regarding the subject matter, the effect of this determination is prospective and not retroactive. What if Parliament enacts an Appropriation Act before the Division of Revenue Act in future? Our answer is that such an Act, would be of doubtful constitutional validity.

**E. Concurring Opinion Of D.k. Maraga, Chief Justice & President Of The Court**

102. I have had the advantage of reading in draft the majority Judgment in this Reference. While I entirely concur with it, I would like to make some observations of my own.

103. The four issues identified as the basis of our Advisory Opinion in this Reference revolve around the interpretation, implementation and enforcement of the Kenya Constitution,

2010. They revolve around the realization of the devolution dream in the 2010 Constitution. In a nutshell, they revolve around the perennial issue of the inequitable distribution of the National cake. Sadly, as was the case with the independence Constitution, the implementation of the 2010 Kenyan Constitution is starting to be lopsided. Those upon whom the Kenyans people have bestowed the power and authority to implement the 2010 Constitution and the political elite, safeguarding their personal and often sectarian interests, are cherry picking what to implement.

104. Any Constitution is as good as its implementation. Unless it achieves some measure of Constitutionalism, in abstract, a Constitution is a dead document. A Constitution which provides for respect for human rights but has no effective mechanism of implementation and enforcement of those rights is a hollow Constitution with no Constitutionalism.

105. Constitutionalism entails limited Government and the commitment to be governed by limitations enshrined in each democratic Constitution; Constitutionalism entails implementation that succeeds in reflecting the desires and aspirations of the people; Constitutionalism entails a vibrant implementation that positively "affects and ... improves the reality of people's [lives]."[1] Kenya typifies the best exemplification of what the late Prof. Okoth Ogendo referred to as a Constitutional democracy "without Constitutionalism." Why do I say that?

106. It is common knowledge that in most African countries, the paradox of Constitutions without Constitutionalism is evident. With the end of colonialism, the realization of the African people's dreams, held for decades if not centuries, was "anchored" on their respective independence Constitutions. Sadly, however, to this day, those dreams continue to mere aspirational platitudes.

107. Although, like those of most other African States, the Kenyan independence Constitution embraced the doctrine of separation of powers that mainly focused on securing the sovereignty of State and setting up the governance machinery. After that was achieved, shortly after independence, the political elite, driven by greed and selfish ambitions, jettisoned the concept of Constitutional implementation and instead embarked on, and succeeded in, making numerous amendments, the overall objective of which was to consolidate all state power and authority in the Executive arm of Government, and in particular the Presidency. That led to patrimonialism that did not tolerate any form of opposition, and established what, in the Kenyan parlance, is referred to as the 'imperial presidency'.

1 Y Ghai, "Kenyan Constitution: History in the Making: The Challenges of Implementation." Pambazuka News (2010). Available at www.pambazuka.org/en/category/features/66501 (accessed on...

108. Instead of entrepreneurs being in the private sector and seeking a reliable legal framework to govern their contracts, in Kenya "the entrepreneurs were those who used, [for selfish gain], State mechanisms which they did not want fettered or questioned, and preferably not accountable to any legal regime."[2] State institutions, including the Judiciary, were subjugated and subordinated to the Executive. Laws that were used for colonial oppression were retained and others introduced to support the State's excesses. The country witnessed some of the monumental plunders of its resources through corruption and outright theft.

109. On the sharing of the National cake, soon after independence, the Executive embarked on a skewed discriminative and exclusionary developmental agenda premised on Sessional Paper No 10 of 1965 on African Socialism and its Application to Planning in Kenya. That created widespread disenchantment among the Kenyan people.[3] In his concurring opinion in The Matter of Speaker of the Senate and Another [2013] eKLR, retired Chief Justice Mutunga gave a litany of the Government's lame duck and poorly conceived initiatives to address the unrelenting demands for equity all of which fell a cropper.

110. As a result of the said acts of impunity, authoritarianism and skewed development, "Kenyans lost respect for ... [their] Constitution and confidence in the political system. Few public institutions enjoyed legitimacy and most [of them] lost the ability to resolve differences among the people or political parties ...."[4] The December 2007 post-election violence for example, was as a result of the opposition parties' refusal to challenge the results of the disputed Presidential election in court on account of their lack of confidence in the Kenyan Judiciary to effectively and impartially resolve electoral disputes, a critical aspect of Constitutionalism.

111. The decline of public confidence in the Government and public institutions had, long before 2007, led to a clamor for reforms. Kenyans demanded for transparency and independent institutions with legitimate roles in a governance structure that adhered to the rule of law and Constitutionalism. In this regard, they demanded first for a multi-party democracy which led to the first multi-party elections in 1992, and, secondly, for Constitutional reforms which culminated in the promulgation of a new Constitution in 2010.

112. In their views to Constitution of Kenya Review Commission (CKRC), recounting their frustrations, many Kenyans felt they were "subjects ... [and] not citizens" of their own

2 Y Ghai, Constitutionalism: African Perspective in The Giant Academic, Essays in Honour of H.W.O.Okoth Ogendo, at page 159-160

3 CKRC Final Report, 2005 p.237.

4 CKRC Final Report (2005), at p. 31.

country. To accommodate everyone, they demanded for devolution, which, as is clear from its objects in article 174 of Constitution, would recognize and protect, inter alia, the rights of minorities and marginalized communities; promote social and economic development; and, most importantly, ensure equitable sharing of the National and local resources.

113. To ensure achievement of these dreams, the Kenyans also demanded for the establishment of the Senate that would, as Dr. Mutakha Kangu wrote, represent and protect "the counties and their Governments as well as their interests in the decision-making processes at the National level .... In effect the Senate [was to] represent both the people organized along the lines of the counties and the County Governments ...."[5]

114. Given the chequered history of skewed development, Kenyans did not trust the Executive or Parliament to equitably distribute the National resources. To ensure equity, Kenyans also demanded for the establishment of the Commission on Revenue Allocation.[6] These and other demands were incorporated in the new 2010 Constitution.

115. To pre-empt absolutist exercise of State authority, in its architecture, Kenya's 2010 Constitution also paid fealty to the doctrine of separation of powers, which is the holy grail of modern democratic Constitutionalism, and delegated the exercise of the people's power to, mainly, the three arms of Government.[7] article 1 thereof provides that "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with [the] Constitution."[8] articles 94(1) and 185(1) respectively vest the Kenyan people's legislative power, at the National level in Parliament and at the County level in County assemblies. Chapter 9 of Constitution vests the people's executive authority at the National level in the National Executive while article 183 vests the people's executive authority at the County level in the County executive committees. article 159(1) of the 2010 Kenyan Constitution delegates the exercise of the people's judicial power to "the courts and tribunals established by or under [the same] Constitution."

116. Besides entrenchment of the doctrine of separation of powers, the Kenya Constitution, 2010, has an elaborate Bill of Rights, including the second-generation Bill of Rights and the concept of devolution. This has led to its billing as one of the world's most progressive and transformative Constitutions which entrenches the doctrine of Constitutional supremacy

5 Mutakha Kangu, Constitutional Law of Kenya on Devolution, Strathmore University Press (2015) p. 346.

6 See Final Report of the Committee of Experts on Constitutional Reform (2010), P.72

7 The others are Independent Commissions established under Constitution

8 article 1(1) of the 2010 Kenyan Constitution.

and binds all persons and organs of State. It is a model Constitution being adopted by nascent democracies in Africa and other parts of the world.

117. In promulgating the 2010 Constitution therefore, especially with elaborate provisions on devolution, the people of Kenya were optimistic that they had put in place institutions, processes and procedures that would facilitate a just and effective governance mechanism for the realization of their hopes and aspirations for a just and equitable society. But has it worked well for Kenyans? Has the 2010 Kenyan Constitution enabled the Kenyan people to realize their dreams of devolution and equitable share of the National cake?

118. Though the Legislature and the Judiciary play critical roles, the primary responsibility of implementing Constitution rests with the Executive arm of Government. It is mainly the Executive that has to formulate and execute appropriate implementing policies. It is mainly the Executive that has to originate various pieces of legislation, amendments and realignments of existing legislations to implement, in particular, non-self-executing provisions of Constitution. Has the Executive arm of Government endeveavoured to thus implement Constitution? Has Parliament played its role in the implementation of Constitution? In my respectful view, they have not.

119. With the above manifest and inescapable historical background in mind and the hankering dreams of the Kenya people pegged on the 2010 Constitution, what is the role of the Judiciary? What is expected of this court in a matter like this the fulcrum of which is equitable distribution of the National resources? Are we supposed to look at it as one of "run-of the mill" cases? I do not think so.

120. As the apex Court in this country, it behoves us, nay, we are obligated by article 259 of Constitution, to have a global view of the problem giving rise to this Reference and give the country appropriate direction. To do otherwise would be a dereliction of our duty and obligation to the Kenyan people.

121. The delegation, by articles 1 and 159(1) of Constitution, of the people's judicial power to "the courts and tribunals established by or under [the same] Constitution" renders the Judiciary the custodian of Constitution.[9] The notion of "delegation", which in most cases is lost sight of, is one of trusteeship, thus rendering the Judges and Judicial Officers trustees or stewards of the people's judicial authority. That position of stewardship obliges the courts and tribunals, in their adjudication of disputes that come before them, to ensure that their

[9] Yash Ghai and Jill Cottrell Ghai; https:www.standardmedia.co.ke/article/2000024468/judiciary-is-custodian-of-the-new-Constitution. See also Law Society of Kenya & 2 others v Attorney General & 2 others [2018] eKLR where it was stated: "The Judiciary as the custodian of the Judicial authority of the People of Kenya under article 1 (3) (c) of Constitution must take lead role, when applying and interpreting Constitution, to uphold and promote the National Value and principle of the Rule of Law entrenched under article 10 of Constitution and, through it, help combat the spectre as well as reality of impunity in the State and society of Kenya."

interpretation and application of Constitution gives effect to the values and aspirations of the Kenyan people enumerated in that Constitution and other statutory provisions, especially those enacted to implement it. articles 20(3)(a) and 259 (1) succinctly speak to this. Even in the penumbral areas, Constitution has to be interpreted in a manner that: "promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance."[10]

122. This calls for a purposive interpretation of Constitution. A purposive interpretation recognizes the fact that a Constitution is a living and durable instrument meant to withstand the test of time and serve not only the present but also future generations. As such, it has to be given, not only a holistic and flexible, but also a dynamic, progressive and liberal interpretation unfettered by technicalities and in tandem with societal changing conditions in the broader historical and social context of its enactment.

123. To achieve this aspiration Judges must courageously rise to the occasion and live up to their oaths of office by ensuring that "commitments, duties and obligations contained in the fundamental law of the land [are] scrupulously respected and enforced", otherwise the "political stability [of our country] and [the] confidence required to attract investment" will be in jeopardy.[11] The Judges must keep reminding the political class that there is no absolute Constitutional right[12] and that Constitutional power is constrained power.

10 article 259(1) of Constitution.

11 Charles M. Fombad, Problematising the Issue of Constitutional Implementation in Africa, in the Implementation of Modern African Constitutions, Challenges and Prospects, at p.14.

12 article 19(3)(c) of Constitution contemplates limitation of rights when it provides that, "the rights and fundamental freedoms in the Bill of Rights-are subject only to the limitations contemplated in this Constitution". Further article 24 provides for limitation of rights and fundamental freedoms thus:

1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

   a. The nature of the right or fundamental freedom;

   b. The importance of the purpose of the limitation;

   c. The nature and extent of the limitation;

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

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

124. Most of the issues raised in this Reference were raised in The Matter of Speaker of the Senate and Another (Advisory Opinion No. 2 of 2013); [2013] eKLR. That reference was occasioned by the act of the National Assembly ignoring the Senate in the enactment of the Division of Revenue Bill on the ground the division of revenue between the two levels of Government was not a matter concerning County Governments but a money Bill which fell within the National Assembly's exclusive legislative authority. In that regard, both the Speaker of the National Assembly and the Attorney General contended that the division of revenue fell entirely within the legislative remit of the National Assembly and as such the Senate had no role to play in the matter. That is one of their contentions in this Reference. They also argued, as they have done in this Reference, that the division of revenue is not a matter for this court's advisory opinion.

125. In the said 2013 Reference, referring to its earlier decision in Re the Matter of the Interim Independent Electoral Commission, Sup. Ct. Const. Appl. No. 2 of 2011, at para. 40 of its Judgment, this court opined that "'any matters touching on County Government' [include] ... any National-level process bearing a significant impact on the conduct of County Government." As such, the Division of Revenue Act is a matter that "has a significant impact on the County Governments" which per force requires the full participation of the Senate; that the division of revenue is "...[an urgent] matter of great public importance which may not be suitable for conventional mechanisms of justiciability ..." progressing from the lowest to the highest court and is therefore a matter "in which the Supreme Court's Advisory-Opinion ...[is] most propitious".

126. Instead of complying with those clear pronouncements of this court, the two Houses of Parliament have been taking the country in a circus in their unnecessary tuff wars. Instead of obeying those clear pronouncements of this court, the National Assembly has, in subsequent years, repeated what provoked the said 2013 Reference for advisory opinion. That is a dangerous course of action which should not be allowed.

127. All State organs and State officers must understand that law comprises not only the provisions of Constitutions and Acts of Parliament but also decisions of Superior Courts. It is trite that until they are set aside, court decisions have to be obeyed by all and sundry; court orders are part of the law of this country and must be obeyed by all. The words of Romer LJ in Hadkinson vs. Hadkinson (1952)2 ALL ER 567, a decision that has been endorsed and applied in many cases in our jurisdiction, succinctly speak to this:

> " It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation

is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

128. As such, the Government as well as State organs and State officers should be in the forefront in obeying and complying with court decisions. As a country, we cannot and should not allow the Government to demand obedience by its citizenry of the law of the land which it is itself disregarding with abandon. No State organ or State officer should be allowed to do that as that will be courting anarchy.

129. This reference was precipitated by, inter alia, the impasse that arose between the two Houses of Parliament on the division of revenue between the two levels of Government during the budget making process of the 2019/2020 financial year. As stated, one of the main points of contention giving rise to that impasse was whether or not the Senate has a role to play in that division.

130. As further stated, like they did in the 2013 reference, the Speaker of the National Assembly (SNA) the Attorney General (AG) and the National Treasury forcibly submitted that the Senate has no role to play in the sharing of revenue between the two levels of Government. According to trio, the Senate's role is restricted to the sharing of revenue among the 47 counties as provided by articles 96(3), 218(1)(b) and 224 of Constitution read together with Section 42 of the Public Finance Management Act (PFMA). Accordingly, the issue of an impasse in the division of revenue between the two levels of Government should never arise. Their position in effect is that the mediation under article 113 does not apply to the division of revenue between the two levels of Government.

131. The AG, in addition submitted that though the term "Parliament" comprises both the National Assembly and the Senate, in article 218, it refers to the two Houses separately. In his view, in Paragraph (a) of Clause (1) of article 218, the term "Parliament" refers to the National Assembly while in Paragraph (b) of that Clause, the term refers to the Senate.

132. On those submissions, both the SNA and the AG invited this court to depart from its previous interpretation on articles 218 and 224 of Constitution in The Matter of Speaker of the Senate and Another, [2013] eKLR where it held that the Senate has a significant role to play in the enactment of the Division of Revenue Act.

133. With profound respect, both the SNA and the AG have misapprehended the role of the Senate with regard to the division of revenue between the two levels of Government in our Constitution. I would like to observe at the outset that article 259(1) and (3) of Constitution obliges everyone to construe Constitution "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; and

d. contributes to good governance.

(2) .....

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...."

134. By this provision therefore, Constitution itself calls for its holistic interpretation. What does holistic interpretation of Constitution entail? In the words of the Ugandan Court of Appeal in the case of Tinyefuza v. Attorney-General, Const. Pet. No. 1 of 1996 (1997 UGCC3), "[T]he entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other." This means that provisions bearing on the same subject matter must be brought together and given a purposive interpretation[13]. Authorities from other jurisdictions can only be useful and persuasive if they are interpreting provisions of other countries' Constitutions which are in pari materia to ours.

And in the case of Kenya Human Rights Commission & another v Attorney General & 6 others [2019] eKLR the Court of Appeal held that: "In interpreting the provisions of Constitution, courts are called upon to apply the principles aptly set out in the case of Kigula & others vs Attorney General [2005] 1 E.A. 132 at page 133 in the following terms;

> " The principles applicable in the interpretation of Constitution include the widest construction possible in its context, should be given according to the ordinary meaning of the words used, the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other, all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument, Constitution should be given a generous and purposive interpretation to realize the full benefit of the guaranteed rights, Constitution of

13 In the Matter of Kenya National Human Rights Commission [2014] eKLR, this court stated thus, "... But what is meant by a 'holistic interpretation of Constitution'? It must mean interpreting Constitution in context. It is the contextual analysis of a Constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete Constitutional provisions into each other, so as to arrive at a desired result."

> Uganda enjoins Courts in the country to exercise judicial power in conformity with law and with the values, norms and aspirations of the people."

135. With this principle in mind, a careful perusal of articles 95 and 96 of Constitutions makes it clear that the two Houses of Parliament share in the performance of quite a number of functions thus "creating an arrangement in which the two houses represent different interests of the people."[14]

136. article 93(1) defines Parliament as consisting "of the National Assembly and the Senate." So, contrary to the AG's submissions, where the term "Parliament" appears in the Kenyan Constitution, it should always be understood to incorporate both Houses. article 94(1) vests the Kenyan people's legislative authority, at the National level, in Parliament. articles 95 and 96 of Constitution set out the legislative roles of the National Assembly and the Senate respectively. Even a casual perusal of these articles reveals, as stated, that, though separately provided for, the discharge of those functions overlaps and is, in most cases, shared by the two Houses. For instance, under article 95(1) & (2) the Members of the National Assembly, representing the people of the constituencies and special interests, deliberate in the National Assembly and resolve issues of concern to the people. As constituencies are in counties, this is more or less what the Senate does under article 96(1): "The Senate represents the counties, and serves to protect the interests of the counties and their Governments."

137. Under articles 95(5) and 96(4), both Houses exercise oversight of State organs and State officers including the President and his or her the Deputy in the discharge of their respective mandates.

138. The overlap and shared mandate is even more explicit in the two Houses' legislative role. Under article 95(3), the National Assembly enacts legislation in accordance with Part 4 of Chapter 8 of Constitution. That Part runs from articles 109 to 116 of Constitution and deals with the legislative procedure; who and where Bills can be originated; what is "a money Bill" that can only be originated and exclusively passed by the National Assembly; the definition of a "Bill concerning County Government"; special and ordinary Bills concerning counties; mediation where the two Houses of Parliament cannot agree on a Bill; Presidential assent and referral; and the coming into effect of Acts passed by Parliament.

139. The Senate has been given more or less the same roles. Save for the Money Bills, the definition of which I will deal with in a moment, the Senate also participates in the legislation of all the Acts of Parliament in accordance with the self-same Part 4 of Chapter 8 of Constitution. article 96(2) makes this clear: "The Senate participates in the law-making function of

14 Mutakha Kangu, Constitutional Law of Kenya on Devolution, Strathmore University Press (2015) p. 346.

Parliament by considering, debating and approving Bills concerning counties, as provided in article 109 to 113."

140. Hon. Kaluma, appearing for the Speaker of the National Assembly, laid particular emphasis on article 95(4)(a) which provides that "The National Assembly—(a) determines the allocation of National revenue between the levels of Government, as provided in Part 4 of Chapter Twelve." He submitted that this provision settles the controversy as to whether the division of revenue between the two levels of Government is a shared function of both Houses. In his view, this provision renders that role an exclusive function of the National Assembly.

141. Part 4 of Chapter 12 of Constitution, which article 95(4)(a) makes reference to, runs from articles 215 to 219. article 215 establishes the Commission on Revenue Allocation and article 216 sets out its functions. article 217 deals with the division of revenue among the counties of the National revenue that is annually allocated to the County level of Government.

142. Although article 96(3) assigns to the Senate the role, in article 217, of division of revenue among counties, that mandate is not exclusive to the Senate. article 217(3), (4) and (5) ropes in the National Assembly in that division. More significantly, one of the criteria employed in the division of that revenue, is the Commission on Revenue Allocation's recommendations which, under article 216 as read with articles 202(1) and 203(1), are submitted to Parliament.

143. Chapter 12 is on Public Finance. The principles of public finance are set out in article 201 while matters of the equitable sharing of National revenue; the equitable share and other laws; the equalization fund; as well as consultation on financial legislation affecting counties are stated in articles 202, 203, 204 and 205 and are addressed to both Houses of Parliament. On the sharing of revenue, article 205 is even more explicit on the involvement of the two Houses:

> "(1) When a bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning County Governments is published, the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate.
>
> (2) Any recommendations made by the Commission shall be tabled in Parliament, and each House shall consider the recommendations before voting on the Bill." [Emphasis supplied]

144. When it comes to the consideration of the annual division and allocation of revenue Bills, I cannot express better the joint role of the two Houses than article 218 has done:

> "
>
> "(1) At least two months before the end of each financial year, there shall be introduced in Parliament—
>
> (a) a Division of Revenue Bill, which shall divide revenue raised by the National Government among the National and County levels of Government in accordance with this Constitution; …."
>
> (b) a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the County level of Government on the basis determined in accordance with the resolution in force under article 217.
>
> (2) Each Bill required under clause (1) shall be accompanied by a memorandum setting out—
>
> (a) an explanation of revenue allocation as proposed by the Bill;
>
> (b) an evaluation of the Bill in relation to the criteria set out in article 203(1); and
>
> (c) a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation." [Emphasis supplied]
>
> The Division of Revenue Bill and the Allocation of Revenue Bill are submitted, not to the National Assembly only, but to Parliament.

145. Earlier on I said I would revert to the definition of a "money Bill". article 114(3) of Constitution states that '"a money Bill" means a Bill, other than a Bill specified in article 218…." [emphasis supplied]. I have reproduced verbatim, the provisions of article 218. They relate to the Division of Revenue Bill between the National and County levels of Government and the County Allocation of Revenue Bill which shares among the 47 counties the revenue allocated to the County level of Government.

146. On these clear provisions, it follows that the annual Division of Revenue Bills which divide revenue between the two levels of Government and the County Allocation of Revenue Bills which share out among the counties the revenue allocated to the County level of Government are not "money Bills" for the exclusive consideration of the National Assembly as required by article 109(5) of Constitution. As is clear from article 114(3), a money Bill is one which deals with imposition of taxes and investment of Government money as well as borrowing by the Government. With the unequivocal provision of article 114(3) of our Constitution, authorities from other jurisdictions which are not in pari materia t0 ours are, with respect, not applicable or useful in the determination of what a money Bill is in our law.

147. Heavy weather was also made of what a matter or Bill "concerning a County Government" means. On finances, article 110(1)(c) defines "a Bill concerning County Government" as "a Bill referred to in Chapter Twelve affecting the finances of the County Governments." As stated, Chapter Twelve of Constitution is on finances. article 218(1)(a) which relates to the Division of Revenue Bill between the two levels of Government and the sharing of revenue among the counties, is in Part 4 of that Chapter. It will be recalled that article 96(1) & (2) provides that the Senate "represents the counties, and serves to protect the interests of the counties and their Governments." The Senate also "participates in the lawmaking function of Parliament by considering, debating and approving Bills concerning counties, as provided in articles 109 t0 113."

148. With these explicit provisions, how can anyone claim that the Senate, created for the sole purpose of protecting interests of counties and ensuring the success of devolution, has no role to play in the enactment of the Division of Revenue Act which divides revenue between the two levels of Government? How can anyone argue that the Senate has no role to play in allocation of revenue to the County level of Government "which ... [allocation] certainly affects the functioning of County Governments."[15] With these explicit provisions, how can anyone claim that the division of revenue between the two levels of Government is an exclusive function of the National Assembly?

149. I reiterate what this court said in 2013:

> " It is quite clear to us that the Division of Revenue Bill is a Bill bearing provisions that deal with the equitable sharing of revenue – which will certainly affect the functioning of County Government .... The Bill deals with equitable allocation of funds to the counties, and so any improper design in its scheme will certainly

15 The Matter of Speaker of the Senate and Another v. The Honourable Attorney General & 4 others, [2013] eKLR at par. 114

occasion inability on the part of the County-units to exercise their powers and to discharge their functions as contemplated under Constitution."[16]

150. In my view, a purposive interpretation of articles 95(4)(a) & (b); 96(2); 110(1)(c); 114(3); 205; and 218(1)(a) of Constitution read together with Sections 38 to 41 of the PFMA, makes it quite clear that both the National Assembly and the Senate play a role in the division of revenue between the two levels of Government.

151. And with those findings, I join the majority in dismissing the pleas by the Speaker of the National Assembly, the Cabinet Secretary for Finance and the Attorney General that we depart from this court's 2013 decision in The Matter of Speaker of the Senate and Another [2013] eKLR. To the contrary, the majority and I reaffirm that decision. I hope this is the last time this or any other court is called upon to pronounce itself on the issue that, in our current Constitutional architecture, the division of revenue between the two levels of Government is one of the central issues concerning County Governments demanding the full participation of the Senate as required by articles 96(2) of our Constitution. The National Assembly should never again subject the country to the anxiety it did last year.

152. Let me add that, as representatives of the people of Kenya, the National Assembly should join hands with the Senate to ensure equitable distribution of the National cake. The National Assembly should ensure that enough resources are devolved to counties to guarantee equitable development. Parliament should ensure that the plunder of National resources, both at the County and National level, is firmly dealt with to enable Kenyans realize their dream of devolution. Parliament should ensure equity in sharing of the meagre National resources that we have.

153. Unless decisive action is taken to address the historical injustices engendered by the skewed development founded on Sessional Paper No. 10 of 1965 and subsequent policies; unless decisive action is taken to address the income and resource allocation inequalities in this country; unless decisive action is taken to address the soaring unemployment; and unless decisive action is taken to address the looting of public resources through corruption; only the naïve will fail to see that we are sitting on a powder keg the detonation of which will render the 2007/08 post-election skirmishes child play.

**E. Dissenting Opinion of Njoki S. Ndungu, SCJ**

154. The Court has given its opinion on four issues as were identified in this court's Ruling of 8th October 2019. I concur on two of those issues and agree with my fellow brother Judges as regards the questions as to:

16 The Matter of Speaker of the Senate and Another v. The Honourable Attorney General & 4 others, [2013] eKLR at par. 114

v. Whether the recommendation by the Commission on Revenue Allocation, is binding upon both Houses during deliberations concerning the Division of Revenue Bill and the Appropriation Bill; and

vi. Whether there should be timelines within which the National Government should release the equitable share of revenue to County Governments;

155. I however find that I am unable to agree with the reasoning and the consequential conclusion of the majority of the Court on the two other issues for the reasons stated below. I shall proceed to illuminate the principles that lead to my conclusion without reiterating the submissions of counsel on the underscored issues, since these are elaborately elucidated in the majority-opinion.

**i. What happens when the National Assembly and the Senate fail to agree on a Division of Revenue Bill thereby triggering an Impasse?**

**a. Invitation to depart from the Court's previous decision with regard to the process relating to the Division of Revenue.**

156. My brother Judges in the Majority are of the view that this court is being moved in a perfunctory manner to depart from their previous decision in The Matter of Speaker of the Senate and Another (Advisory Opinion No.2 of 2013); [2013] eKLR, (hereinafter referred to as the Senate matter 2013). They are of the opinion, that any party contemplating such action ought to have made a formal application to depart from that previous decision, based on which application this court would be empowered to arrive at a considered decision. As this was not done, the bench-majority states that it was unable to consider the merits of the Speaker's arguments.

157. With respect, I do not agree that a formal application to depart is required where the matter at hand is an Advisory Opinion; primarily because in Advisory Opinions, there are no interests at stake, as would normally be the case in adversarial proceedings. The nature of the Court's Advisory Opinion jurisdiction does not flow from any contest of rights or claims disposed of by regular process. As such, in exercising this jurisdiction, this court should not be constrained by procedures required in ordinary proceedings before this court.

158. Firstly, the Supreme Court is not bound by its decision in the Senate Matter 2013 because Constitution anticipates that there will be occasional need for the Supreme Court to depart from its own previous decisions. article 167(3) of Constitution buttresses this assertion.

159. Secondly, this court has previously stated with clarity that 'while rendering an Advisory Opinion under article 163(6) of Constitution, it may undertake any necessary interpretation of Constitution.' (In the Matter of Interim Independent Electoral Commission,

Constitutional Application No. 2 of 2011 [2011] eKLR, at paragraphs 43 and 44). Therefore, the Court's revision of its prior decision relating to a similar matter to the current one before it, would not cause prejudice to any party but rather clarify and outline a harmonious and comprehensive picture of the requirements for the legislative process and roles for the two Houses as provided under Constitution.

160. In addition, I disagree with the majority position that this court was moved on this review issue without real interest or effort. The Speaker of the National Assembly filed his written submissions on the reframed issues on 3rd December 2019. A large portion of his submissions (pages 12-19) focus on persuading this court to depart from its decision in the Senate Matter 2013.

161. The Speaker of the National Assembly's submissions expounded on the architecture of Constitution of Kenya as far as the roles of the National Assembly and the Senate are concerned, outlining the exclusive role of the National Assembly in the Division of Revenue between the National and County Governments and pointing out how the Senate's role is restricted to County Allocation Bill, as per articles 96(3) and 128 (1) (b) and 224 of Constitution as well as the Public Finance Management Act.

162. The Speaker submits that the Court should depart from its Advisory Opinion in the Senate Matter 2013 because it was per incuriam. Counsel urges that it is therefore in the public interest for the Court to depart from that decision, and that this court can depart from its decision where it is right to do so.

163. The Attorney General and Cabinet Secretary Treasury's submissions on the reframed issues filed on 20th January 2020 also address this issue on pages 8-10. Both Parties reiterate and support the submissions of the Speaker of the National Assembly that pursuant to article 163(7) of Constitution the Supreme Court is not bound by its decisions. They also cite the Jasbir Singh Rai Case and urge the Court to depart from its Opinion in Senate Matter 2013. They submit that according to the Jasbir Singh Rai Case, the only thing the Court must do is to find whether there is good cause, and there is good cause here: in that, in order to effectively address the second issue before the Court, (what happens in the event of an impasse?), the Senate Opinion of 2013 must be reviewed.

164. Both the Attorney General and Cabinet Secretary Treasury urge the Court to depart from its opinion in the Senate matter 2013, and hold that only the National Assembly ought to be involved in the discussion of the Division of Revenue Bill and the enactment of the Division of Revenue Act.

165. It is also submitted that should the Court fail to depart from the foregoing opinion, conflicts between the two Houses of Parliament in the division of revenue process will remain a real - and perhaps inevitable - possibility.

166. I am convinced, on the basis of the foregoing submissions, that the request to depart from the Senate matter 2013 was not casually done. In my opinion, a lot of thought, real interest, and effort went into making that proposition.

167. I am of the opinion that the decision of the Majority in the Senate matter 2013 ought to be reviewed especially because it did not take into account the architectural design of Constitution and the legislative processes that derive from that design, with regards to the roles of the two Houses of Parliament as set out in articles 95 and 96 and part 4 of Chapter 12 of Constitution. This design is intended to avoid situations where disputes between the two Houses of Parliament defeat or delay important aspects of public finance and potentially throw the country into chaos by rendering operations by either level of government impossible or impractical. In particular, that architecture and design as drawn by the drafters of Constitution, established which House originates the Division of Revenue (DOR) Bill, as a money bill and what is to happen when there is an impasse over a money bill.

168. It is imperative to look at how this design has been utilized in other jurisdictions and what is considered best practice in legislative terms. One finds that where a deadlock or impasse between two houses exists, in most jurisdictions, resolution is found by allowing the final determination to be made by the house with veto powers, which is the house that originates the Division of Revenue Bill. Also, in other democratic and bicameral jurisdictions, the DOR Bill is considered to be a money bill and therefore the legislative processes that apply to money bills apply to it.

169. In my view, a review of the 2013 decision and a detailed, exhaustive analysis would have established that this court overstepped its bound by allocating to the Senate a role which the drafters of Constitution had not envisioned nor anticipated; that role of participating as an equal partner to the National assembly in the legislative processes regarding the Division of Revenue Bill.

In the Senate Matter 2013 Decision, the bench-Majority declared (at paragraph 117):

> "[117] ..... Upon reflecting on this question, taking into account the comparative material placed before us by counsel, we came to the conclusion that the Division of Revenue Bill is not a "money Bill," in the terms of article 114(3) of Constitution. It has become clear to us that a "money Bill", in a proper case, may only be introduced in the National Assembly, though it is not a settled question whether the Senate may subsequently participate in the relevant legislative deliberations."

170. I do believe that a review of, and departure from, the 2013 decision would have allowed this court to make some observations on bicameral Parliaments such as ours particularly with regards to the origination of Bills. It has consistently been my stance that the Division of Revenue Bill is a money Bill that can only be introduced by the National Assembly in accord to article 109 (5) of Constitution.

171. This view is reinforced by Constitution, which outlines the Role of the National Assembly in article 95 in the following terms:

Role of the National Assembly

95.(1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.

(2) The National Assembly deliberates on and resolves issues of concern to the people.

(3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.

(4) The National Assembly -

(a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;

(b) appropriates funds for expenditure by the national government and other national State organs; and

(c) exercises oversight over national revenue and its expenditure...

172. article 95 of Constitution is categorical that the National Assembly budgets, collects, shares between the levels of government, and audits revenue. It also has a general oversight function which of necessity means it has to be in constant communication with the National Treasury over the finances of the Country. In addition, article 218 of Constitution provides that a Division of Revenue Bill shall divide revenue raised by the National Government among the National and County levels of government in accordance with Constitution.

173. Accordingly, to my mind, the House which originates the Division of Revenue Bill is the National Assembly, the people's representatives. In other words, it is the National Assembly as the people's representative that budgets, collects, shares between the levels of government and audits revenue and it is knowledgeable on the finances of the Country. Thus, with the benefit of such knowledge it is the House best placed to originate the Division of Revenue Bill as it finances the revenue share and proposes revenue collection forecasts in the requisite division. In the event of a deadlock between the Senate and National Assembly, then the National Assembly as the Originating house should have final say or even veto powers. Comparative jurisprudence on this issue is also persuasive.

174. In the United States of America (U.S), article I, Section 7, clause 1 of the U.S. Constitution, is known generally as the "Origination Clause" because it requires that:

> " All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as in other Bills."

175. The idea that money Bills should originate in the popularly elected chamber of the legislature was not a novel one, rather it was a product of the colonial experience, which is replicated in the entire Commonwealth. The overarching view being that taxation and representation are firmly linked and only the people's representatives were accorded that duty.

176. In the U.S, as the House of Representatives is most frequently called upon to enforce the Origination Clause, its precedents have played a primary role in defining what makes a bill for raising revenue. Although the US Senate's role in determining what constitutes a bill for raising revenues is less prominent than that of the House of Representatives, its precedents have, nevertheless, also shaped the application of the Origination Clause. The primary impact of Senate practices, however, has been to underscore the House's interpretation of what constitutes revenue in a Constitutional sense.

177. article I, Section 7, provides that the Senate may propose or concur with amendments as on other bills, but there have been occasions on which either the House or Senate has debated the question of how expansively the Senate's amending authority should be interpreted. Some of the earliest precedents show that in the 19th century the House sometimes exhibited a fairly restrictive view of the Senate's authority to amend a revenue bill and regarded the Origination Clause as limiting the Senate only to germane amendments. Enforcement of the Origination Clause is a Constitutional privilege of the House of Representatives and as such it has ultimate control.

178. In the United Kingdom, Section 1(1) of the Parliament Act 1911 provides that the House of Lords may not delay a money bill for more than a month. It is at the discretion of the Speaker of the House of Commons to certify which bills are money bills, and his decision is final and is not subject to challenge. Section 1(2) of the Act states:

> " A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, the National Loans Fund or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts

> of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this Sub-section the expressions "taxation," "public money," and "loan" respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes."

179. It is useful to note that this Act was enacted following Constitutional crisis which had begun in November 1909 when the Conservative-dominated House of Lords rejected the Liberal Government's 'People's Budget'. The Parliament Bill sought to remove the power of the House of Lords to reject money Bills and to replace the Lords' veto over other public bills with the power of delay. It also proposed the reduction of the maximum duration of a Parliament from seven years to five. The House of Lords passed the Parliament Act by a 131-114 vote in August 1911.

180. Canada also has a bicameral Parliament. The Senate, or upper House, is composed of 105 Senators appointed by the Governor-General on the advice of the Prime Minister —subsequent to a recommendation by the Independent Advisory Board for Senate Appointments—to represent Canada's regions, provinces, and territories. The House of Commons, or lower House, is the elected assembly of the Parliament of Canada. Its members are elected by Canadians to represent defined electoral districts or constituencies, also known as ridings.

181. Bills calling for the spending of public revenues or for the imposing of taxes must originate in the House of Commons. Once introduced, a bill is subjected to a detailed process of review, debate, examination, and amendment through both Houses before it is ready to receive final approval.

182. India's Parliament is comprised of three constituents, namely the President of India, the Rajya Sabha (Council of the States), and the Lok Sabha (House of the People). articles 198 and 199 of Constitution of India lay out the procedure for legislating on money Bills. A Money Bill, which deals with inter alia, taxation, expenditure, and credits of the union government, consolidated funds, may only be introduced in Lok Sabha, on the recommendation of the President. It must be passed in Lok Sabha by a simple majority of all members present and voting. Following this, it may be sent to the Rajya Sabha for its recommendations, which recommendations the Lok Sabha may reject if it chooses to. In other words, the Rajya Sabha cannot amend the bill; it can only recommend amendments. The absolute powers are vested in Lok Sabha. If Rajya Sabha's recommendations are not given within 14 days, it will be deemed to be passed by Parliament.

183. The South African Constitution on which Constitution of Kenya is largely modeled is also persuasive in this aspect. Section 73 (2) (b) provides:

> " National Legislative Process
>
> All Bills
>
> 73. (1) Any Bill may be introduced in the National Assembly.
>
> (2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:
>
> (a) a money Bill; or
>
> (b) a Bill which provides for legislation envisaged in Section 214."

184. Section 214 provides:

> " Equitable shares and allocations of revenue
>
> 214. (1) An Act of Parliament must provide for—
>
> (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;
>
> (b) the determination of each province's equitable share of the provincial share of that revenue; and....

185. The South African Money Bills Amendment Procedure and Related Matters Act, Act No. 9 2009 (as amended by Act No. 13 of 2018: Money Bills Amendment Procedure and Related Matters Amendment Act, 2018) provides at Section 9:

> " Passing the Division of Revenue Bill
>
> 9. (1) After the adoption of the fiscal framework the Division of Revenue Bill must be referred to the committee on appropriations of the National Assembly for consideration and report.
>
> (2) After the Division of Revenue Bill is passed by the National Assembly and referred to the National Council of Provinces, the

> Bill must be referred to the committee on appropriations of the National Council of Provinces for consideration and report.
>
> (3) The Division of Revenue Bill must be passed no later than within 35 days after the adoption of the fiscal framework by Parliament or as soon as reasonably possible thereafter..."

186. These provisions are instructive that a Bill under Section 214 that provides for equitable division of revenue may only be introduced by the Cabinet Member responsible for national financial matters and only in the National Assembly, which then passes it. This bolsters my opinion that any legislation with regard to sharing of revenue between two or more levels of government is originated in the House charged with the responsibility of national revenue collection.

187. In Japan, the Diet is the highest organ of state power and is the sole law-making organ of the State. It consists of two Houses, namely, the House of Representatives and the House of Councillors. Members of both Houses are elected representatives of all the people. article 59 of Constitution of Japan provides that:

> "A bill becomes a law on passage by both Houses, except as otherwise provided by Constitution. A bill which is passed by the House of Representatives, and upon which the House of Councillors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two-thirds or more of the members present. The provision of the preceding paragraph does not preclude the House of Representatives from calling for the meeting of a joint committee of both Houses, provided for by law."

article 60 further provides:

> "The budget must first be submitted to the House of Representatives. Upon consideration of the budget, when the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within thirty (30) days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet."

188. It is arguable that the veto power granted to the House of Representatives on budgetary and revenue issues is premised on the fact that that is the House best placed to serve the interests and aspirations of the people.

189. In conclusion, from the above global practice and Constitutional design and I reiterate as I so stated in my dissent in the Senate Matter 2013, that the DOR bill is a money bill and that the legislative processes relating to it as such ought to be followed under article 105. If this is done, then the solution where there is disagreement between the houses is resolved as it was so intended by the drafters of our Constitution. It is my considered opinion that the decision by the Majority to find otherwise in the Senate Matter 2013, threw the anticipated Constitutional processes relating to the passage of the DOR Bill into disarray. Having upset this architectural design and related Constitutional processes, the Senate 2013 Decision inevitably means that Parliament will always be plagued by the deadlocks such as are before this court. It is, therefore, my considered view that it was in the public interest for this court to review its Opinion in the Senate Matter 2013.

**(ii) On the question of allocating revenue to the County Governments where the enactment of DOR has been delayed?**

190. It is not in dispute that the business of Government should not come to a standstill because of disagreement between the two Houses over the Division of Revenue Bill. Indeed, the question of how to deal with expenditure necessary to carry on the services of the County Government during that year until such time as the Division of Revenue Act is assented to is a pertinent one.

191. In my view the answer is to be found within the existing laws. article 203 (2) of Constitution guarantees County Governments an equitable allocation of a minimum of fifteen percent of all national revenue collected by the National Government. As such, this amount ought to be readily available to the County Governments as it is already allocated under Constitution and is readily ascertainable. Further, obtaining these funds ought not to be subjected to the bicameral legislative process. As it is a direct charge on the behest of Constitution, all that needs to be done, pursuant to article 206 (4) of Constitution, is to seek the approval of the Controller of Budget to authorize the withdrawal of this amount from the Consolidated Fund. In the event of delay in the passage of the DOR, use of article 206(4) provides a tidy and efficient solution.

192. In my view, it would not be appropriate to approach the issue as has been done by the Majority in this matter. The bench-majority are of the view that in the event of an impasse between the two houses of Parliament:

> " the National Assembly shall, for the purpose of meeting the expenditure necessary to carry on the services of the County Government during that year until such time as the Division of Revenue Act is assented to, authorize the withdrawal of money from the Consolidated Fund."

Further they state that:

> " it is our view that in the event of an impasse, the percentage of the money to be withdrawn be based on the equitable allocation to Counties in the Division of Revenue Act of the preceding financial year. In keeping with the spirit of article 222 (2) (b) of Constitution, the money to be withdrawn shall be 50% of the total equitable share allocated to the Counties in the Division of Revenue Act." (emphasis added)

193. With respect to the majority, this is untenable because, in the simplest terms, such a proposal renders itself as a major breach of the doctrine of separation of powers. Allocation of revenue is a task that falls squarely on the Executive and the Legislature. Any proposal from this court, directing or recommending action to be taken by Parliament and what percentage should be allocated to the Counties, is not only an attempt to amend Constitution, but is tantamount to supervising the work of Parliament and endangering the institutional comity between the three arms of government. It must always be remembered that the core function of the Judiciary is to interpret and apply laws; not make them. It is my considered opinion that to ask this court to direct Parliament on how and when it should allocate monies to the counties, outside of any Constitutional provision - and when in plain language the powers to do so rests with the National Assembly - would amend Constitution in a manner not recognized by the Supreme law. As I stated in my opinion in In the Matter of the Speaker of the Senate & Another, Advisory Opinion Reference No. 2 of 2013 [2013] eKLR (see para. 285):

> " .... An option that is not open to the parties in this matter is for an amendment of Constitution through an edict or opinion of this court. I must be categorical and repeat for reasons of certainty, that whatever the case may be, the tools for reviewing Constitution to address restructuring of authority, power and functions of the Legislature and the roles of the Senate and the National Assembly lie squarely in a political and not judicial process."

194. It therefore follows that although the bench-majority are of the view that they are protecting Constitution, they are in fact, in my opinion, re-writing Constitution and dare I say, for lack of a better term, meddling, with a political and budgetary process in which they have no expertise. The simple solution for this issue is to point out to Parliament that they need to solve this with finality by enacting relevant legislation, including - if necessary – by amending Constitution. The Supreme Court cannot supplant this Parliamentary role through a judgment edict of its own.

195. Further, it is my considered opinion that article 10 of Constitution provides in mandatory terms that:

> " 10. (1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them–
>
> (a) applies or interprets this Constitution;
>
> (b) enacts, applies or interprets any law; or
>
> (c) makes or implements public policy decisions."...

196. In the Senate Matter 2013 I observed, "...judicial resolution is not appropriate where it is clear in a matter such as this that the political question doctrine will apply. Under this doctrine, the interpretation of Constitution is left to the politically accountable branches of government." The interpretation of Constitution, therefore, is not an exclusive duty and preserve of the Courts but applies to all State organs including Parliament. Neither the Senate nor the National Assembly are oblivious to this fact as is evident in the pleadings before this court. The Speaker of the National Assembly in Communication from the Chair No. 44 0f 2019 dated 2nd August 2019 (see Senate's Replying Affidavit sworn on 13th August 2019 pages 299-310) makes pertinent legal observations in his communication. Key among them (pg. 303):

> " Hon. Members, you will agree with me that no single provision of Constitution can be read or interpreted in isolation. Indeed, article 259 provides that Constitution must be interpreted in a manner that, among others, promotes its purposes, values and principles, advances the rule of law; and permits the development of the law.....Therefore it goes without saying that interpretation of Constitution must be done in a holistic manner. Parliament must lend credence to the doctrine of interpretation that the law is always speaking. The framers of Constitution did not envisage a situation where the various articles of Constitution would be construed in the form of a staccato speech

> consisting of various disjointed provisions. Rather, the manner of the speech contemplated by Constitution is that of a logical sequence, with a smooth ebb and flow.....Parliament must be at the forefront in demonstrating the respect of the Rule of Law. As the institution in which the legislative authority is vested, Parliament has a higher threshold with regard to the obligation to respect, uphold and defend Constitution."

197. Certainly then, what is exclusive to the Courts is the interpretation of Constitution in a dispute resolution process. Disputes, however, do exist in other forms that do not require judicial intervention and determination, but rather the resolution of a political nature. The issues of an inter-Parliamentary deadlock or impasse, the division and allocation of revenue are matters that require political and not judicial intervention.

198. this court ought to have taken judicial notice that there currently exists a National Assembly Bill, The Public Finance Management (Amendment) Bill, 2019. This Bill seeks to "put into place interim measures to allow county governments to access their minimum share of revenue already guaranteed and granted to them by article 206(2) of Constitution to enable them offer services to the public pending enactment of the Division of Revenue Bill by Parliament in the event the Bill is not enacted within the timelines set."

199. The Senate, cognizant that County Governments can also boost their revenue collection prowess pursuant to article 207 (1) of Constitution, also have a pending Bill, The Public Finance Management (Amendment) Bill, 2019. This seeks to design, develop and implement a county revenue collection system.

200. These Bills point to the fact that the Legislature is acutely aware of the consequences of failing to pass the Division of Revenue Bill. They also show the incremental steps Parliament can and is taking to mitigate the problem. I believe the majority ought to steer clear of this Legislative and political process because Parliament itself can and will alleviate the problem.

**vii. On the proposal for dissolution of Parliament in the event of a disagreement between the two Houses**

201. I am in agreement with the majority that there exists a lacuna on what should happen [if] the two Houses of Parliament fail to reach an agreement [on the DOR] thus reining the stalemate. In doing so, I only agree to the extent that I have stated above, that that particular lacuna has been created by this court in the Senate Matter 2013 and if that decision was rescinded then the legal path would be clear and no lacuna would exist. However, under the circumstances, as the Majority has declined to review that decision, the only path left is for Parliament to make the necessary Constitutional and legislative amendments to clarify whether the DOR is a money bill and what legislative processes then should apply to its

passage including the resolution of disagreements between the 2 Houses. There are other, alternative, Constitutional solutions to a bicameral Parliamentary system impasse that can be found in line with accepted global practice.

202. A case in point is Australia's Federal Parliament, which consists of the Senate, and the House of Representatives. The Senate is elected by proportional representation. Members of the House of Representatives are elected through the preferential voting system, under which voters rank candidates in order of preference.

203. All proposed laws (bills) must be passed by both houses. The Senate's law-making powers are equal to those of the House of Representatives except that it cannot introduce or amend proposed laws that authorize expenditure for the ordinary annual services of the government or that impose taxation. Section 53 of the Australian Commonwealth Constitution is instructive in this regard:

> " Powers of the Houses in respect of legislation
>
> Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.
>
> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.
>
> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.
>
> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.
>
> Except as provided in this Section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws."

204. Since the Senate cannot amend such laws, it can request that the House of Representatives make amendments to financial legislation and it can refuse to pass any bill. If a proposed law passed by the House is rejected by the Senate or passed with amendments to

which the House will not agree, or the Senate fails to pass the bill, then Constitutional means for resolving the disagreement between the Houses commences, with a 'double dissolution' provided for by Section 57 of Constitution whereby both Houses are dissolved simultaneously.

205. Australia's Commonwealth Constitution Section 57 provides:

> " Disagreement between the House
>
> If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.
>
> If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.
>
> The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent."

206. A fundamental feature of Section 57 is that in the process of settlement of deadlocks, it operates in one direction only: it applies to legislation passed by the House of Representatives, which has failed to pass, or been rejected by the Senate. It does not apply to legislation initiated in and passed by the Senate to which the House of Representatives

disagrees with. As such, Constitution asserts the primacy of the House of Representatives as the 'people's house' and the chamber of Government. While it is the actions of the Senate, which create the grounds for a double dissolution, the decision to resort to Section 57 is taken by the Government.

207. An essential purpose of Section 57 is that in the exclusive powers of the House of Representatives with regard to the initiation and amendment of money bills, there is a predominating national element; which is emphasized in the 'deadlock clause', which is designed to ensure that a decisive and determined majority in the national chamber shall be able to overcome the resistance of a majority in the Senate.

208. In a nutshell, Section 57 is to the effect that legislative conflict must be resolved either within the Parliament, through negotiation and compromise on specific issues, or outside it, by means of an election to decide who is to govern. Therefore, the resolution of legislative deadlock must happen either through the formal Constitutional processes or through the practical workings of the political system. Perhaps this is one route our Parliament can consider as they engage on a solution to our current problem.

**viii. On Budget Processes and timelines: a reflection and proposal for resolution**

209. Finally, I would like to make some observations on the budgetary time-lines and related provisions that are to be found in Constitution, in Statute and subsidiary legislation, and which invariably have contributed to some of the untidiness that has been reflected in the delivery of the DOR Bill and other related legislation.

210. Section 191(1) of the Public Finance Management Act (PFM) stipulates that each year when the Budget Policy Statement is introduced (as per Section 25 of the PFM Act, the Budget Policy Statement is introduced to Parliament by the 15th February), the Cabinet Secretary shall submit to Parliament a Division of Revenue Bill and County Allocation of Revenue Bill prepared by the National Treasury as provided in this Act for the financial year to which budget relates. Specifically, that Section states:

> 191. (1)Each year when the Budget Policy Statement is introduced, the Cabinet Secretary shall submit to Parliament a Division of Revenue Bill and County Allocation of Revenue Bill prepared by the National Treasury as provided in this Act for the financial year to which that Budget relates.
>
> (2) The Division of Revenue Bill shall specify the share of each level of government of the revenue raised nationally for the relevant financial year.
>
> (3) The County Allocation of Revenue Bill shall specify— (a) each county's share of that revenue under subsection (2); and (b) any other allocations to the counties, from

the national government's share of that revenue, and any conditions on which those allocations shall be made.

(4) Before the submission of the Division of Revenue Bill and County Allocation of Revenue Bill, the Cabinet Secretary shall notify- (a) the Intergovernmental Budget and Economic Council; and (b) the Commission on Revenue Allocation.

(5) When the Division of Revenue Bill or County Allocation of Revenue Bill is submitted, it shall be accompanied by a memorandum which explains— (a) how the Bill takes into account the criteria listed in article 203(1) of Constitution; (b) the extent of the deviation from the Commission on Revenue Allocation's recommendations; (c) the extent, if any, of deviation from the recommendations of the Intergovernmental Budget and Economic Council; and (d) any assumptions and formulae used in arriving at the respective shares mentioned in Sub-sections (2) and (3).

211. However, Constitution under article 218, provides that at least two months before the end of each financial year, there shall be introduced in Parliament a Division of Revenue Bill and a County Allocation of Revenue Bill. It provides that:

> "(1) At least two months before the end of each financial year, there shall be introduced in Parliament–
>
> (a) a Division of Revenue Bill, which shall divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution; and
>
> (b) a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government on the basis determined in accordance with the resolution in force under article 217.
>
> (2) Each Bill required by clause (1) shall be accompanied by a memorandum setting out–
>
> (a) an explanation of revenue allocation as proposed by the Bill;
>
> (b) an evaluation of the Bill in relation to the criteria mentioned in article 203 (1); and

> (c) a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation."

212. A financial year is defined under article 260 of Constitution to mean the period of twelve months ending on the 30th day of June or other day prescribed by national legislation. Therefore, if one was to calculate backwards from the end of each financial year, as per Constitution, a Division of Revenue Bill and a County Allocation of Revenue Bill ought to be introduced in Parliament by the 30th April each year.

213. This means from the onset there is a conflict between the PFM Act and Constitution on the timelines within which a Division of Revenue Bill and a County Revenue Allocation Bill ought to be introduced and adopted by Parliament. Consequently, the PFM Act 'reduces' the timelines as set by Constitution.

214. According to Section 25(7) of the PFM Act, Parliament shall, not later than fourteen days after the Budget Policy Statement is submitted to Parliament, table and discuss a report containing its recommendations and pass a resolution to adopt it with or without amendments. The Cabinet Secretary shall take into account resolutions passed by Parliament in finalizing the budget for the relevant financial year.

215. Once Parliament approves the Budget Policy Statement, the National Treasury, as per Section 25(9) of the PFM Act, shall publicize the Budget Policy Statement not later than fifteen days.

216. Thereafter, and upon the introduction in Parliament of a Division of Revenue Bill and a County Revenue Allocation Bill, (pursuant to article 218 of Constitution that is, at least 2 months before the end of each financial year), each Bill shall be accompanied by among other documents, a summary of any significant deviation from the Commission on Revenue Allocation Recommendations with an explanation for such deviation. It should be noted that article 218 is silent on the House that should originate a Revenue Bill.

217. Each House of Parliament has its own procedures for proceeding and concluding a Division of Revenue Bill and a County Allocation of Revenue Bill. According to the Senate Standing Orders of the 12th Parliament No. 181(3), the Senate shall proceed upon and conclude consideration of an Annual Division of Revenue Bill not later than fourteen days after the Bill has been introduced with a view to approving it, with or without amendments. The Division of Revenue Bill having been passed by the Senate shall then stand referred to the National Assembly in accordance with Standing Order 156.

218. The National Assembly Standing Order, 4th edition, Standing Order 233, states that every year, not later than 10th March, there shall be introduced in the National Assembly a Division of Revenue Bill, which shall divide revenue raised by the National Government among the National and County levels of Government in accordance with Constitution. According to the said Order, the National Assembly shall proceed upon and conclude its consideration of a Division of Revenue Bill not later than ten sitting days after the Bill has been introduced with a view to passing it, with or without amendments. The Division of Revenue Bill, having been passed by the National Assembly, shall stand referred to the Senate in accordance with Standing Order 142.

219. In an ideal situation, where the two Houses agree on a Division of Revenue Bill and a County Allocation of Revenue Bill, the process ought to end by 30th June.

220. Suppose the two Houses of Parliament fail to agree, what then happens? article 112 of Constitution provides that if one House passes an Ordinary Bill concerning counties, and the second House rejects the Bill, it shall be referred to a Mediation Committee appointed under article 113. (Since the Supreme Court made its decision the Senate 2013 matter, and declared the DOR an ordinary bill instead of a money bill, then this is the path the legislative processes will follow). Mediation Committees, under article 113, comprise of equal members of each House and are supposed to attempt to develop a version of the Bill that both Houses will pass. article 113(4) of Constitution provides that if the Mediation Committee fails to agree on a version of the Bill within 30 days, or if a version proposed by the committee is rejected the Bill is defeated. This, therefore, means that by the time even a single mediation process is concluded, both Houses cannot meet Constitutional timelines of passing the two Bills.

221. It is prudent to note also that from May 1 to June 30, there are other activities that take place within the last quarter with no specific timelines including: public hearings on budget proposals by Budget Committees; publication by the Cabinet Secretary for Finance and the County Executive Member of national and county budget estimates after they are tabled in Parliament and the County Assemblies respectively; consideration of budget estimates by the National and County Government by the National Assembly and the County Assembly respectively which shall be approved with or without amendments by 30th June in each year; and consolidation, publication and publicization of budget estimates by the National and the County Treasury shall consolidate the estimates, publish, and publicize them respectively. Publication of 3rd quarter budget implementation report by the National Government should also be done within this quarter.

222. Regarding the procedure for adopting an annual Appropriation Bill, article 221 of Constitution provides that the same has to be commenced at least two months before the

end of each financial year. Sections 39 of the PFM Act limits the time within which the Appropriation Bill must be enacted to 30th June of each financial year. However, a County Appropriation Bill, in view of article 224 of Constitution can only be prepared and adopted on the basis of the Division of Revenue Bill passed by Parliament under article 218 which process has to end by 30th June of a particular year pursuant to Section 131 of the PFM Act. This therefore means that the timelines for adopting and concluding an Appropriation Bill runs concurrently with those of adopting and concluding the Division of Revenue Bill and a County Allocation of Revenue Bill.

223. The foregoing strict and overlapping timelines notwithstanding, the President may upon receiving the Bills return the same with amendments before assent – again this has to be factored within the 60-day period - which is not possible.

224. As such, there are a number of conflicting timelines that exist within the legal framework that need to be brought to the attention of Parliament for corrective action. There is need to clarify on the exact timelines within which the Division of Revenue Bill and the County Allocation of Revenue Bill can be introduced to Parliament. This may call for amendments to articles 218 and 221 of Constitution, and Section 190 and 191(1) of the PFM Act. The Senate and the National Assembly also need to ensure uniformity in their standing orders, as to when the two Bills may be introduced in Parliament.

225. In conclusion, and most regretfully, I am of the opinion that the Majority decision in this advisory is woefully misinformed and has brought little or no resolution to the legislative conundrum that has been presented before us by the Parties. However, as my learned brother Judges are of a different opinion, then, theirs must be the decision of this court.

**E. Final Determination**

226. This Advisory Opinion, as rendered by the Majority of this Bench, conclusively disposes of the four issues in the manner determined; namely, the recommendations of the Commission on Revenue Allocation are not binding on Parliament; in the event of an Impasse over the Division of Revenue Bill, the solution prescribed in paragraphs 81 to 91 of this Opinion shall apply; the Supreme Court or any other court for that matter, is not the appropriate forum for setting timelines as to when the National Treasury must transfer the equitable share of revenue to counties; and Parliament cannot enact the Appropriation Act before the enactment of the Division of Revenue Act.

227. Before signing off, we would like to remind the Applicants and all the parties to this Reference and indeed all other public functionaries, entities, and the public at large, that this Advisory Opinion is not a "mere advice or opinion". On the contrary, it has the same binding effect as a Judgment in rem of this court. Finally, we would like to profoundly record our

appreciation of all Counsel for the parties including the Amici Curiae for their insightful and robust contributions to the vexed questions raised in the Reference.

**Okoiti v Independent Electoral and Boundaries Commission & another; Kenyatta & 7 others (Interested Parties) (Petition 18 of 2016) [2020] KESC 68 (KLR) (7 February 2020) (Judgment)**

**Supreme Court of Kenya**

**DK Maraga, CJ & P, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2020] KESC 68 (KLR)

***Jurisdiction*** *- jurisdiction of the Supreme Court - exclusive original jurisdiction of the Supreme Court to hear and determine disputes relating to the elections to the office of President arising under article 140 - the scope of the exclusive original jurisdiction of the Supreme Court to hear and determine disputes relating to the elections to the office of President arising under article 140 - at what point would the jurisdiction of the Supreme Court be invoked when determining validity of a presidential election - whether the Supreme Court had the exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President, including interpretation of all the articles relating to the election of a President - Constitution of Kenya article 140(1).*

***Civil Practice and Procedure*** *- costs - award of costs- principles to be followed when awarding costs - whether a petition on the election of the President could be considered a public interest initiative when determining costs.*

**Brief facts**

The petitioner sought the interpretation of article 140 as read with articles 138 and 139 of the Constitution. In particular, the petitioner sought a determination of the question as to what threshold had to be met in order to trigger a fresh presidential election within the meaning of article 140 (3) of the Constitution. The petitioner also sought a determination of the effect of the withdrawal from the October 26, 2017 fresh presidential election by the 2nd interested party.

**Issues**

i. At what point would the jurisdiction of the Supreme Court be invoked when determining validity of a presidential election?

ii. Whether the Supreme Court had the exclusive original jurisdiction to hear and determine disputes relating to the elections to the Office of the President, including interpretation of all the articles relating to the election of a president.

iii. Whether the petition could be considered a public interest initiative when determining costs.

**Held**

1. The Constitution conferred upon the Supreme Court exclusive original jurisdiction to determine disputes relating to the election of the President arising under article 140 only. Though exclusive and original, that jurisdiction was limited to the circumstances contemplated in article 140 (1). It was not a blanket jurisdiction that empowered the Supreme Court to flex its judicial authority over any and all interpretational questions, touching upon the election of the President. Article 163 (3) of the Constitution had not ousted the High Court's original jurisdiction to interpret the Constitution under article 165

(3) (d). The Supreme Court's exclusive and original jurisdiction to determine the validity of a presidential election only kicked in after the declaration of results, following a petition challenging the election.

2. The petitioner had wrongly invoked the Supreme Court's jurisdiction. If the intention was to seek the interpretation of articles 138, 139 and 140 of the Constitution, the petitioner could not leapfrog the High Court and go directly to the Supreme Court. Conversely, if the intention of the petitioner was to challenge the validity of the fresh presidential election of October 26, 2017, then the petition had been filed in breach of article 140 (1) of the Constitution.
3. The Supreme Court could not determine the validity or otherwise of a presidential election, before the same was held and the results thereof declared. It was one thing for the court to pronounce itself on a constitutional or legal question, but it was another thing to determine the validity of an election. In other words, the Supreme Court could not anticipate the validity of a presidential election, within the meaning of article 140 (1) of the Constitution. As such, the court lacked jurisdiction to hear and determine the petition.
4. Costs followed the event. However, in exceptional circumstances, each party bore its own costs. Although election petitions were almost invariably filed by private individuals (losing candidates), they, by their very nature, bore a certain element of public interest. However, not every election petition could be classified as public interest litigation, unless it exhibited a distinct focus on furthering the public interest. Each case had to be determined on its own merits.
5. The instant petition was not filed for the distinct objective of furthering the public interest. It could not be perceived how the petitioner, having actively participated in and supported the election agenda of the 2nd interested party, suddenly experienced an epiphany that propelled him into the just cause of public interest litigation, in the wake of the fresh presidential election of October 26, 2017. In the circumstances, as costs followed the event, having failed in the petition, the petitioner had to bear the costs of the petition being struck out.

*Petition dismissed, petitioner to bear costs of the petition.*

**Citations**

**Cases**

***Kenya***

1. *Aluochier v Independent Electoral and Boundaries Commission (IEBC) & 19 others* Petition 2 of 2013; [2013] KESC 18 (KLR); [2013] eKLR - (Explained)
2. *Aramat, & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR); [2014] eKLR - (Explained)

3. *Aukot, Ekuru v Independent Electoral & Boundaries Commission, Wafula Chebukati, Jubilee Party & Orange Democratic Movement* Petition 471 of 2017; [2017] KEHC 9390 (KLR); [2017] eKLR - (Explained)
4. *In the matter of the principle of gender representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] eKLR; [2012] 3 KLR 718 - (Explained)
5. *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* Petition Nos 552, 554, 573 & 579 of 2012 (Consolidated); [2013] eKLR - (Explained)
6. *Katiba Institute, Africa Center for Open Governance, Okiya Omtatah Okoiti & David Ouma Ochieng v Attorney General, Government Printer & National Assembly* Constitutional Petition 548 of 2017; [2018] KEHC 7560 (KLR); [2018] eKLR - (Explained)
7. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR); [2014] eKLR - (Explained)
8. *Lisamula v Independent Electoral & Boundaries Commission & 2 others* Petition 9 of 2014; [2014] KESC 40 (KLR); [2014] eKLR; [2014] 4 KLR 316 - (Explained)
9. *Mugendi, Daniel v Kenyatta University, Benson I Wairegi, Eliud Mathiu & Olive M Mugenda* Civil Appeal 6 of 2012; [2013] KECA 41 (KLR); [2013] eKLR - (Explained)
10. *Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties)* Election Petition 2 & 4 of 2017; [2017] KESC 54 (KLR); [2017] eKLR - (Explained)
11. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 6 (KLR); [2013] eKLR; [2013] 1 KLR 63 - (Explained)
12. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* Presidential Election Petition 1 of 2017; [2017] KESC 42 (KLR); [2017] eKLR - (Explained)
13. *Okiya Omtatah Okoiti v Attorney General* Constitutional Petition No 543 of 2017 - (Explained)
14. *Okiya Omtatah Okoiti v Independent Electoral & Boundaries Commission, Chairperson, Independent Electoral & Boundaries Commission, Attorney General, Uhuru Muigai Kenyatta, Ekuru Aukot, Jubilee Party & Orange Democratic Movement* Petition 504 of 2017; [2017] KEHC 9448 (KLR); [2017] eKLR - (Explained)
15. *Orange Democratic Movement v Ekuru Aukot & 4 others* Civil Appeal No 359 of 2017 - (Explained)
16. *Outa v Okello & 3 others* Petition 6 of 2014; [2017] KESC 25 (KLR); [2017] eKLR - (Explained)
17. *Rai & 3 others v Rai, Estate of & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Explained)

18. *United States International University (USIU) v the Attorney General & 2 Others* Petition No 170 of 2012; [2012] eKLR; [2012] 2 KLR 357 - (Explained)
19. *Wanjohi v Kariuki & 2 others* Petition 2A of 2014; [2014] KESC 26 (KLR); [2014] eKLR - (Explained)

***India***

1. *People's Union for Democratic Rights v Union of India & Others* 1982 AIR 1473, 1983 SCR (1) 456, AIR 1982 SC 1473, 1982 (14) Lawyer 57 1982 SCC (L&S) 262, 1982 SCC (L&S) 262, AIRONLINE 1982 SC 75 - (Mentioned)
2. *Thakur Bahadur Singh and Another v Government of Andhra Pradesh And Others* 1998(6)ALD101, 1998(5)ALT567 - (Mentioned)

***United States***

*Cohens v Virginia* 19 US 264 (1821) - (Mentioned)

**Statutes**

***Kenya***

1. Constitution of Kenya - (Interpreted) articles 1; 2; 3; 38; 81; 86; 138; 138(8)(b); 139; 138(9); 140; 140(3); 163(2); 165(3)(d)(i); 249(2)
2. Election Laws (Amendments) Bill (No 37 of 2017) - (Cited) In general
3. Elections (General) Regulations, 2012 (cap 7 Sub Leg) - (Interpreted) regulation 52
4. Elections Act (cap 7) - (Interpreted) section 83
5. Evidence Act (cap 80) - (Interpreted) section 109
6. Supreme Court (Election Petition) Rules (cap 9B) - (Cited) In general

**Advocates**

None mentioned

February 7, 2020, the Court delivered the following Judgment:

## A. Introduction

1. The Petition before the court is dated October 27, 2017, and lodged on even date. The petitioner seeks the interpretation of article 140 as read with articles 138 and 139 of the *Constitution*. In particular, the petitioner seeks a determination of the question as to what threshold must be met, in order to trigger a fresh presidential election within the meaning of article 140(3) of the *Constitution*. The petitioner also seeks a determination of the effect of the withdrawal from the 26th October fresh presidential election by the 2nd Interested Party herein.

**B. Background**

2. Following the August 8, 2017General Elections, the 1st respondent declared the 1st Interested Party, Uhuru Muigai Kenyatta, the winner of the elections and the 2nd Interested Party, Raila Amolo Odinga, the runner up, on 18th August 2017, filed a presidential election petition, *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 others*, No 1 of 2017 (hereinafter, Raila Odinga 2017) challenging the validity of the election.

3. On 1st September 2017, this court annulled the 8th August 2017 presidential election on grounds that the same was not conducted in accordance with the *Constitution* and applicable election laws. the court consequently ordered the 1st respondent, to organize and conduct a fresh presidential election, under article 140(3) of the *Constitution*, within 60 days of the determination. Following several developments, the fresh election was fixed to take place on 26th October 2017, by the 1st respondent.

4. On October 10, 2017, the 2nd Interested Party withdrew from the fresh election claiming that, the 1st respondent had failed to undertake basic reforms that could ensure a credible, fair and accountable election.

5. On 11th October 2017, the petitioner filed Constitutional Petition No 504 of 2017, *Okiya Omtatah Okoiti v The Independent Electoral and Boundaries Commission & 3 others*, seeking *inter alia*, the determination of the question as to the effect of the withdrawal from fresh election by the 2nd Interested Party. On October 24, 2017, the High Court (Mativo J) dismissed the petition on the basis that the subject matter jurisdiction was reserved exclusively to the Supreme Court. the court's reasoning was guided by this court's decision *in the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Advisory Opinion No 2 of 2010.

6. Following the High Court decision, the petitioner has filed this appeal seeking the following reliefs:

   (i) A declaration that the Supreme Court decision in *Raila Odinga 2013* was part of the elections laws in force when the NASA presidential and deputy candidates abandoned the repeat election scheduled for 26th October, 2017;

   (ii) A declaration that the decision by NASA presidential and deputy candidates to withdraw from the election was fatal to the said election and effectively and irreversibly cancelled the said election; exiting article 140(3) and kicking into operation article 138(8)(b) of the *Constitution*;

   (iii) A declaration that the elections held pursuant to article 140(3) of the Constitution were invalid, null and void;

(iv) A declaration that IEBC ought to have held the election within sixty days from 10th October, 2017, being on or before the 10th December, 2017, preceded by fresh nominations;

(v) A declaration that the law in force during the 8th August, 2017 presidential elections was the law applicable in the election;

(vi) A declaration that section 83 of the *Elections Act* 2012 is unconstitutional, null and void;

(vii) An order compelling the 1st and 2nd respondents to hold fresh presidential elections preceded by fresh nominations, pursuant to articles 138(8)(b) and 138(9) of the *Constitution* and under the election laws in force during the annulled 8th August 2017 presidential elections;

(viii) Cost of the suit; and

(ix) Any other relief the court may deem just to grant .

7. The petitioner's case in a nutshell is that the fresh election of October 26, 2017, was conducted in violation of the Constitution and electoral laws.

**C. Notices of Preliminary Objection**

8. Three Notices of Preliminary Objection, challenging this court's jurisdiction to hear and determine the Petition, were filed on 7th November 2017, by the 1st and 2nd respondents and the 3rd Interested Party.

**D. The Parties' Respective Cases**

**(i) petitioner's Case**

9. In his written submissions, dated November 2, 2017, and grounds of Opposition to the Preliminary Objections, the petitioner identifies the following issues for determination:

Whether this Petition qualifies as public interest litigation;

(i) Whether the Supreme Court has jurisdiction to hear and determine this Petition;

(ii) Whether the findings and directions of this court at paragraphs 286 -294 of *Raila 2013* on the conduct of fresh presidential elections are binding on lower courts, the State and the public;

(iii) Whether the 2nd Interested Party in law and in fact effectively abandoned/vacated/ withdrew from the October 26, 2017 fresh presidential elections on October 10, 2017;

(iv) What was the legal effect of the 2nd Interested party's October 10, 2017 withdrawal from the fresh presidential race;

(v) Whether the High Court decision in *Ekuru Aukot v. IEBC & others*, High Court Petition No 471 of 2017 (hereinafter Ekuru Aukot Case) delivered a day after the withdrawal by the 2nd Interested Party's withdrawal reverse the trigger of article 138(8)(b) of the *Constitution*;

(vi) Whether the postponement of the elections held on October 26, 2017 violate the provisions of articles 1,2,10, 38, 81 and 86 of the *Constitution*;

(vii) Whether the 1st respondent implemented the judgment of this court in remedying the irregularities and illegalities that resulted in the nullification of the August 8, 2017 presidential election and if not whether the 1st respondent as presently constituted was at all material times capable of conducting free, fair and credible fresh presidential elections;

(viii) Whether IEBC conducted the 26th October, 2017 fresh election in strict compliance with the *Constitution* and applicable election laws as ordered by the Supreme Court;

(ix) Whether the 1st respondent can be deemed to have conducted the fresh presidential election on October 26, 2017 in strict compliance with the Constitution and applicable election laws as ordered by the Supreme Court without considering and taking into account the decision of this court in *Raila Odinga 2013*;

(x) Whether IEBC put in place mechanism, staff and instruments necessary to conduct free, fair and credible fresh presidential elections;

(xi) Whether the laws that governed the August 8, 2017 presidential elections can validly be changed midway by Parliament and whether the new law can guide the conduct of the fresh presidential election;

(xii) Whether section 83 of the *Election Act* 2012 is unconstitutional, null and void; and

(xiii) Who should bear the costs of this Petition?

10. On the issue as to whether this court has jurisdiction to hear and determine the Petition, it is the petitioner's case, that indeed, this court has jurisdiction. The said jurisdiction, submits the petitioner, is founded on the provisions of article 3(1) of the *Constitution*, which obligates everyone to respect and defend the *Constitution*. It is his contention that this Petition was filed in furtherance of the public interest pursuant to the letter and spirit of article 3 (1). In support of his argument, the petitioner cites two Supreme Court of India decisions, namely, *Thakur Bahadur Singh & Another v. Government of Andrah Pradesh* (1998) and *People's Union for Democratic Rights & others v. Union of India & others* (1982) 3 SCC 235.

11. The petitioner further submits that the jurisdiction of this court to determine the Petition is also founded on the provisions of article 163(3)(a) of the *Constitution*. It is his argument that the exclusive jurisdiction, to hear and determine questions as to the validity of a presidential election under article 140 of the *Constitution*, subsists not just after the declaration of results but at any stage of the electoral process. It is the petitioner's case that, this position was confirmed by the High Court in *Okiya Omtatah Okoiti v The Independent Electoral and Boundaries Commission & 3 others* (*supra*); *International Center for Policy and Conflicts & 5 others v the Attorney General & 4 others* [2013] eKLR; and this court *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (Advisory Opinion Application No 2 of 2012) [2012] eKLR.

12. The petitioner also submits that pursuant to article 165(5)(a) of the *Constitution*, where a constitutional issue arises in a dispute whose subject matter is reserved for the original and exclusive jurisdiction of this court, the court has jurisdiction to interpret the *Constitution*. In support of his arguments, the petitioner cites, as persuasive authority, the High Court decision (Majanja J) in *United States International University (USIU) v the Attorney General & 2 others* HC Petition No 170 of 2012 [2012] eKLR and the court of Appeal decision in *Daniel N Mugendi v Kenyatta University & 3 others* Civil Appeal No 6 of 2012 [2013] eKLR.

13. He urges the court to assert its judicial authority in order to save the country from the constitutional confusion created by the actions and/or omissions of the respondents. The petitioner relies on the US Supreme Court decision in *Cohens v Virginia* 19 US 264(1821), as persuasive authority in that regard.

14. On the question whether the findings and directions of this court at paragraphs 286-294 in *Raila Odinga 2013* are binding, the petitioner urges that article 164(7) of the *Constitution* stipulates that all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court as a matter of constitutional imperative. In support of his arguments, the petitioner places reliance upon this court's decision in *Anami Silvester Lisamula v Independent Electoral & Boundaries Commission* [2013] eKLR; paragraphs 238 and 239 of *Evans Odhiambo Kidero & 4 others Ferdinand Ndungu Waititu & others* [2014] eKLR; as well as paragraph 82 of *George Mike Wanjohi v Steven Kariuki* [2014] eKLR. He also revisits the decision in *Jasbir Singh Rai v. Tarlochan Singh Rai* [2013] eKLR, to urge, that it is only the Supreme Court that can depart from its own decision and even so, this court can only do so in special circumstances. He adds that the said decision, has not been departed from by a properly constituted Supreme Court in accordance with article 163(2) of the *Constitution*.

15. It is further submitted that whether obiter or ratio decidendi, the decision of the Supreme Court is binding upon all lower courts. He relies on this court's decision in *Lemanken Aramat v Harun Meitamei Lempaka* [2014] eKLR at paragraph 119 and 120. In the same breathe, the petitioner submits that the directions of the court at paragraphs 286 to 294 in *Raila 2013* were not *obiter dicta* as they were carefully, adequately and judiciously canvassed, deliberated and ruled on by this court. This, he urges, was done in response to the question raised by the Attorney-General appearing as an amicus in the public interest. He urges that indeed paragraph 290 of *Raila Odinga 2013*, is the only legal answer to the question,

> "What happens if a candidate dies or abandons the fresh presidential election under article 140(3)?"

The petitioner consequently submits that, even where there is an inconsistency in the interpretation of the *Constitution* between a statute and a decision of the Supreme Court, the court's decision prevails.

16. On the issue as to whether the 2nd Interested Party on 10th October, 2017 effectively abandoned or vacated the election, the petitioner rejects the assertion that the vacation of the 2nd Interested Party's candidature was incompetent for noncompliance with Regulation 52 of the *Elections (General) Regulations* 2017. He submits that this regulation is not applicable to the withdrawal of October 10, 2017, as it provides for withdrawal of candidature three days after 'nomination'. He therefore urges, that the regulation only contemplates a withdrawal in the nomination process during a general election.

17. On the legal effect of the 2nd Interested Party's withdrawal, the petitioner submits that legal predictability is a fundamental ingredient of the principle of the rule of law. In the petitioner's view, the 2nd Interested Party, while abandoning the fresh presidential election,

relied on paragraph 290 in *Raila Odinga 2013*, in the legitimate expectation that fresh nominations would ensue under article 138(8)(b). He urges that vacation of candidature, is a political right under article 38 of the *Constitution*, which must be protected. He concludes by submitting that upon the withdrawal by the 2nd Interested Party, the elections were vacated by the operation of law, and therefore, the 1st respondent is under an obligation to start the election process afresh, by conducting nominations under article 138(8)(b) of the *Constitution*.

18. Adverting to the High Court Judgment in the *Ekuru Aukot case*, delivered a day after the withdrawal of the 2nd interested party from the election, the petitioner submits that the said Judgment, was not capable of reversing the trigger of the application of article 138(8)(b).

19. On the issue as to whether the election was conducted in strict compliance with the *Constitution* and applicable electoral laws, the petitioner submits that the election was a sham and violated the provisions of articles 1, 2, 3(2), 10 (2), 24, 27, 38, 47, 81, 86, 201(d) and 259(1)(3) of the *Constitution*. He submits that the contents of the internal memo dated October 9, 2017, by Dr Roselyne Akombe, the 1st respondent's CEO internal memo dated October 14, 2017, the signed press release by Dr Roselyne Akombe dated October 17, 2017, and the signed press release by the 2nd respondent dated October 18, 2017, affirm ipso facto that the respondents could not guarantee a free and fair elections.

20. The petitioner adds that the election left the country divided in the middle, posing a threat to the entire *Constitution*. He submits, that the election threatens article 1(1) on sovereignty of the people; article 2(1-4) on supremacy of the *Constitution*; article 3(2) on establishment of Government in accordance with the *Constitution*; article 10(2) on national values; article 38 on political rights; articles 81 and 86 on general principles for electoral system; articles 88 and 249 on mandate of the 1st respondent; article 82(1)(d) and (2) as read with 93(2) on the mandate of Parliament to enact legislation governing elections.

21. On the issue whether the respondents can be deemed to have conducted the election in compliance with the *Constitution* and applicable laws, without considering the Judgment of this court in *Raila Odinga 2013*, the petitioner submits that unless set aside, non-conformity with the provisions of paragraphs 286-294 of the decision in *Raila Odinga 2013* amounts to failure to hold the election in strict compliance with the *Constitution* and applicable laws by the 1st respondent.

22. On the issue of nomination of candidates in the election under article 140 of the *Constitution*, the petitioner submits that the court should interpret "a fresh election" as used in article 140(3) by considering article 138(5) where no fresh nominations are envisaged because of a shorter period of 30 days within which to conduct the fresh presidential election. He urges that the court should also consider the provisions of article 138(8) and

(9) where if scheduled presidential elections are cancelled, a new one must be held within 60 days after fresh nominations; article 139(1)(b) which applies if the President elect dies before assuming office and fresh nominations are envisaged for new presidential candidate(s) within the 60 day period; article 139(3)(b) where, if both the President elect and Deputy President elect die, a fresh presidential election preceded by fresh nominations is to be held within 60 days and article 140(3) where if a presidential election has been nullified by the Supreme Court, a new one is held within 60 days. The petitioner contends that the 60-day period given in article 140(3) was to allow for fresh nominations; otherwise, the Constitution would have set a shorter period for the fresh election as provided for under article 138(5).

23. The petitioner urges the court to depart from its decision in *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others*; Petitions Nos 2 and 4 of 2017 [2017] eKLR and instead hold that fresh elections under article 140 of the *Constitution* must begin with fresh nominations.

24. On the issue as to whether laws that governed the 8th August, 2017 presidential elections can validly be changed midway, the petitioner submits that whereas Parliament has the exclusive constitutional authority to enact laws, the laws so enacted cannot have retrospective application.

25. On the constitutionality of section 83 of the *Elections Act* 2012, the petitioner submits that the same is unconstitutional, as it is worded in a manner that ousts or minimizes the constitutional provisions, especially articles 38, 81 and 86 of the *Constitution* on free, fair and credible elections.

26. On costs, the petitioner submits that while costs follow the event, the court should not award costs to the respondents in the event of an adverse Judgment. It is his contention in that regard that the Petition herein is a public interest litigation suit by a private citizen against the State and so he should not be penalized with an Order of costs.

**(ii) respondents' Case**

27. The respondents are categorical that this court lacks jurisdiction to hear and determine the Petition on the following grounds:

    a) The issues as to what constitutes a fresh election under article 140(3) of the *Constitution*, and whether paragraph 290 in *Raila Ondinga 2013* is binding, were the subject of proceedings before the court of Appeal in *Orange Democratic Movement v Dr Ekuru Aukot & 4 others*, Civil Appeal No 359 of 2017; at the time of filing the petition herein.

    b) The jurisdiction of this court under article 163(3) of the *Constitution*, as read with the *Supreme Court (Election Petition) Rules* 2013, becomes operative only upon the

declaration of results of a presidential election as was held by this court in *Isaac Aluoch Polo Aluochier v IEBC & 19 others* SC Petition No 2 of 2013 [2013] eKLR;

c) This petition is filed as a Constitutional Petition but seeks Orders that can only be granted in a presidential petition contemplated under article 140 of the *Constitution*;

d) The Petition offends mandatory legal compliance requirements relating to filing of presidential petitions;

e) The petitioner seeks the interpretation and/or review of the decision of this court's Judgment in *Raila Odinga v IEBC & others* Petition No 5 of 2013, yet the court lacks such review jurisdiction on the basis of its Ruling in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others*, Supreme Court Petition No 6 of 2014;

f) The petitioner seeks the interpretation of article 138(8) of the *Constitution* by this court yet such jurisdiction is reserved in the first instance, to the High Court;

g) The petitioner is inviting the court to amend the *Constitution* to include, 'voluntary withdrawal by way of a letter' as one of the circumstances that can warrant a cancellation of an election and trigger new elections under article 138(8) of the *Constitution*;

h) The issue of the appointment of returning officers for the fresh presidential election was pending before the court of Appeal in Civil Application No 246 of 2017; at the time of filing this Petition.

28. On the issue of fresh nomination of candidates in the election, the respondents submit that in view of the legal framework set out in the *Constitution*, the *Elections Act* 2012, and the *Elections (General Regulations)* 2012, the full nominations process requires in excess of 60 days and that it is therefore not practicable for fresh nominations to be held in a fresh election contemplated under article 140(3) of the *Constitution*.

29. They submit further that the respondents' decision not to conduct fresh nominations, was informed by the decision of this court in *Raila Odinga 2013* at paragraph 289 and by the High Court decision, in *Ekuru Aukot*, at paragraph 73. They urge that these two decisions, are authority for the proposition that, there was no basis for fresh nominations in a presidential election under article 140(3) of the *Constitution*.

30. The respondents further submit that, the issue as to whether fresh nominations must precede fresh presidential elections under article 140(3) of the *Constitution* is moot. They urge that the same was dealt with extensively and clearly by this court in *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others* (*supra*). They urge

that the petitioner has not given any persuasive grounds to justify this court's departure from its holding.

31. On the issue of the purported withdrawal from the fresh election by the 2nd Interested Party, the respondents submit that the same is untenable and lacks merit. They submit that the purported withdrawal, was made ineffective by the High Court decision in the *Ekuru Aukot Case* delivered on October 11, 2017 directing the 1st respondent to include all the candidates in the annulled presidential election on the ballot for the fresh election.

32. Without prejudice to the contention above, the respondents further submit that the 2nd Interested Party failed to adhere to the provisions of Regulations 52 of the *Elections (General) Regulations* while tendering his withdrawal from the election.

33. They also urge that the circumstances envisaged under article 138(8) of the *Constitution*, were not the basis for the nullification of the election by this court. The respondents therefore submit that the averment by the petitioner, to the effect that the withdrawal by the 2nd Interested Party, kicked into operation the provisions of article 138(8)(b) as read with article 138(9) of the *Constitution*, are misconceived.

34. On the operational preparedness and independence of the 1st respondent to conduct a fresh election, the respondents urge that the petitioner's claim can only be considered in the context of a challenge to the declared results. They urge that the Petition, having been filed before the declaration of results of the election, is not a presidential petition stricto sensu but a devious attempt to overturn a legitimate election in the guise of a constitutional petition.

35. In the alternative, the respondents submit that the election was conducted in compliance with the *Constitution* and the law, as extensively demonstrated in the Replying Affidavit at paragraphs 45 to 65. They urge that the 1st respondent is obliged by article 249(2) of the *Constitution*, to carry out its functions subject only to the *Constitution* and relevant legislation.

36. On the issue of the retrospective application of elections laws, the respondents submit that the amendments to the election laws vide the *Election Laws (Amendments) Bill* No 37 of 2017 did not come into force until after the election and therefore did not affect the manner in which the election was conducted. They in addition, urge that the said laws are a subject of challenge in the High Court in *Katiba Institute & another v The AG & another* Constitutional Petition No 548 of 2017 and in *Okiya Omtatah Okoiti v The AG* High Court Constitutional Petition No 543 of 2017.

37. As regards the petitioner's invitation to this court to consider the constitutionality of section 83 of the *Elections Act*, the respondents submit that the prayer is misconceived. They urge

that the validity of the said section was considered and determined by the Supreme Court in *Raila Odinga 2013* and *Raila Odinga 2017*.

38. On the issue of postponement of elections in certain areas of the Country, the respondents submit that the postponement was legally acceptable in law. They rely on the provisions of section 55B(1)(a) of the *Elections Act*, which envisages the need to cancel elections in certain areas if circumstances so warrant.

**(iii) Interested Parties' Case**

39. The Interested Parties agree with the respondents and submit that this court lacks jurisdiction to hear and determine this Petition, to the extent that the petitioner seeks the interpretation of article 140(3) of the *Constitution* and a declaration of the constitutionality of section 83 of the *Elections Act*. They submit that in line with this court's directions in an application by Dr. Ekuru Aukot made in *Presidential Petition No 1 of 2017*, the jurisdiction to interpret the *Constitution*, or to determine the inconsistency of any law with the *Constitution*, is vested in the High Court in the first instance, by virtue of article 165(3)(d)(i) of the *Constitution*. They urge further, that the Petition relies on an *obiter dicta* of this court in *Raila Odinga 2013*, which is not binding but persuasive.

40. They submit that the Petition offends the doctrine of ripeness and ought to be struck out. They contend that the validity of the elections, was not a justiciable issue at the time the Petition was filed. The Interested parties further contend that under article 163(3)(a) as read with article 140(1) of the *Constitution*, the court may only be moved to challenge the election of a President after the declaration of results.

41. On the withdrawal of the 2nd Interested Party from the election, they agree with the respondents and submit that the said withdrawal offends the provisions of Regulation 52 of the *Elections (General) Regulations* 2012.

42. The Interested Parties urge that, the withdrawal of a party from an election would not vacate an election under the provisions of article 138(8) of the *Constitution*. On the effect of the withdrawal and the interpretation and application of article 138(8) of the *Constitution*, they rely on this court's decision in *Jasbir Singh Rai & others v Tarlochan Singh Rai Estate & 4 others* [2013] eKLR and the High Court decision, in *Ekuru Aukot*, to the effect that the petitioner's reliance on paragraphs 286 to 294 in *Raila Odinga 2013*, is misguided as the same is *obiter dicta*.

43. On whether the respondents complied with the Orders of the Supreme Court in *Presidential Petition No 1 of 2017*, the 1st Interested Party faults the petitioner's reliance on evidence in the form of statements by Dr Roselyn Akombe, to claim that the election was not held in compliance with the court Orders and the *Constitution*. He submits that the said evidence

is hearsay, and does not meet the threshold set out under the provisions of section 109 of the *Evidence Act*.

44. On the question of costs, the Interested Parties submit that, this is a case where the award of costs against the petitioner is appropriate. They urge that the petitioner contested the Busia Senatorial election on a FORD-Kenya ticket, a member of the National Super Alliance. They add that the petitioner supported the candidature of the 2nd Interested Party; hence the Petition is for the benefit of the 2nd Interested Party, disguised as public interest litigation. They urge the court to protect the vehicle of public interest litigation against illegitimate use by politically partisan individuals.

**E. Issues For Determination**

45. Upon consideration of the grounds listed in the Petition, the responses to the Petition, the oral and written submissions by the parties, and the authorities cited in support thereof, we have formed the distinct view that, the Preliminary Objection challenging this court's jurisdiction, must be disposed of at the outset before considering the other issues as set out by the petitioner.

**F. Analysis**

**(i) On Jurisdiction**

46. Both the respondents and Interested Parties have vigorously opposed this Petition for want of jurisdiction. It is their argument that, this court lacks jurisdiction to hear and determine the Petition. It is their further argument that, even if this court had jurisdiction to entertain the Petition (which it doesn't), the same is moot, as all the issues raised by the petitioner have either been conclusively determined by this court or are pending at the court of Appeal.

47. The submissions challenging the court's jurisdiction have been comprehensively highlighted in the foregoing paragraphs. The respondents submit that the Petition, is disguised as seeking the interpretation by this court, of various articles of the Constitution while in essence, it is in reality, challenging the validity of the repeat presidential election held on the 26th October of 2017. In the respondents' view, any declarations or Orders emanating from this court, as a result of the Petition herein, would be a pronouncement about the validity or otherwise of the said election. They also argue that, even if the Petition simply seeks the interpretation of various articles of the *Constitution*, the same is misconceived as the jurisdiction to interpret the *Constitution* in the first instance, lies with the High Court.

48. The petitioner on the other hand, is categorical that this court has the requisite jurisdiction to hear and determine the Petition. It is his contention that the Supreme Court has the exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of

the president. This exclusive original jurisdiction, in the view of the petitioner, also vests the court with original jurisdiction to interpret all the articles relating to the election of a president. He urges the court to seize the moment and clarify a number of questions that he has identified in the Petition.

49. We have carefully considered the reasoned positions of all parties to the Petition regarding the jurisdiction of this court. Towards this end, and as has been the practice of this court in disputes wherein jurisdictional questions have arisen, we have to turn back to article 163(3) of the *Constitution*. In this regard, we focus upon article 163(3) (a) which, provides that the Supreme Court shall have:

> "exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under article 140..." (Emphasis added).

article 140 (1) on the other hand provides that:

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

50. We hasten to restate the position that, the *Constitution* confers upon the Supreme Court, exclusive original jurisdiction, to determine disputes relating to the election of the President arising under article 140 only. Though exclusive and original, this jurisdiction is limited to the circumstances contemplated in article 140(1). It is not a blanket jurisdiction that empowers the Supreme Court, to flex its judicial authority over any and all interpretational questions, touching upon the election of the President. It must be further emphasized that, article 163(3) of the *Constitution* does not oust the High Court's original jurisdiction to interpret the *Constitution* under article 165(3)(d). The Supreme Court's exclusive and original jurisdiction to determine the validity of a presidential election, only kicks in after the declaration of results, following a petition challenging the election; (see *Aluochier* and *Ekuru Aukot*) (*supra*).

51. Applying these principles to the Petition herein, we have no hesitation in agreeing with the respondents' submissions (supported by the Interested Parties) to the effect that the petitioner has wrongly invoked this court's jurisdiction. If his intention is to seek the interpretation of articles 138, 139 and 140 of the *Constitution*, the petitioner cannot leapfrog the High Court and come directly to the Supreme Court. Conversely, if the intention of the petitioner is to challenge the validity of the fresh presidential election of October 26th 2017, then his Petition has been filed in breach of article 140(1) of the *Constitution*. It is not denied that the Petition herein, was filed before the declaration of the results of the October 26th election.

52. The Supreme Court cannot determine the validity or otherwise of a presidential election, before the same is held and the results thereof declared. It is one thing for the court to pronounce itself on a constitutional or legal question, but it is another thing to determine the validity of an election. In other words, the Supreme Court cannot anticipate the validity of a presidential election, within the meaning of article 140(1) of the *Constitution*. As such, this court lacks jurisdiction to hear and determine the present Petition.

**(ii) On Costs**

53. Having determined that the court lacks jurisdiction to entertain this Petition, we see no reason to delve into the other attendant issues. This conclusion then leaves us with the question as to what Orders we should make regarding Costs. The petitioner has urged the court not to visit him with Costs, in the event of an adverse decision to himself. His main argument is that this being a Petition in public interest, the same should not be penalized by way of Costs, as this would go against the spirit of Public Interest Litigation.

54. The respondents and Interested Parties, on the other hand, argue that the petitioner should bear their Costs as the same was filed, not in the public interest as claimed by the petitioner, but in furtherance of his own private interests. In this regard, they submit that the petitioner participated in the 2017 general election as a candidate of NASA; a coalition led by the 2nd Interested Party, whom the petitioner actively supported.

55. We have considered the Parties' Submissions regarding the issue of Costs. We have times without number, stated the general principle that costs follow the event. We have at times departed from this Principle, to order that each party should bears its own Costs in exceptional circumstances. As observed in our past decisions, although election petitions are almost invariably filed by private individuals (losing candidates), they, by their very nature, bear a certain element of public interest.

56. However, not every election petition can be classified as public interest litigation, unless it exhibits a distinct focus on furthering the Public Interest. Each case has to be determined on its own merits. In the instant case, we are not convinced that this Petition was filed for the distinct objective of furthering the Public Interest. We are not able to perceive how the petitioner, having actively participated in and supported the election agenda of the 2nd Interested Party, suddenly experienced an epiphany that propelled him into the just course of public interest litigation, in the wake of the fresh presidential election of October 26th 2017.

57. In the circumstances, as costs follow the event, having failed in his Petition, the petitioner must bear the costs of the Petition being struck out.

**G. Orders**

The Petition dated October 27, 2017, is hereby struck out for want of Jurisdiction;

The petitioner shall bear the Costs of this Petition.

**Modern Holdings (EA) Limited v Kenya Ports Authority (Petition 20 of 2017) [2020] KESC 53 (KLR) (7 February 2020) (Judgment)**

**Supreme Court of Kenya**

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

Neutral citation: [2020] KESC 53 (KLR)

***Statutes*** *– interpretation of statutory provisions – ouster clauses – nature of – where section 62 of the Kenya Ports Authority Act outlawed court action to remedy damage suffered under some provisions of the Act - whether section 62 of the Kenya Ports Authority Act was an ouster clause – Kenya Ports Authority Act Cap 391, section 62.*

***Statutes*** *– interpretation of statutes – interpretation of section 62 of the Kenya Ports Authority Act - where section 62 of the Kenya Ports Authority Act outlawed court action to remedy damage suffered under some provisions of the Act - whether section 62 of the Kenya Ports Authority Act violated the right to enforce property rights under the Constitution – whether section 62 of the Kenya Ports Authority Act ousted the jurisdiction of the High Court and was therefore unconstitutional - Constitution of Kenya article 40, 159(2)(c) and 165(3)(a); Kenya Ports Authority Act (Cap 391) sections 12, 14, 15, 16 and 62.*

***Constitutional Law*** *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms - access to justice - where section 62 of the Kenya Ports Authority Act outlawed court action to remedy damage suffered under some provisions of the Act and provided for an alternative dispute resolution mechanism through arbitration - whether section 62 of the Kenya Ports Authority Act violated the right to access to justice – Constitution of Kenya, article 50(1); Arbitration Act (Cap 49) section 32A; Kenya Ports Authority Act (Cap 391) section 62.*

**Brief facts**

On diverse dates in December 2007 and January 2008, the appellant imported through the port of Mombasa containers of assorted products. Due to the 2007/2008 post-election violence in Kenya, it was claimed that only 6 out of the appellant's 21 containers were traced and cleared. Consequently, in April 2009, the appellant filed a suit at the High Court and claiming the value of the cargo lost as well as consequential losses. After hearing the case, the High Court awarded the appellant a total sum of US $ 9,187,090 being the value of the lost consignment, loss of profits and the cost of following up the consignment.

On appeal, the Court of Appeal set aside the High Court judgment and found that under section 62 of the Kenya Ports Authority Act (KPA Act), the High Court did not have jurisdiction to entertain the appellant's claim. The Court of Appeal also held that it was a misapprehension of the law to argue that section 62 of the KPA Act was unconstitutional for limiting the right of access to justice because it required disputes arising from the respondent's discharge of its statutory duties under sections 12, 14, 15 and 16 of the KPA Act to be referred to arbitration. The Court of Appeal finally held that the High Court erred in entertaining the claim before the parties had attempted or exhausted the out of

court settlement or arbitration procedure set out in section 62 of the KPA Act. Aggrieved by that decision the appellant filed the instant appeal.

**Issues**

i. What was the nature of an ouster clause and whether section 62 of the KPA Act was an ouster clause for outlawing court action to remedy damage suffered under some provisions of the Act?

ii. Whether section 62 of the KPA Act which outlawed court action to remedy any damage suffered under various provisions of the Act and provided for an alternative dispute resolution mechanism through arbitration could oust the jurisdiction of the High Court and whether it was unconstitutional for:

   a. violating the right to enforce property rights under article 40 of the Constitution.
   b. violating the right to access to justice.

**Relevant provisions of the Law**

**Kenya Ports Authority Act (cap 391)**

**Section 62 - Compensation**

*In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice*.

**Held**

1. An ouster clause was one which denied an aggrieved party the right to litigate his claim before a court thus rendering it non-justiciable before the courts; that meant that a person who suffered damage in a given matter had no legal remedy. Far from disentitling aggrieved parties a remedy, section 62 of the KPA Act expressly entitled them compensation for any damage suffered. While it provided that no action or suit shall lie, it nonetheless authorized any person suffering damage thereunder to negotiate with the Kenya Ports Authority a settlement through negotiation failing which then the matter should be referred to arbitration. In the circumstances, section 62 was not an ouster clause.
2. Article 10 of the Constitution of Kenya, (the Constitution) enumerated the national values and principles of good governance. The appellant had not demonstrated how section 62 of the KPA Act fouled any of the values or principles in article 10. In the circumstances, section 62 did not run counter to article 10.
3. By outlawing court action to remedy any damage suffered under sections 12, 14, 15 or 16 of the KPA Act; section 62 of the KPA Act did not violate the appellant's right to enforce its property rights under article 40 of the Constitution. Section 62 of the KPA Act did not forbid or outlaw court action for relief, that section did not grant the Kenya Ports Authority immunity from all judicial intervention or dispute resolution processes. It simply provided for an alternative dispute resolution (ADR) mechanism by way of negotiations

and arbitration in the settlement of any dispute arising under any of sections 12, 14, 15 or 16 of the KPA Act.

4. By article 165(3)(e) and (6) of the Constitution, the High Court did not only retain both appellate and supervisory jurisdiction but had also the final adjudicatory powers over the matters referred to arbitration. The promulgation of the Constitution neither affected section 62 of the KPA Act nor did section 62 override article 165(3)(a) of the Constitution which expressly granted unlimited original jurisdiction in criminal and civil matters. Similarly, article 159(2)(c) of the Constitution which encouraged ADR mechanisms including arbitration on which section 62 was anchored, merely created an alternative but concurrent jurisdiction in resolving disputes.

5. With increased globalization of commerce, arbitration had become one of the preferred ADR mechanisms for settling international disputes. It was, in particular, the major ADR process appropriate for resolution of complex commercial disputes especially those involving technical issues. The issue giving rise to the appeal was loss of the appellant's cargo while in the hands of the respondent in its business as stevedore, wharfinger and/or warehousemen. Determination of the value of such cargo invariably required expertise. Arbitration was only one of the methods of expeditiously resolving such disputes and that explained the efficacy of section 62 of the KPA Act. So far from denying the appellant the right to enforce its property rights, the section was in fact meant to enable claimants to expeditiously and more efficiently enforce their property rights.

6. Besides speed, one of the advantages arbitration had over ordinary litigation was finality; section 32A of the Arbitration Act was the essence of the principle of finality in arbitration. Though arbitrations were private proceedings, nothing stopped any arbitration from being turned into a public hearing if the parties so wished. The appellant was not forbidden from demanding that the arbitration of its dispute with the respondent under section 62 of the KPA Act be made public. As a matter of fact that arbitration was never attempted. It therefore followed that by providing for an ADR mechanism *via* arbitration, section 62 did not deny the appellant access to justice, but to the contrary it promoted his access to justice.

7. The operative word under article 50(1) of the Constitution was fair. The appellant had not claimed or shown that the arbitration of its dispute with the respondent in the matter was not going to be fair. The demand for a public hearing under that provision was a transparency and accountability requirement.

8. Jurisdiction was a fundamental issue in any case. Jurisdiction was everything and could never be equated with a procedural technicality. The backlog of cases was an unsettling issue in Kenya. Some pending cases were as old as twenty and even thirty years. Even before the promulgation of the Constitution, arbitration had long been identified as one of the major ADR mechanisms. The objective behind the enactment of the Arbitration Act No. 4 of 1995, as was manifest from the Parliamentary Hansard Report of July 20, 1995, was to repeal the Arbitration Act of 1968 and enact a new legislation that adapted the UNCITRAL

Model Law and thus entrench arbitration as an ADR mechanism in Kenya in accordance with international arbitration standards. The court could not detract from that.

9. There was no doubt that expeditious and efficient (with the input of experts) disposal of disputes like the one in the instant case was one of the objectives that informed the enactment of section 62 of the KPA Act and other similar provisions such as section 83(1) of the Kenya Railways Corporation Act; section 33 of the Kenya Airports Authority Act; section 29 of the Kenya Roads Act and section 32 of Inter-Governmental Relations Act (IGRA). Save for the Inter-Governmental Relations Act, all the others enactments preceded the promulgation of the Constitution. By requiring courts to promote alternative forms of dispute resolution including arbitration, article 159(2)(c) of the Constitution entrenched arbitration in Kenya's legal system.

10. The arbitration under section 62 of the KPA Act was no aberration; it was a jurisdiction that had been given constitutional *imprimatur*. In the circumstances, it could not be ousted even by a broad interpretation of section 62 of the KPA Act read together with section 7 of the Sixth Schedule to the Constitution which required all law in force immediately before the effective date to remain in force but be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. Therefore, short of an amendment that deleted article 159(2)(c) of the Constitution, that jurisdiction was there to stay. To that extent, the High Court maintained jurisdiction over the arbitrations under section 62, but for two reasons:

    a. Arbitration awards were adopted by courts and enforced as court decrees—section 36(1) of the Arbitration Act.

    b. Arbitrations were quasi-judicial proceedings, as such, they were also subject to the supervisory jurisdiction of the High Court under article 165(6) of the Constitution. It followed therefore that, if the arbitration under section 62 of the KPA Act was not conducted in accordance with the law of the land, the aggrieved party had recourse to the High Court for relief.

11. Section 62 of the KPA Act was not unconstitutional, it simply provided for ADR mechanism of arbitration reinforced by article 159(2)(c) of the Constitution.

12. Any judicial pronouncement that purported to elevate a statutory provision conferring jurisdiction above the express provision of the Constitution was erroneous. Section 62 of the KPA Act, though succored by and anchored in article 159(2)(c) of the Constitution, could not oust the jurisdiction conferred on the High Court expressly by article 165(3)(a) of the Constitution. The question of jurisdiction could be raised at any stage of the proceedings but in the instant case, the Court of Appeal fell into error when it closed its eyes to an express constitutional jurisdiction and relied on another, conferred by a statute (as read with a general constitutional provision) to dismiss the appeal before it. Neither article 159(2)(c) of the Constitution, on which section 62 of the KPA Act was anchored nor article 165(3)(a) of the Constitution should be read so as to supersede the other. They were to be read

together and understood to confer concurrent jurisdiction. To that extent, section 62 was not unconstitutional.

*Appeal partly allowed to the extent that the High Court properly exercised its jurisdiction when it heard and determined the dispute between the parties; Appeal remitted to the Court of Appeal to determine on merit. Each party to bear its costs.*

**Citations**

**Cases**

***Kenya***

1. *Adero & Another v. Ulinzi Sacco Society Limited* Civil Suit 1879 of 1999; [2002] eKLR; [2002] 1 KLR 577 - (Explained)
2. *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others* Petition 13A of 2014 & 14 & 15 of 2013 (Consolidated); [2014] KESC 9 (KLR); [2014] eKLR - (Explained)
3. *Kenindia Assurance Company Limited v James Otiende* Civil Appeal No 103 of 1989, [1989] 2 KAR - (Explained)
4. *Kenya Ports Authority v Kustron (Kenya) Limited* Civil Appeal 315 of 2005; [2011] KECA 98 (KLR); [2011] eKLR - (Explained)
5. *Kenya Ports Authority v. Africanline Transport Company Limited* Civil Appeal Appeal149 of 2012; [2014] eKLR - (Explained)
6. *Multiserve Oasis Company Ltd v. Kenya Ports Authority* Civil Suit No 252 of 2010; [2020] eKLR - (Explained)
7. *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] eKLR; [1989] KLR 1 - (Explained)
8. *Redington (Uganda) Limited v Office of the Attorney General & Kenya Ports Authority* Constitutional Petition 11 of 2017; [2018] KEHC 9454 (KLR); [2018] eKLR - (Explained)
9. *Safmarine Container NV of Antwerp v Kenya Ports Authority* Civil Case 263 of 2010; [2012] KEHC 5015 (KLR); [2012] eKLR - (Explained)
10. *Threeways Shipping Services(K) Limited V Kenya Ports Authority* Commercial Civil Suit 28 of 2010; [2012] KEHC 3729 (KLR); [2012] eKLR - (Explained)

***United Kingdom***

*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 - (Explained)

***Trinidad and Tobago***

*Endell Thomas v Attorney General of Trinidad & Tobago* [1982] AC 113 - (Explained)

**Texts**

1. Datuk Professor Sundra Rajoo (2011), *Law, Practice and Procedure of Arbitration* (Second Edition), LexisNexis Malaysia Sdn Bhd (Co. No. 7625-H)
2. Hogg, QM., (Lord Hailsham) et al (Eds) (1995), *Halsbury's Laws England* London: Butterworth 4th Edn Vol 17 para 13

3. Ivan Cisár & Slavomír Halla (2012), *The finality of Arbitral Awards in Public International Law* Conference Právní Rozpravy, Grant Journal
4. Kariuki Muigua (2016), *Constitutional Supremacy over Arbitration in Kenya*

**Statutes**

***Kenya***

1. Arbitration Act (cap 49) - (Interpreted) section 32A
2. Constitution of Kenya - (Interpreted) articles 10; 40; 48; 50; 159; 163(4)(a); 165(3); Schedule 6
3. Intergovernmental Relations Act (cap 265F) - (Interpreted) section 32
4. Kenya Airports Authority Act (cap 395) - (Interpreted) section 33
5. Kenya Ports Authority Act (cap. 395) - (Interpreted) sections 12; 14; 15; 16; 23; 62
6. Kenya Roads Act (cap 408) - (Interpreted) section 29

**Instruments**

1. European Convention on Human Rights, 1950
2. Universal Declaration of Human Rights (UNDHR), 1948
3. United Nations Basic Principles on the Independence of the Judiciary, 1985 article 16

February 7, 2020, the Court delivered the following Judgment:

## A. Introduction

1. This is an appeal brought under the provisions of article 163(4)(a) of the *Constitution* principally challenging the Court of Appeal's decision on the constitutionality of section 62 of the *Kenya Ports Authority Act* (the KPA Act). The appellant argues that by purporting to oust the jurisdiction of the court to entertain claims against the Kenya Ports Authority (KPA) for damage suffered under sections 12, 14, 15 and 16 of the *Kenya Ports Authority Act* (KPA Act), the section fouls articles 10, 40, 48, 50, 159 and 165(3) of the *Constitution* and is therefore unconstitutional.

## B. Background

2. On diverse dates in December 2007 and January 2008, the appellant, a limited liability company incorporated in the Republic of Tanzania, imported from the United Arab Emirates into the East African Region, through the Port of Mombasa, 21 x 40ft containers of assorted Masafi Products which included fruit juices and mineral water. Due to the 2007/2008 post-election violence in Kenya, it was claimed that the respondent was not able to clear as quickly as possible the consignments received and as a result, there was a huge pileup of cargo at the Port of Mombasa. To ease on that congestion, the respondent

contracted Makupa Transit Shade Ltd to warehouse some of the cargo including that of the appellant.

3. When the situation at the Port normalized, only 6 out of the appellant's said 21 containers were traced and cleared. Consequently, on 29th April 2009, the appellant filed Mombasa HCCC No 19 of 2009 and claimed a total of US$ 24,819,115 being the value of the cargo lost as well as consequential losses including loss of profits and business together with interest at court rates from the date of filing the suit and costs also with interest thereon from. After hearing the case, the High Court (Otieno J) awarded the appellant a sum of US$ 819,554 being the value of the lost consignment, loss of profits of US$ 8,296,536 and the cost of following up the consignment of US$ 71,000 totaling to US$ 9,187,090

4. On appeal, the Court of Appeal found that under section 62 of the *Kenya Ports Authority Act*, the learned trial Judge had no jurisdiction to entertain the appellant's claim holding that though under article 165(3) of the *Constitution* the High Court has unlimited original jurisdiction in both civil and criminal matters, the same *Constitution* in article 159(2)(c) enjoins courts and tribunals to be guided by and to promote alternative forms of dispute resolution including arbitration. The Court of Appeal concluded that it was therefore "a misapprehension of the law to argue that" section 62 of the *Act* is unconstitutional for limiting the right of access to justice because it requires disputes arising from the respondent's discharge of its statutory duties under sections 12, 14, 15 and 16 of the *Act* to be referred to arbitration. In this case, the Court of Appeal found that the High Court erred in entertaining the claim before the parties had attempted or exhausted the out of court settlement or arbitration procedure set out in section 62 of the *KPA Act*. In the circumstances, it allowed the appeal, set aside the High Court judgment and awarded the costs of the appeal to the respondent. This appeal is against that decision.

5. In its Petition of appeal, the appellant faults the Court of Appeal for finding that, pursuant to section 62 of the *Act*, the High Court had no jurisdiction to entertain the appellant's claim in the first instance; for failing to find that sections 23 and 62 of the *Act* are unconstitutional; in failing to find that section 62 of the *Act* only kicks in after admission of liability by the respondent; and that by holding that the matter should have been referred to arbitration pursuant to section 62 of the *Act*, the Court of Appeal failed to be guided by the principle in article 159(2)(d) of the *Constitution* that

> "justice shall be administered without undue regard to procedural technicalities."

6. The respondent sought to strike out the petitioner's appeal on the ground that the petitioner did not have an automatic right to access this Court. However, in its ruling of 9th October 2018, this Court dismissed the application holding that

> "as the constitutionality of section 62 of the *Kenya Ports Act* was challenged, we find that our jurisdiction under article 163(4)(a) was properly invoked."

**C. Appellant's Submissions**

7. Counsel for the appellant submitted that section 62 of the *KPA Act* denies parties access to justice and therefore fouls article 48 of the *Constitution*. Consequently, it also denies parties the right to a fair hearing under article 50 which in turn denies them the right to enforce their property rights under article 40. Counsel contended that any violation or threatened violation of any of these rights can only be litigated and determined before the High Court and not before an arbitrator.

8. On jurisdiction, counsel argued that, save for matters reserved for the Supreme Court and the specialized courts, article 165(3) of the *Constitution* confers on the High Court unlimited original jurisdiction in both civil and criminal matters. An arbitrator appointed under section 62 of the *Act* is not the High Court. He is also not a court or a tribunal. An arbitrator appointed under section 62 of the *KPA Act* is therefore not the court contemplated under article 159 (1) of the *Constitution*. Under article 159(2)(c), it is the court or tribunal that should promote alternative dispute resolution and not Parliament to direct that forum for resolution of disputes.

9. The appellant further argued that arbitrations under section 62 of the *KPA Act* cannot proceed under the Arbitration Act No 4 of 1995 since arbitrations under that *Act* are pursuant to arbitration agreements of parties which was not the case in this matter.

10. The appellant further argued that article 50(1) of the *Constitution* grants the non-derogable right under article 25(c) to have any dispute resolved in a fair and public hearing. In this regard, the appellant contended that arbitration proceedings are not public hearings. In its view, property rights under article 40 can only be taken away by a court and not by an arbitrator. In the circumstances, and on the authority of the High Court decisions in *Multiserve Oasis Company Ltd v. Kenya Ports Authority*,[2012] eKLR and *Threeways Shipping Services (K) Ltd v. Kenya Ports Authority* [2012] eKLR, counsel for the appellant argued that by purporting to oust the court's jurisdiction to determine disputes between Kenya Ports Authority and third parties, section 62 of the *Act* denies parties access to justice and thus violates article 48 of the *Constitution*. He contended that it also violates the appellant's rights under articles 10, 40, 50, 159 and 165(3). He further faulted the Court of Appeal for failing to appreciate that an arbitrator acting pursuant to section 62 of the *KPA*

*Act* has no jurisdiction to adjudicate on the issues touching on the Bill of Rights. As such, it should be held unconstitutional or harmonized with the 2010 *Constitution* as required by section 7 of the 6th Schedule to the *Constitution* which provides that all existing law as at the effective date shall be construed with the alteration, adaptation, qualification and exception necessary to bring it into conformity with the *Constitution*.

11. Citing from the South African De Jure Law Journal by Professor Malan and the Privy Council decision in *Endell Thomas v Attorney General of Trinidad & Tobago* (1982) AC 113, counsel further argued that the 2010 *Constitution* has rendered all ouster clauses in our law unconstitutional as no ouster clause can override provisions of a constitution.

12. Counsel further argued that in this case, the High Court addressed substantive justice. However, the Court of Appeal, contrary to article 159(2)(d) based its decision on a technicality of jurisdiction which was not even raised in the High Court. The appellant also cited several decisions of the European Court of Justice and cited both the *European Convention on Human Rights* and the *Universal Declaration of Human Rights* in support of its contention that section 62 of the *KPA Act* denies a party access to justice contrary to article 48 of the *Constitution*.

13. In conclusion, the appellant argued that if the Court of Appeal's decision is upheld, the appellant will be left with no remedy as its claim will be statute barred. Consequently, the appellant urged us to allow this appeal with costs.

**D. Respondent's Submission**

14. In response to those submissions, the respondent started by arguing that the parties were aware of the fact that their contract or engagement would be governed by the *KPA Act*. In the circumstances, the respondent urged us to dismiss the appellant's challenge of the constitutionality of section 23 for limiting the amount recoverable to KES 200 as against it for any loss or mis-delivery of, damage to, or delay in the delivery of any goods unless expressly stated at the time of depositing the goods, that the value exceeds KES. 200/=, as offending article 40(b) of the *Constitution*.

15. The respondent also dismissed the appellant's argument that the court's jurisdiction under section 62 of the *Act* cannot be raised for the first time on appeal as was done in this matter. He submitted that the issue of jurisdiction is fundamental and can be raised at any stage of the proceedings and cited the Court of Appeal decision in *Adero & Another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577 in support of that argument. He dismissed the appellant's claim that the section 62 of the *Act* is an ouster clause and is therefore unconstitutional.

16. The respondent argued that resolution of disputes through arbitration is anchored in article 159(2)(c) of the *Constitution*. He said that section 62 of the *KPA Act* only limits the

right to court action until resolution, where negotiations or arbitration will have failed. This is because the High Court retains supervisory jurisdiction under article 165(6) and (7) to ensure that the arbitral proceedings under that section are in conformity with fair administration of justice. It therefore follows that if any statutory arbitral proceedings, including those founded on section 62 of the *KPA Act*, are conducted irregularly or illegally, the High Court, under its said supervisory jurisdiction, can intervene and remedy any irregularity or illegality.

17. The respondent urged that section 62 is therefore in perfect harmony with articles 159(2)(c) and 165(6) and (7) of the *Constitution*. In support of this argument, the respondent cited the Court of Appeal decisions in *Kenya Ports Authority v. Kunston (Kenya) Limited* (Unreported), Civil Appeal No. 315 of 2005 and *Kenya Ports Authority v. Africanline Transport Company Limited* [2014] eKLR and the High Court decision in *Safmarine Container NV of Antwerp v Kenya Ports Authority* [2012] eKLR in which suits instituted contrary to section 62 of the *KPA Act* were struck out. The respondent contended that the High Court decisions in *Multiserve Oasis Company Limited v. Kenya Ports Authority* Civil Suit No 252 of 2010; [2012] eKLR and *Three Way Shipping Services Limited v. Kenya Ports Authority* [2012] eKLR which took a contrary view are accordingly bad law.

18. From comparative jurisdiction, it cited the commentaries by *Halsbury's Laws of England* that;[1]

> " An agreement purporting to oust jurisdiction of the court entirely is illegal and void on the grounds of public policy. On the other hand, an agreement that no right of action can be brought in the courts unless and until the parties' differences have been settled in some other way for example by arbitration is valid and enforceable."

19. The respondent also dismissed the appellant's submission that section 62 of the *Act* fouls article 48 of the *Constitution*. To the contrary, the respondent argued, the section is congruent with the promotion of alternative dispute resolution by arbitration as required by article 159(2)(c) of the *Constitution*.

20. Moving on to the issue of fair hearing, the respondent argued that article 50 in its ordinary meaning provides for a fair and public hearing before a court. However, where appropriate, a hearing can be conducted by a subordinate court or another independent and impartial tribunal or body established by article 169(2). From this and the fact that arbitrations are subject to the supervisory jurisdiction of the High Court under article 165(6) and (7), the respondent concluded, section 62 of the *KPA Act* cannot be said to be

1 4th Edition Volume 10 paragraph 719 at pages 11 – 12 of the Respondent's Bundle of Authorities

an ouster clause denying a party access to justice. The respondent therefore dismissed the appellant's invocation of both the *European Convention on Human Rights* and the *Universal Declaration of Human Rights* as a basis for is contention that section 62 of the *KPA Act* denies a party access to justice.

21. Relying on the Court of Appeal's decision in the case of *Kenindia Assurance Company Limited v. James Otiende* Civil Appeal No. 103 of 1989, [1989] 2 KAR 162 , the respondent concluded that jurisdiction cannot be conferred even by the consent of the parties and urged us to dismiss this appeal with costs.

**E. Analysis**

22. From these submissions, three issues emerge for our determination:

    (i) whether section 62 of the *KPA Act* is an ouster clause; and

    (ii) whether section 62 of the *KPA Act* is unconstitutional for fouling articles 10, 40, 48, 50(1), 159(2)(d) and/or 165(3) of the *Constitution*.

    (iii) If the answer to (ii) above is in the negative, what remedy is available.

**(i) Whether section 62 of the KPA Act is an ouster clause**

23. The appellant contended that section 62 of the *KPA Act* is an ouster clause and is therefore unconstitutional. This is because the 2010 *Constitution* has rendered all ouster clauses in our law unconstitutional and no ouster clause can override provisions of a *Constitution*. What is an ouster clause?

24. In *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others*, S.C Petitions 13A of 2013 as consolidated with Petition 14 of 2013 and Petition 15 of 2013 [2014] eKLR, this Court had occasion to deal with the issue of an ouster clause. At paragraph [115], it observed that:

> " [115] .... Ouster clauses are provisions in the *Constitution* or a statute that take away, or purport to take away the jurisdiction of a competent court of law. They deny the litigant any judicial assistance in the relevant matter, and at the same time deny the courts the scope for making any arbitral contribution with respect to the relevant matter. In short, ouster clauses curtail the jurisdiction of the court, as the relevant matter is rendered non-justiciable before the courts."

25. In the light of this authority, an ouster clause is one which denies an aggrieved party the right to litigate his claim before a court of law "thus rendering [it] non-justiciable before

the Courts." This means that a person who suffers damage in a given matter has no legal remedy. Does section 62 of the *KPA Act* render disputes thereunder non-justiciable? The section provides that:

> "In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice."

26. Far from disentitling an aggrieved party a remedy, as a matter of fact the section expressly entitles him compensation for any damage suffered. While it provides that "no action or suit shall lie", it nonetheless authorizes any person suffering damage thereunder to negotiate with the Kenya Ports Authority a settlement through negotiation failing which then the matter should be referred to arbitration.

27. In the circumstances, section 62 of the *KPA Act* is not an ouster clause as the appellant contended.

**(ii) Whether section 62 of the KPA Act is unconstitutional for fouling articles 10, 40, 48, 50(1), 159(2)(d) and/or 165(3) of the Constitution.**

28. The second issue raised in this matter is whether section 62 of the *KPA Act* is unconstitutional for fouling articles 10, 40, 48, 50(1), 159(2)(d) and/or 165(3) of the *Constitution*. article 10 of the *Constitution* enumerates the national values and principles of good governance as:

> "patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development."

The article obliges "State organs, State officers, public officers, and all persons whenever any of them—applies or interprets this Constitution; enacts applies or interprets any law; or makes or implements public policy decisions", to be governed by those principles.

29. The appellant has not demonstrated how section 62 of the *KPA Act* fouls any of these values or principles. In the circumstances, we find that section 62 of the *KPA Act* does not run counter to article 10 of the *Constitution*.

30. The appellant also contended that by outlawing court action to remedy any damage suffered under sections 12, 14, 15 or 16, section 62 of the *KPA Act* violates the appellant's right to enforce its property rights under article 40 of the *Constitution*. That is not correct.

31. The section does not forbid or outlaw court action for relief. That section does not grant the Kenya Ports Authority immunity from all judicial intervention or dispute resolution processes. It simply provides for an alternative dispute resolution (ADR) mechanism by way of negotiations and arbitration in the settlement of any dispute arising under any of sections 12, 14, 15 or 16 of the *KPA Act*. Ogola, J underscored this point in *Reddington (Uganda) Ltd v. Office of the Attorney-General & Another* [2018] eKLR, where he observed that:

> " ...section 62 of the *KPA Act* does not infringe on the Petitioner's right to property as entrenched under article 40 of the *Constitution* nor its right to access to justice under article 48 of the *Constitution*. section 62 of the *KPA Act* merely provides other modes of dispute resolution by which the Petitioner can access justice and in turn safeguard its right to property."

32. In its judgment giving rise to this appeal, the Court of Appeal observed that section 62 of the *Act* does not at all oust the jurisdiction of the court but merely limits and postpones it in the first instance. By article 165(3)(e) and (6) of the *Constitution*, the High Court does, not only retain both appellate and supervisory jurisdiction but has also the final adjudicatory powers over the matters referred to arbitration. The promulgation of the 2010 *Constitution* neither affected section 62 of the Act nor does section 62 override article 165(3)(a) which expressly grants "unlimited"original jurisdiction in Criminal and Civil matters". Similarly, article 159(2)(c) which encourages alternative forms of dispute resolution including arbitration on which section 62 aforesaid is anchored, merely creates an alternative but concurrent jurisdiction in resolving disputes.

33. With increased globalization of commerce, arbitration has become one of the preferred ADR mechanisms for settling international disputes. It is, in particular, the major ADR process appropriate for resolution of complex commercial disputes especially those

involving technical issues. In his book, *Law, Practice and Procedure of Arbitration*, (Second Edition), Prof. Sandra Rajoo underscored this point in his observation that:

> " ...arbitration is now a generally accepted method of resolving disputes in a variety of commercial transactions, in particular those in specialised or technical industries such as shipping, construction, energy and financial services sector." [2]

34. The issue giving rise to this appeal is loss of the appellant's cargo while in the hands of the respondent in its business as stevedore, wharfinger and/or warehousemen. Determination of the value of such cargo invariably require expertise. As stated above, arbitration is only one of the methods of expeditiously resolving such disputes and that explains the efficacy of section 62 of the *KPA Act*. So far from denying the appellant the right to enforce its property rights, the section is in fact meant to enable claimants to expeditiously and more efficiently enforce their property rights.

35. Besides speed, one of the advantages arbitration has over ordinary litigation is finality. In their article, '*The finality of Arbitral Awards in Public International Law*,' Ivan Cisár and Slavomír Halla observed that;

> " The ultimate aim of the international arbitration is to end the dispute absolutely. Therefore, the arbitral award should be [a] final determination of the rights and obligations of the disputants."[3]

36. section 32A of the Kenyan *Arbitration Act* succinctly speaks to that also:

> " Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this *Act*."

37. This is the essence of the principle of finality in arbitration: get a dispute heard expeditiously and a final award made, binding on all the parties to such proceedings. What better way is there of enforcing one's property rights? We find the contention that section 62 fouls article 40 of the *Constitution* also untenable.

2 Datuk Professor Sandra Rajoo, *Law, Practice and Procedure of Arbitration* (Second Edition), LexisNexis Malaysia Sdn Bhd (Co. No. 7625-H), at p 6. In the 2013 Survey by PWC, Corporate Choice in International Arbitration, 2013 PWC, a majority of the respondents stated that arbitration was the preferred mode of resolution of their disputes.

3 Ivan Cisár, Slavomír Halla, '*The finality of Arbitral Awards in the Public International Law*' Conference Právní Rozpravy, Grant Journal, 2012, pp. 1

38. The appellant's contention of denial of its right of access to justice under article 48 is linked to the alleged denial of its right to a fair hearing under article 50 of the *Constitution*. We shall therefore combine our determination of section 62's alleged violation of those articles.

39. The appellant submitted that by outlawing court action (which contention we have shown is a misconception of section 62 of the *KPA Act*) section 62 violates its right to a public hearing. This is on the ground that arbitrations, which the section mandates, are private and not public proceedings as required by article 50(1) of the *Constitution*.

40. We agree with the appellant that arbitrations are private proceedings. As Dr. Kariuki Muigua has observed:

> " Unless parties agree otherwise in an Arbitration agreement ... all the aspects of the case are confidential. ... For parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure."[4]

Nothing, however, stops any arbitration from being turned into a public hearing if the parties so wish. In this case, the appellant was not forbidden from demanding that the arbitration of its dispute with the respondent under section 62 of the *KPA Act* be made public. As a matter of fact that arbitration was never attempted. It therefore follows that by providing for an ADR mechanism via arbitration, section 62 does not deny the appellant access to justice. To the contrary it promotes his access to justice.

41. At any rate what is the purpose of a public hearing required by article 50(1) of the *Constitution*? In our view, the operative word under article 50(1) is "fair." The appellant has not claimed or shown that the arbitration of its dispute with the respondent in this matter was not going to be fair. We understand the demand for "a public hearing" under this provision to be a transparency and accountability requirement.

42. The appellant's main ground in this appeal is its contention that by outlawing court action, (which contention we have debunked), section 62 of the *KPA Act* runs counter to articles 159(1), 159(2)(d) and 165(3)(a) of the *Constitution*. article 159(1) provides that "Judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." article 159(2)(d), on the other hand, states that "In exercising judicial authority, the courts and tribunals shall be guided by the principle—[that] ... justice shall be administered without undue regard to procedural technicalities...." On its part, article 165(3)(a) directs that "Subject to clause (5), the High Court shall have—(a) unlimited original jurisdiction in criminal and civil matters."

[4] Kariuki Muigua (Dr.), *Constitutional Supremacy over Arbitration in Kenya*, March, 2016, pp. 11

43. Clause (5) of article 165 of the *Constitution* excludes from the High Court's jurisdiction determinations of petitions challenging the Presidential election; rendering advisory opinions under article 163(6) at the request of the national government, any State organ, or any county government with respect to any matter concerning [a] county government and....which matters are served for the exclusive jurisdiction of the Supreme Court. It also excludes "disputes relating to—employment and labour relations" which are reserved for the Employment and Labour Relations Court; and those relating to "the environment and the use and occupation of, and title to, land" which are reserved for the Environment and Land Court.

44. The appellant accuses the Court of Appeal of failing to be guided by the principle in article 159(2)(d) of the *Constitution* that "justice shall be administered without undue regard to procedural technicalities", and basing its decision on the technicality of jurisdiction which was not even raised before the High Court. In so doing, the appellant submitted, the Court of Appeal gave section 62 of the *KPA Act* a narrow and a wrong interpretation. If, pursuant to section 7 of the 6th Schedule to the *Constitution*, the Court of Appeal had given section 62 of the *KPA Act* a proper interpretation, the appellant further argued, it would have adopted Lord Reid's statement in the case of *Anisminic Ltd v. Foreign Compensation Commission* that:

> " It is a well-established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly - meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court."

Consequently, the appellant urged us to reverse the Court of Appeal's decision on this point and find that the High Court had jurisdiction to entertain its claim.

45. Jurisdiction is a fundamental issue in any case. As the late Justice Nyarangi observed in the case of *Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] eKLR, a decision that has been adopted in literally all subsequent cases on the issue, "jurisdiction is everything...." Jurisdiction can never be equated with a procedural technicality.

46. Turning back, in the above context, the other major point the appellant took on is its contention that section 62 of the *KPA Act* is unconstitutional based on the provisions of article 165(3)(a) that "Subject to clause (5), the High Court shall have—(a) unlimited original jurisdiction in criminal and civil matters." We have shown that Clause (5) excludes from the ambit of the High Court's unlimited original jurisdiction matters reserved for the Supreme Court, the Environment and Land Court, the Employment and Labour Relations Court. In light of that fact, the appellant argues that article 165(3)(a) of the 2010

*Constitution* fundamentally altered the original jurisdiction of the High Court by outlawing any statutory provision or authority that purports to oust or restrict that jurisdiction. The appellant thus submitted that section 62 of the *KPA Act* is one such provision and urged us to accordingly declare it unconstitutional. In support of that submission, the appellant cited to us the persuasive High Court decisions in *Multiserve Oasis Company Ltd v. Kenya Ports Authority*, [2012] eKLR and *Threeways Shipping Services (K) Limited v. Kenya Ports Authority and Another* [2012] eKLR.

47. In the above context, it is common knowledge that the backlog of cases is an unsettling issue in our country. Some pending cases are as old as twenty and even thirty years. Even before the promulgation of the 2010 *Constitution*, arbitration had long been identified as one of the major ADR mechanisms. The objective behind the enactment of the Arbitration Act No. 4 of 1995, as is manifest from the Parliamentary Hansard Report of 20th July 1995, was to repeal the Arbitration Act of 1968 and enact a new legislation that adapts the UNCITRAL Model Law and thus entrench arbitration as an alternative dispute resolution mechanism in Kenya in accordance with international arbitration standards. We cannot detract from that.

48. We have no doubt that expeditious and efficient (with the input of experts) disposal of disputes like the one in this case was one of the objectives that informed the enactment of section 62 of the *KPA Act* and other similar provisions such as section 83(1) of the Kenya Railways Corporation Act; section 33 of the *Kenya Airports Authority Act*; section 29 of the *Kenya Roads Act*; and section 32 of *Inter-Governmental Relations Act* (IGRA).

49. Save for the *Inter-Governmental Relations Act*, all the others enactments preceded the promulgation of our 2010 *Constitution*. It is trite that by requiring courts to promote "alternative forms of dispute resolution including ... arbitration", article 159(2)(c) of the 2010 *Constitution* entrenches arbitration in our legal system. So the arbitration under section 62 of the *KPA Act* is therefore no aberration. It is a jurisdiction that has been given constitutional imprimatur. In the circumstances, contrary to the appellant's contention, it cannot be ousted even by a broad interpretation of section 62 of the *KPA Act* read together with section 7 of the 6th Schedule to the *Constitution* which requires

> " All law in force immediately before the effective date ... [to remain in force but] ... be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this *Constitution*." Therefore, short of an amendment that deletes article 159(2)(c) of the *Constitution*, that jurisdiction is here to stay.

50. To the above extent, we agree with the respondent that the High Court maintains jurisdiction over the arbitrations under section 62 of the *KPA Act*, but for two reasons. One, arbitration awards are adopted by courts and enforced as court decrees—section 36(1) of

the *Arbitration Act*. Secondly, arbitrations are quasi-judicial proceedings. As such, they are also subject to the supervisory jurisdiction of the High Court under article 165(6) of the *Constitution*. It follows therefore that, if the arbitration under section 62 of the *KPA Act* is not conducted in accordance with the law of the land, the aggrieved party still has recourse to the High Court for relief.

51. For these reasons, we affirm the Court of Appeal decision that section 62 of the *KPA Act* is not unconstitutional. It simply provides for ADR mechanism of arbitration reinforced by article 159(2)(c) of the *Constitution*. In stating so, we have only addressed one part of the question before us.

52. Despite our above finding, therefore, we must still settle the issue of the concurrent jurisdiction of the High Court under article 159(2)(c) and that conferred by article 165(3)(a). In the present case, the appellant, invoking the latter provision, went straight to the High Court seeking compensation for its lost goods. The respondent, acquiescing to the issue of jurisdiction, proceeded to file a defence, denied the claim and the matter went to full trial before Otieno J. A judgment in favour of the appellant was thereafter given, both on liability and quantum.

53. Dissatisfied by that judgment, the respondent filed an appeal in the Court of Appeal and raised, for the first time, the issue of lack of jurisdiction by the High Court. The Court of Appeal, without addressing the merits of the High Court's decision, invoked the said section 62 of the *KPA Act* and allowed the appeal on that issue alone. It however, completely misunderstood the jurisdiction under article 165(3) (a) in the present context.

54. We are aware that the above controversy is not new. In *Safmarine Container N.V. of Antwerp v Kenya Ports Authority* (*supra*), Mwera J. took the same position as the Court of Appeal in this matter. Ojwang J. (as he then was) in *Multiserve Oasis Co. Ltd v Kenya Ports Authority* (*supra*) on the other hand was categorical when he stated thus:

> "……it is clear that the new *Constitution* is today, the basis of the jurisdiction of the High Court; and it is not permissible to limit this jurisdiction on the basis of ordinary statutes not provided for within the terms of the *Constitution*."

55. The Court of Appeal in *Kenya Ports Authority v African Line Transport* (*supra*) was however, of a contrary view and following *Kenya Ports Authority v Kustron (Kenya) Limited*, Civil Appeal No.315 of 2005 (unreported) made the curious pronouncement that the High Court's jurisdiction was ousted by section 62 aforesaid and that "parties could not confer jurisdiction on the superior court."

56. We have no doubt in our minds that any judicial pronouncement that purports to elevate a statutory provision conferring jurisdiction above the express provision of the *Constitution*

is erroneous. We wish to state that section 62 of the *KPA Act*, though now succored by and anchored in article 159(2)(c) of the *Constitution*, cannot oust the jurisdiction conferred on the High Court expressly by article 165(3)(a). We thus agree with Ojwang J. (as he then was) when he stated in *Threeways Shipping Services (K) Ltd v Kenya Ports Authority* [2012] eKLR that "the law today is that the High Court has unlimited jurisdiction in all causes save in matters reserved by the *Constitution* itself to the Supreme Court, or to certain specialized courts. Consequently, the contention that, in the suit herein, S.62 of the Kenya Ports Authority Act has ousted the High Court's jurisdiction is untenable".

57. In concluding on this issue, it is trite that the question of jurisdiction, can be raised at any stage of the proceedings but we have shown that in the instant case, the Court of Appeal fell into error when it closed its eyes to an express constitutional jurisdiction and relied on another, conferred by a statute (as read with a general constitutional provision) to dismiss the appeal before it. Neither article 159(2)(c), on which section 62 is anchored nor article 165(3)(a) should be read so as to supersede the other and we have shown why. They are to be read together and understood to confer concurrent jurisdiction. To that extent, we agree with the appellant on the application of article 165(3)(a) to this case while also agreeing with the respondent that section 62 is not unconstitutional.

**(iii) What remedy is available to the parties**

58. The history of this matter bears repetition. The acts complained of, occurred in 2008. Both parties litigated at the High Court from 2009. Eleven (11) years later, the dispute remains alive. We have stated above that arbitration under section 62 is an option both parties should have taken but did not. The jurisdiction of settlement of civil disputes under article 165(3)(a) of the *Constitution* was however properly invoked but rejected by the respondent as an afterthought only because it lost the case before the High Court (Otieno J.)

59. The justice of the case would therefore lead us to one remedy: that the appeal ought to be allowed only to the extent that we hereby declare that, the respondent having, at the outset, not demanded compliance with section 62, the jurisdiction of the High Court was properly invoked. The consequence is that we must remit the appeal to the Court of Appeal to determine it on the merits of the liability and quantum of damages as against the respondent.

60. As regards costs, it is best that we exercise discretion and order that each party shall bear its costs.

**F. Disposition**

61. Flowing from our conclusions above, we make the following orders:

(a) The petition of appeal dated 3rd November 2017 is hereby allowed to the extent only that we hereby declare that the High Court properly exercised its jurisdiction when it heard and determined the dispute between the parties herein.

(b) The judgment of the Court of Appeal dated 29th September, 2016 is hereby set aside to the above extent only.

(c) The appeal is hereby remitted to the Court of Appeal to determine the same on merit.

(d) Each Party shall bear its costs of the appeal

62. Orders accordingly.

**Gitonga v Republic (Petition 11 of 2017)**
**[2020] KESC 61 (KLR) (23 January 2020) (Judgment)**

**Supreme Court of Kenya**

**MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2020] KESC 61 (KLR)

***Jurisdiction*** *- jurisdiction of the Supreme Court - appellate jurisdiction of the Supreme Court - boundaries within which the Supreme Court's appellate jurisdiction could be exercised - where the issue raised before the Supreme Court was first raised in the Court of Appeal and not any other lower court - whether the Supreme Court had jurisdiction to hear, on appeal, a matter that raised an issue which was first handled at the Court of Appeal and not any other lower court - whether the Court of Appeal erred when it entertained the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the lower courts - Constitution of Kenya, 2010, article 163(4)(a)*

**Brief facts**

The appellant challenged the entire judgment and orders of the Court of Appeal and thus sought four (4) declaratory orders namely; that the Supreme Court had jurisdiction to entertain additional constitutional questions in relation to existing constitutional questions; that it was mandatory for an accused person in custody to be informed of his right to legal representation; that the fundamental rights of the appellant were gravely violated and that the trial court was mandated to make an inquiry as to whether an accused person in a serious case deserved an advocate assigned by the State and at the State's expense. Apart from the declaratory orders, the appellant also sought orders to have him discharged or acquitted and that the Court of Appeal's judgment be reversed and set aside.

On the other hand, the respondent had argued that the appellant did not have an automatic right of appeal to the Supreme Court and that his prayer that he be acquitted on grounds that his rights to legal representation under article 50(2)(g) and (h) of the Constitution were violated, was totally misconceived and legally untenable.

**Issues**

i. Whether the Supreme Court had jurisdiction to hear, on appeal, a matter that raised an issue which was first handled at the Court of Appeal and not any other lower court.
ii. Whether the question of legal representation as one of the grounds of appeal could be handled despite an acknowledgement by the Court of Appeal that it was never raised in the lower courts.

**Relevant provisions of the Law**

**Constitution of Kenya, 2010**

**Article 163 (4)(a)**

*(4) Appeals shall lie from the Court of Appeal to the Supreme Court –*

*a) As of right in any case involving the interpretation or application of this Constitution;*

**Held**

1. There were boundaries to the jurisdiction of the Supreme Court. An appeal to the Supreme Court had to originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution.
2. An appellant had to challenge the interpretation or application of the Constitution which the Court of Appeal used to dispose the matter in that forum. Such a party had to be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it could not support a further appeal to the Supreme Court under article 163(4)(a) of the Constitution.
3. In order to determine whether the appeal was properly before court, it had to be confirmed that the issues of constitutional interpretation and application being raised, arose through the normal appellate mechanism so as to reach the court. The question as to whether the appellant's right to a fair trial was infringed by failure to accord him legal representation at the expense of the state or by failure to inform him of the right to legal representation was raised for the first time at the Court of Appeal. The issue was neither raised at the Resident Magistrate's Court nor at the High Court. In addition, none of the articles of the Constitution in the petition of appeal was the subject of interpretation and application at the High Court.
4. The Court of Appeal was at fault for entertaining the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the lower courts. To allow the appellant to ignore the normal hierarchy of courts would amount to abuse of the process of court. The Supreme Court lacked jurisdiction to entertain the appeal pursuant to article 163(4)(a) of the Constitution.

*Petition of appeal dismissed with no orders as to cost.*

**Citations**

**Cases**

***Kenya***

1. *Abdallah Mohammed v Republic* Criminal Appeal 90 of 2012; [2018] eKLR - (Explained)
2. *Ali Salim Awadh alias Majid v Republic* Criminal Appeal 192 of 2012; [2015] KECA 322 (KLR); [2015] eKLR - (Explained)
3. *Caleb Wawire Sifuna v Republic* Criminal Appeal 174 of 2016; [2018] KEHC 1705 (KLR); [2018] eKLR - (Explained)
4. *David Njoroge Macharia v Republic* Criminal Appeal 497 of 2007; [2011] eKLR - (Explained)
5. *Erad Supplies & General Contractors v National Cereals Produce Board* Petition 5 of 2012; [2012] eKLR - (Explained)

6. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Application 5 of 2014; [2014] eKLR - (Explained)
7. *Hassan Njanje Charo v Mwashetani & 3 others* Civil Application 14 of 2014; [2014] eKLR - (Explained)
8. *Isaac Ng'ang'a Kahiga & another v Republic* Criminal Appeal 272 of 2005; [2006] KECA 137 (KLR); [2006] eKLR - (Explained)
9. *John Nduati Ngure v Republic* Criminal Appeal 121 of 2014; [2016] KECA 674 (KLR); [2016] eKLR - (Explained)
10. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] eKLR - (Explained)
11. *Joseph Kamau Gichuki v Republic* Criminal Appeal 523 of 2010; [2013] KECA 448 (KLR); [2013] eKLR - (Explained)
12. *Karani v Republic* Criminal Appeal 26 of 2008; [2010] eKLR; [2010]1KLR 734 - (Explained)
13. *Lowethit Loritim v Republic* Criminal Appeal 126 of 2012; [2014] KEHC 6816 (KLR); [2014] eKLR - (Explained)
14. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Explained)
15. *Mercy Mugure v Republic* Criminal Appeal 150 of 2017; [2018] KEHC 5734 (KLR); [2018] eKLR - (Explained)
16. *Michael Mungai v Housing Finance Co (K) Ltd & 5 other* Civil Appeal (Application) 9 of 2015; [2017] KESC 47 (KLR); [2017] eKLR - (Explained)
17. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR); [2014] eKLR - (Explained)
18. *Muruatetu & another v Republic & 6 others* Petition 15 & 16 of 2015; [2017] KESC 2 (KLR); [2017] eKLR; [2017]1KLR 101 - (Explained)
19. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] eKLR - (Explained)
20. *Ndwiga & 2 others v Republic* Criminal Appeal 78 of 2014; [2017] KECA 443 (KLR); [2017] eKLR - (Mentioned)
21. *Neema Mwandoro Ndurya v Republic* Criminal Appeal 446 of 2007; [2008] eKLR - (Explained)
22. *Ngoge v Kaparo & 5 others* Petition 2 of 2012) [2012] KESC 7 (KLR); [2012] eKLR - (Explained)
23. *Office of Director of Public Prosecutions v Peter Onyango Odongo, SPM Siaya & Attorney General* Petition 2 of 2015; [2015] KEHC 91 (KLR); [2015] eKLR - (Explained)
24. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] eKLR - (Explained)
25. *Rama Alfani & 2 others v Republic* Criminal Appeal No 223 of 2002 - (Explained)

26. *Republic v Chengo & 2 others* Petition 5 of 2015; [2017] KESC 15 (KLR); [2017] eKLR - (Explained)
27. *Simon Gitau Kinene v Republic* Criminal Appeal 9 of 2016; [2016] KEHC 1569 (KLR); [2016]eKLR - (Explained)
28. *Yusuf Gitau Abdallah v Building Centre (K) Ltd, UBM Overseas Ltd, Alibhai Shariff & Co Ltd, Raffiq Shariff & Noor Shariff* Petition 27 of 2014; [2014] KESC 50 (KLR); [2014[ eKLR - (Explained)

***United Kingdom***

1. *DPP v Woolmington* [1935] UKHL 1 - (Explained)
2. *Pett v Greyhound Racing Association* (1968) 2 ALL ER 545 - (Explained)

***United States***

1. *Gideon v Wainwright* 372 US 335, 372 US 344 [1963] - (Explained)
2. *Johnson v Zerbst* 304 US 458 (1938) - (Explained)
3. *Powell v Alabama* 287 US 45 [1932] - (Explained)
4. *United States v Cronic* 466 U.S 648 [1984] - (Explained)

***Canada***

1. *New Brunswick (Minister of Health and Community Services) v G(J)* [1999] 3 SCR 46 - (Explained)
2. *R v Rowbotham* 1988 CanLII 147 (ON CA) - (Explained)

**Texts**

Office of the Inspector General (2017), *National Police Service Standing Orders* Government Printer

**Statutes**

***Kenya***

1. Constitution of Kenya - (Interpreted) articles 20(2); 20(3)(4)(5); 22; 23; 25(c); 48; 49(1)(c); 50(1)(2); 164(3)(a)(4)(a)(b)(i)
2. Criminal Procedure Code (cap 75) - (Interpreted) sections 200(3); 207
3. Legal Aid Act (cap 16A) - (Cited) In general
4. Penal Code (cap 63) - (Interpreted) section 296(2)
5. Supreme Court Act (cap 9B) - (Interpreted) section 15(1)

**Instruments**

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981
2. Basic Principles on the Role of Lawyers, 1990
3. European Convention on Human Rights, 1950
4. International Covenant on Civil and Political Rights (ICCPR), 1966
5. Universal Declaration of Human Rights (UNDHR), 1948

**Advocates**

1. Mr. Kanjama - Counsel for the Appellant

2. Mr. O'mirera - Counsel for the Respondent

January 23, 2020, the Court delivered the following Judgment:

## A. Introduction

1. Before us a Petition of Appeal dated and filed on 21st July, 2017, pursuant to article 163(4)(a) of the *Constitution*. The appellant is challenging the entire judgment and Orders of the Court of Appeal (Waki, Nambuye & Kiage, JJA) at Nyeri in *Criminal Appeal No 78 of 2014* delivered on 7th June, 2017.

2. The appellant's case is premised on five (5) grounds particularly, that the Court of Appeal erred and misdirected itself by; holding that the appellant did not demonstrate that he was willing but unable to obtain legal representation despite the fact that the appellant was never informed of his Constitutional right to legal representation; holding that the State was not under any obligation to provide free legal counsel at the time the appellant's trial commenced despite the substantial injustice arising from the fact that the appellant was charged with an offence whose penalty is death; upholding the judgments of the High Court and the Magistrate's Court; failing to properly evaluate the standard and burden of proof in criminal cases; and failing to recognize and apply the principle that lack of or insufficient assistance by counsel is directly injurious to the due process and the Constitutional guarantees to a fair trial in an appropriate case, such as the criminal trial of the appellant.

3. The appellant has thus sought four (4) declaratory orders namely; that this Court has jurisdiction to entertain additional constitutional questions in relation to existing constitutional questions; that it is mandatory for an accused person in custody to be informed of his right to legal representation; that the fundamental rights of the appellant were gravely violated and that the trial Court is mandated to make an inquiry as to whether an accused person in a serious case deserves an advocate assigned by the State and at the State's expense. Apart from the declaratory orders, the appellant has also sought two other orders; firstly, to have him discharged or acquitted and second, an order that the Court of Appeal's judgment be reversed and set aside. The appellant finally sought any other orders that the Court would deem fit to grant.

4. The Respondent opposed the Petition by filing written submissions dated 20th September, 2019, the substance of which we shall shortly summarize.

## B. Background

5. The appellant, together with two others not before this Court (John Bosco Njue and Irene Wawira Muthoni) were charged with the offence of robbery with violence contrary to

Section 296 (2) of the *Penal Code* before the Senior Resident Magistrate's Court at Wanguru. The trial Court (BM Ochoi, SRM) connected several factual chain links from the evidence tendered and found no coexisting circumstances to weaken that chain of events pointing unerringly to the three accused as the perpetrators of the alleged crime.

6. Dissatisfied by the decision of the trial Court, the appellant, John Bosco Njue and Irene Wawira Muthoni all preferred appeals to the High Court. The High Court (Ong'udi & Githua, JJ) found no reason to overturn the decision of the trial Court. The learned Judges in their judgement accepted the chain link of events as found by the trial Court and laid emphasis on the finding of the deceased's stolen items in possession of the appellant, John Bosco Njue and Irene Wawira Muthoni in circumstances that they could not explain away. Consequently, the Court rejected the defences put forward by the appellant and the co-accused in the same manner as the trial Court had done.

7. Further aggrieved by the decision of the High Court, the appellant, together with his co-accused lodged a second appeal before the Court of Appeal being *Criminal Appeal No. 78 of 2014*. Specifically, it was the appellant's case that the learned Judges of the High Court erred in law and fact by: not making a finding that the prosecution contravened Section 46 of the *Police Standing Orders* during his trial; applying the doctrine of recent possession yet none of the deceased's items were recovered from him; relying on uncorroborated evidence; relying on the evidence of PW6 who was not a trustworthy witness; not considering his defence; not taking into account the fact that he lacked legal representation in both the Magistrate's Court and at the High Court; relying on circumstantial evidence to uphold his conviction; applying accomplice evidence to prove that he committed the alleged offence with others; and by failing to consider that none of the elements of robbery with violence under section 296(2) of the *Penal Code* had been satisfied. On 7th June, 2017, the Court of Appeal dismissed the appeal for lack of merit hence the present appeal filed as of right under article 164(3)(a) of the *Constitution*.

**C. Parties' Submissions**

**(i) The appellant's submissions**

8. On the Court's jurisdiction to entertain the Petition, the appellant submitted that the Court has jurisdiction to entertain the Appeal pursuant to article 163(4)(a) as read with article 163(4)(b)(i) of the *Constitution*. The appellant in that regard seeks interpretation of several articles of the *Constitution* including articles 20(2), (3), (4) & (5), 22, 23, 25(c), 48, 49(1)(c) and 50(1)(2)(a, b, c, g, h, I, j, k l, q). The appellant submits that the issue of legal representation which led to an unfair trial under article 50 of the *Constitution* arose at the Court of Appeal and was subject of the Court of Appeal's determination thus placing his Appeal within this Court's jurisdiction. He further anchors his submissions on that issue in

three of this Court's decision namely, *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] eKLR, *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others* [2014] eKLR and *Gatirau Peter Munya v Dickson Mwenda & 2 others* [2014] eKLR.

9. Counsel for the appellant, Mr Kanjama, furthermore submitted that the appellant's right to have legal representation under article 50(2) and elevated by article 25(c) of the *Constitution* is non-derogable and at no point in time was the appellant ever accorded the said right. Consequently, he added, the appellant's right to fair trial was gravely violated. Counsel also contended that the right to fair trial cannot be limited and that the trial Court was mandated to inform the appellant of his right to legal representation but did not do so. Counsel also faulted the High Court for not looking into the omission.

According to Counsel the Court of Appeal also erred in finding that the appellant fully and meaningfully participated in the trial and first appeal and that his belated complaint on non-representation was baseless. On this point, counsel for the appellant cites various international legal instruments such as the *Universal Declaration of Human Rights* 1948, *International Covenant on Civil and Political Rights* 1966, the *African Charter on Human and People's Rights* 1969, *European Convention on Human Rights* and the *Basic Principles on the Role of Lawyers* 1990. He also relied on several cases in support of his submissions including this Court's decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, the U. S Supreme Court cases of *United States v Cronic*, 466 U.S 648 [1984], *Gideon v Wainwright*, 372 US 335, 372 US 344 [1963], *Johnson v Zerbst* US 458 [1938], and *Powell v Alabama*, 287 US 45 [1932] as well as the Court of Appeal's decision in *David Njoroge Macharia v Republic* (Criminal Appeal No. 497 of 2007). Counsel in that regard maintained that the appellant was compelled to participate fully in the trial and first appeal proceedings because he had no choice but to defend against the charges against him and that action should not be used against him.

10. While citing sections 200(3) and 207 of the *Criminal Procedure Code*, the appellant compared the Court's duty to inform an accused person of the right to legal representation with other absolute rights to information in the course of criminal proceedings. For instance, he argued that a trial magistrate has a mandatory obligation to inform an accused person of the right to demand any witnesses to be re-summoned and re-heard. On this point, Counsel cited several decisions to support his argument ie: *Simon Gitau Kinene v Republic* [2016]eKLR, *Abdallah Mohammed v Republic* [2018]eKLR, *Caleb Wawire Sifuna v Republic* [2018] eKLR, *Mercy Mugure v Republic* [2018]eKLR, *Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others* High Court at Siaya [2015] eKLR. The appellant concluded on this issue by stating that the right to information is absolute and that if the same is not exercised, the proceedings are a nullity. He therefore, urges this Court to nullify the proceedings of the courts below and set him free.

11. Counsel in addition urged that the appellant's constitutional right to legal representation at the state's expense is enshrined in article 50(2)(h) of the *Constitution* and citing the *International Covenant on Civil and Political Rights*, he submitted that legal aid is mandatory in offences whose penalty is loss of life in case of conviction. He thus submits that since the charge facing the appellant was so serious in complexity and consequence, substantial injustice did result from the absence of both legal counsel and information of the right to legal representation at the State's expense, hence the claim of an unfair trial. He cited the cases of *Pett v Greyhound Racing Association* (1968) 2 ALL ER 545, *New Brunswick (Minister of Health and Community Services) v G(J)* [1999] 3 SCR 46, *R v Rowbotham*, [1988] Can LII 147 (ON CA),and this court's decision in *Republic v Karisa Chengo & 2 others* [2017]eKLR, to anchor his submissions on that point. The appellant consequently, faults the Court of Appeal's finding that the State was not under any obligation to provide free legal counsel when the appellant's trial commenced in October, 2010.

12. The appellant has also submitted that the Court of Appeal erred and misdirected itself by upholding the judgments of the High Court and Magistrate's Court despite both being laden with various shortcomings. First, Counsel urged that none of the prosecution witnesses testified as having seen the appellant with the deceased prior to his demise. In the appellant's view, the Court of Appeal believed the testimony of a PW6 aforesaid without the said witness tendering sufficient proof that the appellant stole anything from the deceased. Counsel thus urged that the learned Judges of Appeal relied on hearsay evidence in dismissing a valid appeal and cites the Court of Appeal's decision in *Ali Salim Awadhi alias Majid v Republic* [2015] eKLR to support his submission in that regard.

13. Counsel further submitted that the evidence of PW7 was not tendered in form of either video or photographic evidence. In addition, that the learned judges failed to take judicial notice of the fact that the place where PW7 (Esther Nduku Damaris) is alleged to have seen the appellant drop a driving licence in the name of the deceased (Josphat Mugo Muriuki) was a public place where human traffic is great. Counsel therefore urged that there was sufficient exculpatory evidence to absolving him of any crime.

14. While citing the Court of Appeal's decisions in *Rama Alfani & 2 others v Republic* (Criminal Appeal No. 223 of 2002), *Isaac Ng'ang'a Kahiga & another v Republic* (Nyeri Criminal Appeal No. 272 of 2005), *Neema Mwandoro Ndurya v Republic* [2008] eKLR and *John Nduati Ngure v Republic* [2016] eKLR, Counsel for the appellant urged that the learned judges failed to believe the evidence of the appellant without assigning any sufficient reasons to it and wrongly applied the doctrine of recent possession yet the appellant was not found in possession of any of the alleged stolen items. The appellant also maintained in his submissions that the learned Judges wrongly placed reliance on circumstantial evidence to

uphold the appellant's conviction and erroneously applied accomplice evidence to show that the appellant committed the alleged robbery.

15. Subsequently, Counsel submitted that none of the elements of robbery with violence under section 296(2) of the *Penal Code* were sufficiently proved and to support this argument he cited the case of *Lowethit Loritim v Republic* [2014] eKLR. Counsel also submitted that the appellant was not armed with a dangerous weapon at any time, no dangerous weapon produced as evidence in court and that there was also no evidence that the appellant was at the scene of crime.

16. It was also the appellant's submission that the Court of Appeal failed to evaluate the standard and burden of proof in criminal cases, and thus shifted the burden of proof to the appellant contrary to his constitutional right to a fair trial. The case of *DPP v Woolmington*, [1935] UKHL 1 in support of the appellant's submission in that regard.

17. To conclude his submissions, Counsel for the appellant urged that the Court of Appeal had failed to recognize and apply the principal that lack of or insufficient assistance by Counsel is directly injurious to due process and the constitution guarantees to a fair trial in an appropriate case, such as the criminal trial of the appellant herein. He thus urged that lack of assistance by counsel made it difficult for the appellant to cross-examine the prosecution witnesses effectively and mount a defense to the charges against him. Consequently, the appellant has urged this Court to allow the appeal with costs and to grant the reliefs sought.

**(ii) The Respondent's submissions**

18. As to whether this Court has jurisdiction to entertain the appeal, Mr. O'mirera, Counsel for the Respondent submitted that the appellant cannot avail to himself both rights under article 50(2) (g) and (h) of the *Constitution*. Counsel for the Respondent argued that the appellant was either poor to qualify be availed an advocate at the state's expense or he had means and could have engaged an advocate of his own choice had he been promptly informed of his right to legal representation. Counsel thus maintained that there are clear provisions under article 22 of the *Constitution* that the appellant ought to have used and complained and/or instituted appropriate proceedings on the alleged violation. Thus, the mere fact that both courts below did not inform him of his rights under article 50(2)(g) and (h) is not enough a ground to nullify the entire case against him. Further, that article 50(2)(h) does not expressly provide that a court must meet the terms of legal representation and of an accused person before commencement of a trial and therefore the correct remedy available to the appellant is to refer the case to the High Court to determine if the appellant was prejudiced or that substantial injustice could otherwise result by non-representation.

19. The Respondent, in support of his submissions relied on article 163(3) (b), (4) (a), and (5) of the *Constitution*, this Court's decisions in *Samuel Kamau Macharia & another v*

*Kenya Commercial Bank Limited & 2 others*, SC App No 2 of 2011; [2012] eKLR, *Yusufu Abdallah v Building Centre (K) Ltd & 4 others*, SC. Pet. No. 7 of 2014(Yusuf Abdallah Case), *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Pet No 3 of 2012; [2012] eKLR(Lawrence Nduttu Case), H*assan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Pet No 10 of 2013( Hassan Joho Case); [2014]eKLR and *Republic v Karisa Chengo*, SC Pet 2 of 2015[2017] eKLR (Karisa Chengo Case). Referring to the *Karisa Chengo Case*, Counsel distinguished it from the facts in the instant appeal. He maintained that in the *Karisa Chengo Case*, unlike in the instant appeal, there were two central issues that made this Court assume jurisdiction firstly, the fact that the High Court Bench was not properly constituted and that the Petitioners were not accorded legal representation at the State's expense. Secondly, in the, the Respondent had specifically asked the Court to pronounce itself on whether their rights to fair trial under article 50(2)(h) had been violated. The Respondent submitted that in the instant case, the appellant seeks a declaration under both articles 50(2)(g) and (h) of the *Constitution* which is an anomaly leading to no remedy being available for him.

20. As to whether the appellant suffered substantial injustice, Counsel for the Respondent submitted that even though the Court of Appeal did not take into account this Court's decision in the *Karisa Chengo Case* declaring the right to legal representation as a fundamental ingredient in the right to a fair trial, it was acutely aware that the *Legal Aid Act* had been enacted though not operationalized. The Respondent thus urged that the learned Judges of Appeal considered the legal dilemmas in the circumstances of the entire case and satisfied that the appellant had meaningfully and adequately participated in the trial, no substantial injustice was suffered nor occasioned. Further, the Respondent urged that the trial Magistrate rightly convicted the appellant on identification evidence and evidence of recent possession which conviction remains unshaken. The Respondent cited the Court of Appeal's decision in *Isaac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic* Cr App No 272 of 2005(UR) in support of his submission that all the elements on the doctrine of recent possession were satisfied in the instant appeal ranging from the circumstantial evidence by PW1(Lewis Gaithuma Njeri), PW2(Cyrus Njagi), PW6(Peter Maina Mwangi), PW7(Esther Nduku Damaris), PW9 and PW12(Cpl. Richard Odhiambo). In addition, the Respondent submitted that the High Court was satisfied that the prosecution's case was premised purely on circumstantial evidence to the effect that the three appellants appeared in PW6's rental house at the same time the robbery was committed and having possession of the deceased's stolen motor cycle.

21. Counsel for the Respondent furthermore urged that the High Court rightly addressed itself on the factors to be considered before invoking the doctrine of recent possession, considered the appellant's defense, consequently, concurring with the trial Court's finding and dismissing the appellant's appeal.

22. While citing the Court of Appeal's finding in the case of *Karani v Republic* [2010]1KLR 734, the Respondent submitted that the Court of Appeal adequately considered all the issues on the concurrent findings by both the magistrate's Court and the High Court before reaching its decision. The Respondent alleged that further evaluation of circumstances of the instant case on points of law will not yield a different outcome because nothing had changed in that regard.

23. On the second issue of jurisdiction to raise additional related constitutional questions, and the third issue on whether the Court of Appeal properly exercised its mandate, the Respondent submitted that the issues of contestation ought to have been raised at the first appellate Court and at the trial Court. That neither the appellant nor his co-accused raised any complaint about their inability to understand the trial process at the High Court in the first instance. Counsel for the Respondent also urged that the law does not operate in a vacuum but is part of a large system of public decision-making processes which embodies the rule of law as provided under articles 1, 2, 10, 20(3), 27 and 259 of the *Constitution*. The Courts below therefore exercised their respective mandates as donated by the Constitution and the present complaint by the appellant is akin to casting aspersions on the Court's exercise of its powers and functions. To support his case, the Respondent cited the following authorities; *Erad Supplies & General Contractors v National Cereals Produce Board*, SC Pet No 5 of 2012; [2012] eKLR, *Lawrence Nduttu Case*, *Hassan Njanje Charo v Mwashetani & 3 others*, SC Appl No 4 of 2014, and *Yusuf Abdallah v Building Centre (K) Ltd & 4 others*.

24. On the relief sought, the Respondent relying on this Court's decision in *Karisa Chengo Case* and Court of Appeal case in *Joseph Kamau Gichuki v Republic* Crim Appeal No 523 of 2010 argued that the rights to legal representation under article 50(2)(g) of the *Constitution* is on equal footing with the right under article 50(2)(h) of the *Constitution* with the same effect to secure a fair trial for an accused person. The Respondent added that this Court has already pronounced itself on this issue and therefore, no controversy to warrant further interpretation.

    In conclusion, the Respondent thus urged that the appellant does not have an automatic right of appeal to the Supreme Court and that his prayer that he be acquitted on grounds that his rights to legal representation under articles 50(2)(g) and (h) of the *Constitution* were violated is totally misconceived and legally untenable.

**D. Issues for Determination**

25. From the filed pleadings, written and oral submissions by parties, the following issues emerge for determination:

(i) Whether the appeal before this Court meets the Constitutional threshold under article 163(4)(a) of the *Constitution*.

(ii) If the answer to issue (i) is in the affirmative, whether the appellant's right to fair trial was infringed by failure to accord him legal representation at the expense of the State or by failure to inform him of the right to legal representation

(iii) What remedies are available in the circumstances?

**E. Analysis**

**(i) Does the Appeal before this Court meet the constitutional threshold under article 163(4)(a) of the Constitution?**

26. Whereas, it is Respondent's submissions that this court lacks jurisdiction to determine whether the appellant's right to fair trial was infringed by failure to accord him legal representation at the expense of the State or by failure to inform him of the right to legal representation; The appellant's view is to the contrary, and argues that this appeal is properly before this Court within the ambit of article 163(4)(a) of the *Constitution*.

27. The appellate jurisdiction of this Court is rightly captured in article 163(4) of the *Constitution of Kenya* which states as follows:

> "(4) Appeals shall lie from the Court of Appeal to the Supreme Court –
>
> a) As of right in any case involving the interpretation or application of this Constitution; and
>
> b) In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)
>
> (5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

28. Likewise, section 15(1) of the *Supreme Court Act* provides that appeals to the Supreme Court shall be heard only with the leave of the Court. Section (15)(2) of the *same Act* on the other hand provides that Sub-Section (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.

29. Apart from the foregoing constitutional and legal provisions, this Court has ceaselessly stipulated the boundaries of its jurisdiction under article 163(4)(a) of the *Constitution* in

several decisions, which decisions are still applicable. In the *Lawrence Nduttu case*, a two-Judge Bench of this Court (Tunoi and Wanjala SCJJ) set the guiding principles as follows:

> " 28: The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the *Constitution*. In other words, an appellant must be challenging the interpretation or application of the *Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the *Constitution*, it cannot support a further appeal to the Supreme Court under the provisions of article 163 (4) (a)."

30 Further, in the *Hassan Joho Case* this court observed as follows:

> " 37: In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the *Constitution*.... " [emphasis added].

31. The same principle was affirmed in this Court's decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC App No 5 of 2014; [2014] eKLR (Munya 1) where we stated thus:

> " 69: The import of the Court's statement in the *Ngoge Case* is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."

32. In order to determine whether this Appeal is proper before us therefore, we must confirm that the issues of Constitutional interpretation and application being raised before us have risen through the normal appellate mechanism so as to reach us. It is in that regard not

disputed that the question as to whether the appellant's right to fair trial was infringed by failure to accord him legal representation at the expense of the state or by failure to inform him of the right to legal representation was raised for the first time at the Court of Appeal. We have also interrogated the record before us and confirmed that the issue was neither raised at the Resident Magistrate's Court nor at the High Court. None of the articles of the Constitution in the present appeal was also the subject of interpretation and application at the High Court.

33. This Court has in previous decisions emphasized the significance of respecting the hierarchy of the judicial system. For instance, in the *Peter Oduor Ngoge v Francis Ole Kaparo & others* [2012] eKLR we stated thus:

> "In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."

34. Further, in *Michael Mungai v Housing Finance Co (K) Ltd & 5 other*, SC Appeal/ Application 9 of 2015; [2017] eKLR, we specifically stated as follows:

> "14. The powers of this Court have to be exercised within and in accordance with a specific jurisdiction as provided for in article 163(3) of the *Constitution*. One cannot ask the Court to exercise its powers in a carte blanche manner. A litigant's plea must be precise and targeted. One cannot make omnibus prayers to the Court with the expectation that the Court will be merciful to him and decipher them and grant one or either of them. Each of the jurisdictions of the Court has a definite outcome that is predictable: an appeal may lead to an affirmation or overturning of the decision being appealed against; while a reference will definitely lead to an advisory opinion being rendered or declined. Consequently, any matter that comes before this Honourable Court has to be focused and targeted. One must have a cognizable cause of action and a litigation trajectory that can be well traced within the judicial hierarchy in case of an appeal. A litigant cannot therefore, in a haphazard manner, request this Court to review or set aside the orders of the High Court directly. Such a

> request does not lie within the definite thread of a cause of action that has risen through the judicial hierarchy."

35. We thus fault the Court of Appeal for entertaining the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the Courts below. To allow the appellant ignore the normal hierarchy of courts would amount to abuse of the process of Court. We consequently lack jurisdiction to entertain this appeal pursuant to article 163(4)(a) of the *Constitution*.

36. Concerning costs, this Court has previously settled the law on award of costs, that costs follow the event, and that, a Judge has the discretion in awarding costs. This was the decision in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012; [2014] eKLR. Noting that the appellant is incarcerated and has no lawful means of paying any costs awarded against him, we order that there should be no order as to costs.

37. Consequently, the appeal fails and is dismissed.

**Orders**

38. Accordingly, and in view of the foregoing reasons the final orders are:

    i. The Petition of appeal dated 21st July, 2017 be and is hereby dismissed.

    ii. There shall be no order as to costs.

39. Orders accordingly.

**Kenya Plantation & Agricultural Workers' Union v Omulama & 9 others (The Kenya Export Floriculture, Horticulture and Allied Workers' Union (KEFHAU) Represented by its Promoters) (Petition 4 of 2018) [2020] KESC 59 (KLR) (23 January 2020) (Judgment)**

**Supreme Court of Kenya**

**MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2020] KESC 59 (KLR)

***Constitutional Law*** *– applicability of the Constitution of Kenya, 2010 (Constitution) – time within which the Constitution became applicable – where there was a dispute relating to refusal of registration of a trade union - where the application for registration was made before the promulgation of the Constitution and the refusal was after the promulgation – whether the Constitution was applicable to the dispute.*

***Constitutional Law*** *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to form a trade union – registration of a trade union – refusal of registration – where the Registrar of Trade Unions declined to register a trade union dealing with floriculture and horticulture industries on the basis that there existed another trade union dealing with plantation and agriculture industries - when could the Registrar of Trade Unions refuse to register a trade union - whether refusal to register the trade union amounted to an infringement of the right of existence of a trade union – Constitution of Kenya articles 24, 36 and 41; Labour Relations Act (Cap 300) sections 12, 13 and 14.*

**Brief facts**

On July 17, 2009, the 1st to 9th respondents made an application to the 10th respondent, Registrar of Trade Unions (Registrar) for the establishment of a trade union namely, the Kenya Export, Floriculture, Horticulture and Allied Workers' Union (KEFHAU). The Registrar acknowledged receipt of the application by a letter dated March 25, 2010 and notified the 1st to 9th respondents that the application would be placed before the National Labour Board for consideration. Later, the Registrar notified the General Secretary of the appellant of the pendency of the application aforesaid and invited objections if any. Thereafter, the Registrar sent a letter dated August 30, 2011 to the interim secretary of KEFHAU enclosing a notification of refusal of registration on the ground that there was a registered trade union, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants sought registration.

Aggrieved by the Registrar's decision, the 1st to 9th respondents appealed to the Employment and Labour Relations Court which while reversing the Registrar's decision held that there was a fundamental difference between that which comprised the plantations and agricultural industry and the floriculture and horticulture. Aggrieved by that decision, the appellant preferred an appeal to the Court of Appeal. The Court of Appeal dismissed the appeal. Aggrieved by the dismissal of the appeal, the appellant filed the instant appeal.

**Issues**

i. When would the Registrar of Trade Unions refuse to register a trade union?

ii. Whether refusal to register a trade union dealing with floriculture and horticulture industries on the basis that there existed another trade union dealing with plantation and agriculture industries amounted to an infringement of the right of existence of a trade union.

iii. Whether the Constitution was applicable to a dispute relating to the refusal to register a trade union where the application for registration was made before the promulgation of the said Constitution and the refusal was after the promulgation.

**Relevant provisions of the Law**

**Constitution of Kenya**

**Article 41 - Labour relations**

(2) *Every person has the right-*

*(c) to form, join or participate in the activities and programmes of a trade union.*

**Labour Relations Act (cap 233)**

**Section 12 - Establishment of a trade union or employers' organisation**

*(1) No person shall recruit members for the purpose of establishing a trade union or employers' organization unless that person has obtained a certificate from the Registrar issued under this section.*

**Section 13 - Application to register a trade union or employers' organisation**

*A trade union or employers' organization shall apply to the Registrar for registration within six months of receiving a certificate issued under section 12.*

**Section 14 - Requirements for registering a trade union**

*(1) A trade union may apply for registration if—*

*(d) no other trade union already registered is—*

*(i) in the case of a trade union of employers or of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration; or*

*(ii) in the case of an association of trade unions, sufficiently representative of the whole or a substantial proportion of the trade unions eligible for membership thereof:*

*Provided that the Registrar shall, by notice in the Gazette and in one national daily newspaper with wide circulation, notify any registered trade union, federation of trade unions or employers' organisations which appear to him to represent the same interest as the applicants of the receipt of such application and shall invite the registered trade union federation of trade unions or employers' organisation concerned to submit in writing, within a period to be specified in the notice, any objections to the registration;*

**Held**

1. The 1st to 9th respondents' application for registration for their trade union was received by the 10th respondent on February 16, 2010. The notification of refusal to register the 1st to 9th respondents' union was made on August 30, 2011. The issue in dispute before the then Employment and Labour Relations Court was refusal of registration of the appellants by

the Registrar. In light of the observations made from the record, the cause of action was refusal of registration of the appellants by the Registrar of trade unions and the same arose on August 30, 2011, a year later after the promulgation of the Constitution of Kenya, 2010 (Constitution). The applicable Constitution was therefore the Constitution and not the repealed Constitution.

2. A court could draw insight from the Constitution for just and fair resolution of a dispute that arose prior to the promulgation of the Constitution. Therefore, even if the cause of action arose prior to promulgation of the Constitution, the court would have been right to draw insights from the same for the fair determination of the issue before it that was, refusal of registration of the appellants by the Registrar.
3. After a perusal of the provisions of sections 12, 13, and 14 of the Labour Relations Act and other relevant statutory and constitutional provisions in respect to the issue in question; once an application for registration of a trade union had been made and the same was compliant with the aforesaid sections and the Constitution, the Registrar had no choice but to register the same. The only reason for refusal of registration was where there was another trade union sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants sought registration as provided under section 14(1)(d)of the same Act.
4. Section 14(1)(d) of the Labour Relations Act did not operate in a vacuum. The Registrar had to make an inquiry on any objection before arriving at a decision to reject or allow an application. The inquiry made by the Employment and Labour Relations Court based on the evidence presented before it to the effect that the decision of the Registrar in rejecting the application for registration of the 1st to 9th respondent's union, was largely based on the provisions in the repealed Constitution. The limitations under article 24 of the Constitution did not apply with regard to the 1st to 9th respondents' union. There was a fundamental difference between what comprised plantations and agriculture industries, as against the floriculture and horticulture industries.
5. Infringement of the appellant's right of existence as a general and giant union by the Court of Appeal without considering the provisions of article 41 of the Constitution could not have occurred. That was because the appellant was already registered and was enjoying its rights of existence as a trade union under article 41 of the Constitution. It was the 1st to 9th respondents' rights that would be infringed, if the orders sought were to be granted more so, considering the fact that the appellant was not a primary party to the original suit. The most crucial interest or stake in any case was that of the primary parties before the court.
6. The registration certificate was issued by the Senior Assistant Registrar of Trade Unions. The role of registration of a trade union was a statutory duty of the Registrar and a relevant Court only had jurisdiction to order registration of the proposed union and further, the Registrar cured any defect that could have occurred in the order of the Employment and Labour Relations Court.

*Appeal dismissed.*

***Orders***

*Appellant to bear costs of the 1st to 9th respondents.*

**Citations**

**Cases**

***Kenya***

1. *Benson Ngoma Mtungu,Lawrence Katana Kenga,Maurice Otieno Olunya,Caroline Helinda Auma Mobutu,Michael Owino,Harriet Mboli Manga & Simon Ndolo v Registrar of Trade Unions & Transport Workers Union* Civil Appeal 16 of 2017; [2018] KECA 620 (KLR); [2018] eKLR - (Explained)
2. *Charles Salano & 9 others (Proposers & Promoters of Kenya Supermarkets Workers Union (KESMWU) v Registrar of Trade Unions & Food And Allied Workers Union* Civil Appeal 19 of 2016; [2017] KECA 398 (KLR); [2017] eKLR - (Explained)
3. *David Benedict Omulama & 8 Others v Registrar of Trade Union & Another* Appeal 7 of 2011; [2014] eKLR - (Explained)
4. *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition 4 of 2012; [2014] eKLR - (Explained)
5. *Kenya Export Flouriculture, Horticulture And Allied Workers Union (Kefhau) Represented By Its Promotoers And Applicants:- David Benedict Omulama ,Andrew Makwaga,Bernard Amuchizi Mukaisi ,Adriano Mukalo ,Wycliffe Sore ,Soverio Masika ,Lilian Ingutia ,Efeli A. Nandi ,James Amatonye v The Registrar Of Trade Union & Kenya Plantation And Agricultural Workers Union* Cause 7 of 2011; [2014] KEELRC 642 (KLR) - (Mentioned)
6. *Kenya Plantation & Agricultural Workers Union v David Benedict Omulama, Andrew W. Makwaga, Benard Amuchizi Mukaisi, Andriano Mukalo, Wycliffe Sore, Severio Masika, Lillian Ingutia, Efeli A. Nandi, James Amatonye & Registrar of Trade Unions* Civil Appeal 141 of 2014; [2017] KECA 543 (KLR); [2017] eKLR - (Mentioned)
7. *Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR); 2013] eKLR - (Explained)
8. *Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project* (Intended Amicus Curiae) Petition 15 & 16 of 2015 (Consolidated); [2016] KESC 12 (KLR); [2016] eKLR - (Explained)
9. *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] eKLR - (Explained)
10. *Town Council of Awendo v Nelson O Onyango 1st - 13th Respondents, Attorney General 14th Respondent; Abdul Malik Mohamed & 178 others* Petition 37 of 2014; [2019] KESC 38 (KLR); [2019] eKLR - (Explained)

**Statutes**

***Kenya***

1. Civil Procedure Act (cap 21) In general - (Cited)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) In general - (Cited)
3. Constitution of Kenya - articles 20; 24; 36; 41; 163(4) (Interpreted)
4. Constitution of Kenya (Repealed) In general - (Cited)
5. Employment and Labour Relations Court Act (cap 8E) section 12; 13; 14 - (Interpreted)
6. Industrial Court Act (Repealed) (No 20 of 2011) section 12(3) - (Cited)
7. Labour Relations Act (cap 233) section 12; 13; 14(1)(d)(i) - (Interpreted)

January 23, 2020, the Court delivered the following Judgment:

## A. Introduction

1. The appellant moved this court via a Petition dated 6th March 2018, being an appeal against the Judgment of the court of Appeal (Githinji, Waki & Kiage JJA) in *Kenya Plantation & Agricultural Workers Union v David Benedict Omulama & 9 others*, Nairobi Civil Appeal No 141 of 2014 which upheld the Judgment of the Industrial court (now Employment and Labour Relations court) at Nairobi (Monicah Mbaru, J) in Cause No 7 of 2011. the court of Appeal dismissed the appellant's appeal on 12th May, 2017.

2. While certifying this appeal as one involving a matter of general public importance, in Civil Application No. Sup.5 of 2017, the learned Judges of Appeal (Warsame, Ouko & Murgor JJA) on 23rd February, 2018 held themselves thus:

> "We have analyzed the Notice of Motion and the affidavit in support of the application and hold that the intending appellant has met his obligation to identify and concisely set out the specific elements of "general public importance" which he attributes to the matter for which certification is sought. Counsel for the applicant outlined clearly that the decision shall affect the labour movement, the work force and the economy if the parameters of registration of trade unions are not set right. In *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, Supreme court Petition No. 10 of 2013 [2014] eKLR at para 52, it is stated that an appeal to the Supreme court within the terms of article 163 (4) should be founded on cogent issues of constitutional controversy. The applicant has demonstrated to our satisfaction that he intends to challenge the interpretation or application of any specific provision in the *Constitution* and has demonstrated how the issues that were before the High court and the court of Appeal became matters within the ambit of article 163 (4) of the *Constitution.* The Supreme court in *Peter*

> *Oduor Ngoge v Francis Ole Kaparo & 5 others* (*supra*) stated that a petitioner must rationalize the transmutation of the issue in contention from an ordinary subject of leave to appeal, to a meritorious theme involving the interpretation or application of the *Constitution*, such that it becomes a matter as of right falling within the appellate jurisdiction of the Supreme court. In the instant case, the applicant has established that this court's reasoning and conclusions in Nairobi Civil Appeal No 141 of 2014 delivered by Hon. Justice Philip Waki, Onesmus Githinji and Patrick Kiage dated 12th May2017 can properly be issues of constitutional interpretation or application, for which under article 143(4)(a) of the *Constitution* no leave would be required. In totality, however, we are satisfied that the threshold in article 143(4)(b) has been met." [emphasis added]

3. The appellant has thus sought orders namely, that the Petition is allowed; the Judgment/Order of the court of Appeal be set aside, and an order be made allowing the appeal with costs including costs of the courts below.

**B. Background**

4. On 17th July, 2009, the 1st to 9th respondents made an application to the Registrar of Trade Unions for the establishment of a trade union namely, the Kenya Export, Floriculture, Horticulture and Allied Workers' Union (KEFHAU). The Registrar acknowledged receipt of the application by a letter dated 25thMarch 2010 and notified the 1st to 9th respondents that the application would be placed before the National Labour Board for consideration. Later, the Registrar notified the General Secretary of the Kenya Plantation & Agricultural Workers Union (the appellant) of the pendency of the application aforesaid and inviting objections if any. Thereafter, the said Registrar sent a letter dated 30th August 2011 to the interim secretary of KEFHAU enclosing a notification of refusal of registration in the following terms:

> " The ground of refusal is as follows: -
>
> There is already registered a trade union, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants sought registration namely:
>
> Kenya Plantation and Agricultural Workers Union"

**(i) Proceedings at the Employment and Labour Relations court**

5. Aggrieved by the Registrar's decision, the 1st to 9th respondents appealed to the Employment and Labour Relations court in *David Benedict Omulama & 8 others v Registrar of Trade Union & Another*, Appeal No 7 of 2011 [2014] eKLR. The orders sought in the appeal were against the Registrar of Trade Unions and included an order to quash the Registrar of Trade

Unions' decision dated 30th August 2011; a mandatory order compelling the Registrar to unconditionally register the 1st to 9th respondents' Union, the Kenya Export Floriculture and Allied Workers Union; an order to issue a certificate and enter the same in the register of registered trade unions; the costs of the appeal; and any other relief that the court deemed fit to grant. The issue in dispute was "refusal of registration of the appellants by the registrar of trade unions."

6. The 10th respondent filed their response on 4th May 2012 submitting that the registration of the respondents was heard and determined by the National Labour Board which rejected it and thus the appeal lacked merit. The appellant, upon application to the court, was enjoined as an Interested Party. The appellant is an amalgamation of 4 different unions which represent interests of workers in the coffee, tea, sisal and general agriculture industries. They supported the 10th respondent's decision to decline registration of KEFHAU on the ground that such registration would override their rights as a registered union.

7. On 11th February, 2014, the learned judge (Monicah Mbaru, J) considered the provisions of the Constitution of the appellant organization in terms of assessing the issue of representation and sectoral interest vis-a-vis the rights of all parties and found that the Registrar's decision was largely based on the provisions of the *repealed Constitution* and the limitation under article 24 of the *Constitution* did not apply to the 1st – 9th respondents. the court also found that there was a fundamental difference between that which comprised the plantations and agricultural industry and the floriculture and horticulture. Consequently, the learned Judge reversed the decision of the Registrar, declared KEFHAU to be registered as a trade union, and ordered the Registrar to immediately issue a registration certificate.

**(ii) Proceedings at the court of Appeal**

8. Aggrieved by the decision of the Industrial and Labour Relations court, the appellant preferred an appeal to the court of Appeal, in *Kenya Plantation & Agricultural Workers Union v David Benedict Omulama & 9 others*, Nairobi Civil Appeal No 141 of 2014. the court of Appeal (Githinji, Waki & Kiage JJA) dismissed the appeal on 12th May, 2017. That court held that the application for registration was made before the promulgation of the current *Constitution* and also found that the decision of the Registrar refusing registration was made on 30th August 2011, slightly over one year after the current *Constitution* commenced. Hence, the applicable law at the time the decision was made was the *Labour Relations Act* and the current *Constitution*. On the issue as to whether the learned judge failed to recognize the fact that the rights to form and join trade unions and associations are not absolute and are limited by article 24 of 2010 *Constitution*, the court of Appeal found that the condition imposed by section 14(1)(d)(i) of the *Labour Relations Act* was not an unconstitutional limitation of the right to form and join a trade union. the court of

Appeal also found that whereas a court should not assume any role in the registration of a trade union, it found that the trial court had jurisdiction to order registration and that the subsequent registration of KEFHAU by the Registrar cured any defect in the order. The dismissal of the appeal triggered the filing of the Petition herein.

**(iii) Proceedings before the Supreme court**

**(a) The appellant's Submissions**

9. The appellant filed the instant Petition of Appeal based on five grounds as follows:

    1. That the learned Appeal Judges erred in law in finding and holding that the Industrial court was right in applying the provisions of the Constitution to a case that came into being before its promulgation;

    2. That the learned Appeal Judges erred in law and in fact in infringing on the appellant's right of existence as a general and giant union without considering its rights under article 41 of the *Constitution* in the same manner as those of the respondent;

    3. That the learned Appeal Judges erred by misapprehending the order of registration by the court for registration of the respondent by the Judges as set out in article 41 of the *Constitution* and section 14(d) of the *Labour Relations Act* without power or mandate to do so;

    4. That the learned Appeal Judges erred in fact and in law in taking into account an irrelevant factor to the effect that the registration of the Union by the Registrar of Trade Unions cured the defect in the Superior court's (Justice Mbaru) orders of 11th February 2014 when the order related to a specific cause of action that arose before the promulgation of the *Constitution of Kenya* in August, 2010; and

    5. That the learned Appeal Judges erred in law and in fact by making the decision that is plainly wrong as they failed;

        (a) to appreciate that floriculture and horticulture are indeed part of the agriculture sector activities which areas attract great public interest as well as economic attention;

        (b) to overrule the trial Judge's lack of mandate to register the new union which is the preserve of the Registrar of Trade Unions; and

        (c) to observe the administrative role of the Registrar of Trade Unions in issuing certificates to unions that have been duly registered by virtue of the statutory mandate of the said office and not otherwise.

10. In the above context, Counsel for the appellant in his submissions urged that the court of Appeal itself in holding that the Petitioner's right of existence as a general and giant union was a violation of article 41 of the *Constitution* in the same manner as the 1st to 9th respondent Union whose application was made on 16th February 2010 before the promulgation of the *Constitution*.

11. Further, Counsel submitted that the learned Judges of Appeal contravened the provisions of section 14(d) of the *Labour Relations Act* by ignoring the fact that the law has vested the powers of Registration of Trade Unions squarely on the 10th respondent and that any attempt by the court to usurp the powers was null and void. Consequently, he challenged the decision of the trial court to have the 1st to 9th respondent's union registered. Counsel cited the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*, SC Appl 2 of 2011; [2012] eKLR in support of his submissions on this point.

12. While further citing the court of Appeal decisions in *Charles Salano & 9others v The Registrar of Trade Union & another* CA No 19 of 2016 and *Benson Ngurua Mtengu & 6 others v the Registrar of Trade Unions & another* CA No 16 of 2017, Counsel for the appellant urged that the Learned Judges of Appeal failed to appreciate the requirements of sections 12, 13 and 14 of the *Labour Relations Act* by the condition that there should not be another union in existence that is sufficiently representative of employees interest in the named sector.

13. Furthermore, Counsel for the appellant urged that the court of Appeal failed to appreciate that the trial court's orders were premised on the 2010 *Constitution* despite the cause of action arising prior to the promulgation of the *Constitution*. It was the appellant's other case that the Constitution did not apply retrospectively and maintained that the only applicable law at the material time was the *Labour Relations Act*. In that regard, the appellant blamed the court of Appeal for dismissing its appeal on a wrong interpretation and application of articles 36 and 41 of the *Constitution*. They thus urged us to allow the Petition as prayed.

**(b) 1st to 9th respondent's Submissions**

14. In response to the Petition, the 1st to 9th respondents filed their replying affidavit and a further affidavit sworn on 28th March 2018 and 8th July, 2018 respectively. They also filed their submissions dated 18th September, 2018. No pleadings were filed by the 10th respondent. Further, when the suit came up for hearing on 15th October, 2019, there was no appearance on the part of the 10th respondent despite being duly served with the hearing date.

15. In opposing the appeal, the 1st – 9th respondents submit that their Union was established to represent its members drawn from Export Floriculture and Allied Sectors covering specific areas as set out in the union's Constitution.

16. In their view, for a trade union to qualify for registration, emphasis is placed on the provisions of its Constitution regarding the specific sector or sectors from which it seeks to draw membership and the Constitution of any objecting union. They cite section 14 of the *Labour Relations Act* to support the argument that facts in the Constitutions of intended and/or existing unions must support the applicable laws.

17. Further, the 1st to 9th respondents submit that their main areas of interest are export, floriculture industry and horticulture industry and all types of fruits cultivation mainly for the export market, which specific sectors are not included clearly defined in the appellant's Constitution. They therefore support the finding of the Employment and Labour Relations court and that of the court of appeal.

18. In countering the appellant's submissions that the court of Appeal erred in upholding the trial court's decision to apply the *Constitution* 2010 retrospectively, the 1st – 9th respondents submitted that the cause of action arose on 30th August, 2011 when the 10th respondent notified them of the refusal to register their Union and not the date the application was made. Ultimately, they submitted that the *Constitution* 2010 was therefore in force as at the time the cause of action arose. They also urged us to find that the court of Appeal was right to find that the cause of action occurred more than a year after the promulgation of the *Constitution*.

19. The respondents further submitted that the learned Judge of the Employment and Labour Relations court and the Registrar of Trade Unions were bound to apply their minds to the provisions of article s 20 and 41(2) (c) of the *Constitution*. And as to whether the court of Appeal infringed the appellant's right to exist as a general and giant trade union pursuant to article 14(1)(e) of the *Constitution*, the respondents submitted that the ground of appeal is misplaced as the learned Judges of Appeal did not in any way infringe on the rights of the appellant as alleged. Instead, they urge that trade unions are registered in specific sectors and not general areas of coverage.

20. Additionally, it is the 1st to 9th respondent's submissions that the Employment and Labour Relations court did not register their trade union but directed the Registrar to issue a registration certificate, an order the registrar understood and complied with. They therefore support the court of Appeal's interpretation of that court's orders. Furthermore, they cite section 12(3) of the *Industrial court Act* which empowers the court to issue orders of specific performance and any other appropriate relief in line with the orders that court had issued.

21. On the fourth ground of appeal, that the court of Appeal erred in considering an irrelevant factor to the effect that the registration of the union by the Registrar of Trade Unions cured the defect in the trial court's judgement, they supported the court of Appeal's finding on the question; that the court did not register their trade union but directed the registration of the same.

22. In disagreeing with the appellant that the court of Appeal was entirely wrong in its decision, the 1st – 9th respondents urge that the learned judges appreciated the requirements imposed by sections 12, 13 & 14 of the *Labour Relations Act* and insist that having complied with all the steps set out to register a trade union, the the trial court and the court of Appeal did not have any reason to hold that they had not complied with the laid down procedure. They also challenge the relevance of the authorities cited by the appellant namely, *Charles Salano & 9others v The Registrar of Trade Union & another* CA No 19 of 2016 and *Benson Ngurua Mtengu & 6 others v the Registrar of Trade Unions & another* CA No 16 of 2017. In their view, the facts in those cases were completely different from the instant case, in that in *CA No 19 of 2016*, the appellants therein had not complied with the relevant legal provisions and in *CA 16 of 2017*, the appellant had clearly and specifically provided for the supermarket sector in its Constitution and even signed collective bargaining agreements with major supermarkets. They furthermore submit that the court of Appeal did not have the benefit of seeing the said authorities as they were delivered after the decision in the instant appeal.

23. In addition, the 1st – 9th respondents urged the court to read section 14 of the *Labour Relations Act* in context of article 24(2)(b)(c) of the *Constitution* find that section 14(2) of the *Labour Relations Act* does not intend to limit the fundamental right of workers in the Floriculture and Horticulture sectors to form, join and participate in activities of a trade union of their choice.

24. Finally, the 1st – 9th respondents submit that if the Appeal is allowed and the orders sought granted, they will suffer irreparable prejudice as their rights under article 41(5) will be infringed. They thus submit they were issued with a certificate of registration by the 10th respondent, they have been operating as a trade union, recruited members and entered recognition agreements with employers of the areas covered. They also urge that negotiation for Collective Bargaining Agreements are ongoing and so the Appeal has been overtaken by events.

**C. Issues for Determination**

25. Having considered the court of Appeal's order certifying this appeal as one involving a matter of general public importance, the grounds of appeal, the submissions of the parties, the

authorities in support thereof and having further noted that the appellant has raised several other issues for determination, it is evident to us that there is only one issue for determination by this court, namely:

> What are the parameters of registration of a trade union?

**D. Analysis**

26. The appellant submits that the court of Appeal erred in holding that their right of existence as a general and giant union was a violation of article 41 of the *Constitution* in the same manner as the 1st to 9th respondent's Union whose application was made on 16th February, 2010 before the promulgation of the *Constitution*. The 1st to 9th respondents on their part urge that their cause of action arose on 30th August, 2011 when the 10th respondent notified them of the refusal to register their union. We must thus answer the question in line as to whether the trial court applied article 24 of the *Constitution* retrospectively. In that regard, we note from the record at page 88 that the 1st to 9th respondent's application for registration for their trade union was received by the 10th respondent on 16th February, 2010. We have also taken note of the record at page 66 and 114 that the notification of refusal to register the 1st to 9th respondents' union was made on 30th August, 2011. So then, when did the 1st to 9th respondents' cause of action against the 10th respondent arise? It is noted from the record (Vol one pages 29, 32 and 46) that the issue in dispute before the then Industrial court was "refusal of registration of the appellants by the Registrar of trade unions". In light of the observations made from the record, we are inclined to agree with both the trial court and the learned Judges of Appeal that the cause of action was refusal of registration of the appellants by the Registrar of trade unions" and that the same arose on 30th August 2011, a year later after the promulgation of the *Constitution* 2010. The applicable *Constitution* was therefore the one of 2010 and not the former and now repealed one. We therefore find no reason to fault the finding of the courts below on this issue.

27. This finding notwithstanding, this court has previously held that a court of law can in appropriate circumstances apply fall back to the provisions of the *Constitution* 2010 in determining a dispute that may have crystalized before the promulgation of the *Constitution*. In *Samuel Kamau Macharia & 2 others v Kenya Commercial Bank & 2 others* [2012] eKLR, at paragraph 62, this court specifically stated as follows:

> "At the onset, it is important to note that a *Constitution* is not necessarily subject to the same principles against retrospectivity as ordinary legislation. A *Constitution* looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a *Constitution* may and does embody retrospective

> provisions, or provisions with retrospective ingredients. However, in interpreting the *Constitution* to determine whether it permits retrospective application of any of its provisions, a court of law must pay due regard to the language of the *Constitution*. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the court ought not to import it into the language of the *Constitution*. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately acquired before the commencement of the *Constitution*."

28. More recently, in *Town Council of Awendo v Nelson O Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties)*, SC Pet No 37 of 2014; [2019] eKLR, this court found at paragraph 54, that a court of law can draw insights from the *Constitution* 2010, for just and fair resolution of a dispute that may have arisen prior to the promulgation of the *Constitution* 2010. We therefore, find that even if the cause of action would have arisen prior to the 2010 *Constitution*, the court would have been right to draw insights from the same for the fair determination of the issue before it that is, refusal of registration of the appellants by the Registrar of trade unions.

**What are the parameters for registration of a trade union?**

29. We now turn to the main issue for determination, what are the parameters for registration of a trade union? Were they complied with? Were the appellant's rights infringed in the registration of the 1st to 9th respondents' union? Counsel for the appellant urged that the Learned Judges of Appeal failed to appreciate requirements in sections 12, 13 and 14 of the *Labour Relations Act* of the condition that there should not be another union in existence that is sufficiently representative of the employees' interest in the sector. Conversely, it's the 1st to 9th respondents' case that their Union was established to represent its members drawn from Export, Floriculture and Allied Sectors covering specific areas set out in their Constitution, areas that are not included in the appellant's Constitution. They also submit that they complied with the provisions of the *Labour Relations Act* before their union could be registered.

30. In that context article 41(2)(c) of the *Constitution* makes provision for the rights of workers as follows:

> "Every person has the right to form, join or participate in the activities and programmes of a trade union."

31. Article 36 of the *Constitution* on the freedom of association provides as follows:

(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

(2) A person shall not be compelled to join an association of any kind.

(3) Any legislation that requires registration of an association of any kind shall provide that--

(a) registration may not be withheld or withdrawn unreasonably; and

(b) there shall be a right to have a fair hearing before a registration is cancelled."

32. article 24 of the *Constitution* makes provision for limitation of rights and fundamental freedoms in the following terms:

" A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including--

(1)

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

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

(c) the nature and extent of the limitation;

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

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

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom --

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service--

(a) article 31 – Privacy;

(b) article 36 – Freedom of association;

(c) article 37 – Assembly, demonstration, picketing and petition;

(d) article 41 – Labour relations;

(e) article 43 – Economic and social rights; and

(f) article 49 – Rights of arrested persons."

33. On the requirements for the registration of Trade Unions, the *Labour Relations Act*, 2007 provides as follows:

"12. (1) No person shall recruit members for the purpose of establishing a trade union or employers' organization unless that person has obtained a certificate from the Registrar issued under this section. ...

13. A trade union or employers' organization shall apply to the Registrar for registration within six months of receiving a certificate issued under section 12."

14.

(1) A trade union may apply for registration if—

(a) the trade union has applied for registration in accordance with this Act;

(b) the trade union has adopted a constitution that complies with the requirements of this Act, including the requirements set out in the First Schedule;

(c) the trade union has an office and postal address within Kenya;

(d) no other trade union already registered is —

(i) in the case of a trade union of employers or of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration; or

(ii) in the case of an association of trade unions, sufficiently representative of the whole or a substantial proportion of the trade unions eligible for membership thereof:

Provided that the Registrar shall, by notice in the Gazette and in one national

daily newspaper with wide circulation, notify any registered trade union, federation of trade unions or employers' organizations which appear to him to represent the same interest as the applicants of the receipt of such application and shall invite the registered trade union federation of trade unions or employers' organization concerned to submit in writing, within a period to be specified in the notice, any objections to the registration;

(e) subject to subsection (2), only members in a sector specified in the constitution qualify for membership of the trade union;

(f) the name of the trade union is not the same as that of an existing trade union, or sufficiently similar so as to mislead or cause confusion;

(g) the decision to register the trade union was made at a meeting attended by at least fifty members of the trade union;

(h) the trade union is independent from the control, either direct or indirect, of any employer or employers' organizations; and

(i) the trade union's sole purpose is to pursue the activities of a trade union.

> (2) Notwithstanding the provisions of subsection (1)(d), the Registrar may register a trade union consisting of persons working in more than one sector, if the Registrar is satisfied that the constitution contains suitable provisions to protect and promote the respective sectoral interests of the employees."

34. We have carefully perused the provisions of sections 12, 13 and 14 of the *Employment and Labour Relations Act* and other relevant statutory and Constitutional provisions in respect to the issue in question. It is clear in our mind that once an application for registration of a trade union has been made and the same is compliant with the aforesaid sections and the *Constitution*, the Registrar of Trade Unions has no choice but to register the same. The only reason for refusal of registration is where there is another trade union sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration as provided under section 14(1)(d)of the same *Act.* It is not disputed that the 1st to 9th respondents' trade union met the criteria for registration as set out in sections 12, 13 and 14. The only reason the appellant challenged the registration of the respondents' union was that it contravened section 14(1)(d) of the *Labour Relations Act*. We will therefore limit ourselves to the said section.

35. We have to make it clear from the onset that section 14(1)(d) of the *Labour Relations Act* does not operate in a vacuum. The Registrar has to make an inquiry on any objection before arriving at a decision to reject or allow an application. In the instant case, we are convinced that the inquiry made by the trial Judge based on the evidence presented before her, to the effect that the decision of the 10th respondent in rejecting the application for registration of the 1st to 9th respondent's Union, was largely based on the provisions in the *repealed Constitution*; that the limitations under article 24 of the *Constitution* did not apply with regard to the 1st to 9th respondents' union; and that there was a fundamental difference between what comprises plantations and agriculture industries, as against the floriculture and horticulture industries was proper. This position was also upheld by the learned Judges of Appeal.

36. We opine that even though the appellant submitted that the court of Appeal infringed on their right of existence as a general and giant union without considering the provisions of article 41 of the *Constitution*, we do not see how any infringement of right could have occurred. This is because the appellant is already registered and is enjoying its rights of existence as a trade union under article 41 of the *Constitution*. In our opinion, it is the 1st to 9th respondents' rights that will be infringed, if the orders sought were to be granted more so, considering the fact that the appellant was never a primary party to the original suit. This

court has previously emphasized that the most crucial interest or stake in any case is that of the primary parties before the court. In *Francis Karioki Muruatetu & another v Republic & 5 others*, Sup Ct Pet 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

> " Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.
>
> Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the court. That stake cannot take the form of an altogether a new issue to be introduced before the court" [emphasis supplied].

37. Similarly, we thus observed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, Civil Appeal No 290 of 2012 (paragraph 24):

> " A suit in court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and *Rules*, under the *Civil Procedure Code*, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

The foregoing authorities are still applicable and we see no need to depart from them in the context of the issue at hand.

38. The appellant has also urged the point that the court of Appeal contravened the Provisions of section 14(d) of the *Labour Relations Act* by ignoring that the law has vested the powers of Registration of the Trade Union squarely on the 10th respondent. The 1st – 9th respondents

submit on the other hand and urge that it is the 10th respondent who registered their Union and not the court, hence curing the defect in the trial court's judgment. Having gone through the record (Volume one page 48) we note that the registration certificate was issued by the Senior Assistant Registrar of Trade Unions. We thus agree with the court of Appeal's finding that the role of registration of a trade union is a statutory duty of the Registrar of Trade Unions and that a relevant court only has jurisdiction to order registration of the proposed union and further, that the Registrar cured any defect that may have occurred in the order of the trial judge. We find therefore the appellant's submission on this issue baseless.

39. On costs, this court has previously settled the law on this issue, stating that costs follow the event in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012; [2014] and that a court has the discretion in awarding costs in its decision. This remains the law. In the instant case, we see no reason to deny the 1st – 9th respondents the costs of the Appeal herein.

40. For the foregoing reasons, we do not find any reason to disturb the decision of the court of Appeal.

**Orders**

41. Consequently, upon our findings above, the final orders are that:

    1. The Petition of Appeal dated 6th March, 2018 be and is hereby dismissed.

    2. The appellant shall bear the costs of the 1st to 9th respondents.

42. Orders accordingly.

**Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment)**

**Supreme Court of Kenya**

**MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2020] KESC 66 (KLR)

*The Supreme Court dismissed an appeal concerning alleged racial discrimination due to the petitioners' failure to discharge the initial burden of proof. The case also involved claims of intellectual property rights violations and the Court of Appeal's handling of a cross-appeal. The petitioners, clinical researchers associated with a research program, argued they faced racial discrimination, including differential employment terms and unfair dismissal. The Supreme Court found that the evidence presented did not sufficiently support claims of discrimination or intellectual property violations. Additionally, it held that the Court of Appeal's failure to address the cross-appeal did not warrant referral back for determination.*

***Evidence Law*** *- burden of proof - shifting of the burden of proof - discharge of the initial burden of proof - burden of proof on a claim of discrimination - what level of evidence was required to discharge the initial burden of proof in discrimination claims and shift the burden of proof to the opposing party - whether the petitioners' evidence of alleged racial discrimination was sufficient to discharge the initial burden of proof and shift the burden of proof to the respondent - Evidence Act (Cap 80), sections 108 and 109*

***Law of Evidence*** *- proof of facts - alleged violations of intellectual property rights by an employer - where evidence did not show when an employee made an alleged innovation and the manner in which the alleged innovation was made - whether the evidence sufficiently proved violations of intellectual property rights - Evidence Act (cap 80) sections 108, 109*

***Civil Practice and Procedure*** *- appeals - cross-appeal - failure by the Court of Appeal to make determinations on a cross-appeal - what was the legal effect of a failure by an appellate court to address a cross-appeal - whether the Supreme Court would refer the cross-appeal back to the Court of Appeal for a determination*

**Brief facts**

The petitioners were employees of the 1st respondent, they were also attached to the KEMRI-Welcome Trust Research Programme, hosted by 1st respondent, as clinical researchers. They were pursuing post-graduate studies leading to the award of the degree of Doctor of Philosophy. Their contention was that under the programme they faced racial discrimination and that research grants were awarded in favour of European Economic Area residents at the expense of equally or more qualified local blacks.

The petitioners said that they were engaged under multiple and extremely short contracts and that with different contracts from the 1st respondent and the programme, there was an unclear chain of command. Contracts from the two entities differed in terms of gratuity and staff guidelines and the doctors' rights to join a trade union of their choice had been curtailed. The petitioners added that

in violation of the rules of natural justice, there had been unfair dismissal effected without a hearing and without reasons being given. They said that those who raised grievances were victimized through suspension and improper indefinite leave.

The Employment and Labour Relations Court made the finding that the petitioners had been discriminated and granted various reliefs including an award of five million Kenya shillings as compensation. The Court of Appeal set aside those findings and entered judgment which was *inter alia* to the effect that the 1st respondent did not employ foreign researchers who retained their careers structures and terms of employment from their home institutions and universities while visiting the 1st respondent. The Court of Appeal held that the differential pay was based on the different contracts that the visiting researchers had with third parties and the 1st respondent was not privy to those contracts. An appeal was lodged at the Supreme Court. The reliefs sought by the petitioners included an interpretation as to what would amount to indirect discrimination and a declaration that institutional discrimination was part of discrimination prohibited under article 27 of the Constitution.

**Issues**

i. What level of evidence was required to discharge the initial burden of proof in discrimination claims and shift the burden of proof to the opposing party?

ii. What constituted sufficient evidence to establish a violation of intellectual property rights within an employment context, including proof of creation and ownership of innovations?

iii. What was the legal effect of a failure by an appellate court to address a cross-appeal?

**Held**

1. A party that made an averment in validation of a claim was the one to establish the plain veracity of the claim. In civil suits the standard of proof was the balance of probability. It meant that there had to be evidence on the basis of which the court could determine that it was more probable than not that the respondent bore responsibility in whole or part for what was complained of.

2. Section 108 of the Evidence Act provided that the burden of proof in a suit or procedure would lie on the person that would fail if no evidence at all were given on either side. Additionally, section 109 of the Evidence Act provided that the burden of proof as to any particular fact lay on the person who wished the court to believe in its existence, unless it was provided by any law that the proof of that fact had to lie on any particular person. The basic rule on the shifting of the evidential burden was that the petitioner should be under an obligation to discharge the initial burden of proof before the respondents were invited to bear the evidential burden.

3. The petitioners had the overriding obligation to provide evidence to establish that they had suffered discrimination in the hands of the 1st respondent. Events at both superior courts below the Supreme Court showed that the burden of proof did not shift to the 1st respondent.

4. The petitioners' allegations of discrimination were captured in various e-mails, affidavits, and the petition. The 1st respondent explained how foreign researchers were engaged and that the 1st respondent had no control over their terms of employment. That explanation was not controverted by the petitioners who merely claimed that the 1st respondent's lack of control over terms of engagement had exposed them to discrimination.
5. Despite the fact that proof of indirect discrimination was difficult, the petitioner ought to have provided sufficient evidence before the court to enable it to make a determination. In that regard, the petitioners failed to discharge their initial burden of proof.
6. The claim of violation of intellectual property rights had its basis on various allegations including the allegation that the 5th petitioner made an innovation while he was not in the 1st respondent's employment, that there was citation amnesia and disregard syndrome. The claim with respect to the 5th respondent could not be raised at the Supreme Court as it was not part of the pleadings at the Employment and Labour Relations.
7. The e-mail communications used by the petitioners to prove violations of intellectual property rights did not amount to sufficient proof. It was not possible to ascertain when the alleged innovations were made and the manner in which they were made so as to dissociate them from the employment relationship.
8. The cross-appeal entailed a claim that the trial court failed to calculate and to award benefits such as payment for unfair termination of services, payments in lieu of leave, unpaid salary in lieu of notice, and other outstanding payments. The Court of Appeal mentioned the cross-appeal but it did not make determinations on it. The petitioners did not succeed in proving that they had been discriminated and the compensation sought in the cross-appeal was for the unproven discrimination. Justice under the circumstances did not require the referral of the cross-appeal back to the Court of Appeal for determination.

*Appeal dismissed. Parties were to bear their own costs.*

**Citations**

**Cases**

***Kenya***

1. *Buss, Janine v Gems Cambridge International School Limited* Cause 612 of 2015; [2016] KEELRC 1550 (KLR) - (Mentioned)
2. *Masinde, Mary Mwaki v County Government of Vihiga & 2 others* Petition Cause No. 25 of 2014; [2015] KEHC 1602 (KLR) - (Mentioned)
3. *Muhoro, David Wanjau v Ol Pejeta Ranching Limited* Cause 1813 of 2011; [2014] KEELRC 296 (KLR) - (Mentioned)
4. *Odinga v Independent Electoral and Boundaries Commission & 3 others* Petition 5 of 2013; [2013] KESC 2 (KLR) - (Mentioned)
5. *VMK v CUEA* Cause No 1161 of 2010; [2013] eKLR - (Mentioned)

***United Kingdom***

*Sarka Angel Walkins Singh v Governing Body of Aberdare Girls High School & another* [2008] EWHC 1865

***India***

*Madhu & another v Northern Railway & others* on 17 January, 2018 - (Mentioned)

***Canada***

*Ontario Human Rights Commission & Theresa O'Malley (Vincent) v Simpsons - Sears Limited* [1958] 2 S.C.R 536 - (Explained)

***Regional Court***

*Zarb Adami v Malta* Application No 16631/04 - (Mentioned)

**Statutes**

***Kenya***

1. Constitution of Kenya - (Interpreted) articles 3, 10, 27, 28, 35(1)(b); 40; 41; 73(1)(a); 91 156; 163(4)
2. Employment Act (cap 226) - (Interpreted) sections 5(2); 19(1); 45
3. Evidence Act (cap 80) - (Interpreted) sections 108, 109
4. Industrial Property Act (cap 509) sections 13(2); 32(1)
5. Supreme Court Act (cap 9B) - (Interpreted) sections 15(2); 20; 21; 22
6. Supreme Court Rules, 2012 (cap 9B Sub Leg) - (Interpreted) rules 33(1)(2)(3)(4)(5)(6)(7)

**Instruments**

Discrimination (Employment and Occupation) Convention, 1958
article 1

**Advocates**

M/s Chigiti & Chigiti Advocates – Represented by Mr Chigiti for the Petitioners (Appellants)

M/s Muriu Mungai & Co Advocates – Represented by Mr Peter Munge for the 1st Respondent (Kenya Medical Research Institute)

M/s Enonda & Associates – Represented by Mr. Peter Enonda for the 4th Respondent (Union of National Research and Allied Institutes Staff of Kenya)

January 10, 2020, the Court delivered the following Judgment:

## A. Introduction

1. This is an appeal from the Judgment of the Court of Appeal, dated 9 November 2018, by which the Judgment and Decree of the Employment and Labour Relations Court dated 18 July 2014 had been set aside. The trial Court had found that the petitioners had suffered discrimination in their employment, at the hands of the 1st respondent, and had awarded

each petitioner 5 million Shillings. The petition is dated 19 March 2019, and is premised on article 163(4)(a) of the *Constitution*.

**B. Background**

2. The petitioners had been employees of the 1st respondent under various contracts renewed and extended from time to time, over a period of several years. They had also been attached to the KEMRI-Wellcome Trust Research Programme, hosted by 1st respondent, as clinical researchers, and were pursuing post-graduate studies leading to the award of the degree of Doctor of Philosophy, in their fields of research. The said programme belonged to Oxford University in England, and was operated through the Nuffield Department of Medicine, as one of its global health centres, founded by the Wellcome Trust.

3. The 2nd and 3rd respondents have been taking a passive posture, and have not participated in this appeal. The 4th respondent was enjoined as an interested party, in its capacity as a trade union, during the trial proceedings, and it has consistently supported the petitioners' case.

4. Before the trial Court, the petitioners alleged contravention of articles 3, 10, 27, 28, 40, 41, 73(1)(a), and 156 of the *Constitution* by their employer, Kenya Medical Research Institute (KEMRI). They contended, *inter alia,* that their contracts under the programme, which was later subsumed under KEMRI (1st respondent), allowed discrimination against them, and treated them unequally, on account of their race, in various respects, including in the award of Wellcome Trust Research grants, which were skewed in favour of European Economic Area residents and "white expatriates", at the expense of "equally or more qualified local blacks"; that there was prejudice and condescension towards local African workers, as well as lack of commitment to racial equality; that there was a violation of their right to fair labour practices, contrary to the terms of article 41 (1) of the *Constitution* ¾ in particular by way of their extremely short multi-contracts; that there was a violation of rules of natural justice, through unfair dismissal without a hearing and without reasons; that there was conflict in the setting of contracting authority, with contracts from both KEMRI and the Programme, leading to an unclear chain of command; that there were differential gratuity and staff guidelines between the two entities, and a curtailing of the doctors' right to join a trade union of their choice; that there was an unfavourable working environment, leading to or involving career stagnation for doctors; that there was interference with their training opportunities, and with their access to clinical funds; that they were victimised through suspension, for raising these grievances; that they were subjected to improper, indefinite leave, and were victimised by violation of article 40 of the *Constitution*, regarding their right to intellectual property; and that they were subjected to loss of dignity, in violation of articles 28, 29 and 30 of the *Constitution*.

5. The Employment and Labour Relations Court *(Nduma, J),* in a Judgment delivered on 18 July 2014, allowed the petition, holding as follows:

   (a) That, the 1st respondent's conduct amounts to discrimination against the petitioners, under article 27 (4) of the *Constitution*.

   (b) That the 1st respondent's conduct, acts and/or omissions are unlawful, illegal and/or unfair, and the same violate articles 27 (1), 28, 29(d) & (f), 35(1)(b), 40(1) and 41(1) & (2) of the *Constitution*.

   (c) That each of the petitioners is entitled to compensation for the said violations under article 23 of the *Constitution*, in the sum of Kes 5 million within thirty (30) days of the Judgment.

   (d) That the petitioners are entitled to access all the outcomes of their scientific research, and to the credit and benefit attached to the said outcomes, under articles 35 and 40 of the *Constitution*.

   (e) That each of the petitioners is entitled to a certificate of service, acknowledging the service and scientific outcomes attributed to their research and work within 30 days from the date of the Judgment.

   (f) The 1st respondent to pay interest at Court rates on item (c) above, as from the date of this Judgment, in full.

   (g) The 1st respondent to pay costs of the petition.

6. Aggrieved by the trial Court's Judgment, the 1st respondent appealed to the Court of Appeal, which allowed the appeal in a Judgment dated 8 February 2019, and set aside the Judgment and Decree, in the following terms:

   (a) The trial Judge misdirected himself in certain factual or legal matters; considered matters he ought not to have considered; failed to consider matters he ought to have considered and, therefore, arrived at an erroneous decision; and he was clearly wrong in the exercise of discretion.

   (b) The trial Court should not have decided the case on the basis of affidavit evidence, as more light and more accurate picture would have been attained, had it proceeded by way of viva voce evidence.

   (c) The replying affidavit of Margaret Rigiro, with its annexures, which was 210-page, substantive, detailed response to the petitioners' case, is not referred to or mentioned in the Judgment; and similarly overlooked was her "Further Supplementary Affidavit", sworn on 30 October 2012, indicating that KEMRI paid the doctors all

contractually-agreed remuneration, including that for periods when they did not work.

(d) The omission (stated above) occasioned a patent injustice, and was the mark of an unfair trial.

(e) the trial Court was wrong in finding that the 1st respondent violated article 35(1)(b) of the *Constitution*, as the same was not pleaded by the petitioners.

(f) Had the Judge evaluated the replying affidavit of Magaret Rigiro, he would have found that KEMRI did not directly employ foreign researchers, and those visiting retained their career structures and terms of employment from their home institutes and universities, over which KEMRI had no control; the programme had trained more than a score of senior legal researchers; KEMRI had in place an extremely well-funded remuneration structure that was competitive, and superior to that which the doctors' peers were paid, in the public sector or elsewhere, and any differential with what the expatriates were paid was on the basis of their different contracts with third parties, to which KEMRI was not privy; KEMRI offered benefits to doctors not expressly stipulated in their contracts, but which were similar to those it offered to all employees of similar positions, at great cost to itself.

(g) The doctors did not discharge their burden of proving that any differentials in pay were unreasonable, unaccountable, or discriminatory.

(h) It is not the case that any differential treatment is, ipso facto, discriminatory; for a differentiation of treatment to be un*Constitution*al and impermissible, it has to be based on any of the prohibited grounds under article 27 of the *Constitution*.

(i) The trial Judge failed to pay heed to the provisions of section 32 (1) of the Industrial Property Act, which provides that the right to a patent for an invention in the course of execution of an employment contract, shall belong to the employer. The Judge was under duty to inquire if there was a basis for departing from this general rule.

(j) There was no basis for the award of damages made by the trial Court.

**C. The Supreme Court Case**

**(a) The Parties' Standpoints**

7. The petitioners, being dissatisfied with the Judgment of the Court of Appeal, filed a petition of appeal dated 19 March 2019. The petition is made pursuant to article 163(4)(a) of the *Constitution* ? "as of right". It invokes articles 24, 27 and 40 of the *Constitution*; sections 15(2), 20, 21 and 22 of the *Supreme Court Act*; Practice Directions A(1)(2)(3)(4)(5)(6) and

(7) and E (28) (29) (30); rule 33(1)(2)(3)(4)(5)(6) and (7) ¾ under the *Supreme Court Rules*. The petition of appeal is supported by the affidavit of Dr Moses Ndiritu, the 5th appellant, and a further affidavit by Dr Samson Gwer, the first appellant, filed on 16 August 2019.

8. The appeal is based on the following grounds:

   (a) equality and freedom from discrimination, under article 27 of the *Constitution*;

   (b) onus of proof, in discrimination cases;

   (c) right to property under article 40 of the *Constitution*; and

   (d) failure to determine a cross-appeal.

9. The appeal sets out the following issues for determination:

   (a) what amounts to "indirect discrimination", and whether or not discrimination under article 27 of the *Constitution* encompasses institutional discrimination, as a form of indirect discrimination?

   (b) Whether or not a particular failure to make institutional anti-discrimination policies under article 5(2) of the *Employment Act* amounts to an indirect discrimination under article 27 of the *Constitution*?

   (c) Who has the onus of proof in discrimination cases under article 24 of the *Constitution*, and section 5(2) of the *Employment Act*?

   (d) Whether or not the onus of proving discrimination rests with the person claiming to be a victim of discrimination?

   (e) Whether or not the Judges of the Court of Appeal misinterpreted the provisions of article 27 of the *Constitution*, as read with article 24, and section 5(2) of the *Employment Act*?

   (f) Whether or not the onus of proving discrimination shifts from the alleged victims to the culprit, under article 24 of the *Constitution*?

   (g) What amounts to a prima facie case, in the case of discrimination; and whether or not the learned Judges of the Court of Appeal misinterpreted the law, in assessing what would amount to a prima facie case of discrimination?

   (h) The Court is invited to interpret whether the right to intellectual property under article 40 of the *Constitution*, in relation to innovations made when an employee is not in employment, belongs to the employer under section 13(2) of the *Industrial Property Act* or not.

(i) Whether or not the Judges of the Court of Appeal misdirected themselves, in finding that the intellectual property statute is applicable even when the employer-employee relationship is suspended and/or severed, under article 40(1) of the *Constitution*?

(j) Whether or not the failure of the Court of Appeal to determine a cross-appeal offends article 27(1) of the *Constitution*?

(k) What are the parameters of discretion, in re-analyzing a case after the Judges sitting on appeal point out that a case was fit for viva voce hearing?

10. The appeal seeks the following reliefs:

(a) interpretation of what amounts to indirect discrimination;

(b) declaration that discrimination, under article 27 of the *Constitution*, includes "institutional discrimination";

(c) interpretation, and a declaration that the onus of proving discrimination under article 27 of the *Constitution*, shifts from the victim to the culprit, once there is a prima facie case of discrimination under article 24 of the *Constitution*, and section 5(2) of the *Employment Ac*t;

(d) interpretation, and a declaration that the onus of proving discrimination lies on the respondent, ultimately under article 24 of the *Constitution*, and under section 5(2) of the *Employment Act*;

(e) declaration that the Judges of Appeal erred in law, in placing the burden of proof on the victims, and thereby, allowing the appeal;

(f) interpretation, and a declaration, that the right to intellectual property under article 40 of the *Constitution*, and to innovations made when an employee is not in employment, belong to the employee, under section 13(2) of the *Intellectual Property Act*;

(g) interpretation and Order to the effect that, failure to determine a cross- petition offends article 27(1) of the *Constitution*;

(h) Order, setting aside the Judgment of the Court of Appeal, and allowing the petition;

(i) any other orders or directions such as Court deems fit;

(j) costs of this petition, against 1st respondent.

(b) Submissions of Counsel

11. The advocates for the petitioners, M/s Chigiti & Chigiti Advocates, filed their written submissions dated 6 September 2019, in support of the petition of appeal, the same being highlighted on 15 October 2019. Learned counsel, Mr Chigiti submitted that the critical question is, what amounts to "indirect discrimination"? He referred to a listing of his authorities on the definition of indirect discrimination, urging that such a form of discrimination is unique in type, and is difficult to prove. But he maintains that there was indirect discrimination, as viewed in relation to prohibited practices under article 27 (1) of the *Constitution*, and under section 5 of the *Employment Act* (No. 11 of 2007). It was submitted that, in awarding grants from the Wellcome Trust, African residents were excluded, most funding going to white expatriates, apart from the distribution of scientific positions being racially skewed, and controlled by such expatriates. In addition, it is submitted, there was no career progression for African workers; that there was a lack of equal pay for equal work; that there was a practice of condescension against local African workers; and that there was a lack of commitment to racial equality, there being no policy to ensure equality.

12. The alleged practices by the 1st respondent were said to offend section 5(8) of the Employment Act, as they constituted institutional and/or structural racism. Counsel urged that this Court should draw inferences as to the reality of racial discrimination, by taking into account the resulting impacts of the same; the policies pursued by the 1st respondent; the practices of the 1st respondent; and the rules and regulations guiding the 1st respondent

13. The petitioners have cited *Zarb Adami v. Malta*, Application No. 16631/04 (paragraph 80), in which the Court held that discrimination is not always direct or explicit, and that in certain cases, a policy, or general measure, will have prejudicial effects on a group of people, even if it is not directed at a particular group. They have also relied on the UN Committee on the Elimination of Racial Discrimination, in its General Recommendation XIV (at page 1), where racial discrimination was defined as extending "beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect". They have also relied on the *Discrimination (Employment and Occupation) Convention of 1958*, which defines the term discrimination in (article 1) to include "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".

14. The petitioners submitted that it is not necessary for them to prove that the impugned measure was designed or applied with any discriminatory intent. They call in aid the case of *Ontario Human Rights Commission and Theresa O'Malley (Vincent) v. Simpsons - Sears Limited* [1958] 2 SCR 536, which they urge to hold that proof of 'intent' was not important, because indirect discrimination is mainly concerned with the consequences of a conduct. They have also cited an Indian case, *Madhu & another v Northern Railway & others*

[2018], urging that the Judges had appreciated that the most important thing in indirect discrimination is the outcome, or the effects of the actions of the culprits, rather than the object of the relevant actions.

15. It is the petitioners' submission that the Appellate Court had made no reference to the implications of indirect or institutional discrimination, such as emanated from lack of anti-discriminatory policies: even though institutional discrimination was substantively pleaded, and canvassed, by the petitioners in their submissions; that such was a narrow interpretation which failed to embrace the subtle forms of discrimination; and that the Appellate Court failed to make an interpretation of the concept of indirect discrimination.

16. On indirect discrimination, the petitioners relied on the case of Queen, on the Application of *Sarka Angel Walkins Singh v. the Governing Body of Aberdare Girls High School, and another* [2008] EWHC 1865, (paragraph 38), where Justice Silber considered the claimants' case on the grounds of indirect discrimination, prescribing several steps to guide the proof:

    (a) to identify the relevant 'provision, criterion or purpose', which is applicable;

    (b) to determine the issue of disparate impacts, which entails identifying a pool for the purpose of making a comparison of the relevant disadvantage;

    (c) to ascertain whether the provision, criterion or practice also disadvantages the claimant personally; and

    (d) to consider whether the policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving such a legitimate aim.

17. Learned counsel, Mr. Chigiti submitted that the employer might have no intention to practice discrimination: yet the outcome gives a different answer, in quality; and in this regard, the statistics, numbers, figures will help the Court to appreciate the inequality in the outcomes. The petitioners submit that the Appellate Court, while re-evaluating evidence, failed to draw its mind to the statistics which would have demonstrated a *prima facie* case. He urges that the statistics create a comparative platform where one is able to tell how many researchers are black, and how many are white.

18. The petitioners' stand is that where the credibility of statistics has been positively assessed, their significance, trend and patterns need to be given legal effect, by a shifting of the burden of proof. It is urged that the weight of statistics will depend upon the extent of disadvantage that they reveal; and on this basis, statistical evidence is sufficient to establish a *prima facie* case of indirect discrimination. It is submitted that this Court should adopt the statistics-based approach, and acknowledge the emerging jurisprudence regarding the inherent difficulties in proving indirect discrimination.

19. It is submitted that, once the petitioners have proved a prima facie case, the burden ought to have shifted to the 1st respondent, to prove that discrimination was no part of the situation occasioning grievance. The burden of proof, Mr Chigiti submitted, ought to have shifted to the 1st respondent, especially as it is usually the employer who has the custody of records, of salaries, and of leave days of the employees. Counsel urged that the Appellate Court had misinterpreted the law, and failed to appreciate that the onus of proof, in discrimination cases, ultimately lies with the culprit, once the victim raises the issue of discrimination in the terms of article 24 of the *Constitution*, and section 5(2) of the *Employment Act*.

20. Mr Chigiti submitted that the Court of Appeal erred, in believing the affidavit of the 1st respondent, which lacked statistics; in failing to address and analyse issues of leadership inequality, of fellowship, of lack of policies. He urges the Court to pay heed to the Concordat document attached to the petition, and which includes a bundle containing principles and values that regulate the Wellcome Trust, which funds KEMRI (1st respondent) in Kenya.

21. The petitioners have invited this Court to consider whether the right to intellectual property, under article 40 of the *Constitution*, in relation to innovations made when an employee is not in employment, belongs to the employer, under section 13 (2) of the *Intellectual Property Act*. They submit that the appellate Court had not paid attention to the fact that the 5th petitioner made some innovations while he was out of employment, during one of the several multiple contract-gaps. It is also submitted that the 1st respondent has on many occasions violated the petitioners' rights to property.

22. The petitioners have invited this court to adopt a liberal interpretation of the law, in relation to the concept of indirect discrimination, in line with article 259 of the *Constitution*. They have urged this Court to adopt a purpose-oriented interpretation.

23. This Court took into account the submissions of the 4th respondent, in support of the petitioners' case. The advocates for the 4th respondent, M/s Enonda & Associates, filed written submissions dated 15 August 2019, these being highlighted by learned counsel Mr Peter Enonda. These submissions highlight the point of contact between the 4th respondent and the petitioners, as well as 4th respondent's stand in favour of internal arbitral engagement, in the first place. The 4th respondent had also been involved when, following disagreement, the matter was reported to the Minister of Labour. The 4th respondent continued to be involved, as the matter came up before the Labour and Employment Court, and at the Appellate Court.

24. The 4th respondent submits that the Court of Appeal ought to have made a determination on the cross-appeal, on the basis of the merits of each party's claim. Failure in this regard, counsel urged, amounted to an abdication of that Court's duty.

25. The 4th respondent submits that the Appellate Court declined to take into account overwhelming evidence of discrimination, which was tendered by the petitioners, preferring to rely on the affidavit of the 1st respondent, and, consequently, arriving at a wrong conclusion. According to this respondent, the Appellate Court ought to have taken into account the abandoned mediation process, and a conciliator should have been appointed to determine the issues raised by the petitioners.

26. The 4th respondent expressed disagreement with the argument by the 1st respondent, that it had no control over the contracts between its collaborators, on the one hand, and visiting foreign researchers, on the other hand: indeed, in that very argument, the 4th respondent conceives of such an improper control, on the party of 1st respondent, as did open doors to discrimination.

27. The 4th respondent invited this court to consider the matters from the Employment and Labour Relations Court, where damages were awarded for discrimination, as Constitutional violations. This party made reference to several Court decisions: *VMK v CUEA* [2013] eKLR (where the claimant was awarded Kes 5 million); *David Wanjau Muhoro v Ol Pejeta Ranching Limited* [2014] eKLR (where the Court awarded Kes 18,256, 947); *Mary Mwaki Masinde v County Government of Vihiga & 2 others* [2015] eKLR (where the Court awarded Kes 3 million); and *Janine Buss v Gems Cambridge International School Limited* [2016] eKLR (where the Court awarded a sum of Kes 6 million). On the basis of such Judgments, the 4th respondent urges that the relevant Superior Court had indeed had justification for its awards. The 4th respondent, therefore, urges this Court to allow the petition.

28. The advocates for the 1st respondent, M/s. Muriu Mungai & Co. advocates, have filed their written submissions dated 10 September 2019, contesting the petition. They are also relying on their grounds of opposition dated 30 April 2019; and their replying affidavit sworn by Ms. Margaret Rigoro, filed on 14 June 2019. The 1st respondent is essentially rebutting the issues and allegations emanating from the petitioners. The submissions were highlighted by learned counsel, Mr. Peter Munge (on 15 October 2019), who proceeded from the threshold that the petitioners did have a contract with the 1st respondent, and while serving in that capacity, the petitioners were suspended, on account of their improper digital communications with third parties. Such suspensions were, however, subsequently lifted, on the basis of resolutions arrived at.

29. Learned counsel submitted, as regards the claim of institutional discrimination, that the allegations are framed in a broad and general manner, without any nexus to the subject matter; and also that the petitioners are seeking to introduce fresh issues at the stage of second appeal. It was submitted that, no particulars of institutional discrimination had been pleaded at trial Court. It was submitted that section 5(2) of the *Employment Act*, as cited by the

petitioners, is framed in a general manner, yet it holds no place for the issues relating the 1st respondent, which had not been pleaded in the primary petition. Counsel urged, as regards intention to discriminate, that no particulars, or any evidence had been given, to prove some improper intent by the 1st respondent.

30. Responding to the allegation by the petitioners, that there were no anti-discrimination policies at the Kenya Medical Research Institute (KEMRI), it is submitted that the 1st respondent had confirmed that there were policies in place at the material time: reference was made to the supplementary affidavit of Dr. Solomon Mpoke (Volume 17, page 4246 to volume 18, page 4401). In any event, learned counsel urges, failure to have a policy in place would not amount to an infringement of a constitutional right, as the law has clear remedies for such a state of affairs.

31. As regards the allegation of distribution of scientific positions and career progression slots for those of African origin, the 1st respondent submits that the petitioners had not provided any particulars. Learned counsel submitted that the Court of Appeal cannot be faulted for its finding on such allegations, as the 1st respondent had replied to all of them, by way of the replying affidavit by Margaret Rigoro, and the supplementary affidavit of Dr Solomon Mpoke. Counsel submitted that even though 1st respondent did respond on all allegations raised by the petitioners, the trial Court's Judgment did not consider any of the affirmations thus made. The responding affidavits, it was submitted, gave details of those local researchers who held senior positions in the 1st respondent's Wellcome Trust Research Programme; gave details of local researchers who had been awarded funding through the 1st respondent's Wellcome Trust Research Programme; rebutted the allegations of differential pay; and explained that foreign researchers working under the 1st respondent's auspices, are seconded to Kenya under contracts with their respective employers , and not with KEMRI.

32. On the issue of onus of proof in discrimination cases, the 1st respondent submits that its standpoint on pertinent law, though detailed, had not been accommodated in the trial-Court record. Supporting the Appellate Court on its interpretation of the provisions of article 27 of the *Constitution*, the 1st respondent submits that the petitioners had presented no material before the trial Court, to warrant a finding of infringement of the *Constitution*. It was submitted, furthermore, that the petitioners had not provided any justification for the alleged differential of treatment, to be treated as un constitutional.

33. In response to the claim of violation of the right to property, the 1st respondent submits that the issue was not part of the pleadings in the petition before the trial Court, and the petitioner cannot introduce a new issue at this stage. It is also submitted that the Appellate Court cannot be faulted in its finding, as contracts between the institute and the petitioners

expressly address the innovation theme bearing upon invention clause 13 of the employment contract, specifying that:

> Any intellectual property including patents, copyrights etc which arises in the performance of the duties of the person engaged shall belong to the Institute".

34. Learned counsel submitted that the Court of Appeal had duly appreciated the statutory provision, wherein section 32 (1) of the *Industrial Property Act* provides that, in the absence of contractual provisions to the contrary, the right to a patent for an invention made in execution of a commission or an employment contract, shall belong to the person having commissioned the work, or to the employer. Counsel submits that, at the material time, the petitioners were working as employees of KEMRI, and also, as Ph.D. students, being supported by the Institute, and were working under experienced mentors or researchers in the relevant field, and in the development of other research areas. As such, it is submitted, what is being done was in relation to the petitioners' capacity as employees of KEMRI, and there was no evidence to the contrary. Learned counsel submitted, further, that the petitioners had not cited any innovation, in any case, to which their grievance related.

35. On the issue of compensation, learned counsel invited the Court to consider section 19(1) (c) of the *Employment Act*, especially in relation to the consistent action of the employer, in continuing with regular payment to the petitioners, who had refused to work for close to one year. He submitted that the Court should have considered the terms of section 45 of the *Employment Act*, before awarding Kes 5 million to each of the petitioners. He urged that there was no basis in law under which the Court had awarded the said sums in damages.

36. In response to the contention by the 4th respondent, that the 1st respondent declined to abide by the report of the conciliator, learned counsel urged that the decision by the conciliator was not binding; for, once a conciliator makes recommendations, and a party does not comply, the other party has a right to move to court. Learned counsel expressed his dissatisfaction with the said report, stating that it was untenable for the recommendation by the conciliator to direct a reinstatement of parties who had been requested to come back and had refused.

37. On the allegation that the Court of Appeal did not consider the cross-appeal by the petitioners, it is submitted that the findings of that Court, in respect of the main appeal, sufficiently addressed the issues pleaded in the cross-appeal; and, with the collapse of the main appeal, the cross-appeal also failed, because the relevant issues were interrelated.

38. Learned counsel submitted that although the 2nd and 3rd respondents were named in the petition before the trial Court, no allegations were made against them. He submitted that this was a private dispute between an employer and employees; he attributed fault to the trial

Court for delivering a Judgment in which it found all the respondents jointly and severally liable. The 1st respondent urges this Court to dismiss the petition with costs.

**D. Analysis And Determination**

39. We have attentively considered all submissions from the parties, as well as their depositions and lists of authorities. Due credit goes to learned counsel, who have generously supplied the Court with informative records and works on novel aspects of the intriguing subject of "indirect discrimination".

40. In our considered view, the following are issues for determination:

    (a) whether discrimination in the course of employment had characterized the operations of the 1st respondent?

    (b) who has the onus of proof in discrimination cases?

    (c) were the petitioners' rights to intellectual property violated by the 1st respondent?

    (d) what was the effect of the non-determination of a cross-appeal by the Appellate Court?

41. It is the petitioners' contention that the 1st respondent had subjected them to discrimination in employment. They aver that there was discrimination in the dispensation of international jobs; in awarding grants from the Wellcome Trust; in the distribution of scientific positions with access to funding, to career-progression for African workers, and to equal pay for equal work; lack of commitment to racial equality, as well as a lack of a policy to ensure racial equality; and that there was prejudice against local African workers. They refer to the position alleged, as that of institutional discrimination by 1st respondent.

42. The petitioners have urged the Court to appreciate that, the ascertainment of "indirect discrimination" is problematic, as it is so unique in its manifestation ¾ and therefore, difficult to prove. They have urged the court to focus on the outcome of indirect discrimination, which they contend, reflects itself in systematic inequalities in society.

43. The 1st respondent, on the other hand, has refuted the claims of institutional discrimination. For this party, it is submitted that the particulars of institutional discrimination in the petition are novel issues, not at all pleaded at the trial Court; and that parties must be bound by their pleadings. The 1st respondent also relies upon the supplementary affidavit by Dr Solomon Mpoke, which affirms that there had been, indeed, anti-discrimination policies guiding the operations of KEMRI. The party submits further, that all allegations by the petitioners had drawn proper responses through the affidavit of Margaret Rigoro, as well as the supplementary affidavit of Dr Solomon Mpoke.

44. The Court of Appeal affirmed that the trial Court had failed to consider both the replying affidavit by Margaret Rigoro and the supplementary affidavit of Dr Solomon Mpoke, even though the two affidavits contained the crucial response by the petitioners. We have gleaned the essentials of the trial Court Judgment, and we agree with the Appellate Court, that the two affidavits were entirely overlooked. We have perused the said affidavit of Margaret Rigoro, the legal officer of the 1st respondent, dated 27 April 2012. Annexed to this affidavit is a copy of the memorandum of understanding between KEMRI and Wellcome Trust (marked MR-1); a copy on guidelines and policies on harassment in the work-place (marked MR-2); staff terms and conditions (marked MR-3); e-mail communications on equal work, equal pay and equal opportunity; reviewed salary scales for researchers (marked MR-10). There are nine other annexures in this affidavit, attempting to respond to the allegations made by the petitioners. Similarly, the supplementary affidavit by Dr. Solomon Mpoke is accompanied by a certain number of annexures. The depositions of the two have given details of how the foreign researchers were employed; the mode of engagement between KEMRI and the Wellcome Trust; investigations upon the issues raised by the petitioners; responses on racial-discrimination claims; responses on allegations made regarding training and career stagnation; capacity development under the programme; nature of employment for the petitioners; and other related matters. It is unfortunate that the trial court did not consider these affidavits. Such issues, it is our perception, went to the very core of the work-relations between the petitioners and the 1st respondent, and, consequently, they would be the very basis of the legal reference-points defining the scenario of rights, justice, fair-play, and constitutional entitlements marking the state of employment relations.

45. The petitioners, though blaming the Appellate Court for considering the affidavit of the 1st respondent while overlooking their evidence, have not shown precisely how that Court ignored their evidence.

46. The petitioners contest the Appellate Court's finding that they failed to discharge their burden of proof, that any differentials in pay were unreasonable, unaccountable, and therefore, discriminatory. The petitioners urge that once they proved what they perceived as a prima facie case, the burden ought to have shifted to the 1st respondent, to establish that discrimination played no part in the employment set-up. According to the petitioners, the onus of proof, in discrimination cases, ultimately lies with "the violator", once the complainant raises the issue of discrimination. The Appellate Court held that it was incumbent upon the petitioners to prove that they were treated differently, that they suffered prejudice, on account only of their skin-colour, or racial background.

47. It is a timeless rule of the common law tradition Kenya's juristic heritage and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the

"balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.

48. The petitioners' case is set around the constitutional right of freedom from discrimination *Constitution of Kenya*, 2010, article 27). It is already the standpoint of this Court, as regards standard of proof, that this assumes a higher level in respect of Constitutional safeguards, than in the case of the ordinary civil-claim balance of probability. The explanation is that, virtually all constitutional rights-safeguards bear generalities, or qualifications, which call for scrupulous individual appraisal for each case. This is the context in which the rights-claim in the instant case, founded upon racial discrimination, is to be seen.

49. Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the *Act* declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

50. This Court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

> ...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

52. The allegations of discrimination are captured in various e-mails, affidavits, and the petition itself. The petitioners have not denied that they were engaged in an employment contract with the 1st respondent, which contract expressly stipulated the terms of engagement. The affidavit of Magaret Rigoro brings this out, and also explains how foreign researchers were engaged by the 1st respondent, even though 1st respondent had no control over the terms of their employment. This has not been controverted by the petitioners, who merely claim that such lack of control had exposed them to discrimination.

53. In spite of the commonplace that proof of "indirect discrimination" is difficult, the petitioners ought to have provided sufficient evidence before the court, to enable it to make a determination. The 1st respondent, by a more positive scheme, went ahead to counter the bare allegations. The petitioners failed, in this regard, to discharge their initial burden of proof.

54. The petitioners have alleged that their right to property, under article 40 of the Constitution, was violated by the 1st respondent. They have asked the Court to determine whether innovations made when an employee is not in employment belongs to the employer, under section 13(2) of the *Industrial Property Act*, or not. They claim that the 5th petitioner made some innovations at a time when he was out of employment, during one of the several multiple contract-gaps. They have provided e-mail conversation with one Alex Aiken, who offers to pay a consultancy fee, so that an IT expert can gain access, and transfer information from IMRS (Integrated Records System), that the 5th petitioner had developed. The petitioners have also claimed that the 1st respondent has, on many other occasions, compromised their right to intellectual property by way of "disregard syndrome", "Mathew Effect", "citation amnesia" ¾ and this, they perceive as the hallmark of "indirect discrimination" in a scientific setting, offending section 5(8) of the Employment Act.

55. The 1st respondent, in response, states that the allegation that 5th petitioner, Dr. Moses Nderitu, made some innovation while being out of employment, was not part of the issues pleaded at the Employment and Labour Court. Besides, 1st respondent urged that, at the material time, the petitioners were working as employees of KEMRI, while also being PhD students supported by KEMRI, working under experienced mentors or researchers ¾ all in their capacity as employees of KEMRI.

56. The Appellate Court was guided by clause 13 of the petitioners' contract of employment, which provided that any intellectual property, including patents and copyrights arising in the course of KEMRI operations, shall belong to the Institute. The Appellate Court also relied on the terms of section 32(1) of the *Industrial Property Act*, which provides that in the absence of contractual provisions to the contrary, the right to a patent for an invention made in the course of performance of a task under the employment contract, shall belong to the person who commissioned the work, namely, the employer.

57. section 32 (5) of the said *Act* provides for the entitlement of the employee, as follows: "Inventions made without any relation to an employment or service contract and without the use of the employer's resources, data, means, materials, installations or equipment shall belong solely to the employee or the person commissioned."

58. It is evident, in our view, given the foregoing statutory provisions, that the Appellate Court did take the valid and proper standpoint in law: it behoved the petitioners to show that their

claim fell within the terms of section 32(5) of the Industrial Property Act, as a basis of claim against 1st respondent.

59. The petitioners' claim in respect of Dr. Moses Ndiritu, however, raises its own difficulty. A look at the suit before the Employment and Labour Relations Court shows that, the claim that Dr. Ndiritu had made innovations falling outside the employment framework under KEMRI, did not feature at all in the pleadings. This fact negates a crucial judicial-process element, which is vital in the quest for justice: and, accordingly, we would not allow a fresh claim at this ultimate appellate stage.

60. We have considered e-mail communications in respect of which the petitioners alleged violations of intellectual property rights. It is not, however, possible to ascertain the point in time when such alleged innovations were made, or the manner in which they were made ¾ so as to enable us to relate them to the period of the employment-relationship with 1st respondent. The particulars of such violations are also inadequately focussed, in their formulation; and this renders it difficult for the Court to relate them to the petitioners herein. The overall effect is that the petitioners did not establish the claim, that they had made innovations of the nature of industrial property, outside their employment, and which 1st respondent did compromise.

61. The last issue is the failure by the Court of Appeal to determine the cross-appeal filed by the 4th respondent. The Appellate Court did, indeed, make reference to the cross-appeal in its Judgment, though without determining it. The petitioners and the 4th respondent argue that this is denial of justice.

62. We have considered the details of the cross-appeal, dated 9 January 2019. Its claim is that the trial Judge erred in failing to calculate and to award benefits such as payment for unfair termination of services, payments in lieu of leave; unpaid salary in lieu of notice, and other outstanding payments. It emerges that the trial Court declined to consider the issue of unfair termination, as the contract involving the petitioners had already ended.

63. The 1st respondent has urged that the cross-appeal was inter-related with the main appeal, and that it necessarily collapsed, with the dismissal of the appeal. There is no doubt that, for the regularity and normalcy of the trial process, the cross-appeal ought to have been determined. As such an opportunity was missed, the proper question now before this Court is: is there a remedy to be granted?

64. No doubt exists, that the contract involving the petitioners had come to an end. Indeed, the petitioners have not denied that they were magnanimously paid, even for the period during which they rendered no work. This is clear from the Judgment of the Court of Appeal. The Appellate Court, however, had not clearly stated that the cross-appeal lacked merit. If we were now to refer this cross-appeal back to the Appellate Court, for determination, we would

not expect anything different. The petitioners having failed to discharge their evidential burden, the plea of unfair process stood unproven, and there was no material before the Court to show unfair determination. In our view of the goals of justice, we see no need to refer the cross-appeal back to the Appellate Court.

**E. Orders**

65. Our detailed consideration of this case, now culminates in the following Orders:

(a) The petition of appeal dated 19 March 2019 has no merit, and is hereby disallowed.

(b) The parties shall bear their own individual costs.

**SGS Kenya Limited v Energy Regulatory Commission & 2 others (Petition 2 of 2019) [2020] KESC 64 (KLR) (10 January 2020) (Judgment)**

**Supreme Court of Kenya**

**MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2020] KESC 64 (KLR)

***Precedent*** *- doctrine of stare decisis – applicability of the doctrine of stare decisis in tribunals - doctrine of stare decisis in quasi-judicial decisions - Public Procurement Administrative Review Board (PPARB) - whether quasi-judicial tribunals, such as the PPARB, were bound by the doctrine of stare decisis - whether a tribunal was bound by its previous decision*

**Brief facts**

The 1st respondent, Energy Regulatory Commission, floated a tender for the marking and monitoring of petroleum products, a service meant to curb adulteration of fuel. The tender attracted 3 bids. After evaluation of the bids, the tender was awarded to the petitioner but was subsequently terminated upon the realization that some technological elements had not been incorporated in the tender process. The petitioner was aggrieved by the decision to terminate the tender and filed a request for review before the Public Procurement Administrative Review Board (2nd respondent) seeking orders that the said tender-termination be annulled. The Board disallowed the request for review. The High Court quashed the decision of the 1st respondent and ordered it to proceed with the tender as was awarded to the petitioner.

Aggrieved by the High Court decision, the 1st respondent appealed. The Court of Appeal subsequently set aside the High Court judgement sustaining the termination of the tender-award, on the ground that the applicable term of reference did not include the possibility of emergent technical conditions. The Court of Appeal faulted the High Court for determining a judicial review matter as if it was an appeal, and for going into the merits of a decision already taken.

Aggrieved by the judgment of the Court of Appeal, the petitioner sought to have the matter certified as one of general public importance, an application which was allowed by the Court of Appeal on December 19, 2019, upon a single issue; whether tribunals were bound by the doctrine of *stare decisis.*

The petitioner contended that the failure by the Public Procurement Administrative Review Board to abide by its precedent in *Avante International Technology Inc. v. IEBC PPARB, Review No.19 of 2017*, or give reasons for digressing from it, was an untransparent, inequitable and irrational exercise of its decision-making power in the public procurement process

**Issues**

Whether a tribunal was bound by its previous decision.

**Held**

1. Tribunals, in their primary category, were specialized bodies charged with programming and regulatory tasks of the socio-economic, administrative and operational domains.

Membership in such tribunals generally reflected the essential skills required for the specific tasks in view. The Public Procurement Administrative Review Board fell within that category. It was endowed with requisite experience from its membership, and had access to relevant information and expertise, to enable it to dispose of matters related to procurement.

2. The question whether a tribunal was bound by its previous decisions, as it took on different matters, called for flexibility in the regulatory scheme. In principle, matters on the agenda of an administrative tribunal would merit determination on the basis of the claims of each case, and would depend on the special factual dynamics. The relevant factors of materiality, and of urgency, would require individualised response in many cases: and in those circumstances, a strict application of standard rules of procedure or evidence could negate the fundamental policy-object.
3. On that account, the specialized tribunal should have the capacity to identify relevant factors of merit; be able to apply pertinent skills; and have the liberty to prescribe solutions, depending on the facts of each case. Such a tribunal should fully take into account any factors of change, in relation to different cases occurring at different times; without being bound by some particular determination of the past. Administrative decision-makers should have significant flexibility in responding to changes that affect the subject-matter before them. Matters before an administrative tribunal should be determined on a case-to-case basis, depending on the facts in place.
4. By asking the court to consider if it was entitled to orders of judicial review had exceeded the leave and certification granted by the Court of Appeal, within the terms of article 163(4)(b) of the Constitution; the petitioner had engaged the court in an essentially academic exercise. However, the Court of Appeal was right in its finding that the High Court should not have gone to the merits of the Public Procurement Administrative Review Board decision as if it was an appeal, nor granted the order of *mandamus*, since the 1st respondent did not owe any delimited statutory duty to the petitioner.

*Appeal dismissed; costs to be borne by the respondent in the Supreme Court, Court of Appeal, High Court and the Public Procurement Administrative Review Board.*

**Citations**

**Cases**

***Kenya***

1. *Avante International INC v Independent Electrol and Boundaries Commission* Review No 19 of 2017 - (Followed)
2. *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others* Civil Application 35 of 2014; [2015] KESC 20 (KLR) - (Followed)
3. *Macharia & another v Kenya Commercial B ank Ltd & 2 others* Application 2 of 2011[2012] eKLR; [2012] 3 KLR 199 - (Mentioned)

4. *Martin Nyaga Wambora & another v Speaker of the Senate & another* Petition 51 of 2014; [2014] KEHC 7080 (KLR) - (Followed)
5. *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989 [1989] eKLR; [1989] KLR 1 - (Mentioned)
6. *Republic v Commissioner of Customs Services Ex parte Imperial Bank Limited* Miscellaneous Application 123 of 2014; [2015] KEHC 6939 (KLR) - (Followed)
7. *SGS Kenya Limited v Energy Regulatory Commission* Application No. 64 of 2017 - (Mentioned)
8. *SGS Kenya Limited v Energy Regulatory Commission & 2 others* Civil Application 39 of 2018; [2019] KESC 45 (KLR) - (Mentioned)
9. *Yusuf Gitau Abdalla v Building Centre (K) Ltd & 4 Others* Petition 27 of 2014; [2014] KESC 50 (KLR) - (Mentioned)

***South Africa***

1. *Pharmaceutical Manufacturers Association of South Africa, ex parte President of the Republic of South Africa & Others* [2000] (2) SA 674 - (Followed)

***Canada***

1. *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professional* [2011]3 SCR 616 at para 45 - (Followed)
2. *Sweney v Department of Highways* [1933] - (Followed)
3. *Weber v Ontario Hydro* [1995] 2 SCR 929 - (Followed)

**Texts**

Glanville Williams (1973), *Learning the Law* Stevens & Sons; 9th Revised edition (January 1, 1973)

**Statutes**

***Kenya***

1. Constitution of Kenya, 2010 - (Interpreted) articles 10 (1); 47; 163(4) (a) (b) (7); 164 (a) ; 201; 227(1); Chapter 12
2. Energy Act (Repealed) (Act No 12 of 2006) - (Cited) In general
3. Public Procurement And Asset Disposal Act (cap 412C) - (Interpreted) sections 27; 63(1) (a)(4)
4. Public Procurement and Disposal Regulations (cap 412C subleg) - (Interpreted) In general
5. Supreme Court Rules, 2012 (cap 9B subleg) - (Interpreted) rule 33

***South Africa***

Constitution of the Republic of South Africa, 1996 - (Interpreted) In general

**Advocates**

Mr. Muite and Mr. Musyoka for the Petitioner.

Mr. Otachi for the 1st Respondent.

Ms. Mwasao (holding brief for Mr. Bita) for the Attorney General.

January 10, 2020, the Court delivered the following Judgment:

## A. Introduction

1. This is an appeal from a Judgment of the Court of Appeal, dated 11 May 2018, in Civil Appeal No. 341 of 2017, which set aside the Judgement and decree of the High Court at Nairobi by (Mativo, J.), dated 22 September 2017. The High Court (in J.R Misc. Application No. 496 of 2017) had quashed the decision of the Public Procurement Administrative Review Board (PPARB), which upheld the decision of the Energy Regulatory Commission to terminate the award of Tender Number ERC/PROC/4/2/16-17/119, won by the petitioner herein. The Judgment of the Court of Appeal had the effect of sustaining the termination of the tender-award, on the ground that the applicable terms of reference did not include the possibility of emergent technical conditions.

## B. Background

2. The 1st respondent, Energy Regulatory Commission, is a public body established under the *Energy Act*, 2006. Its mandate includes the regulation of electrical energy, petroleum and related products, renewable energy, and other forms of energy. On or about 12 May 2017, the 1st respondent floated tender number ERC/PROC/4/3/16-17/119, for the marking and monitoring of petroleum products, a service meant to curb adulteration of fuel. The tender attracted 3 bids. These were opened on 31 May 2017, with the responding firms being SILPA SA, Intertek Testing Services (EA) Ltd, and SGS Kenya Ltd (SGS).

3. The 1st respondent appointed an evaluation committee which duly evaluated the bids, on the basis of technical and financial criteria. The evaluation committee recommended, on 30 June 2017, that the contract for the provision of petroleum-marking and monitoring services be awarded to SGS (the petitioner), at an annual cost of US$ 2,760,844.72. This was on the basis that SGS had attained the highest score, and had been the lowest bidder. The Commission, in the course of its recommendation upon the bids received, thus remarked in its evaluation report:

> General Observation
>
> (a) The increasing need of detection of adulteration by use of Jet 1 ought to have been captured in the terms of reference for this tender. This is so because Jet A1 is never marked unlike illuminating kerosene and there is reliable information that the perpetrators of adulteration have now shifted to the use of jet A1 as an adulterant

for diesel. Further, the Commission is now aware of an existing technology that can easily detect Jet A1 in motor fuel.

(b) The team also noted the need for a detailed explanation of how the test-results from the monitoring teams are to be transmitted to the client. To this end . . . the advantage of use of a real-time and tamper-proof mechanism that would provide more authentic results".

4. Taking into account the existence of the technology referred to in the general observations, the 1st respondent's Acting Director for Petroleum, gave an opinion on 7 July 2017, recommending to the Acting Director-General, that the procurement process be terminated, and then re-commenced, with the requirement that the said technological elements be incorporated in the tender, and with reference to the monitoring of the petroleum service. The Acting Director-General considered this opinion, as well as that of the Head of Procurement, and on that basis, approved the recommendation for termination, by virtue of Section 63 (1) (a) of *the Act*. The decision to terminate the tender was communicated to all bidders, as required by Section 63(4) of *the Act*.

5. SGS was aggrieved by the decision to terminate the tender, and filed a request for review, before the Public Procurement Administrative Review Board (2nd respondent), seeking Orders that the said tender-termination be annulled. SGS asked that it be awarded the tender; and in the alternative, SGS sought that the 1st respondent be directed to proceed with the tender and complete the process. The Board, by its decision of 1 August 2017, disallowed the request for review. It also gave the liberty to re-advertise the tender, for the provision of the petroleum marking services.

6. SGS thereafter moved to the High Court, seeking leave to file a judicial review application. In its motion filed on 16 August 2017, SGS sought Orders of:

(a) Certiorari, to remove in to the High Court and quash the Board's decision;

(b) Prohibition, to countermand the decision of the 1st respondent to proceed with a new tender process;

(c) Prohibition, to prohibit the 1st respondent from entering into or signing any contract with any third party on the basis of a new tender; and

(d) Mandamus, directing 1st respondent to proceed with the old tender, including award of the contract to SGS.

7. Mativo J. heard the judicial review proceedings, culminating in a Judgment dated 25 September 2017, bearing the following Orders:

(a) an Order of Certiorari to remove into the High Court to quash the decision and Ruling delivered by the Public Procurement Administrative Review Board on 1 August 2017, in Application No. 64 of 2017 (*SGS Kenya Limited v. Energy Regulatory Commission*);

(b) an Order of Prohibition to remove into the High Court and quash the decision of the Energy Regulatory Commission, to proceed with the tender process in Tender Number ERC/PROC/4/3/17-18/016 for the provision of Marking and Monitoring Petroleum Products;

(c) an Order of Prohibition directed to the Energy Regulatory Commission, prohibiting it, directly and /or through its servant and/or agents, from entering and /or signing any contract with any third party, concerning tender number ERC/PROC/4/3/17-18/016, for the provision of Marking and Monitoring of Petroleum Products;

(d) an Order Mandamus directing the Energy Regulatory Commission to proceed with the tender process in tender number ERC/PROC/4/3/16-17/119, for the provision of Marking and Monitoring of Petroleum Products in conformity with the recommendation of its evaluation committee, for the award of the tender/contract to SGS Kenya Limited;

(e) each party to bear its own costs.

8. Aggrieved by the Judgment of the High Court, 1st respondent lodged an appeal in the Court of Appeal. The Appellate Court, in a Judgment dated 11 May 2018, allowed the appeal, setting aside the Orders of the High Court, and substituting them with an Order dismissing the substantive motion with costs.

9. The Court of Appeal faulted the High Court Judge for determining a judicial review matter as if it was an appeal, and for going into the merits of a decision already taken. The Appellate Court held it to be improper for the High Court to make value judgment regarding the evidence; to weigh the same, and to minutely examine it, to determine whether it reached a certain standard of acceptance.The Court found that the High Court had occasioned room for abuse of its power, by usurping the competences of the Public Procurement Administrative Review Board.

10. The Appellate Court held that, in a judicial review matter, the Court's mandate is limited to procedural improprieties, and extends not to the merits of a decision. It held that the Board had been duly mindful of its own earlier decision in *Avante International INC v. IEBC* (Review No. 19 of 2017): it took into consideration the nature and weight of the opinion on technological change, which the 1st respondent had acted upon; and the Board's reasoning

exhibited a fidelity to practicality and to good sense. Consequently, the Appellate Court held, the Judge ought to have shown greater deference to the Board's decision, and should have been more circumspect in its view of such a decision, bearing in mind the specializations of the Board. The Appellate Court held that the 1st respondent did not bear a statutory duty to award the tender to SGS, or to any other entity, so as to attract the compulsive force of Mandamus.

11. Aggrieved by the Judgment of the Court of Appeal, the petitioner sought to have the matter certified as one of general public importance under Article 163(4) (b) of the *Constitution* an application which was allowed by the Appellate Court on 19 December 2019, upon a single issue: whether tribunals are bound by the doctrine of *stare decisis*. The petitioner filed a petition of appeal in this Court, thereafter, on 22 January 2019.

**C. Tribunal Mandate, Judicial Review, and the Scope for Appeal: Case Before the Supreme Court**

12. The petition is stated to fall under Rule 33 of the *Supreme Court Rules*, 2012 and it raises the following issues for determination:

    (a) whether Tribunals, such as the Public Procurement Administrative Review Board, are bound by their prior decisions, in accordance with the doctrine of precedent (*stare decisis*);

    (b) whether the failure by quasi-judicial bodies (such as the PPARB) to abide by, or distinguish their prior decision, without giving reasons, is an irrational, or improper exercise of their mandate;

    (c) whether it was unfair, inequitable, untransparent, or not cost-effective, for the procuring agency to terminate the tender process, with a view to starting the same all over again, when the petitioner had offered to avail the relevant petroleum-technology information at no extra cost.

13. The petition is premised on the following grounds:

    (a) failure by quasi-judicial tribunals to adhere to the doctrine of *stare decisis* would subject the course of administration of justice, and of the rule of law, to caprice, irrationality and unpredictability on the part of such bodies, causing extreme uncertainty in the processes of justice;

    (b) PPARB failed to adhere to the terms of Article 227(1) of the *Constitution*, the *Public Procurement and Assets Disposal Act*, 2015 and the *Public Procurement and Disposal Regulations*, for ensuring that the procurement system is fair, equitable, transparent, competitive and cost-effective;

(c) the failure by the PPARB to abide by its precedent in *Avante International Technology Inc. v. IEBC* PPARB, Review No.19 of 2017, or give reasons for digressing from it, is an untransparent, inequitable and irrational exercise of its decision-making power in the public procurement process;

(d) the appellant suffered loss and damage, by the tender process being terminated, on the basis of criteria not recognized by the law.

14. The petitioner prays for the following reliefs:

(a) a declaration that the 2nd respondent and all other quasi-judicial bodies under Kenyan law, are bound by their previous decisions, in accordance with the doctrine of precedent;

(b) a declaration that the Court of Appeal erred in holding that the 2nd respondent did not act in ignorance, nor disregard its own decision in the earlier case;

(c) a declaration that the Court of Appeal erred in finding that the High Court had improperly and impermissibly delved into an evaluation of the evidence, and in substituting its opinion in place of the 2nd respondent's opinion;

(d) a declaration that the failure to adhere to the doctrine of precedent, or even to provide reasons for departing from its earlier decision, resulted in an unfair and untransparent decision-making process, contrary to Article 227(1) of the *Constitution*, and the *Public Procurement and Asset Disposal Regulations*;

(e) an Order setting aside the Judgment, Order and decree of the Court of Appeal in Civil Appeal No.341 of 2017;

(f) an Order affirming the Judgment, Order and decree of the High Court in Judicial Review Miscellaneous Application No.496 of 2017

(g) costs of the appeal.

**D. Submissions of Counsel**

15. Learned counsel for the petitioner and the 1st respondent filed their written submissions, which were highlighted on 24 September 2019: Mr. Muite and Mr. Musyoka for the petitioner; Mr. Otachi for the 1st respondent; and Ms. Mwasao (holding brief for Mr. Bita) for the Attorney-General. Ms. Mwasao, however, stated her obligation as being limited to observing the proceedings, without making submissions.The 3rd respondent was not represented, even though its advocates had been duly served with the hearing notice.

16. Learned Senior Counsel, Mr. Muite, submitted that the 1st respondent had violated the provisions of Article 227 (1) of the *Constitution*, by failing to follow a system that is fair, equitable, transparent, competitive and cost-effective, in the procurement of public goods and services. He called in aid, in that regard, the terms of Article 10(1) of the *Constitution*, on "national values", which he alleged, were violated by the 1st respondent, especially as regards good governance, integrity, transparency and accountability. He submitted that the procurement process lacked openness and accountability, contrary to the terms of Chapter 12 of the *Constitution*, which relates to public finance. He urged that public money, in the present circumstances, would not be used in a prudent and responsible manner. He submitted that the petitioner, having scored 84.7% in the bid-assessment, was the highest scorer, on combined technical and financial criteria, and so, should have been awarded the tender, and failure in this regard would amount to imprudent use of tax-payers' money.

17. Mr. Muite submitted that the Court of Appeal was wrong in failing to appreciate that judicial review proceedings are no longer a set of proceedings *sui generis*, but are now anchored under Article 47 of the *Constitution*, which requires fair administrative action. He submitted that judicial review now falls within the express prescriptions of the *Constitution*, and on this account, the Appellate Court was in error, in hold that the High Court had improperly interfered with the jurisdiction of a body that was subject to Articles 10, 47, 201 and 227. He invited this Court to find that these Articles of the *Constitution* had been violated; and he urged that a general message on the importance of prudent financial management, should issue forth to all public entities.

18. The petitioner's written submissions focus upon four principal questions, for determination:

    (i) whether the Review Board failed to follow its decision in a past decision (the Avante case);

    (ii) whether the doctrine of stare decisis applies to quasi-judicial tribunals, like the Review Board;

    (iii) whether the petition has exceeded the terms of the leave and certification granted by the Court of Appeal on 19 December 2019;

    (iv) should the answer to (ii) above be in the negative, would the petitioner be entitled to Orders of judicial review?

19. On the first issue, the petitioner submits that, despite the *Avante decision* being cited to the Review Board, and the Board expressly making reference to it, the Board, nonetheless, overlooked the principle of that decision.

20. On the second issue, learned counsel, Mr. Musyoka urged that the doctrine of stare decisis is a fundamental jurisprudential yardstick, and that prior decisions must be followed, save for good cause justifying a departure. Counsel urged that the doctrine is helpful in achieving uniformity/consistency, predictability and certainty, in law. He submitted that the need for consistency in administrative decisions demands that, even though an administrative tribunal is not bound by its previous decisions, and is free to adopt any reasonable interpretation of the pertinent legislation in a matter before it, previous interpretations will have some bearing on the reasonableness of the tribunal's interpretation, in a current matter.

21. The petitioner, in extolling the object of precedent, invoked works of record: Glanville Williams, *Learning the Law* (9th ed. 1973); *Sweney v. The Department of Highways* (Canada, 1933) (Ontario Court of Appeal, Middleton, J.A.). It was the petitioner's position that, a disregard of past cases bearing similarity to the present one, has the negative consequence of occasioning uncertainty in the law.

22. On the third and fourth issues, the petitioner submits that it is common ground, that the certification by the Appellate Court for this appeal, was on the question of whether quasi-judicial tribunals are bound by the doctrine of *stare decisis*. But it is also submitted that, tied to that issue, is the question whether the Review Board followed the *Avante* precedent, and whether it should have followed it. The petitioner submits that the decision of this Court should bring out the consequences of its determination of the two issues, lest the decision holds its place as no more than an academic statement.

23. The petitioner invokes Article 47 of the *Constitution* (on fair administrative action), as well as the High Court's decision in *Martin Nyaga Wambora v. Speaker of the Senate* [2014]eKLR, urging that the rules of natural justice, and the duty to act fairly when making administrative, judicial or quasi-judicial decisions, coalesced into constitutional rights, capable of enforcement by an aggrieved party, in appropriate cases.

24. The petitioner draws a comparison between the concept of judicial review under the *Constitution* of Kenya, and under the *Constitution* of South Africa, and in that context, cites a South African case, *Pharmaceutical Manufacturers Association of South Africa, ex parte President of the Republic of South Africa & Others*, 2000(2) SA 674, where the Court thus held:

> "The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts"

25. The petitioner has also placed reliance on the High Court decision in *Republic v. Commissioner of Customs Services ex parte Imperial Bank Limite*d [2015]eKLR where Odunga J. recognized that "judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision."

26. The 1st respondent, in grounds of opposition and replying affidavit filed on dated 23 April 2019 and filed on 24 April 2019, states that the petition, in effect, extends in design beyond the terms of the leave and certification granted by the Court of Appeal on 19 December 2018. The replying affidavit is sworn by Mueni Mutunga, the 1st respondent's Commission Secretary and Director of Legal Services, who depones that, in so far as the petitioner seeks to challenge the merits of the Court of Appeal's Judgment, the true object of the Appellate Court's certification has been missed. This, as maintained by learned counsel, Mr. Otachi, was not for sustaining: for, if the petitioner had perceived true constitutional issues, then a petition of appeal would have been filed under Article 164 (a) of the *Constitution*, within time.

27. The 1st respondent, in written submissions dated 26 August 2019, maintains that the appeal before this Court should be restricted to the single issue of whether tribunals are bound by the doctrine of *stare decisis*, as held by the Court of Appeal on 19 December 2018 ¾ and not whether the petitioner was entitled to Orders of judicial review at the High Court or the Court of Appeal. Therefore, it was urged, by dint of Article 163 (4) (b) of the *Constitution*, the Court's jurisdiction, for purposes of this appeal, is limited to the said issue. To sustain this argument, 1st respondent cited the decision of this Court in *SGS Kenya Limited v. Energy Regulatory Commission & 2 others* [2019]eKLR.

28. The 1st respondent submits that the petition exceeds the jurisdiction of this Court, citing the case of *Owners of the Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Ltd* (1989) KLR 1, in support. Citing the decision of this Court in *Samuel Kamau Macharia & Anor v. KCB Ltd & 2 Others*, Application 2 of 2011, this respondent urges that the Court's jurisdiction cannot be expanded through sheer judicial craft, or innovation. The 1st respondent recalls the caution that the Court is not to assume jurisdiction merely on account of a litigant's badgering (*Yusuf Gitau Abdalla v. Building Centre (K) Ltd & 4 Others* [2014]eKLR).

29. The 1st respondent submits that the instant petition goes against the declared judicial stand, by enlarging the issues for determination, and introducing matters beyond the contemplation of the leave-grant of the Court of Appeal (in Civil Appeal No. 341 of 2017). The 1st respondent urges this Court to decline the invitation by the petitioner to upset the merits of the Appellate Court's Judgment.

30. The 1st respondent, next, addresses the question whether a tribunal is bound by is prior decisions. It is submitted that the relevant case must, in the first place, address the same legal

questions as are presently arising; and secondly, such earlier must have been decided by the same Court, or a superior Court within the judicial-administration hierarchy to which the Court considering the current case belongs. The context of this principle, it was urged, is to be found in Article 163 (7) of the *Constitution*, which stipulates that: "All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court".

31. Learned counsel submitted that the petitioners' case would entail an inapposite notion of horizontal stare decisis, that binds Tribunals or Subordinate Courts to their own previous decisions, on matters so much dependent on variable facts on the ground. Mr. Otachi submitted that Tribunals are not Courts, in a literal sense, and should not be held to be subject to the rule of *stare decisis*.

32. Learned counsel urged that the Public Procurement Adminstrative Review Board was a specialized agency established under Section 27 of the *Public Procurement and Asset Disposal Act*, and its main tasks involved reconsideration or review of administrative decisions, on their merits. Such an agency, it was urged, stands in the shoes of the original decision-maker, and makes decisions all over again, uninfluenced by the original decision. Such an agency, it was urged, works to expectations, thanks to variety in its composition, the experience of its members, and the ready access to all such information as may be found relevant; and in that regard, settled legal positions founded upon precedent will not be the requisite consideration, in achieving right outcomes.

33. The 1st respondent's standpoint sought support in a Canadian case ( *Weber v. Ontario Hydro* [1995] 2 SCR 929), in the dissenting opinion of Lacobucci, J. (para 14)

> " The first significant difference between courts and tribunals relates to the difference in the manner in which decisions are rendered by each type of adjudicating body. Courts must decide cases according to the law and are bound by stare decisis. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate."

34. For the 1st respondent herein, it was submitted that administrative decision-makers are permitted to draw rules from the general law, and to modify these to the needs of a particular regulatory setting. In this respect, learned counsel called in aid the decision of Fish J. in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professional* [2011]3 SCR 616 (at para 45):

> " [A]rbitrators may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature

of the collective bargaining process, and the factual matrix of the grievances of which they are seized."

35. In such a context, the 1st respondent's position was that, applying *stare decisis* to bind an administrative tribunal may preclude it from applying its expertise to reach a differing conclusion such as may be justified, in light of its specific policy goals, and its regulatory structure. It was urged that administrative decision-makers do have significant flexibility in responding to changes, and they may attune their directives to better suit changed circumstances.

36. Mr. Otachi supported the finding of the Court of Appeal, that the tribunal had not disregarded its own decision in Avante, as it did take into consideration the nature and the weight of the opinion on technological change. Learned counsel thus urged this Court to dismiss the petition.

**E. Analysis And Determination**

37. Learned Senior Counsel, Mr. Muite, had urged the Court to consider the instant appeal under the terms of Article 163 (4) (a) as well as (b). Not only, according to him, has this case been certified by Court of Appeal as involving "matter of general public importance", (i.e. Clause (b)), it also involves issues of interpretation and application of the Constitution (in accord with clause (a)). In *Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others* [2015]eKLR, this Court in resolving a similar issue, held as follows (paras. 39 and 41):

(i) "The two avenues of the appellate jurisdiction of this Court are distinct. Firstly, an appraisal of the nature of an appeal as involving matter of constitutional interpretation and/or application, signals access to the Supreme Court 'as of right'; and no form of authorization or leave from the Court of Appeal, or the Supreme Court is required at the beginning...."

(ii) "Suffice it to say that the path that a litigant takes is determined on the basis of the subject-matter, as has been held by the Superior Courts. Once the Court of Appeal renders its decision, the litigant is able to elect which course to follow. This decision is taken in advance, as it is the basis of determination on whether to seek certification first, or proceed straight to the Supreme Court. Thus, the decision on how to proceed, rests on the character of the issues involved in the subject matter, rather than on such procedural shortfalls as may have afflicted a litigant's progress. It follows that where a party has elected the path to the Supreme Court 'as of right', that matter cannot be 'converted' to one where certification is required, just because time for filing 'an appeal as of right' has lapsed..."

38. It is clear to us that the petition of appeal has been brought under Article 163 (4) (b) of the *Constitution*. We have also taken note that the written submissions have not incorporated arguments on Article 163 (4) (a). The new line of submissions only came up during the highlighting stage.

39. Such a scenario comports with our Ruling of 12 February 2019, when the petitioner herein was seeking to stay the Judgment of the Court of Appeal. We held, on that occasion, that the application was properly before us, having been certified by the Appellate Court as raising a single question of great public importance: whether tribunals are bound by the doctrine of stare decisis. We do not intend to belabour this issue. The petitioner herein elected to proceed under the second limb.

40. The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the Appellate Court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic "Administrative Law", is clear enough, and it is unnecessary to belabour the point.

41. So we turn to the single issue before us: are the Tribunals bound by the doctrine of stare decisis? The petitioner has contended that the Review Board failed to follow its own decision in Avante, without any explanation. According to the petitioners, stare decisis applies to quasi-judicial tribunals, to the intent that there be uniformity/consistency, predictability, and certainty in law, in general terms. The 1st respondent, quite to the contrary, has argued that tribunals are not bound by their previous decisions such being only persuasive; and that each tribunal-task is to be determined on the basis of the facts before it.

42. From the two contending propositions, it emerges, in our view, that tribunals, in their primary category, are specialized bodies charged with programming and regulatory tasks of the socio-economic, administrative and operational domains. Membership in such tribunals generally reflects the essential skills required for the specific tasks in view. The Public Procurement Administrative Review Board falls within this category. It is endowed with requisite experience from its membership, and has access to relevant information and expertise, to enable it to dispose of matters related to procurement. The question is: whether it is bound by its previous decision, as it takes decisions on different matters lately coming up.

43. Such a variegated range of implementation scenarios, it is apparent to us, calls for flexibility in the regulatory scheme. In principle, matters on the agenda of an administrative tribunal will merit determination on the basis of the claims of each case, and will depend on the special factual dynamics. The relevant factors of materiality, and of urgency, will require individualised response in many cases: and in these circumstances, a strict application of standard rules of procedure or evidence may negate the fundamental policy-object. On this

account, the specialized tribunal should have the capacity to identify relevant factors of merit; be able to apply pertinent skills; and have the liberty to prescribe solutions, depending on the facts of each case. Such a tribunal should fully take into account any factors of change, in relation to different cases occurring at different times: without being bound by some particular determination of the past.

44. We would agree with the 1st respondent, that administrative decision-makers should have significant flexibility, in responding to changes that affect the subject-matter before them. Matters before an administrative tribunal should be determined on a case-to-case basis, depending on the facts in place.

45. The petitioner has asked this Court to consider if it was entitled to Orders of judicial review. It is argued that, failure to do so would render the petition a bare academic exercise. It is the case, however, that the petitioner has engaged this Court in an essentially academic exercise. This prayer has exceeded the leave and certification granted by the Court of Appeal, within the terms of Article 163 (4) (b) of the *Constitution*. We have, however, observed that the Appellate Court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the Order of Mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner.

46. The petition of appeal lacks merit.

**F. Orders**

47. This Judgment has provided occasion for shedding some light on the dividing line between the remits of specialized administrative tribunals, on the one hand, and the regular judicial process in so far as it accommodates the long-standing practice of stare decisis on the other hand. Such a clarification enables this Court to resolve the instant dispute by way of the following Orders:

    (a) The petition of appeal dated 22 January 2019 is hereby disallowed.

    (b) The petitioner shall bear the costs of the 1st respondent in this Court, in the Court of Appeal and the High Court, as well as at the Tribunal.

**Asanyo & 3 others v Attorney-General (Petition 7 of 2019)**
**[2020] KESC 62 (KLR) (10 January 2020) (Judgment)**

**Supreme Court of Kenya**

**MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ**

Neutral citation: [2020] KESC 62 (KLR)

***Jurisdiction*** *– jurisdiction of the Supreme Court - appellate jurisdiction - matters of constitutional interpretation and application - exceptions to the requirement that the appeal would have to relate to matters of constitutional interpretation and application that were raised at the other superior court, including the High Court, courts of equal status as the High Court and the Court of Appeal - whether the Supreme Court could exercise jurisdiction in relation to an issue that arose at the Court of Appeal but had not been raised at the High Court - Constitution of Kenya articles 163(4)(a) and (7)*

***Civil Practice and Procedure*** *- orders - consent order - adoption of a consent order by a Court - where a Court found that the issues relating to the adoption were contentious and ordered parties to make a formal application while giving a right of reply to the opposing party - whether such an order was within what a Court could require from the parties when adopting a consent order.*

***Civil Practice and Procedure*** *- doctrine of functus officio - applicability of the doctrine of functus officio – stage at which a court would become functus officio - where the Supreme Court gave directions for the Court of Appeal to adopt a consent filed by the parties - extent to which the Court of Appeal could exercise jurisdiction where all it was required to do was to adopt a consent order - whether the Court of Appeal rendered itself functus officio by undertaking procedural steps to adopt a consent order previously directed by the Supreme Court - Constitution of Kenya articles 163(7)*

**Brief facts**

The petitioners sought to challenge directions issued by the Court of Appeal. The directions required the petitioners to file a formal application seeking compliance with a Supreme Court order and it gave the respondents a right of reply. They contended that contrary to the doctrine of *functus officio*, the directions amounted to a re-opening of litigation in a concluded matter. They added that the directions also infringed on article 163(7) of the Constitution which required all other courts to comply with the Supreme Court's decisions.

The background to the matter was a consent dated September 18, 2015 which the Court of Appeal declined to adopt and instead delivered judgment which disposed of the substantial matter. On appeal, the Supreme Court issued various orders including orders for the setting aside of the judgment and orders for the Court of Appeal to adopt the consent filed by the parties.

When the matter was mentioned at the Court of Appeal, the Attorney General opposed the adoption of the consent. He stated that the consent was recorded during the tenure of his predecessor - the retired Attorney General - and the position had changed. During a second mention of the matter, the Court of Appeal made a ruling. It ruled that the matter was contentious and the petitioners should approach the court by way of a formal application with the Attorney General having a right of reply. The petitioners lodged the instant appeal against the ruling.

**Issues**

i. What was the scope of the doctrine of precedent and *functus officio* in Kenya?
ii. Whether the Court of Appeal rendered itself *functus officio* by undertaking procedural steps to adopt a consent order previously directed by the Supreme Court
iii. Whether the Supreme Court could exercise jurisdiction in relation to an issue that arose at the Court of Appeal but not at the High Court (trial court).
iv. What did the adoption of a consent order require a court to do?
v. At what point would a court become *functus officio*?

**Held**

1. The jurisdiction of the Supreme Court was limited by the Constitution and relevant legislation. Occasionally, there were situations wherein the court's jurisdiction was not so sharply defined and the court had to ascertain, on a case-by-case basis, whether jurisdiction could properly be assumed.
2. The appeal did not stem from subject matter that was before the High Court. It was based on the petitioner's assertion that the Court of Appeal had conducted itself in a manner that did not give due regard to the Supreme Court's determination within the terms of article 163(7) of the Constitution and that the Court of Appeal had violated the doctrine of *functus officio*. The grievance arose at the Court of Appeal and in such a context the Supreme Court would adopt a pragmatic approach in relation to the issue of jurisdiction.
3. Article 163(7) of the Constitution established the principle upon which rested the authority of judicial decisions as precedent in subsequent litigation, guiding judges who were bound to follow the same. Courts and tribunals exercising judicial authority were duty-bound to follow the principle.
4. The Supreme Court had inherent power to do justice. The court should only depart from the principle that in order for it to exercise jurisdiction, issues of constitutional interpretation and application had to rise through the superior courts to the Supreme Court, in the clearest of cases.
5. The issues raised by the petitioners would ordinarily involve questions on the application and interpretation of the Constitution that warranted entertainment by the court.
6. Article 163(7) of the Constitution provided that all courts, other than the Supreme Court, were bound by the decisions of the Supreme Court. It embodied the common law doctrine of *stare decisis* and required the precedents set by the Supreme Court to bind all other Courts in the land. The doctrine of *stare decisis* was fundamental to the administration of justice in that it required the authority of decisions to be scrupulously respected by all courts upon which they were binding. It created uniformity and consistency in the law as pronounced.
7. There was need for fidelity to the principle of *stare decisis* as it ensured that judges reached substantially the same legal conclusions that were reached in previous cases when considering similar legal issues. That created certainty, clarity, predictability and legitimacy.

8. The doctrine of *functus officio* meant that the holder of adjudicative or decision- making powers could exercise them only once in relation to a particular matter. Once a decision was made it was final and conclusive and the decision-maker could not vary it.
9. The decision of the Supreme Court of November 20, 2018 was to the effect that the judgment of the Court of Appeal was a nullity as one of the judges in the relevant bench failed to render a determination. That was still the position of the Supreme Court. The Supreme Court on November 20, 2018, also gave orders directing to the Court of Appeal to adopt the consent of the parties.
10. Adoption of a consent order was a process wherein the court would discharge the duty of evaluating the clarity of the consent and giving directions on the manner of adoption. That would circumvent the risk of an unlawful order and validate the mode of adoption and compliance.
11. A consent by parties would become an order of the court only when it had been formally adopted by the court. It was only at that stage that the Court would become *functus officio*. As the Court of Appeal had not formally adopted the consent, it was not *functus officio*. In directing the parties to make a formal application, the Court of Appeal was validly engaged in a judicial process attendant upon the consent adoption process which was in line with the Supreme Court's orders. Therefore, the Court of Appeal, in giving the directions, was engaged in the lawful exercise of its jurisdiction.
12. The petition before the court was premature and was not a proper basis for invoking the jurisdiction of the Court.

*Petition dismissed.*

***Orders***

i. *The petition of appeal dated February 13, 2019, was disallowed.*
ii. *Costs borne by the parties respectively.*

**Citations**

**Cases**

***Kenya***

1. *Asanyo & 3 others v Attorney General* Petition 21 of 2015; [2018] KESC 15 (KLR); [2018] eKLR - (Explained)
2. *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* Petition 5 of 2012; [2012] eKLR - (Explained)
3. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Application 5 of 2014; [2014] eKLR - (Explained)
4. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] eKLR - (Explained)
5. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR); [2014] eKLR - (Explained)

6. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Explained)
7. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] eKLR; [2012] 2 KLR 804 - (Explained)
8. *Ngoge v Kaparo & 5 others* Petition 2 of 2012) [2012] KESC 7 (KLR; [2012] eKLR - (Explained)
9. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 6 (KLR); [2013] eKLR - (Explained)
10. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] KESC 20 (KLR); [2013] eKLR - (Explained)

***Canada***

1. *Canada v Craig* [2012] 2 SCR 489; 2012 SCC 43 of 1 August 2012 - (Explained)
2. *David Polowin Real Estate Ltd v Dominion of Canada General Insurance Co* (2008), 244 OAC 151 (CA);2008 ONCA 703 - (Explained)
3. *Gunn v Canada* 2006 FCA 281, [2007] 3 FCR 57 - (Explained)
4. *Moldowan v Queen* [1978] 1 SCR 480 - (Explained)

***Regional Court***

*Dodhia v National & Grindlays Bank Limited and Another* [1970] EA 195 - (Explained)

**Texts**

Pretorius, DM., (Ed) (2005), *The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law* 122 South African Law Journal 832

**Statutes**

***Kenya***

1. Constitution of Kenya - (Interpreted) articles 163(4)(a); 163(7)
2. Government Contracts Act (cap 25) - (Interpreted) section 2
3. Supreme Court Act (cap 9B) - (Interpreted)

January 10, 2020, the Court delivered the following Judgment:

## A. Introduction

1. The Petition of appeal before the Court is filed under article 163(4)(a) and (7) of the *Constitution*, contesting the decision of the Court of Appeal dated 22 January 2019. Principally, the petitioners contest the Court of Appeal's directions, which required them to file a formal application seeking compliance with a Supreme Court Order, with the respondents being given a right of reply. They urge that the Court of Appeal's directions infringe on the doctrine of *functus officio*, in that they amount to a re-opening of litigation on

a matter that has been heard with finality. The petitioners contend, further, that the Court of Appeal's directions contravene article 163(7) of the *Constitution*, which requires all other Courts to comply with the decisions of the Supreme Court.

**B. Background**

2. This is not the first time the matter is being brought before this court. The Petitioners herein had previously filed in this court Petition No 21 of 2015 - challenging two decisions of the Court of Appeal, both arising from Civil Appeal No 260 of 2014. On the one hand, the petitioners faulted the Appellate Court for declining to adopt a consent Order dated 18 September 2015. On the other hand, they sought to set aside the Judgment of that court, which had disposed of the substantive matter in disregard of the consent Order. Upon considering the matter, on 20 November 2018, this court held that the Court of Appeal should have adopted the consent of the parties. The court also declared the Judgement of the Court of Appeal to be a nullity, and void *ab initio*, since one of the Judges failed to deliver his reasoning, yet such non-delivery did not fall within the regular legal exceptions.

3. Ultimately, the court gave the following Order:

> "(1) The Petition of Appeal dated 21 December 2015 is hereby allowed in the following specific terms:
>
> (a) A declaration is hereby made that the Court of Appeal judgment dated 13 November 2015 in Nairobi Civil Appeal No 260 of 2014 is null and void.
>
> (b) The Ruling of the Court of Appeal dated 12 November 2015 in Nairobi Civil Appeal No 260 of 2014 is hereby set aside.
>
> (c) An order do hereby issue that this matter be remitted back to the Court of Appeal for the adoption of the consent filed by parties on 18 September 2015, on a priority basis.
>
> (2) Each party shall bear its own costs".

4. Pursuant to the foregoing Order, on 21 November 2018, the petitioners wrote a letter to the President of the Court of Appeal, requesting him to constitute a three-Judge Bench, for purposes of adoption of the consent Order filed by the parties before that Court on 18 September 2015.

5. The matter was first mentioned before the Court of Appeal on 14 January 2019. On that occasion, the Attorney-General opposed the adoption of the consent. He urged that the consent was recorded during the term of the retired Attorney-General, a position that has since changed. After hearing the parties, the Presiding Judge adjourned the matter, so that he could familiarize himself with the case.

6. During the second mention of 22 January 2019, the Bench (Waki, Musinga & Gatembu JJA) rendered a Ruling in the following terms:

> " After hearing brief submissions...it dawned on us that the matter was contentious and may not simply be a matter for a 'mention'. We made an Order for further mention today, with a view to giving further directions after the perusal of the record. We have done so, and even found a copy of the Judgment of Kiage, JA dated 13th November, 2015 which the Supreme Court found was non-existent. In our view, this compounds the matter. Considering the further contentions raised earlier by counsel on both sides, we think it is desirable that the respondents in this appeal (the petitioners herein) approach the Court with a formal application, with a right of reply by the Attorney-General. In view of those perceived complications, we also think the matter should be placed before the same Bench that dealt with the appeal, now that they are all based in Nairobi, that is to say, Ouko (P), Kiage & Murgor JJ A."

7. It is this Ruling that triggered the filing of the present appeal. The appeal is anchored on the following grounds:

   (i) that the learned Judges of Appeal infringed the doctrine of functus officio, when they purported to reopen the matter for a hearing of the adoption-of-consent, yet their Judgment had been declared null and void by the Supreme Court, and finality had been attained;

   (ii) that the respondent has changed his position as regards the said consent;

   (iii) that the learned Judges of Appeal, in failing to allow the parties to adopt the consent as directed by this Honourable Court, violated the principle laid down under article 163(7) of the *Constitution*, which provides that all Courts are bound by the decisions of the Supreme Court; and

   (iv) that this court has the requisite jurisdiction to hear and determine this matter under article 163(4)(a) of the *Constitution*.

8. The petitioners seek the following reliefs:

(a) The entire Order of the Court of Appeal (Waki, Musinga & Gatembu JJA) dated 22 January 2019, in Civil Appeal No 260 of 2014, be set aside.

(b) this court be pleased to adopt the consent letter dated 11th September 2015, and filed on 18 September 2015.

(c) Any other Order as this court may deem fit, in the circumstances.

**C. Submissions by Learned Counsel**

**(a) Petitioners**

9. By their written submissions dated 14 March 2019, the petitioners urge that this court is clothed with the requisite jurisdiction to hear and determine this appeal, under article 163(4)(a) of the *Constitution*. They submit that, by the terms of article 163(7) of the *Constitution*, the decisions of this court are binding on all other courts in Kenya, and hence, the Court of Appeal was bound by this court's Order which directed it to adopt the consent as filed by the parties. In the circumstances, it was submitted that the Court of Appeal is in contravention of the said article 163(7) — thus bringing this appeal under the limb of "appeals as of right," under article 163(4)(a).

10. The petitioners urge that the Court of Appeal ought not to have ordered them to file a formal application, with a right of reply accorded the respondent: for, doing so amounts to a re-opening of litigation. In particular, they urge that the Appellate Court is functus officio, in so far as Civil Appeal No 260 of 2014 is concerned, as it had already rendered its Judgment on merit, which Judgment was set aside. As such, when the matter was remitted to the Court of Appeal, as directed by this court, the single action required of that Court, was to adopt the consent.

**(b) Respondent**

11. The respondent submits that the purpose of the mention before the Court of Appeal was not to adopt the consent, but to give directions on how the Judgement of this court ought to have been dealt with. Learned counsel thus urges that the Court of Appeal rightly directed that a formal application for adoption of consent be filed. It was submitted that the Court of Appeal had duly noted the Attorney-General's opposition to the consent — as, under section2 of the *Government Contracts Act*, the Principal Secretary in Ministry of Interior and Co-ordination of National Government had not given his approval.

12. Submission was made for the Attorney-General, that stands in clear departure from the normative ultimacy of a Supreme Court directive: that the Appellate Court had rightly

recognised that the procedural question was contentious, and should be canvassed before it, by way of a formal application.

13. Even though the Supreme Court had already required compliance with the consent Order, the Attorney-General's position was that he was entitled to challenge it, and to seek its setting aside. Justification for such a stand was founded on the argument that the consent stood vitiated by the failure on the part of the Principal Secretary to give approval. It was further urged for the Attorney-General, that the consent-adoption question was *res judicata*: because it had already been in issue before the Supreme Court, and this court had already taken a decision upon it. The Attorney-General, to support the *res judicata* argument, thus quotes from the terms of this court's Judgment (para. 108):

> " [W]e hold that justice in this matter is not for this court to record the consent. ...having found that the Court of Appeal should have recorded the consent, the matter should be remitted back to that Court to do that which it ought to have done in the first place."

14. In conclusion, the Attorney-General urges that the appeal is premature, as the Court of Appeal has not made a determination on whether or not the consent should be adopted: and so, issues warranting the assumption of this court's jurisdiction have not yet crystallized, and the Court lacks jurisdiction to hear and determine this matter. He seeks the dismissal of this appeal.

**D. Issues for Determination**

15. The following are the main issues arising for determination, as drawn from the petition of appeal, the responses thereto, and the written and oral submissions:

    (a) whether this court has jurisdiction to determine the petitioner's appeal;

    (b) whether the Court of Appeal Order of 22 January 2019 is at variance with article 163(7) of the *Constitution*;

    (c) what is the meaning and effect of this court's Order made on 20 November 2018?

    (d) what are the appropriate reliefs?

**E. Analysis**

**(a) The Question of Jurisdiction**

16. It is the petitioners' case that this court is clothed with the requisite jurisdiction to hear and determine the matter at hand. In that behalf, learned counsel rely on the case of Hassan Ali

Joho & Another v. Suleiman Said Shahbal & 2 others, Supreme Court Petition No 10 of 2013 [2014] eKLR, and *Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board*, Supreme Court Petition No 5 of 2012. It is contended that the present matter raises weighty issues of interpretation and application of the *Constitution*: specifically, whether or not the Appellate Court can reject a determination by the Supreme Court, in view of article 163(7), which ordains final pronouncement by the apex Court.

17. The respondent, taking a divergent view, argues that this appeal is only concerned with directions given during a mention before the Appellate Court, which Court is yet to take a decision regarding the adoption of the consent. It is contended that the petitioners' rights have not been infringed, and that it is, therefore, premature to invoke the jurisdiction of the Supreme Court under article 163(4)(a) of the *Constitution*.

18. The operative provision of the *Constitution* is article 163(4)(a), which provides that an appeal lies from the Court of Appeal to the Supreme Court

> "as of right in any case involving the interpretation or application of the *Constitution*".

this court has already determined the import, scope, and limits of its appellate jurisdiction under article 163(4)(a) of the *Constitution* in a number of cases: *Samuel Kamau Macharia and another v Kenya Commercial Bank and 2 others* [2012] eKLR; *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & Another* [2012] eKLR; *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others* [2012] eKLR; *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others* [2014] eKLR; *Evans Odhiambo Kidero & 4 others v Ferdinand Ndung'u Waititu & 4 others* [2014] eKLR; *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2013] eKLR — among others.

19. As we have observed in such decisions, the jurisdiction of this court is limited, and flows from the terms of the *Constitution* and the relevant legislation. Occasionally, however, there will arise situations in which the jurisdiction of the court is not quite so sharply defined, in which case it devolves to the Court to ascertain, on a case-by-case basis, whether jurisdiction may properly be assumed.

20. It is to be noted that the present appeal does not stem from a subject-matter that was before the High Court; but it is the petitioner's case that the manner in which the Appellate Court has conducted itself not only goes against this court's determination, and against its guiding principle under the law (specifically, article 163 (7) of the *Constitution*), but also infringes the well-known doctrine of *functus officio*.

21. We recall that when the matter first came up before this court, we did address ourselves to the question of jurisdiction: and we duly noted that the appeal, in its essence, did not flow from

the subject-matter that had featured before the trial Court. The grievance of the petitioners had its origin in the Appellate Court; and it was our perception, in such a context, that the Supreme Court would have to adopt a pragmatic approach in relation to the issue of jurisdiction.

22. We recall our decision in the *Joho case* where we did emphasize that each case was to be evaluated on its own facts; and we observed that several factors, in that instance, merited consideration before we could assume jurisdiction under article 163(4)(a) of the *Constitution*. We thus remarked (at para. 37):

> "In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts, and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the *Constitution*. Indeed, ordinarily, in our view, a question regarding the interpretation or application of the *Constitution* may arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the *Constitution* should be interpreted broadly and liberally, so as to capture the principles and values embodied in it."

23. The petitioner herein raises the question as to the Court of Appeal being bound by the decision of the Supreme Court, so that the action taken by that Court would amount to reopening and rehearing the matter. article 163(7) of the *Constitution* establishes the principle upon which rests the authority of judicial decisions as precedent in subsequent litigation, guiding Judges who are bound to follow the same. Courts and tribunals exercising judicial authority are duty-bound to follow this principle. In *Geoffrey M Asanyo & 3 others v Attorney-General*, Sup Ct Pet No 21 of 2015 [2018] eKLR, we thus stated (at para. 61):

> "It thus emerges that a concise reading of the judicial principles in article 159(2) of the *Constitution* would show that they are non-derogable, and have to be adhered to by all Courts and tribunals exercising judicial power/authority. Where there is, therefore, a *prima facie* case of derogation, it behoves this court to intervene, so as to safeguard the *Constitution*, within its jurisdiction under article 163(4)(a). This was well stated in the *Joho case* [paragraphs 51 & 52] where the Court expressed itself thus:
>
> > In defending the *Constitution* and the aspirations of the Kenyan people, this court must always be forward-looking, bearing in mind the consequences of legal uncertainty upon the enforcement of

> any provision of the *Constitution*. This aspect of defending the *Constitution* is replicated under article 163(4)(a), which allows appeals from the Court of Appeal to the Supreme Court as of right, in any case involving the interpretation or application of the *Constitution*. Such is the approach that this court in hearing this appeal must seek to apply.
>
> Applying a principled reading of the *Constitution*, this court responds to the demands of justice by adjudicating upon issues that tend to bring the interpretation or application of the *Constitution* into question. However, it is to be affirmed that any appeal admissible within the terms of article 163(4)(a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this court, in furtherance of the objects laid out under section3 of the *Supreme Court Act*, 2011 (Act No 7 of 2011)'" [emphasis supplied].

24. In that matter, we found that in spite of the fact that the issue before the court had not been argued in the Court of Appeal, it devolved to this court's inherent jurisdiction to set right any jurisdictional wrongs committed by other Superior Courts. We thus observed (para. 62 – 63):

> "In that context, the appellants submitted that despite filing a consent which would have settled the matter in line with article 159(2), on the constitutional principle of promotion of alternative forms of dispute resolution, the Court of Appeal disregarded it. We have no doubt that, whereas the issue before us may not have been articulated at the Court of Appeal, the inherent jurisdiction of this court to right jurisdictional wrongs committed by the Superior Courts in executing their constitutional mandates, would necessitate that this court should assume jurisdiction and interrogate those alleged wrongs. In stating so, we reiterate our holding in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others*, Petition No 6 of 2014; [2017] eKLR:
>
> > "The [Supreme] Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. The Constitution from which this court, and indeed all Courts in the land, derive their legitimacy decrees that we must do justice to all."
>
> We further reiterate that this court should only depart from the principle that issues of constitutional interpretation must rise through the Superior Courts to

this court, in the clearest of cases, and the exception to that principle should be carefully considered by the Court in the manner we have expressed herein...."

25. We see no reason to depart from this reasoning, and are in agreement with the petitioners that the dispute herein would ordinarily raise questions as to the application and interpretation of the *Constitution*, warranting entertainment by this court.

**(b) Court of Appeal's Order of 22 January 2019: Does it offend article 163(7) of the Constitution?**

26. article 163 (7) of the *Constitution* provides that

> "All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court."

The nature of that provision is absolute. this court expounded this principle in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, as follows (para. 196):

> "article 163 (7) of the *Constitution* is the embodiment of the time-hallowed common law doctrine of *stare decisis*. It holds that the precedents set by this court are binding on all other Courts in the land. The application, utility and purpose of this constitutional imperative are matters already considered in several decisions of this court: *Jasbir Singh Rai v Tarlochan Singh Rai & others*, and quite recently, in *George Mike Wanjohi v Steven Kariuki & others* Petition No 2A of 2014.
>
> In addition to the benchmark decisions to which this court adverted in *Wanjohi v Kariuki* (*supra*), regarding the importance of the doctrine of stare decisis, we would echo the dictum in *Housen v Nikoaisen* (2002) 2 SCR:
>
> > "It is fundamental to the administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence, the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ... should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all Judges are liable, we must maintain the complete integrity of relationships between the courts'."

27. In *Kidero & 5 others v. Waititu and others*, Sup Ct Petition No 18 of 2014 (Consolidated with Petition No 20 of 2014), Njoki Ndungu, SCJ, in her concurring opinion, made the following pertinent remarks (para 236):

> " The principle of *stare decisis* in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. The articles of establishment and jurisdiction reveal the Court's vital essence and the decisions of this court protect settled anticipations by ensuring that the Constitution is upheld and enforced, and that the aspirations of the Kenyan people embodied in a system of constitutional governance are legitimized. The constitutional contours of article 163(7) oblige this court to settle complex issues of constitutional and legal controversy, and to give jurisprudential guidance to the lower Courts. In the exercise of our mandate, we determine the constitutional legality of statutes and other political acts to produce judicially-settled principles that consolidate the rule of law and the operation of government, and the political disposition, particularly in the settlement of electoral disputes. As a Court entrusted with the final onus of settling constitutional controversies, one of our principal duties is the enforcement of constitutional norms."

28. In *Dodhia v National & Grindlays Bank Limited and Another* [1970] EA 195, Duffus, VP. expounded the principle of stare decisis stating that;

> " The adherence to the principle of judicial precedent or *stare decisis* is of utmost importance in the administration of justice in the Courts in East Africa, and thus to the conduct of the everyday affairs of its inhabitant; it provides a degree of certainty as to what is the law of the country, and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and, subject to these decisions, also to the decisions of the High Court in the particular State."

29. We had thus recounted in another case, *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Supreme Court Petition No 4 of 2012, [2013] eKLR,

> " Adherence to precedent should be the rule and not the exception ....; the labour of judges would be increased almost to breaking-point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

30. We may draw from the comparative lesson: in Canada, the importance of the principle was clearly articulated by Laskin, J.A. of the Ontario Court of Appeal in *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co*. (2008), 244 OAC 151 (CA);2008 ONCA 703, in the following terms:

> " [t]he values underlying...stare decisis are well known: consistency, certainty, predictability, and sound judicial administration. Adherence to precedent promotes these values...Adherence to precedent also enhances the legitimacy and acceptability of judge-made law and by so doing enhances the appearance of justice. Moreover, courts could not function if established principles of law could be reconsidered in every subsequent case."

31. In another case, the Canadian Supreme Court reiterated the principles it will apply in determining whether to overrule one of its own prior decisions, and affirmed that lower Courts are bound to follow decisions of the Supreme Court, regardless of their views as to the correctness of those decisions (*Canada v Craig*, 2012 SCC 43 of 1 August 2012).

32. In the case aforementioned, a Federal Court of Appeal declined to follow the Supreme Court's 1977 decision in *Moldowan v. The Queen* [1978] 1 SCR 480, instead, following its own decision in *Gunn v Canada*, 2006 FCA 281, [2007] 3 FCR 57.

33. Speaking for a unanimous Court, Justice Rothstein confirmed that it is not open to a lower Court to purport to overrule a decision of the Supreme Court; in his words (at paras. 20 – 22):

> " It may be that *Gunn* departed from *Moldowan* because of the extensive criticism of *Moldowan*. Indeed, Dickson J. himself acknowledged that the sectionwas 'an awkwardly worded and intractable sectionand the source of much debate'. Further, that provision had not come before the Supreme Court for review in the three decades since *Moldowan* was decided.

> But regardless of the explanation, what the court in this case ought to have done was to have written reasons as to why *Moldowan* was problematic, in the way that the reasons in Gunn did, rather than purporting to overrule it.
>
> The Federal Court of Appeal, on the basis of its prior decision in *Miller v Canada (Attorney General)*, 2002 FCA 370 (CanLII), 2002 FCA 370, 220 DLR (4th) 149, in which that court reaffirmed the rule that it would normally be bound by its own previous decisions, followed Gunn, and not Moldowan. The application of Miller and the question of whether the Federal Court of Appeal should have followed Gunn simply did not arise, in view of the Moldowan Supreme Court precedent."

34. The objective scenario bears the lesson that there is need for fidelity to the principle of stare decisis, a bearing that ensures that Judges reach substantially the same legal conclusions that were reached in previous cases, when considering similar legal issues: this creates certainty, clarity, predictability and legitimacy within the law. On that basis, the decision of this court in Petition 21 of 2015 was binding upon the Court of Appeal in Civil Appeal No. 260 of 2014.

35. The other crucial question in this matter is the functus officio concept: has the Appellate Court's role become wholly redundant, and it may no longer entertain the relevant question?

36. this court, in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR, had cited with approval a passage in an article by Daniel Mala Pretorius entitled "*The Origins of the functus officio Doctrine, with Special Reference to its Application in Administrative Law*", in South African Law Journal, Vol. 122 (2005), at p. 832, in the following terms:

> " The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been taken, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision-maker."

37. In determining whether the Appellate Court was *functus officio*, we need to ask ourselves whether that Court resolved the matter before it with finality. In our Order of 20 November 2018, we declared the Judgment of the Court of Appeal to be a nullity, and void *ab initio*, since one of the Judges failed to render a judicial determination, and to furnish regular

reasoning. That remains our position, as the said Judge's statement was not on the record then.

38. We turn now to the standing of the consent filed by the parties before the Appellate Court. The pertinent question is: When does a consent by the parties transmute into an Order of the Court? What is the role of the Court in the adoption of the consent?

39. In this court's Order of 20 November 2018, we directed that the Appellate Court do adopt the consent of the parties.

40. Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court. It is only from that stage, that the Court becomes *functus officio*. this court having ruled that the Judgment of the Court of Appeal (dated 13 November 2015) was a nullity; and that Court having not formally adopted the consent by parties, was not yet *functus officio*.

41. It follows, as we find, that the Appellate Court, in directing the parties, on 22 January 2019 to make formal application, was validly engaged in the judicial process attendant upon the consent-adoption process, entirely in line with the Orders emanating from this court.

42. From this standpoint, it is evident to us that the Appellate Court is at this stage engaged in the lawful exercise of its jurisdiction. It is under obligation to proceed on that basis; and so, this court will not encroach on such a legitimate exercise of judicial remit.

**F. Conclusion, and Final Orders**

43. In the final outcome, we recall that the petitioner had contested the Court of Appeal's Order of 22 January 2019, an Order that directed the petitioner to lodge a formal application, to which the Attorney-General would have a right of reply. It devolves not to this court to reckon on how the Appellate Court would have resolved such an application — as it was but a procedural process for giving directions on the specific terms of the consent. It is clear, then, as we have held, that the Court of Appeal was not *functus officio*.

44. It follows, as is quite clear to us, that Petition No. 7 of 2019 is entirely premature, and is not a proper basis for invoking the jurisdiction of this court. The Appellate Court's directions of 22 January 2019 stand in perfect consistency with the Orders of this court of 20 November 2018.

45. Consequently, our Orders are as follows:

(a) The petition of appeal dated 13 February 2019 is disallowed.

(b) Costs shall be borne by the parties respectively.